



Australian Government

**Department of Employment and
Workplace Relations**

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

Revised September 2005



Australian Government

**Department of Employment and
Workplace Relations**

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

Revised September 2005

Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
Revised September 2005

© Commonwealth of Australia 2005

ISBN 0642326126

The Australian Government, its employees, officers and agents do not accept any liability for the results of any action taken in reliance upon, based on or in connection with this document. To the extent legally possible, the Australian Government, its employees, officers and agents, disclaim all liability arising by reason of any breach of any duty in tort (including negligence and negligent misstatement) or as a result of any errors and omissions contained in this document.

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 (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 (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 companies that receive Australian Government funded, or partly funded, construction contracts.

The changes made to the Guidelines in 2003 remain included in this revision of the Guidelines. At that time, the Australian Government decided to extend the application of the Code to all construction projects to which it contributes funding, subject to financial thresholds.

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

From 1 November 2005, any party wishing to do business with the Australian Government or work on government 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 government agencies and *Commonwealth Authorities and Companies Act 1997* bodies will ensure that the government's reform agenda for the construction industry is significantly advanced.

The government's reform agenda has also moved forward, with the *Building and Construction Industry Improvement Act 2005* (BCII Act) receiving Royal Assent on 12 September 2005. The BCII Act establishes the Australian Building and Construction Commissioner (ABC Commissioner), and allows for the issue of a Building Code. The ABC Commissioner will monitor, investigate and enforce federal workplace relations laws and the building code, and refer other matters to the appropriate federal, State and Territory agency. These Guidelines will continue to operate independently of Commonwealth legislation.



Kevin Andrews
Minister for Employment and Workplace Relations
Canberra

September 2005

Contents

Foreword

Section 1

Introduction	7
--------------	---

Section 2

Application and scope	9
-----------------------	---

2.1 Construction activity covered by the Code and Guidelines	9
--	---

2.2 Construction activity undertaken by departments and agencies	9
--	---

2.3 Australian Government authorities and companies	9
---	---

2.4 Indirectly funded projects	9
--------------------------------	---

2.5 Privately funded construction sites	10
---	----

2.6 Pre-commitment lease projects	10
-----------------------------------	----

2.7 Build Own Operate Transfer/ Build Own Operate	11
---	----

2.8 Public Private Partnerships and Private Finance Initiatives	11
---	----

Section 3

Date of effect	12
----------------	----

Section 4

Documentation	13
---------------	----

4.1 All parties to be advised of requirement to comply	13
--	----

4.2 Tender documents to incorporate Code and requirement to comply	13
--	----

4.3 Contract documents and project management procedures to incorporate requirement to comply	14
---	----

4.4 Minor works and very small contracts	14
--	----

4.5 Consultant contracts	15
--------------------------	----

4.6 Projects funded under Australian Government grants and programmes	15
---	----

Section 5

Australian Government directly funded construction	16
--	----

5.1 Australian Government departments and agencies as clients of the building and construction industry	16
---	----

5.2 Contractors, subcontractors, consultants, and employees	17
---	----

Section 6

Australian Government indirectly funded construction	19
--	----

6.1 Departments and agencies as funding administrator	19
---	----

6.2 Responsibilities of grant and funding recipients	20
--	----

6.3 Contractors, subcontractors, consultants, and employees	22
---	----

Section 7

Australian Government administration of the Code and these Guidelines	23
---	----

7.1 Code Monitoring Group (CMG) secretariat	23
---	----

7.2 Department of Finance and Administration (Finance)	23
--	----

7.3 Department of Employment and Workplace Relations (DEWR)	23
---	----

7.4 Office of the Australian Building and Construction Commissioner (Office of the ABC Commissioner)	23
--	----

Section 8

Workplace relations and occupational health and safety (OHS) components	24
---	----

8.1 Awards and legal obligations relating to employment	24
---	----

8.2 Workplace arrangements	25
----------------------------	----

8.3 Pressure to make over-award payments	26
--	----

8.4	Project agreements and project awards	26
8.4.1	Project agreements and project awards for privately funded construction work	28
8.5	Freedom of association and right of entry	29
8.5.1	Right of entry	30
8.6	Dispute settlement	32
8.7	Strike pay	32
8.8	Industrial impacts	32
8.9	Workplace reform	33
8.10	Occupational health safety and rehabilitation (OHS&R)	34

Section 9

	Compliance and monitoring provisions for the Code and Guidelines	36
9.1	The agency role as client	36
9.2	The agency role as funding administrator	36
9.3	Code Monitoring Group (CMG)	36
9.4	Sanctions	37
9.5	Complaints concerning private sector breaches of the Code	37
9.6	Complaints concerning agency breaches of the Code	38
9.7	Appeals and complaints concerning sanctions applied under the Code	38

Section 10

	Contact details	39
--	-----------------	----

Appendix A

	Acronyms	40
--	----------	----

Section 1

Introduction

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.

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. These Guidelines also detail the extra-agency processes that the government has set up to:

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

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

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

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.

