



**Australian Government**  
**Department of Employment and  
Workplace Relations**



**Government  
of South Australia**

# Joint Australian Government and South Australian Government Implementation Guidelines for AusLink projects in South Australia (Joint Guidelines)

December 2004

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*Please note:*

- The text in italics in section six of these Joint Guidelines is from the National Code of Practice for the Construction Industry.
- The following agencies and departments referred to in the Joint Guidelines have changed:
  - the Building Industry Taskforce (BIT) (Australian Government) was replaced with the Office of the Australian Building and Construction Commissioner (ABCC) on 1 October 2005
  - the Department of Transport and Urban Planning (DTUP) (South Australian Government) was replaced with the Department of Transport, Energy and Infrastructure (DTEI) on 1 July 2005
  - Workplace Services (South Australian Government) was replaced with SafeWork SA on 24 October 2005.

## SECTION 1 Application and scope

The National Code of Practice for the Construction Industry (the Code) is to be applied to the maximum practicable extent to all construction and building work undertaken for and on behalf of the Australian Government and to construction projects to which the Australian Government has contributed funding. These Joint Guidelines have been developed by the Australian Government and the State Government of South Australia for the application of the Code to AusLink-funded projects in South Australia.

The following sections elaborate on the types of activities covered by the Code.

### 1.1 | Construction activity covered by the Code and these Joint Guidelines

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

Activity that 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; and 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.

### 1.2 | Funding thresholds and delivery mechanisms

The Code and these Joint Guidelines apply to all construction projects in South Australia indirectly funded by the Australian Government through AusLink 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.

Subject to these financial thresholds, the Code applies to all jointly funded AusLink construction projects in South Australia including those delivered via Public Private Partnerships (PPPs), Private Finance Initiatives (PFIs), Build Own Operate Transfer (BOOT) and Build Own Operate (BOO) projects.

## SECTION 2 Date of effect

All contracts, tendering processes, expressions of interest or market testing proposals associated with AusLink-funded projects in South Australia must comply with all elements of the Code and these Joint Guidelines as detailed in those documents as at the date of issuing of these Joint Guidelines. Obligations of the parties under the Code and these Joint Guidelines will have effect to all decisions/actions taken from the date of issuance of these Joint Guidelines.

The Code and these Joint Guidelines will not apply to projects approved by the Australian Government prior to 1 January 2004.

To avoid any ambiguity, any advertisements placed or processes commenced prior to the issuance of these Joint Guidelines do not need to be readvertised or reprocessed. However, all contracts for construction activity for projects within the scope of these Joint Guidelines, as defined in Section 1, must be structured to comply.

## SECTION 3 Documentation

### 3.1 | All parties to be advised of requirement to comply

All parties invited to express interest in the joint funded AusLink construction projects or projects to which the Australian Government and the State Government of South Australia contribute funding should be informed of the application of the Code and these Joint Guidelines 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 Joint Australian Government and South Australian Government Implementation Guidelines for AusLink projects in South Australia, applies to this project.*

### 3.2 | Tender documents to incorporate Code and requirement to comply

The Code and these Joint 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 **[www.constructionsa.com.au](http://www.constructionsa.com.au)**.

Tenderers should also be advised that compliance with the Code and these Joint Guidelines is to extend to all subcontractors, consultants and material suppliers who may be engaged by the tenderer on the project. Australian Government and South Australian Government agencies are expected to actively assist parties to ensure they can readily access and understand the Code and these Joint Guidelines.

The Department of Transport and Regional Services (DOTARS), as an agency covered by the *Financial Management and Accountability Act 1997* (FMA Act), must undertake procurement in a manner consistent with the principles contained in the *Commonwealth Procurement Guidelines*. 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 DOTARS on compliance with the Code and these Joint Guidelines in the context of the preferred tendering process.

It may be useful for the South Australian Department of Transport and Urban Planning (DTUP) to obtain a completed and signed undertaking to apply the Code and these Joint Guidelines at the assessment stage before a company can proceed to tender. Previous compliance performance in applying the Code to projects can be included in the weighted assessment of the tenderers satisfying the mandatory criteria.

