



**Australian Government**

**Department of Education, Employment  
and Workplace Relations**

**Australian Government  
Implementation Guidelines  
for the National Code of Practice  
for the Construction Industry**

August 2009

**IMPLEMENTATION  
GUIDELINES**





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and Workplace Relations**

AUSTRALIAN GOVERNMENT

**IMPLEMENTATION GUIDELINES FOR  
THE NATIONAL CODE OF PRACTICE  
FOR THE CONSTRUCTION INDUSTRY**

AUGUST 2009

Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry  
Issued July 2009

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ISBN 978-0-642-32874-8

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## FOREWORD FROM MINISTER

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The building and construction industry is a critical sector of the Australian economy. The Australian Government is committed to strengthening this sector and through this supporting jobs and investment throughout Australia.

As a major procurer of building and construction services, the Australian Government can and will influence the behaviour of the industry through its procurement processes as governed by the *Implementation Guidelines for the National Code of Practice for the Construction Industry* (the Guidelines) and the *National Code of Practice for the Construction Industry* (the Code).

These Guidelines return to the original intent of the Code, as agreed between the Federal and State Governments in 1997. That intent was to lift the behavioural standards of the industry and to secure compliance with all legal obligations and ethical tendering requirements.

The Code and Guidelines require that all employers, employees and their respective organisations all abide by the law and by their industrial instruments, or face penalties if they do not do so.

The Rudd Labor Government is committed to ensuring that all participants in the building and construction industry comply with Australia's workplace relations laws.

The Rudd Government has no tolerance for conduct which breaks the law whether it be unlawful industrial action or underpayment of employees.

These Guidelines reflect the *Fair Work Act 2009* (FW Act) and the commitment of the Australian Government to a fair and balanced workplace relations policy.

These updated Guidelines represent the Government's commitment to a balanced workplace relations system in which the primacy of collective agreement making, negotiating in good faith and linking of agreement making to productivity play a vital role.

Maintaining the highest standards of occupational health and safety on building and construction projects is essential to the Government's policy. The Office of the Federal Safety Commissioner has a vital role in giving effect to the Government's commitment to ensuring that the safety standards for every worker in the industry are maintained.

The continuation of the Guidelines signifies the Australian Government's commitment to ensuring the industry remains strong and prosperous for the benefit of all participants.

The Australian Government is committed to ethical tendering requirements to ensure that the Government enters into contracts with organisations that uphold the principles and behaviours expressed in the Code and the FW Act. Organisations that breach their legal obligations face preclusion from future tendering opportunities for Australian Government funded work.

The Government believes these amended Guidelines will return balance to the building and construction industry for all participants and ensure continued strong growth in the industry.



Julia Gillard  
Minister for Employment and Workplace Relations  
Canberra  
9 July 2009



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# SECTION 1

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## Introduction

1.1 The National Code of Practice for the Construction Industry (the Code) was developed in 1997 as a joint State/Territory Governments and Federal Government initiative.

### *The Code states*

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 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 high standards in occupational health safety and rehabilitation and in environmental management, and
- encourages responsible industrial relations leading to economically-sustainable arrangements.

1.2 The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (Guidelines) have been developed to:

- use the Australian Government's purchasing power to ensure compliance with all legal obligations imposed on building and construction industry employers, employees and industrial associations;

- assist industry stakeholders understand the Australian Government's expectations and requirements in relation to entities who tender for and/or are awarded Commonwealth funded construction related work; and
- assist Commonwealth Funding Entities interpret and implement aspects of the Code in relation to construction projects.

1.3 For the purposes of these Guidelines, 'Funding Entities' includes:

- all Departments of State, Departments of the Parliament and prescribed agencies named in the *Financial Management and Accountability Regulations 1997*; and
- all the Commonwealth authorities and wholly owned Commonwealth companies required by a General Policy Order, issued under section 48A of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), to apply the Code and Guidelines.