These Guidelines were revised in December 2003 due to the government's decision to transfer responsibility for investigating alleged breaches of the workplace relations provisions of the Code from the Office of the Employment Advocate to the 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 Australian Building and Construction Commissioner (ABC Commissioner). The ABC Commissioner will subsume the role currently performed by BIT on 1 October 2005. Accordingly, until 1 October 2005, references in these Guidelines to a person occupying a position in the Office of the Australian Building and Construction Commissioner (Office of the ABC Commissioner) are to be read as references to BIT.

The December 2003 revision included changes resulting from the 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 government extended the Code and Guidelines to those government authorities and businesses covered by the CAC Act.

This revision of the Guidelines follows 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.

Changes to these Guidelines include:

- a requirement for Australian Government and State and Territory agencies to only accept tenders/ 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/ expression of interest
- contractors interested in undertaking Australian Government construction work must comply with the Code and these Guidelines on all of their privately funded Australian-based construction activities where expressions of interest or tenders are called for 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.

These changes to the Guidelines will take effect from 1 November 2005.

In addition to these Guidelines, Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry (Industry Guidelines) were issued in March 1998 to assist Commonwealth agencies as clients in their dealings with industry partners including: consultants, contractors, subcontractors and suppliers.

The Industry Guidelines provide a clear statement of government policy and set out the workplace relations and administrative requirements of those parties with whom the Australian Government wishes to do business. For clarity, reference to the 'Guidelines' in this document refers to the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry. Where the Industry Guidelines are referred to, it is always as the 'Industry Guidelines'.

The Industry Guidelines have also been revised to reflect the changes to these Guidelines.

Section 2

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

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.

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

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

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

2.2 Construction activity undertaken by departments and agencies

The Code and Guidelines apply to all construction activity undertaken by or on behalf of Australian Government and State and Territory governments' 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

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

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

2.4 Indirectly funded projects

As of 1 January 2004, the Code and Guidelines also apply to all construction projects indirectly funded by the Australian Government through grant and other 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.

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

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

2.5 Privately funded construction sites

Contractors interested in undertaking Australian Government construction work must comply with the Code and these Guidelines on all of their privately funded Australian-based construction activities where expressions of interest or tenders are called for on or after 1 November 2005. This applies to contracts that are:

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

Any party, such as a head contractor, subcontractor, consultant or material supplier, interested in undertaking Australian Government construction work is required to comply with the Code and these Guidelines on privately funded construction projects in which they are involved.

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

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 of their building and construction related industrial instruments Code compliant.

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.

'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* [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.

2.6 Pre-commitment lease projects

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

2.7 Build Own Operate Transfer/Build Own Operate

The Code must also be applied to Build, Own, Operate, Transfer (BOOT) and Build, Own, Operate (BOO) projects initiated by an Australian Government agency for the delivery of Australian Government functions or services. In many cases an Australian Government entity will be the subsequent tenant of such projects and can request Code compliance in accordance with section 2.6 of these Guidelines.

2.8 Public Private Partnerships and Private Finance Initiatives

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

Section 3

Date of effect

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

As noted in section 2.5, from 1 November 2005 all companies 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 privately funded Australian-based construction activities where expressions of interest or tenders are called for on or after 1 November 2005.

This version of the Guidelines will 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.

The Code and this version of the Guidelines will 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.

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.

Section 4

Documentation

4.1 All parties to be advised of requirement to comply

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

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, applies to this project.

4.2 Tender documents to incorporate Code and requirement to comply

Compliance with the Code and the Industry Guidelines, which are based on section eight of these Guidelines, must be made a condition of tender. The Code and the Industry Guidelines must be included as an attachment to tender documents and should be made available on request to all interested parties. Alternatively, the conditions of tender may include advice on where those documents can be viewed at the Australian Workplace website at www.workplace.gov.au/building.

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 privately funded Australian-based construction activities where the tender or expression of interest was called for on or after 1 November 2005.

Prospective tenderers must also be advised that compliance with the Code and the Industry Guidelines is to extend to all subcontractors,

consultants and material suppliers who may be engaged by the tenderer on the project. Agencies and CAC Act bodies are expected to actively assist parties to ensure they can readily access and understand the Code and Industry Guidelines.

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

A two-stage tender process can assist in the selection of tenders by providing an initial assessment of the suitability of tenders for larger projects. Where a two-stage tender process is used, the first stage or expression of interest documents issued should clearly state that the Code and Industry Guidelines apply. The documents should also state that companies must have Code compliant workplace arrangements in place at the time of lodging their first stage tender or expression of interest. 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 contractor on applying the Code to projects funded by the Australian Government should also be included as a separate tender schedule. It may be useful for agencies to obtain a completed and signed undertaking to apply the Code and Industry Guidelines, including to private construction activity, at the assessment stage before a company can proceed to tender. All applicants must be compliant with the Code and Industry 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 tenderers satisfying the mandatory criteria.

In a single stage process where tender documents are issued to all companies responding to an advertisement, the advertisement must state that the project is covered by the Code and Guidelines. 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).

Model clauses, including clauses for a two-stage tender process, 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 and arrangements.

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

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

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

4.4 Minor works and very small contracts

Australian Government departments, agencies and CAC Act bodies are required to ensure that the Code and these 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. Agencies and CAC Act bodies may determine whether the model clauses are appropriate for minor works projects based on the value and complexity of projects and their own operational requirements.

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

The National Code of Practice for the Construction Industry (the Code) and the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, apply to this project. By agreeing to undertake the works, you will be taken to have read and to agree to comply with the Code and Industry Guidelines.