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

Further information on tender procedures can be obtained from the Department of Finance and Administration (DFA) (see section 9 of these Joint Guidelines for contact details).

### **3.3 | 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 these Joint 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.

### **3.4 | Consultant contracts**

The model clauses may be appropriate for consultant contracts for construction-related activities. These include contract management contracts, project management contracts, and design and supervision contracts. Advertisements calling for expressions of interest from consultants may include the statement:

*The National Code of Practice for the Construction Industry, in accordance with the Joint Australian Government and South Australian Government Implementation Guidelines for AusLink projects in South Australia, applies to this project.*

### **3.5 | Projects funded under AusLink**

DOTARS, acting as the funding administrator must ensure that DTUP, as the funding recipient, includes the requirement to apply the Code and these Joint 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 at [www.workplace.gov.au/building](http://www.workplace.gov.au/building). These model clauses can be used for projects where the Code and these Joint Guidelines apply, when affecting the transfer of funds from the Australian Government to the South Australian Government for AusLink-funded projects in South Australia. Advice should be sought from DEWR where significant modifications to these model clauses are proposed for particular projects.

DOTARS, being 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.

This section applies to Australian Government departments and agencies that fund construction activity in relation to AusLink funding in South Australia through grants or programme expenditure.

## SECTION 4 Australian Government indirectly funded construction

### 4.1 Responsibilities of DOTARS as funding administrator

DOTARS is responsible for administering AusLink programme expenditure involving construction and is responsible for ensuring the grantee or recipient of the Australian Government funding applies the Code and these Joint Guidelines to all AusLink related projects in South Australia, as per the thresholds described in section 1.2.

DOTARS, acting as funding administrator, is responsible for ensuring there is a provision in any relevant funding agreement with DTUP, as the recipient organisation, which requires DTUP ensure that all parties involved in the project comply with the Code and these Joint Guidelines.

DOTARS, as funding administrator, should consider the following points to assist funding recipients understand the requirements under the Code and these Joint Guidelines applying to contractors engaged by them.

DOTARS, as funding administrator, 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 these Joint Guidelines
- they obtain commitments from DTUP as the funding recipient that the Code and these Joint Guidelines will be complied with
- tenders and contractual documents include the requirement for the Code and these Joint Guidelines to apply
- adequate reporting arrangements are in place with DTUP as funding recipient for reporting on Code-related issues
- they respond to requests for information concerning Code-related matters made on behalf of the Code Monitoring Group (CMG) through the Project Joint Code Monitoring Group (PJCMG) and the South Australian Government Contract Superintendent
- DTUP will require alleged breaches of the Code and these Joint Guidelines to be reported to the South Australian Government Contract Superintendent within 28 days
- PJCMG and CMG are promptly notified of all allegations of breaches of the Code and these Joint Guidelines by the South Australian Government Contract Superintendent
- sanctions applied under the Code are enforced, including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

DOTARS, as funding administrator, should seek assurance from DTUP as funding recipient that they ensure/have ensured that:

- all advertisements, from the date of issuance of these Joint Guidelines calling for expressions of interest, tenders, submissions and invitations regarding applicable projects incorporate the obligation to apply the Code and these Joint Guidelines. The advertisement should include the words:

*The National Code of Practice for the Construction Industry, in accordance with the Joint Australian Government and South Australian Government Implementation Guidelines for AusLink projects in South Australia, applies to this project.*

- the Code and these Joint Guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
- tenderers are not currently included 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 these Joint Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- there is a reporting mechanism in regard to the application of the Code and these Joint Guidelines on the project
- application of the Code and these Joint 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 are occupational health and safety (OHS), welfare and injury management and return to work arrangements in place that are consistent with the requirements under the relevant South Australian legislation
- the contractor initiates remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention
- all parties involved in the project, including the funding recipient, are aware of the requirement to report any alleged breaches or other Code-related matters to the South Australian Government Contract Superintendent within 28 days
- the South Australian Government Contract Superintendent will promptly refer all alleged breaches of the Code and these Joint Guidelines to the appropriate government agency for investigation. This includes Workplace Services for OHS breaches and the Building Industry Taskforce (BIT), PJCMG, CMG or the Building Industry Branch of DEWR for other breaches.