1.4 These Guidelines also detail the processes that the Government has set up to:

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

1.5 In these Guidelines references to applying the *Commonwealth Procurement Guidelines* (CPGs) only relate to those Funding Entities subject to the CPGs through the *Financial Management and Accountability Act 1997* (FMA Act) and section 47A of the CAC Act.

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### Date of effect

2.1 These Guidelines apply to all projects that were the subject of an expression of interest or tender let for the first time on or after 1 August 2009.

2.2 This version of the Guidelines does not apply to projects where expressions of interest or tenders were called for before 1 August 2009. The Code and Guidelines as at the date of commencement of those projects will continue to apply for the life of the project.

### Scope

#### *The Code states*

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

...

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.

### 3.1 Construction activity covered by the Code and Guidelines

3.1.1 Activity which falls within the scope of the Code and Guidelines includes, but is not limited to, 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.

3.1.2 These Guidelines apply solely to parties who participate in on site activities. On site activities include work performed on auxiliary or holding sites separate from the primary construction site(s).

3.1.3 All supply contracts are subject to the secondary boycott provisions of the *Trade Practices Act 1974*.

3.1.4 Activity that does not fall within the scope of the Code and Guidelines includes:

- mining operations;
- the maintenance of building systems;
- landscaping such as lawn mowing, pruning and other horticultural activities; and
- cleaning buildings.

### 3.2 Directly funded projects

3.2.1 The Code and Guidelines apply to all construction activity undertaken by or on behalf of Funding Entities irrespective of the value of a project.

### 3.3 Indirectly funded projects

3.3.1 The Code and Guidelines also applies to all construction projects indirectly funded by the Australian Government through grant and other programs where:

- the value of Australian Government contribution to a project is at least \$5 million and represents at least 50 percent 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.

3.3.2 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.

3.3.3 The Code and Guidelines do not apply to Australian Government funded projects where funding for construction is not an explicit component of the grant.

### 3.4 Privately funded construction projects

3.4.1 ‘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.

3.4.2 Parties interested in undertaking Australian Government construction work where the Code and Guidelines apply, must comply with the Code and 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.

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

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

### 3.5 Related Entities

3.5.1 Entities related to any party 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 activity they undertake.

3.5.2 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;
- all related entities in complex corporate structures, including specific purpose or joint venture entities, will be required to be Code compliant.

3.5.3 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.

3.5.4 'Connected' means the entity:

- a) can control, or materially influence, the tenderers activities or internal affairs; or
- b) has the capacity to determine, or materially influence, the outcome of the tenderers financial and operating policies; or
- c) is a member of the tenderer; or
- d) is financially interested in the tenderers success or failure or apparent success or failure.

3.5.5 '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.

### 3.6 Pre-commitment lease projects

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

### 3.7 Build Own Operate Transfer/Build Own Operate

3.7.1 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 3.6 of these Guidelines.

### 3.8 Public Private Partnerships and Private Finance Initiatives

3.8.1 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.

### Tender and Funding Agreement Requirements

#### *The Code states*

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.

#### 4.1 Tender Documentation

4.1.1 All parties invited to express interest in Australian Government building and construction projects or projects to which the Australian Government contributes funding must be informed of the application of the Code and Guidelines to the project.

4.1.2 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, August 2009, applies to this project. This document can be viewed at the Australian Government website at [www.deewr.gov.au/building](http://www.deewr.gov.au/building).*

4.1.3 Compliance with the Code and these Guidelines must be made a condition of tender for Australian Government funded construction work. Funding Entities must ensure the requirements of these Guidelines are met.

4.1.4 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.

4.1.5 Additionally, tenderers are to be advised that they must comply with the Code and Guidelines on all of their new privately funded Australian-based construction activities.

4.1.6 Prospective tenderers must also be advised that compliance with the Code and these Guidelines is to extend to all subcontractors and consultants who may be engaged by the tenderer on the project.