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.

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 the Industry Guidelines. They should also be provided with copies of the Code and the Industry Guidelines.

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

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

4.5 Consultant contracts

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

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, applies to this project.

4.6 Projects funded under Australian Government grants and programmes

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.

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

Section 5

Australian Government directly funded construction

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

Australian Government departments, agencies and authorities that are subject to the FMA Act, and the CAC Act, that 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 government policy. As a client, it is important to take all reasonable steps to ensure that all parties in a contractual relationship with the Australian Government and in subcontracts discharge their contractual obligations to comply with the Code and Guidelines on Australian Government construction projects. The client is responsible for ensuring that:

- the application of the Code and these Guidelines are included as an integral component of construction contract management procedures within their organisations
- parties developing proposals, expressing interest, tendering or undertaking work in relation to an Australian Government construction project, are informed of their responsibility to comply with the Code and the Industry Guidelines
- commitments are obtained that the Code and the Industry Guidelines will be complied with in the form specified in section 4.3 of these Guidelines
- initial action is undertaken to address the Code and the Industry Guidelines' issues which may arise in relation to a project—'initial action' is further defined in section 9.1 of these Guidelines
- they respond to requests for information concerning Code-related matters made on behalf of CMG
- they report to DEWR through e-CODE on all planned and current construction activity (including minor works, see section 4.4 for details on minor works)
- advertisements calling for expressions of interest, tenders, submissions and invitations regarding projects incorporate the Code must include the words:

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, applies to this project.
- contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
- the Code and Industry Guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
- there are no tenderers on the exclusion list due to previous breaches of the Code (this information is available from CMG)
- the workplace relations arrangements proposed for the project are consistent with the Code and these Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- parties are compliant with the Code and Guidelines at the time they lodge an expression of interest or tender, and in the case of a two-stage tender process, be compliant at the expression of interest stage
- parties comply with the Code and Guidelines on all of their privately funded Australian-based construction activities where expressions of interest or tenders for either are called for on or after 1 November 2005

- there is a reporting mechanism in regard to the application of the Code and Guidelines on the project
- application of the Code and Guidelines is a standing item on the agenda for site/project meetings
- parties are aware of the need for agencies and CAC Act bodies to evaluate whether to authorise a project agreement if applicable—project agreements are only appropriate for major contracts valued above \$25 million
- if they are proposing to authorise a project agreement, there is a demonstrable benefit to the Australian Government in having such an agreement on the project
- the project manager or the head contractor has established appropriate processes to support freedom of association and union right of entry to premises in accordance with the law
- where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- there is an occupational health safety and rehabilitation (OHS&R) plan for the project
- where practicable, the contractor initiates remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and that CMG and the Office of the ABC Commissioner are notified of the non-compliance and any remediation
- where it is not practicable for contractors to initiate remedial action, ensure CMG will be notified of that fact
- all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the Office of the ABC Commissioner, CMG or the Building Industry Branch of DEWR
- CMG is notified of all allegations of breaches of the Code and Industry 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 decisions advised by CMG.

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

5.2 Contractors, subcontractors, consultants, and employees

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

- comply with the Code and the Industry Guidelines
- require compliance with the Code and Industry Guidelines from all subcontractors and material suppliers—all contracts must specifically require the Code and Industry Guidelines be complied with
- ensure that contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
- assess whether the workplace relations arrangements proposed for the project are consistent with the Code and Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- ensure parties are compliant with the Code and Guidelines at the time they lodge an expression of interest or tender
- ensure the workplace relations arrangements of potential subcontractors/suppliers in respect of all their privately funded Australian-based construction activities comply with the Code and Guidelines
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism

-
- where practicable, ensure contractors or subcontractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and that CMG and the Office of the ABC Commissioner are notified of the non-compliance and any remediation
 - where it is not practicable for contractors or subcontractors to initiate remedial action, ensure CMG will be notified of that fact
 - ensure that all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the Office of the ABC Commissioner, CMG or the Building Industry Branch of DEWR
 - ensure that CMG is notified of all allegations of breaches of the Code and Industry Guidelines within 21 days of the party becoming aware of the alleged breach
 - be aware that sanctions applied under the Code are enforced, including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

Contractors, subcontractors, consultants or employees must also report any suspected breaches of the Code to the client, CMG or the Office of the ABC Commissioner.

Section 6

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

The Code and these Guidelines apply to indirectly funded Australian Government projects as set out in section 2.4. In situations where departments and agencies are not the client, but are responsible for administering Australian Government 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 Industry Guidelines to all projects funded with Australian Government funds, as per the thresholds described in section 2.4.

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

Funding administrators must consider the following points to assist funding recipients understand the requirements under the Code and Guidelines applying to contractors engaged by them.

Departments and agencies that administer funding should ensure that:

- funding recipients developing proposals, tendering or undertaking work in relation to a project are informed of their responsibility to comply with the Code and Industry Guidelines

- they obtain commitments from the funding recipient that the Code and the Industry Guidelines will be complied with—agencies must ensure that tenders and contractual documents include the requirements for the Code
- contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
- adequate reporting arrangements are in place with funding recipients for reporting on Code-related issues
- they respond to requests for information concerning Code-related matters made on behalf of CMG
- CMG is notified of all allegations of breaches of the Code and Industry Guidelines within 21 days of the agency 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 decisions advised by CMG
- they report to DEWR through e-CODE on all planned and current construction activity.