## 4.2 | Responsibilities of DTUP, as AusLink funding recipient

DTUP, as recipient of AusLink funds from DOTARS, has a responsibility to ensure projects involving AusLink expenditure are bound by the Code and these Joint Guidelines. DTUP must ensure that:

- contractual documents concerning AusLink-funded projects include an acknowledgement of the role of Workplace Services and BIT in monitoring compliance with the Code and these Joint Guidelines, and accepting the right of Workplace Services and BIT officers in gaining access to sites to monitor compliance, where relevant
- they provide a commitment to DOTARS, as the funding agency, that the Code and these Joint Guidelines will be complied with and that tender and contractual documents include the requirement to comply with the Code and these Joint Guidelines
- they respond to requests for information concerning Code-related matters made on behalf of the South Australian Government, DOTARS as the funding agency, CMG and BIT
- advertisements, from the date of issuance of these Joint Guidelines calling for expressions of interest, tenders, submissions and invitations regarding projects incorporate the Code. The advertisement should include the words:

*The National Code of Practice for the Construction Industry, in accordance with the Joint Australian Government and South Australian Government Implementation Guidelines for AusLink projects in South Australia, applies to this project.*

- the Code and these Joint 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 check tenderers are not currently included 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 Joint Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- there is a reporting mechanism on the project and that the Code is a standing item on the agenda for site/project meetings
- there is an adequate mechanism for consultation with the South Australian Government and DOTARS regarding the suitability of a project agreement on a particular project (project agreements are only appropriate for contracts valued above \$25 million)
- 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

- arrangements for occupational health and rehabilitation and return to work are consistent with the requirements of the relevant South Australian legislation
- the contractor initiates remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention
- all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the South Australian Government Contract Superintendent within 28 days
- the South Australian Government Contract Superintendent will promptly refer alleged breaches of the Code and these Joint Guidelines to the appropriate government agency for investigation—this includes Workplace Services for OHS breaches and BIT, PJCMG, CMG or the Building Industry Branch of DEWR for other breaches
- sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG
- joint audits of compliance with the Code and these Joint Guidelines will be carried out by Australian Government and South Australian Government officials on a regular basis.

### **4.3 | Contractors, subcontractors, consultants, and employees**

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

- comply with the Code and these Joint Guidelines
- require compliance with the Code and these Joint Guidelines from all subcontractors and material suppliers—all contracts should specifically require that the Code and these Joint Guidelines are complied with
- ensure that the workplace relations arrangements proposed for the project are consistent with the Code and these Joint Guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- ensure that contractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention
- ensure that all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the South Australian Government Contract Superintendent within 28 days, who will promptly refer all alleged breaches of the Code and these Joint Guidelines to the appropriate government agency for investigation—includes Workplace Services for OHS breaches and BIT, PJCMG, CMG or the Building Industry Branch of DEWR for other breaches

- 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
- ensure that a project agreement, if approved for the project, is complied with
- note that joint audits of compliance with the Code and these Joint Guidelines will be carried out by Australian Government and South Australian State Government officials on a regular basis.

## SECTION 5 Australian Government administration of the Code and these Joint Guidelines

This section sets out some of the responsibilities of CMG, PJCMG, DEWR, DFA, DOTARS and DTUP in relation to the implementation of the Code and these Joint Guidelines.

### 5.1 | Code Monitoring Group (CMG)

CMG deals with Code issues, including breaches, that have come to its attention. Following investigation, CMG may impose a sanction against a party found to be in breach of the Code. The Secretariat of CMG is drawn from the Workplace Relations Implementation Group of DEWR.

### 5.2 | Project Joint Code Management Group (PJCMG)

PJCMG will be established to oversee Code compliance on AusLink-funded projects in South Australia. PJCMG will report to CMG.