#### 4.2 Tender Evaluation Criteria

4.2.1 The Code and Guidelines are 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 building and construction projects to which the Australian Government has contributed funding, in a manner consistent with the CPGs.

4.2.2 Consistent with the CPGs, Funding Entities must not enter into contracts with contractors who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim.

4.2.3 Funding entities are required to assess the previous performance of the tenderer on applying the Code and Guidelines to projects funded by the Australian Government. This will include confirming whether the tenderer has had any adverse court, tribunal, or industrial relations commission/Fair Work Australia finding, order, penalty awarded against it in the last two years.

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4.2.4 While acknowledging that value for money is the core principle underpinning decisions on government procurement, preference may be given in projects funded by the Australian Government to tenderers that have a demonstrated commitment to:

- a) adding and/or retaining trainees and apprentices;
- b) increasing the participation of women in all aspects of the industry; or
- c) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.

4.2.5 Funding Entities have the capacity to waive elements of the Guidelines in limited circumstances based on a strict public interest test. The public interest test includes:

- the project is urgently required because of an emergency (e.g. natural disasters or issues of public safety); or
- where no suitable compliant tenderer is identified at the completion of a competitive tender process, in which case, a new approach to the market must commence to comply with the CPGs.

4.2.6 The scope of any Code and Guidelines requirements which are not to be applied must be determined and documented for each project.

4.2.7 The following conditions may not be waived under any circumstances:

- project monitoring and reporting requirements; and
- acceptance of the sanctions regime.

### 4.3 Project Agreements

#### *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” 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.

4.3.1 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 (A – E).

- A. Project agreements will only be appropriate for major contracts as defined by the Funding Entity (and funding recipient for indirectly funded projects). Other than in exceptional cases, project agreements will not be permitted on projects worth less than \$100 million.

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- B. The Funding Entity must not agree to project agreements or project awards unless there is a clear and demonstrable benefit to the Australian Government in doing so. In deciding whether to approve 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 or project awards;
  - 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.
- Funding Entities are free to not agree to the creation of project agreements.
- C. The Funding Entity is accountable for decisions to approve project agreements and must state their reasons for doing so in writing to the relevant portfolio minister (and copied to the CMG Secretariat). The reasons must include objective and detailed grounds and clearly demonstrate the benefit to the project.
- D. Subcontractors will be involved in the process of developing a project agreement before it is finalised.
- E. A project agreement or project award must be either:
- made under the *Fair Work Act 2009* (FW Act); or
  - a project agreement or award made under a State industrial law.

### 4.4 Contract documents and project management procedures

4.4.1 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 and consultants associated with the project to comply.

4.4.2 The relevant contractual documents must allow Workplace Inspectors to access sites, documents and personnel to monitor compliance with the Code and Guidelines.

4.4.3 Model contract clauses are available at the website at [www.deewr.gov.au/building](http://www.deewr.gov.au/building). These model clauses will be updated from time to time to reflect changes in Australian Government contractual practice.

### 4.5 Minor works and very small contracts

4.5.1 Funding Entities are required to ensure that the Code and Guidelines are applied to minor works contracts. Funding Entities are encouraged to use the model contract clauses available on the website [www.deewr.gov.au/building](http://www.deewr.gov.au/building) for tenders and contracts relating to minor works.

4.5.2 Funding Entities 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.

4.5.3 In relation to very small contracts (where the value of the contract is \$25 000 or less), Funding Entities 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, August 2009 (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.*

4.5.4 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.

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4.5.5 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 advised that these documents can be viewed at the Australian Government website at [www.deewr.gov.au/building](http://www.deewr.gov.au/building).

### 4.6 Consultant contracts

4.6.1 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. Funding Entities 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, August 2009, applies to this project.*

### 4.7 Funding agreements

4.7.1 Funding Entities acting as funding administrators (i.e. in relation to indirectly funded projects) 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.