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

- all advertisements calling for expressions of interest, tenders, submissions and invitations regarding applicable projects incorporate the obligation to apply the Code and these Guidelines and must include the words:

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, applies to this project.

-
- contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
 - the Code and Industry Guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
 - they respond to requests for information concerning Code-related matters made on behalf of CMG or the Office of the ABC Commissioner
 - there are no tenderers on the exclusion list due to previous breaches of the Code (this information is available from CMG)
 - the workplace relations arrangements proposed for the project by contractors are consistent with the Code and Industry Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
 - parties are compliant with the Code and Industry Guidelines at the time they lodge an expression of interest or tender
 - parties comply with the Code and Industry Guidelines on all of their privately funded Australian-based construction activities where expressions of interest or tenders are called for on or after 1 November 2005
 - there is a reporting mechanism in regard to the application of the Code and the Industry Guidelines on the project
 - application of the Code and Industry Guidelines is a standing item on the agenda for site/project meetings
 - the head contractor has established appropriate processes to support freedom of association and right of entry provisions
 - where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
 - there is an OHS&R plan for the project
 - where practicable, the contractor initiates remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and notifies CMG and the Office of the ABC Commissioner of the non-compliance and any remedial action
 - where it is not practicable for contractors to initiate remedial action, ensure CMG will be notified of that fact
 - all parties involved in the project, including the funding recipient, are aware of the requirement to report any alleged breaches or other Code-related matters to the Office of the ABC Commissioner, CMG or the Building Industry Branch of DEWR
 - CMG is notified of all allegations of breaches of the Code and Industry Guidelines within 21 days of the funding recipient becoming aware of the alleged breach.
- ## 6.2 Responsibilities of grant and funding recipients
- Recipients of grants or funds from Australian Government departments and agencies have a responsibility to ensure projects involving Australian Government programme expenditure are bound by the Code and Industry Guidelines. Grant and funding recipients, including State and Territory agencies, must ensure that:
- contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
 - they provide a commitment to the funding agency that the Code and Industry Guidelines will be complied with and that tender and contractual documents include the requirement to comply with the Code and Industry Guidelines

-
- they respond to requests for information concerning Code-related matters made on behalf of the funding agency, CMG and the Office of the ABC Commissioner
 - advertisements calling for expressions of interest, tenders, submissions and invitations regarding projects incorporate the Code and must include the words:

The National Code of Practice for the Construction Industry and the Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, apply to this project.
 - the Code and Industry Guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
 - there are no tenderers on the exclusion list due to previous breaches of the Code (this information is available from CMG)
 - the workplace relations arrangements proposed for the project are consistent with the Code and Industry Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
 - there is a reporting mechanism on the project and that the Code is a standing item on the agenda for site/project meetings
 - parties are compliant with the Code and Industry Guidelines at the time they lodge an expression of interest or tender
 - parties comply with the Code and Industry Guidelines on all of their privately funded Australian-based construction activities where expressions of interest or tenders are called for on or after 1 November 2005
 - there is an adequate mechanism for consultation with the funding agency regarding the suitability of a project agreement on a particular project (project agreements are only appropriate for major contracts valued above \$25 million)
 - the project manager or the head contractor has established appropriate processes to support freedom of association and right of entry provisions
 - where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
 - there is an OHS&R plan for the project
 - where practicable, contractors or subcontractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and notify CMG and the Office of the ABC Commissioner of the non-compliance and any remedial action
 - where it is not practicable for contractors or subcontractors to initiate remedial action, they ensure CMG will be notified of that fact
 - all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the Office of the ABC Commissioner, CMG or the Building Industry Branch of DEWR
 - CMG is notified of all allegations of breaches of the Code and Industry Guidelines within 21 days of the funding recipient 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 decisions advised by CMG.

6.3 Contractors, subcontractors, consultants, and employees

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

- comply with the Code and Industry Guidelines
- require compliance with the Code and Industry Guidelines from all subcontractors and material suppliers—all contracts should specifically require compliance with the Code and Industry Guidelines
- ensure contractual documents concerning Australian Government funded projects allow for a person occupying a position in the Office of the ABC Commissioner to access sites to monitor compliance with the Code and these Guidelines
- ensure the workplace relations arrangements proposed for the project are consistent with the Code and Industry Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- ensure parties are compliant with the Code and Industry Guidelines at the time they lodge an expression of interest or tender
- assess whether the workplace relations arrangements of potential subcontractors/suppliers in respect of all their privately funded Australian-based construction activities comply with the Code and these Guidelines
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- where practicable, ensure contractors or subcontractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and notify CMG and the Office of the ABC Commissioner of the non-compliance and any remediation

- where it is not practicable for contractors or subcontractors to initiate remedial action, ensure CMG will be notified of that fact
- ensure that all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the Office of the ABC Commissioner, CMG or the Building Industry Branch of DEWR
- ensure that CMG is notified of all allegations of breaches of the Code and Industry Guidelines within 21 days of the party becoming aware of the alleged breach
- 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
- be aware that sanctions applied under the Code are enforced, including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

Contractors, subcontractors, consultants or employees must also report any suspected breaches of the Code to the client, CMG and the Office of the ABC Commissioner.