Membership will be drawn from:

- the Workplace Relations Implementation Group and BIT from DEWR
- DOTARS
- the South Australian Department of Administrative and Information Services
- DTUP.

### 5.3 | Department of Finance and Administration (DFA)

DFA 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.

DFA is responsible for Australian Government procurement policy, including the *Commonwealth Procurement Guidelines*.

### 5.4 | Department of Employment and Workplace Relations (DEWR)

DEWR has the following Code-related responsibilities:

- advising agencies, *Commonwealth Authorities and Companies Act 1997* bodies and other interested parties about the workplace relations and occupational health safety and rehabilitation (OHSR) aspects of the Code, and
- monitoring and promoting compliance with the workplace relations aspects of the Code on behalf of the Australian Government.

BIT has primary responsibility for investigating alleged breaches of the workplace relations provisions of the Code and these Joint Guidelines. BIT will report the results of its investigations to PJCMG.

### **5.5 | Department of Transport and Regional Services (DOTARS)**

The responsibilities of DOTARS under the Code and these Joint Guidelines as funding administrator are set out at section 4.1.

### **5.6 | Department of Transport and Urban Planning (DTUP)**

The responsibilities of DTUP under the Code and these Joint Guidelines as AusLink funding recipient are set out at section 4.2.

## SECTION 6 Workplace relations and occupational health and safety components

### 6.1 Awards and legal obligations relating to employment

*All parties must comply with the provisions of applicable:*

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

Awards set out minimum conditions of employment and employers are obliged to comply with awards unless they have entered into certified agreements (CAs) or Australian Workplace Agreements (AWAs) that displace or vary the terms of awards. CAs and AWAs are also legally enforceable and must be complied with by all parties. This includes 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 Industrial Relations Commission of South Australia and the Australian Industrial Relations Commission such as those issued under section 127 of the *Workplace Relations Act 1996* (the WR Act). It should be noted that State-registered project agreements cannot override federal awards (or AWAs or CAs). The Code does not require compliance with unregistered industry agreements.

Parties must comply with any obligations arising from legislation such as the 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 through existing compliance procedures and the compliance principles of the Code.

## 6.2 | 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 WR Act provides a framework for cooperative workplace relations and enables employers and employees to choose the most appropriate form of agreement for their particular circumstances. AWAs and CAs are available under the WR Act 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.

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 (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 and these Joint Guidelines, 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.

### 6.3 | 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. This means that no contractor, subcontractor, consultant or supplier is allowed to enter into any agreement or issue a contract or subcontract or 'industrial instruction' that directly or indirectly binds or otherwise pressures or coerces another contractor, subcontractor, consultant or supplier into making over-award payments.

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

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

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

## 6.4 | Project agreements

*Project agreements will only be appropriate for major contracts. Accordingly project agreements incorporating site-wide payments, conditions or benefits may be negotiated where the strategy has first been authorised by the principal.*

*The integrity of individual enterprise agreements must be maintained. This means project agreements cannot override the workplace arrangements of individual contractors, subcontractors, consultants and suppliers, nor may they provide conditions which by their nature have effect beyond the duration of the project, such as, for example, redundancy pay and superannuation contributions. While there may be provisions in a relevant workplace arrangement that enables the parties to the arrangement to encompass provisions in a project agreement, there shall be no double counting of '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.*

The Code is based on the primacy of enterprise-level determination of pay and conditions. Nevertheless, the Code does recognise that there may be some situations where project agreements may be appropriate but only under strict conditions, the most important of which is the agreement of DTUP and DOTARS. DTUP and DOTARS may, consistent with the Code, adopt a policy of not agreeing to project agreements.

It is very important that DTUP and DOTARS do not agree to project agreements unless there is a clear and demonstrable benefit to the Australian and South Australian Governments 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.

DTUP and DOTARS are accountable for decisions to approve project agreements and must state their reasons for doing so in writing to the relevant portfolio Ministers.