4.7.2 Model clauses for inclusion in deeds of agreement, grant documents and other legal instruments are also included at the website [www.deewr.gov.au/building](http://www.deewr.gov.au/building). These model clauses can be used by Funding Entities 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 DEEWR where significant modifications to these model clauses are proposed for particular projects.

4.7.3 Funding Entities 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 clauses, in all contracts relating to the construction projects concerned.

### Code and Guidelines Responsibilities

#### *The Code states*

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.

...

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.

#### 5.1 Responsibilities of Funding Entities

5.1.1 The Funding Entity is responsible for ensuring that:

- the application of the Code and Guidelines is included as an integral component of construction project and contract management procedures within their organisations;
- all planned and current construction activities are reported to e-CODE when expressions of interest or tenders are called for;
- all expressions of interest, tender and contractual documents clearly set out the requirements specified in these Guidelines;
- they do not consider expressions of interest or tenders from, or provide work to, entities who:
  - (a) have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim; or
  - (b) are on the exclusion list due to previous breaches of the Code and Guidelines; or
  - (c) have been assessed to be non-compliant by DEEWR;
- sanctions applied under the Code are enforced, including the exclusion of identified parties from work opportunities in accordance with CMG and Ministerial decisions;

- all parties are aware that the Funding Entity will only approve project agreements where there is a demonstrable benefit to the Australian Government in having such an agreement (Other than in exceptional cases, project agreements will not be permitted on projects worth less than \$100 million);
- CMG Secretariat is notified of all allegations of breaches of the Code and Guidelines within 21 days of the Funding Entity becoming aware of the alleged breach;
- they respond to requests for information concerning Code-related matters made on behalf of CMG; and
- 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 Funding Entity may write to a party to request clarification of behaviour which is considered a Code and Guidelines 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.

#### *Funding Entities as funding administrator (i.e. indirect funding)*

5.1.2 In situations where Funding Entities are not the client, but are responsible for administering Australian Government program expenditure involving construction, the Funding Entity 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.

#### 5.2 Responsibilities of grant and funding recipients

5.2.1 Recipients of grants or funds from Funding Entities have a responsibility to ensure projects involving Australian Government program expenditure are bound by the Code and Guidelines.

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5.2.2 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 Code and Guidelines requirements;
- there is an adequate mechanism for consultation with the Funding Entity regarding the suitability of a project agreement on a particular project;
- 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 and Guidelines (this information is available from the CMG Secretariat);
- they cooperate with and respond to requests for information concerning Code-related matters made on behalf of the funding agency, CMG and/or a Workplace Inspector;
- 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 CMG decisions.

### 5.3 Responsibilities of Tenderers

5.3.1 Parties submitting tenders or lodging expressions of interest in relation to projects covered by the Code and Guidelines must comply with the Code and Guidelines from the date of Tender/lodging the expression of interest.

### 5.4 Responsibilities of contractors, subcontractors, consultants and project managers

5.4.1 Contractors, subcontractors, consultants and project managers undertaking work on projects covered by the Code and Guidelines must:

- comply with the Code and Guidelines;
- require compliance with the Code and Guidelines from all subcontractors before doing business with them. All contracts must specifically require the Code and Guidelines to 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;
- ensure that contractual documents allow Workplace Inspectors to access sites, documents and personnel to monitor compliance with the Code and Guidelines;
- 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 project managers report such action to the Funding Entity;
- respond to requests for information concerning Code-related matters made on behalf of CMG;
- contractors must proactively ensure compliance with the Code and Guidelines by subcontractors including by confirming this at site or project meetings, and by making this a contractual obligation;
- 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 and Guidelines are enforced including the exclusion of identified parties from work opportunities in accordance with Ministerial decisions.

### Workplace relations and Occupational Health Safety and Rehabilitation components

#### 6.1 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.

6.1.1 Section 6.1 requires compliance 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. These matters include, but are not limited to, freedom of association, employee entitlements and wages, and occupational health and safety requirements.