Section 7

Australian Government administration of the Code and these Guidelines

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

7.1 Code Monitoring Group (CMG) secretariat

The secretariat of CMG instituted by these Guidelines 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
- liaising with other jurisdictions at officer level about Code matters.

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

7.2 Department of Finance and Administration (Finance)

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 government procurement policy, including the Commonwealth Procurement Guidelines.

7.3 Department of Employment and Workplace Relations (DEWR)

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
- assist in monitoring and promoting compliance with the workplace relations aspects of the Code on behalf of the Australian Government.

The Federal Safety Commissioner (FSC) is the accrediting authority in relation to the occupational health and safety (OHS) accreditation scheme for building and construction projects funded by the Australian Government.

Through administration of the accreditation scheme, the FSC will test contractors' OHS credentials on the job, as well as through their management policies and systems, before they enter into contracts with the Australian Government to carry out building work.

The FSC, through Federal Safety Officers, will have responsibility for monitoring compliance with the accreditation scheme. The FSC will be responsible for managing all aspects of the accreditation scheme including any sanction regime established as part of the scheme.

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

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

Section 8

Workplace relations and occupational health and safety (OHS) components

8.1 Awards and legal obligations relating to employment

All parties must comply with the provisions of applicable:

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

Awards set out minimum conditions of employment and employers are obliged to comply with awards unless they have entered into certified agreements (CAs) or Australian workplace agreements (AWAs) that displace or vary the terms of awards, or unless otherwise specified in section 8.4 (project agreements and project awards). CAs and AWAs are also legally enforceable and must be complied with by all parties. This includes CAs, AWAs and enterprise agreements approved under State legislation. The requirement to comply with legal obligations extends to orders and directions of tribunals and courts. This includes State Supreme Court and Federal Court injunctions, and orders issued by the Australian Industrial Relations Commission such as those issued under section 127 of the *Workplace Relations Act 1996* (the WR Act).

State-registered project agreements and project awards cannot override federal awards, AWAs or CAs. (Note that a State agreement may operate despite a federal award—see s.152 of the WR Act.)

An unregistered agreement is an individual or collective arrangement that has not been certified or registered by an industrial relations commission. An unregistered agreement may be reached between an employer and its employee(s) or apply at an industry level. Unregistered agreements are not legally enforceable under workplace relations laws.

Where unregistered agreements do apply, these must comply with the workplace relations requirements of the Code and Industry Guidelines.

Additionally, an unregistered agreement must not provide for a site allowance.

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

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

An industrial instrument must not put any restriction or limitation on the choice of agreement currently or which may in the future be available to employees. Section 8.2 of these Guidelines indicates that it is up to employers and employees (and their employees' representatives, if that is the employees' wish) what form of workplace industrial instrument, if any, should apply. As such, an industrial instrument should not contain provisions that limit employers' or employees' future agreement-making options, including a requirement to negotiate on a particular form of agreement or a requirement that an employer will renegotiate a future agreement with a union.

Additionally, an industrial instrument must not contain a provision that restricts the type of agreement that can be offered to, or requested by, an employee. Provisions must not inhibit, explicitly or in practice, an employer's capacity to offer an AWA to an employee during the term of a certified, registered or unregistered agreement.

An 'industrial instrument' means 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, or provides for the prevention or settlement of a dispute between an employer and the employer's employees.

For the purposes of the Code and these Guidelines, it also means an agreement that has not been certified or registered under an industrial law, but is concerned with the relationship between an employer and the employer's employees.

8.2 Workplace arrangements

Workplace arrangements which reflect the needs of the enterprise are important elements in achieving continuous improvement and best practice. The contents of the workplace arrangements are a matter for the parties to those arrangements, subject to them meeting legislative requirements. However, they may encompass:

- improved OHS and rehabilitation practices
- training and skill formation strategies
- multi skilling
- flexible work practices, for example in relation to working time.

A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to, and/or the contents, or the form of their workplace arrangements. This does not prevent action sanctioned by relevant industrial relations legislation.

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

The WR Act provides for more effective choice and flexibility for parties in reaching workplace agreements. AWAs and CAs are available and are designed to enable employers and employees to take responsibility for their own workplace arrangements and relations. Parties should ensure that implementation of the Code supports a direct relationship between employees and employers and contractors/subcontractors, with a reduced role for third party intervention in workplace arrangements.

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

The Code prohibits head contractors or clients requiring or attempting to unduly influence (either through the tendering process or otherwise) that subcontractors or material suppliers have particular workplace arrangements in place, whether that be in the form of a CA, AWAs, or a State enterprise agreement. It is up to each employer to negotiate with their employees (and their employees' representatives where that is the employees' wish) what form of workplace arrangement, if any, should apply. It is up to employers and their employees to decide whether to have a CA (and if so what kind), AWAs, a State enterprise agreement, or to work under the terms of the relevant award (supplemented possibly by over-award payments).

Except where a project agreement has been agreed to by the client in accordance with the Code, a party must not require another party to agree to pay certain rates as a condition for the allocation of work or the awarding of a tender. This includes a requirement to set pay rates or pay particular allowances or conditions on a project through a tendering process, contractual arrangements or otherwise.