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

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

Project agreements will not be permitted on projects worth less than \$25 million except in exceptional cases.

Where contractors wish to negotiate a project agreement to regulate special payments, conditions or benefits for more than one contractor, the strategy must first be discussed with, and authorised by, DOTARS and DTUP before work commences. Whenever practical, subcontractors and their employees 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 tribunal.

While project agreements may cover matters other than pay and conditions, in regard to the latter they should generally only provide for project specific productivity payments, which should be tied to the achievement of identified performance targets. The project agreement must not require employers with their own workplace agreements in place to make payments or provide other benefits which would result in double dipping by other parties. For example, where a project agreement provides for a project/productivity allowance, the subcontractor must be able to absorb any enterprise productivity allowance against the project allowance. Parties must not use any term, condition or benefit in the project agreement as a precedent on any other project or for any other purpose.

In deciding whether to approve the use of a project agreement, DOTARS and DTUP should consider:

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

Project agreements covering several employers should be certified under the multiple-business provisions of the WR Act (section 170LC) and/or State legislation and this should be made a condition of approval by DOTARS and DTUP.

## 6.5 | 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. Under federal legislation 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, and
- 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/employer association requirements, '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 contracts, federal awards, CAs and AWAs that provide for preference in employment or use of members of employee associations are null and void and unenforceable.

The payment of 'bargaining fees', success fees or other payments to employer bodies, industrial associations by persons who are non members is contrary to the principles of freedom of association. Membership of employer bodies, industrial associations and any associated membership fees or other payments must be entirely voluntary under the WR Act. 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, and
- 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 and these Joint Guidelines 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 or employer associations
- sacking workers because they belong to a union and replacing them using labour hire companies
- supplying the names of contractors or subcontractors to unions or employer associations
- '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, by a union of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate, or other person, on a construction site and any attempt by a union to compel any contractor, subcontractor or employer to hire an individual nominated by a union
- the imposition, of pressure on a subcontractor to join an employer association
- using site delegates to undertake or administer site induction processes. Site induction should always be undertaken by site management. Site management may, however, invite site delegates to participate in the induction process to outline site specific safety procedures and practices. This may only occur where a site delegate has nominated health and safety representative or safety supervisor status. The use of site delegates in this way should not be a device to compromise or circumvent freedom of association principles
- using induction forms requiring the employee to identify their union status or a contractor their membership of an employer association
- using forms requiring employers and contractors to identify the union status of employees or subcontractors or their membership of an employer association
- the existence, whether in a CA or otherwise, of any requirement for any person or enterprise to pay a fee to a registered organisation of which he or she is not a member including, but not limited to, any requirement that a person pay a 'bargaining fee' however described, to an industrial association in respect of services provided by it regarding any workplace arrangements that might regulate that person's employment by that enterprise.

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

Parties must report any alleged or suspected breaches of the freedom of association provisions of the Code or the WR Act of which they are aware to the South Australian Government Contract Superintendent in the first instance.

### 6.5.1 | Right of entry

*The right of entry of employee association and union representatives is to be in accordance with the legal requirements of State and federal legislation.*

The principal contractor, subcontractor, consultant or employee is to grant admission to a site by a representative of an industrial association in compliance with the procedures governing entry and inspection under the WR Act or under relevant State legislation.

Under the WR Act, representatives of registered organisations do not have an automatic right of entry to workplaces. A registered organisation may apply to the Industrial 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 the Industrial 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. In addition, the permit holder's organisation must be bound by the relevant federal award, agreement or Commission order. If these conditions are met, the permit holder may enter a workplace during working hours and inspect and make copies of any pay or time sheets relevant to the suspected breach, inspect machinery and other appliances relevant to the suspected breach, and speak to employees about the suspected breach. However, permit holders cannot inspect an AWA or documents that show some or all the contents of an AWA.

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

In each of these above reasons to enter, under the WR Act 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 and workers' compensation and rehabilitation legislation. Construction sites often involve a mixture of employees bound by federal and State awards and agreements. Parties should ensure that they comply with all the terms of such legislation, awards and agreements.