##### *Unregistered written agreements*

6.1.2 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.

6.1.3 The use of unregistered written agreements, (other than common law agreements made between the employer and an individual employee) are inconsistent with the Code and Guidelines. The entity/entities to which such an agreement applies will be deemed non-compliant with the Code and Guidelines.

##### *Sham contracting*

6.1.4 The FW Act and the *Independent Contractors Act 2006* protect genuine employees from 'sham' contracting arrangements which are sometimes used by employers to avoid paying employee entitlements (e.g. annual leave). Sham contractor arrangements are inconsistent with the Code and Guidelines.

### 6.2 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; 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.

6.2.1 The Code prohibits any party requiring or attempting to unduly influence (either through the tendering process or otherwise) subcontractors or suppliers to have particular workplace arrangements in place.

### 6.3 Pressure to make over-award payments

#### *The Code states*

“Overaward payment” is defined to mean any payment and/or benefit above that set out in the relevant award, registered agreement and/or legislation. This includes payments provided for in workplace arrangements.

Decisions on 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.

6.3.1 The Code prohibits direct or indirect coercion or pressure being applied by a contractor, subcontractor or consultant to make over-award payments. Further, no contractor, subcontractor or consultant 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.

6.3.2 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.

### 6.4 Freedom of association

#### *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.

6.4.1 Contractors must adopt policies that are consistent with applicable industrial law to ensure that all those working on projects covered by the Code have their right to choose whether or not to join a union or an employer association properly respected.

6.4.2 By way of example, the following practices are inconsistent with the Code:

- providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
  - 'no ticket, no start' signs or 'show card' days;
  - discriminating against or disadvantaging elected employee representatives;
  - using forms requiring the employee to identify their union status or 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; 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.

6.4.3 A range of practices are also prohibited by the FW Act.

6.4.4 Employers must not cooperate with or act to facilitate these practices. Such conduct will be a breach of the Code and these Guidelines.

### 6.5 Right of entry

6.5.1 Parties tendering for Australian Government funded construction activity must ensure they and their subcontractors strictly comply with their right of entry requirements in accordance with the applicable legislation, court and tribunal orders, and industrial instruments. These right of entry requirements include those applicable to workplace relations and OHS&R. These procedures govern access to employer and employee records and/or the holding of discussions with employees.

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### 6.6 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.

6.6.1 Any significant disputes or disagreements relating to workplace relations or OHS&R matters must be reported to the principal contractor at the earliest opportunity. The principal contractor must report any dispute that may impact on project costs or timelines to the Funding Entity.

6.6.2 To ensure the Funding Entity and principal contractor are appropriately advised, project managers are to be encouraged to establish an effective and clear reporting structure for construction projects.

### 6.7 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).

6.7.1 Under the FW Act it is unlawful for:

- employers to pay,
- employees to accept or seek, or
- employee organisations to seek strike pay.

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

6.8.1 Any actual or threatened industrial action is to be reported by the relevant Funding Entity to CMG. Funding Entities are strongly encouraged to establish internally coordinated arrangements which will ensure effective communication with CMG.

### 6.9 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.

6.9.1 The FW Act creates a national workplace relations system that is fair, flexible and promotes productivity and economic growth. The FW Act also provides a framework with the flexibility to achieve a range of outcomes by promoting enterprise agreements that are tailored to suit the needs of businesses and employees.

6.9.2 Under the FW Act all parties are expected to demonstrate good faith when bargaining.

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6.9.3 Workplace reform under the FW Act 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.

### 6.10 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.

6.10.1 The principal contractor must establish a comprehensive 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.

6.10.2 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 including, with the employer's consent, participation of the site OHS&R delegate;
- appropriate case management and rehabilitation; and
- efficient maintenance of records.

6.10.3 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.