8.3 Pressure to make over-award payments

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.

The Code prohibits direct or indirect coercion or pressure being applied by a contractor to another 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.

Payments to industry superannuation, redundancy and sick leave funds which provide for contributions in excess of award and legislative requirements are matters to be decided by each employer. No party may compel or attempt to compel or unduly influence another party into making such voluntary contributions into such schemes including schemes which provide top up payments over and above the provisions contained in awards, agreements or legislation. 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, as defined earlier in this section.

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

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

8.4 Project agreements and project awards

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.

It is important to note that s.64 of the BCII Act provides that certain project agreements are unenforceable. In particular, project agreements must be certified to be enforceable. The commentary that follows is, accordingly, subject to the prohibition on certain project agreements contained in s.64 of the BCII Act.

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 or project awards may be appropriate but only under strict conditions, the most important of which is the agreement of the principal (that is, the client). In respect of indirectly funded projects, agreement is required from the funding agency (Australian Government agency) and the funding recipient (State agency). Clients may, consistent with the Code, adopt a policy of not agreeing to project agreements or project awards.

It is very important that Australian Government clients, and funding recipients in respect of indirectly funded projects, do 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.

For directly funded projects, the principal is accountable for decisions to approve project agreements or project awards and must state their reasons for doing so in writing to the relevant portfolio minister.

For indirectly funded projects, the funding agency and the funding recipient are accountable for decisions to approve project agreements or project awards and must state their reasons for doing so in writing to the relevant portfolio ministers.

Decisions to approve project agreements or project awards must be defensible on objective and detailed grounds and clearly demonstrate a benefit to the project, such as improved completion schedules that

would not otherwise have been achievable on a best practice basis.

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

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

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

For indirectly funded projects, project agreements or project awards will only be appropriate for major contracts as defined by the funding agency and the funding recipient from time to time and will not be permitted on projects worth less than \$25 million except in exceptional cases.

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

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

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

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

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

It should be noted that State-registered project agreements and project awards should maintain the integrity of workplace arrangements including CAs and AWAs. Section 8.1 of these Guidelines provides further details on the interaction of State-registered project agreements and awards and existing agreements and awards.

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

- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and workplace relations

- past performance and the parties' history of maintaining and abiding by agreements
- the manner in which the proposed project agreement or project award will interact with workplace arrangements including CAs and AWAs already in place or in the process of being negotiated, endorsed or certified
- whether there is anything in the proposed agreement or project which is inconsistent with the Code, awards or other legislation.

Project agreements shall be certified or registered under relevant legislation. In particular, project agreements covering several employers should be certified under the multiple-business provisions of the WR Act (s.170LC), or relevant State legislation in respect of indirectly funded projects, and this should be made a condition of approval by the client. In the case of indirectly funded projects, this should be made a condition of approval by the funding agency and funding recipient.

8.4.1 Project agreements and project awards for privately funded construction work

It is important to note that s.64 of the BCII Act provides that certain project agreements are unenforceable. In particular, project agreements must be certified to be enforceable. The commentary that follows is, accordingly, subject to the prohibition on certain project agreements contained in s.64 of the BCII Act.

Given the workplace focus of the agreement system, the capacity for multi-employer agreements to be made requires the consent of all employers and the majority of the employees to be covered and involves testing by the Australian Industrial Relations Commission or relevant State industrial tribunals.

While project agreements or project awards may cover matters other than pay and conditions, in regard to the latter they should generally only provide for project-specific productivity payments, which should be tied to the achievement of identified performance targets. They should not cover other types of benefits such as superannuation or

redundancy contributions, workers' compensation insurance, '24 hour cover' etcetera. These are all matters that should be covered in enterprise or workplace agreements, if at all.

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

If an industrial instrument provides for a site allowance, the amount must be specified in an industrial instrument certified or registered under the WR Act or otherwise approved under relevant State legislation. 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.

It should be noted that State-registered project agreements and project awards should maintain the integrity of workplace arrangements including CAs and AWAs. Section 8.1 of these Guidelines provides further details on the interaction of State-registered project agreements and awards and existing agreements and awards.

Project agreements shall be certified or registered under relevant legislation. In particular, project agreements covering several employers should be certified under the multiple-business provisions of the WR Act (s.170LC) or State legislation.

8.5 Freedom of association and right of entry

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

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

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

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

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

The payment of 'bargaining fees' or other payments to, or at the direction of, industrial associations by anyone who is not a member, is contrary to the principles of freedom of association. Membership of industrial associations and any associated membership fees or other payments (however described) must be voluntary. Employment discrimination against, or victimisation of, a party (or threatened discrimination

or victimisation) is unlawful where that occurs on the grounds of:

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

Contractors must adopt policies to ensure that all those working on projects covered by the Code have their right to choose whether or not to join a union or employer association properly respected. In particular, the following practices are inconsistent with the Code:

- employers providing the names of new staff or job applicants to unions
- supplying the names of contractors or subcontractors to unions
- 'no ticket, no start' signs, or other notices, posters, helmets, stickers etcetera that imply that union membership is anything other than a matter for individual choice
- 'show card' days
- an employer encouraging or discouraging employees to join a union
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate, or other person, on a construction site, or have the effect of requiring any contractor, subcontractor or employer to hire an individual nominated by a union
- pressuring subcontractors to join employer associations
- using site delegates to undertake or administer site induction processes (this should be undertaken by site management)
- using induction forms requiring the employee to identify their union status

- using forms requiring employers and contractors to identify the union status of employees or subcontractors
- a requirement, whether explicitly contained in an industrial instrument or not, 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 (see section 8.6 for further details on employee involvement in dispute settlement)
- the existence, whether in a certified agreement or otherwise, of any requirement for any person or enterprise to pay a fee to a registered organisation of which he or she is not a member including, but not limited to, any requirement that a person pay a 'bargaining fee' however described, to an industrial association in respect of services provided by it regarding any workplace arrangements that might regulate that person's employment by that enterprise.

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

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

8.5.1 Right of entry

No principal contractor, subcontractor, consultant or employee is to grant admission to a site by a representative of an industrial association other than in strict compliance with the procedures governing entry and inspection under the WR Act or under relevant State legislation, including OHS legislation. Accordingly, an industrial instrument must not include provisions allowing access in addition to that permitted under the WR Act or relevant State legislation.

Principal contractors, subcontractors, consultants and employees are required to follow the procedures in strict compliance with the WR Act or relevant State legislation in respect of allowing union delegates and shop stewards access to employer records and/or holding discussions with employees, in respect of content of industrial instruments and workplace practices.

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

The WR Act provides that permit holders may only enter a workplace for two reasons.

The first is to investigate a suspected breach of the WR Act, of a federal award or CA, or of an order of the Australian Industrial Relations Commission. To exercise a right of entry:

- there must be employees who are members of the permit holder's organisation who work at the premises and
- the permit holder's organisation must be bound by the relevant federal award, agreement or commission order.

If these conditions are met, the permit holder may:

- enter a workplace during working hours and inspect and make copies of any pay or time sheets relevant to the suspected breach
- inspect machinery and other appliances relevant to the suspected breach, and
- speak to employees about the suspected breach.

Permit holders cannot inspect an AWA or documents that show some or all the contents of an AWA.

The second reason is to hold discussions with employees who are members, or eligible to be members, of the relevant organisation at the workplace. To exercise a right of entry:

- a federal award binding on the organisation must apply to work that is being carried on at the premises
- a permit holder may only enter the premises during working hours, and
- may only hold the discussions during the employees' mealtime or other breaks.

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

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

It should be noted that an industrial instrument, whether certified, registered or unregistered, must not provide for a person or entity that is not a party to the industrial instrument to monitor the operation of the industrial instrument. '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 Dispute settlement

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

Grievances or matters under dispute are to be dealt with at the workplace between the appropriate level of management and employees and union representatives. Awards and agreements should contain arrangements providing graduated steps for discussion of disputes involving higher levels of authority to which the matter in dispute can be referred if it cannot be resolved.

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

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

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 an employee representative of their choice.

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

8.7 Strike pay

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

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

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

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

8.8 Industrial impacts

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

Any disputes or disagreements relating to workplace relations or OHS&R matters, which can impact on the construction programme or the contract, project

costs or other related contracts, must be reported to the principal at the earliest opportunity. To ensure the principal is appropriately advised, project managers are to be encouraged to establish an effective and clear reporting structure for construction projects.

Such reporting structures should enable government agencies and CAC Act bodies to:

- identify at an early stage any disputes or disagreements and, in particular, determine whether these have arisen through the failure to apply the Code by any of the parties to the dispute
- assist with better managing their overall work programmes.

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

8.9 Workplace reform

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

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

Workplace reform is by nature a dynamic and evolving change process and requires the

commitment of employers and employees. Workplace reform covers innovations and complementary approaches to workplace behaviour including:

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

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

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

The Code seeks to provide an environment conducive to the pursuit of workplace reform strategies. The parties shall not 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 permitted 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 employers’ 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-one 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 the application of the Code and Guidelines are inconsistent with these Guidelines. Such clauses typically 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, the amount must be specified in an industrial instrument certified or registered under the WR Act or otherwise approved under relevant State legislation. 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. Additionally, an unregistered agreement must not provide for a site allowance.

8.10 Occupational health safety and 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.

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

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

A comprehensive management plan will include:

- explicit management commitment
- employee involvement
- rigorous work practices analysis

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

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

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

The BCII Act sets out the powers of the FSC, and provides for an OHS accreditation scheme to be administered by the FSC. The accreditation scheme will ensure that any person contracting with the Australian Government for building work must meet certain OHS standards.

The FSC will also:

- advise on the OHS elements of the Australian Government Building Code (expected to be released in 2006) and promote and monitor compliance with the OHS aspect of the Code
- raise awareness about the need for agencies and contractors to reduce, if not eliminate, OHS risk in construction at the design stage, before construction work begins.

The Australian Government established the Office of the FSC as an administrative entity within DEWR in January 2005. An FSC commenced duty in June 2005.

The proposed Australian Government OHS accreditation scheme for construction projects is currently under development. The FSC has commenced consultations with Australian Government stakeholders, State and Territory governments and agencies, industry representatives and associations, and companies about the proposed accreditation scheme.