6.10.4 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.

6.10.5 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 *Building and Construction Industry Improvement Act 2005* (BCII Act). The Scheme is separate to the Code or these Guidelines.

6.10.6 Further information about the Scheme is available at [www.fsc.gov.au](http://www.fsc.gov.au).

### 6.11 Security of Payment

#### *The Code states*

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.

6.11.1 All parties are to comply with relevant legislation concerning security of payment.

6.11.2 All parties are expected to make payments in a timely manner and settle any dispute over payments in a reasonable, timely and cooperative way.

### Australian Government administration of the Code and Guidelines

#### 7.1 Department of Education, Employment and Workplace Relations (DEEWR)

7.1.1 DEEWR has responsibility for the following activities related to the Code and Guidelines:

- overall policy responsibility;
- providing policy advice to the Australian Government through the Minister for Employment and Workplace Relations;
- assessing certified, registered, lodged or otherwise approved industrial instruments, and common law agreements (see 6.1.3) for Code and Guidelines compliance;
- promoting Funding Entities' awareness through a broad range of educational activities; and
- providing a Secretariat to the CMG.

#### 7.2 Code Monitoring Group (CMG)

7.2.1 CMG has responsibility for the following activities related to the Code and Guidelines:

- sets the strategic direction for Code and Guidelines related education and compliance activities of DEEWR and the ABCC;
- reviews reports of alleged breaches of the Code and Guidelines which have come to its attention from Funding Entities, ministers or other parties; and
- deciding on possible sanctions to be applied under the Code and Guidelines and making recommendations to Ministers on preclusion sanctions for breaches of the Code and Guidelines.

7.2.2 CMG consists of a Senior Executive Service representative from each of the Department of Finance and Deregulation, DEEWR, the Office of the Federal Safety Commissioner (OFSC), the Department of Prime Minister and Cabinet, the Department of Defence and the Department of Infrastructure, Transport, Regional Development and Local Government (Infrastructure). The ABCC and the Office of the Fair Work Ombudsman will be non-voting members of the CMG.

7.2.3 The CMG is supported by a Secretariat drawn from DEEWR.

#### 7.3 Department of Finance and Deregulation (Finance)

7.3.1 Finance is responsible for Australian Government procurement policy, including the CPGs.

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

7.4.1 The ABCC has primary responsibility for monitoring and promoting employer, employee and industrial associations' compliance with the Code and Guidelines. This includes:

- monitoring all parties compliance with all applicable legislation, court and tribunal orders, directions and decisions and industrial instruments;
- promoting industry stakeholder awareness through a broad range of educational activities, including holding seminars, producing fact sheets, etc;
- conducting on-site visits to promote awareness;
- conducting on-site audits to ensure compliance;
- conducting on-site investigations of alleged breaches of the Code and Guidelines;
- investigations include seeking the views of all parties who may be able to provide information relevant to the alleged behaviour; and
- referring matters outside of their jurisdiction to appropriate authorities and monitoring progress.

7.4.2 The ABCC will report on the results of these activities to CMG.

7.4.3 Further information about the ABCC is available at [www.abcc.gov.au](http://www.abcc.gov.au).

7.4.4 The Australian Government has announced its intention to retain the ABCC until 31 January 2010. Following that date, all ABCC functions and responsibilities, including those under the Code and Guidelines, will transfer to a specialist inspectorate, the Fair Work - Building Industry Inspectorate, subject to the passage of applicable legislation.

# Compliance and monitoring provisions for the Code and Guidelines

## 8.1 Code Monitoring Group (CMG)

8.1.1 Once an agency (including the ABCC) or another party has advised CMG Secretariat or DEEWR 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; and
- for breaches of State and Territory legislation including OHS and security of payments legislation, referral of the matter to the relevant State/Territory regulatory authority.

8.1.2 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.

8.1.3 Where an alleged breach is sustained the Funding Entity or funding recipient will be responsible for seeking voluntary rectification of a breach, and advice on what remedial action has been taken.

## 8.2 Sanctions

8.2.1 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 to the satisfaction of the CMG. Sanctions will be considered for all construction work covered by the Code and Guidelines.

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

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

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

8.2.4 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.

8.2.5 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.

8.2.6 If a first breach is of a serious nature, such as a breach of applicable legislation, a more serious sanction may be considered, such as preclusion from tendering.

8.2.7 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.

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

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

8.2.10 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 8.4 of these Guidelines.

8.2.11 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.

8.2.12 Details of the process for considering imposing a sanction are available at [www.deewr.gov.au/building](http://www.deewr.gov.au/building).

### 8.3 Complaints concerning agency breaches

8.3.1 The Code imposes obligations on all parties. A Funding Entity 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 DEEWR. However, this does not prevent complaints from being lodged directly with CMG or the ABCC.

8.3.2 Where it has been established that a Funding Entity 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 Deregulation.

8.3.3 If the breach has been committed by a party contracted to represent the Funding Entity, 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.

8.3.4 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 Entity 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.

8.3.5 Following consultation with DEEWR, the Funding Entity may refer the matter to its portfolio minister. The portfolio minister may write to the relevant State or Territory minister.

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

### 8.4 Appeals and complaints concerning sanctions applied

8.4.1 Parties who are subject to a sanction will have been afforded several opportunities to correct any misconceptions and/or address allegations including:

- the right to respond to allegations during the initial investigation;
- if necessary they will be asked by the CMG to show cause why the CMG should not apply, or recommend, a sanction; and
- fourteen days notice from CMG of the intention to apply or recommend a sanction.

8.4.2 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.

8.4.3 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*.

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

### Contact Details

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

- the National Code Hotline: 1300 731 293
- the National Code Mailbox: [building@deewr.gov.au](mailto:building@deewr.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](http://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](http://www.fsc.gov.au)

**The contact for the Fair Work Ombudsman is:**

- Phone: 13 13 94
- [www.fairwork.gov.au](http://www.fairwork.gov.au)

These Guidelines are available on the DEEWR website at [www.deewr.gov.au/building](http://www.deewr.gov.au/building). The Code and the model tender and contract clauses to the Guidelines are also available on the website.

# APPENDIX A

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## Abbreviations and Defined Terms

ABCC	Office of the Australian Building and Construction Commissioner
BCII Act	<i>Building and Construction Industry Improvement Act 2005</i>
BOO	Build, Own, Operate
BOOT	Build, Own, Operate, Transfer
CA	Certified Agreement
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CMG	Code Monitoring Group
CPGs	Commonwealth Procurement Guidelines
Code	National Code of Practice for the Construction Industry. Available on the Australian Government internet site at <a href="http://www.deewr.gov.au/building">www.deewr.gov.au/building</a>
DEEWR	Department of Education, Employment and Workplace Relations
FW Act	<i>Fair Work Act 2009</i>
FWO	Fair Work Ombudsman
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FSC	The Office of the Federal Safety Commissioner
Funding Entity	Departments of State, Departments of the Parliament and prescribed agencies named in the <i>Financial Management and Accountability Regulations 1997</i> ; and Commonwealth authorities and wholly owned Commonwealth companies required by a General Policy Order, issued under section 48A of the <i>Commonwealth Authorities and Companies Act 1997</i> (CAC Act), to apply the Code and Guidelines.
Guidelines	Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
Infrastructure	Department of Infrastructure, Transport, Regional Development and Local Government
OHS&R	Occupational health safety and rehabilitation
PFI	Private Finance Initiatives
PPPs	Public Private Partnerships
Workplace Inspector	a person appointed as an Australian Building and Construction Inspector, Fair Work – Building Industry Inspectorate Inspector or Fair Work Inspector as defined under the BCII Act and FW Act respectively