Further information about the proposed accreditation scheme and other FSC initiatives will be provided to stakeholders as part of the implementation of the scheme. Guidelines about OHS matters in general will also be updated.

Further information is available at www.fsc.gov.au.

Section 9

Compliance and monitoring provisions for the Code and Guidelines

9.1 The agency role as client

The intention of the Code is to encourage cooperation, best practice and ethical behaviour by all parties involved in a construction project. The Australian Government approach to implementation is also intended to ensure that client agencies have the support necessary to effectively apply the Code without detriment to their principal focus on successful project management.

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

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

Clients should, however, inform CMG of all breaches of the Code within 21 days, and refer breaches of the Code for further action by CMG.

9.2 The agency role as funding administrator

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

9.3 Code Monitoring Group (CMG)

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.

CMG consists of a senior representative from each of Finance, DEWR, the Office of the ABC Commissioner, Prime Minister and Cabinet, the Department of Defence and the Department of Transport and Regional Services (DOTARs).

A working party of CMG, comprising senior officers from DEWR, the Office of the ABC Commissioner, 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.

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 Office of the ABC Commissioner if the alleged breach is related to workplace relations aspects of the Code and these Guidelines
- referral of the matter to Finance if the alleged breach relates to non-workplace relations aspects of the Code and these Guidelines
- for breaches of State and Territory occupational health and safety legislation, referral of the matter to the relevant State/Territory OHS regulatory authority—for breaches of occupational health and safety obligations under the National Code, referral of the matter to the FSC.

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.

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.

9.4 Sanctions

Sanctions will be considered where a party has failed to meet their obligations as outlined in the Code and these Guidelines and the breach has not been voluntarily rectified.

For a first breach, CMG will issue a formal warning that future breaches may lead to more significant sanctions. The breach (or alleged breach) may, if appropriate, be reported to the appropriate statutory body or law enforcement agency and/or an appropriate industry association for action.

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

For a second breach, CMG will report and recommend to relevant Ministers that a party be precluded from tendering for some (such as work in a particular State) or all Australian Government work for a period of up to six months. The breach, or alleged breach, may if appropriate, be reported to the appropriate statutory body or law enforcement agency and/or appropriate industry association for action.

In practice, 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.

For subsequent breaches, the period of preclusion could be extended by up to six months for each breach.

Once a decision is made, the CMG Secretariat will set out CMG's decision and reasoning in writing. Where a sanction is to be applied, the party will be advised of its rights of review.

Following the imposition of a sanction, the Workplace Relations Ministers' Council and the Australian Procurement and Construction Ministers' Council will be advised of the imposition of a sanction. The advice would identify the party concerned and the nature of the breach and sanction. The advice will

be communicated to all Australian Government agencies to ensure a 'whole-of-government' approach.

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

9.5 Complaints concerning private sector breaches of the Code

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 head contractor and subcontractors or suppliers.

A sanction can be applied to a particular division of a company operating in a particular State. A sanction can also be applied 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.

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

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

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.

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. 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.

9.6 Complaints concerning agency breaches of the Code

The Code imposes obligations on all parties and it is possible that the client agency or its representatives may breach, or be alleged to have breached, the Code and these Guidelines. In such circumstances the complaint should be dealt with by the relevant agency and DEWR. However, this does not prevent complaints from being lodged directly with CMG or the Office of the ABC Commissioner.

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.

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.

It is possible that a funding recipient, that is a State or Territory agency, may breach, or be alleged to have breached, the Code and these Guidelines. Where a State or Territory agency is alleged to have breached 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.

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.

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

9.7 Appeals and complaints concerning sanctions applied under the Code

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

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.

Section 10

Contact details

Queries about the Code or its application can be referred to CMG secretariat.

The contact for CMG secretariat and for workplace relations and OHS&R matters is:

Mr Leigh Quealy
Workplace Relations Implementation Group
Department of Employment and Workplace Relations
Phone: 02 6121 7765
Fax: 02 6276 7004
Email: leigh.quealy@dewr.gov.au

General queries about the Code and Guidelines, and the workplace relations aspects can be directed to:

- the National Code Hotline: 02 6121 7844
- the National Code Mailbox: code.implementation@dewr.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:

Mr James Hart
Phone: 02 6121 9161
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 2062
Fax: 02 6267 3018
Email: robert.butterworth@finance.gov.au

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

Appendix A

Acronyms

AWA	Australian Workplace Agreement
BCII Act	<i>Building and Construction Industry Improvement Act 2005</i>
BIT	Building Industry Taskforce
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
Code	National Code of Practice for the Construction Industry
DEWR	Department of Employment and Workplace Relations
Finance	Department of Finance and Administration
DOTARs	Department of Transport and Regional Services
FMA Act	<i>Financial Management Accountability Act 1997</i>
FSC	Federal Safety Commissioner
Guidelines	Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
Industry Guidelines	Australian Government Industry Guidelines for the National Code of Practice for the Construction Industry
Office of the ABC Commissioner	Office of the Australian Building and Construction Commissioner
OHS	occupational health and safety
OHS&R	occupational health safety and rehabilitation
PFI	Private Finance Initiatives
PPPs	Public Private Partnerships
WR Act	<i>Workplace Relations Act 1996</i>