## 6.6 | Dispute settlement

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

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

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

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

Where a dispute relates to OHSR issues, the procedures contained in the *South Australian Occupational Health Safety and Welfare Act 1986* should be observed.

## 6.7 | 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).*

Under the WR Act, industrial action is permitted in relation to bargaining for a CA or an AWA, subject to the requirements specified in the WR Act having been met. Industrial action other than genuine bargaining for agreements is not compatible with the system and is not lawful.

Under the WR Act 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, however, perform other safe and appropriate work if directed to do so.

## 6.8 | 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 OHSR 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 OHSR matters, that can impact on the construction programme or the contract, project costs or other related contracts, must be reported to the South Australian Government Contract Superintendent at the earliest opportunity. To ensure the South Australian Government Contract Superintendent is appropriately advised, site project managers are to be encouraged to establish an effective and clear reporting structure for construction projects.

Such reporting structures should enable government agencies to:

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

Any actual or threatened industrial action flowing from implementation of the Code and these Joint Guidelines is to be reported by the South Australian Government Contract Superintendent to PJCMG. Government agencies are strongly encouraged to establish internally coordinated arrangements that will ensure effective communication with PJCMG.

## 6.9 | 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
- consultative arrangements
- quality management
- OHSR.

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 communication, motivation, morale and commitment
- higher standards in OHSR and return to work performance
- improved remuneration and working conditions for the workforce.

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

## 6.10 | OHSR

*OHSR obligations must be actively addressed by all industry participants. Unequivocal commitment to OHSR 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 OHSR outcomes.*

Federal and State governments have given the highest priority to improving the management of OHSR 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 OHSR 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 OHSR 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 OHSR performance requires positive measures that aim for prevention rather than correcting things when they go wrong. This initiative is directed at making OHSR management an integral part of the organisational culture of companies and enterprises.

## SECTION 7 Additional practices and components

### 7.1 | Consultant selection and ethics

The ethics to be adopted by the industry apply to all parties and reflect those identified in the Australian Standard (AS 4121-1994). This standard is based on the following principles:

- the conditions of inviting proposals are the same for each consultant
- the consultant selection process is conducted honestly and fairly
- consultants retain their right and title to intellectual property submitted unless specific engagement conditions or payments are made for that intellectual property or there are exceptional circumstances clearly warranting an alternative approach
- the principal will have regard to the costs of preparing proposals with a view to minimising the overall cost of selection
- briefing documents will specify the principal's requirements as clearly and precisely as possible
- the principal will specify what information in the proposal documents is to be treated as confidential
- consultants often provide professional services without payment but the principal shall not require work without payment
- consultants will not respond to an invitation unless they genuinely believe they have the competence and capacity to undertake that project
- parties shall be prepared to attest to their probity, if necessary by statutory declaration or other reasonable means
- parties will comply with all legislative obligations including those required by trade practices and consumer affairs legislation
- parties will seek and submit proposals with the firm intention to proceed;
- parties will not engage in any practices that give one party an improper advantage over another
- parties will not engage in practices such as collusion, secret commissions, or any other such improper arrangements
- any party with a conflict of interest will immediately disclose that conflict of interest.

## 7.2 | Tendering Process

No party will require or compel another party, either directly or indirectly, to be bound by a contract, contractual direction and/or tender which includes provisions contrary to the intent of these Joint Guidelines.

The best practice principles that these Joint Guidelines adopt reflect those identified in the Australian Standard (AS 4120-1994). These include the requirements that all parties at all levels of the industry involved in the tendering process must:

- conduct tendering honestly and fairly and refrain from seeking or submitting tenders without a firm intention to proceed
- seek to constrain the costs of bidding
- apply the same conditions of tendering for each tenderer and avoid any practice that gives one party an improper advantage over another
- produce tender documents that clearly specify the principal's requirements and evaluation criteria
- preserve the confidentiality of all tender information nominated as confidential during the tendering process other than public opening of tenders and disclosure of tender prices that are acceptable
- comply with all statutory obligations, including trade practices and consumer affairs legislation
- refrain from practices such as collusion on tenders. Collusive tendering practices are defined as including but not limited to:
  - agreements between tenderers as to who should be the successful tenderer,
  - any meeting of tenderers prior to the submission of their tenders that may disadvantage the principal,
  - agreements between tenderers to fix prices,
  - the submission of a cover tender (a pre-arranged inflated bid or a non-genuine bid) or any assistance to submit such a cover tender that is intended to advantage another tenderer or disadvantage the principal,
  - any unlawful or illegitimate agreement between tenderers before submission of tenders, such as fixing a special rate of payment to a third party where the payment of such fees is conditional on the tenderer being awarded the contract or commission,
  - agreement between tenderers for payment of money, incentives, the securing of reward or benefit, incentives or other concessions for unsuccessful tenderers or other third parties by the successful tenderer, particularly where that benefit does not relate to the provision of bona fide services relevant to the object of the tender
- be prepared to attest to their probity by statutory declaration, in particular on issues concerning collusive practices and conflicts of interest

- recognise that tenderers retain their right to intellectual property, unless otherwise provided in the contract
- not conduct post-tender negotiations solely on price. Neither clients nor contractors shall seek to trade off different tenderers' prices against others in an attempt to seek lower prices.

### **7.3 | Security of payments**

The following minimum practices are to be adhered to in construction contracting:

- payment terms within a contract that match accepted industry practice including intervals at which payments are to be made
- the safeguard and return of all cash and other securities when the contract is satisfactorily completed
- the safeguard and return of all retention monies held during the course of the contract
- timely and effective dispute resolution procedures. In the event of a dispute, all payments that are not directly subject to dispute will continue to be made in accord with the agreed process and conditions and any agreed payment cycle
- 'paid when paid' and 'paid if paid' practices are prohibited
- all parties are to avoid frivolous claims and disputes, particularly those affecting the amount or timing of payments.

### **7.4 | Environmental management**

All industry parties have a responsibility to contribute to meeting the community's demand for ecologically sustainable development. Sound environmental practices above and beyond mere compliance with regulatory requirements are encouraged to be in place. Service providers should develop and implement a systematic approach to environmental management to ensure that it becomes an integral part of organisational culture and day to day work practices.

Government and other industry clients will encourage ecologically sustainable development by working with industry to:

- define ecologically sustainable development in a way which is meaningful for participants in the construction industry
- establish environmental best practice on projects
- showcase projects with outstanding environmental innovation and management
- pilot recycling and re-use of material on government construction projects
- support effective use of scarce resources.

For service providers a systematic approach to environmental management includes:

- explicit management commitment and environmental policy
- acceptance by the organisation that its activities, products or service have an impact on the environment
- development and implementation of planning processes and procedures that assist in identifying possible environmental impacts and measures to mitigate or minimise these impacts
- establishing organisational responsibility, systems and procedures to review the implementation process
- establishing management processes for the review of these systems and procedures which support the organisation's commitment and environmental policy and which leads to continually improving performance.

## **7.5 | Skills development and training**

The Code supports skills development and training. In particular, it encourages the harnessing and extension of the skills and creativity of the people working in the industry and the continual development of training to help develop career paths.

The following principles will be encouraged as best practice:

- employees should be encouraged to acquire those skills which match industry needs and assist them to rapidly understand new technology
- current job roles and contract practices should be continually tested against existing and emerging industry operational requirements
- changes to work systems and practices should be aimed at improving industry productivity
- employees should be employed in their most productive capacity
- work should be organised to encourage the development and introduction of best practice in skill development and training activity
- all relevant parties should participate in skill development and training
- active management of OHSR policies and procedures.

A commitment to the following best practices by all parties is encouraged and may be a requirement for those seeking government projects. The industry should aim to achieve best practice in relation to:

- employee qualification and skill levels
- completion of projects on time
- value for money
- quality in all aspects of service, delivery and product
- training, research and development
- OHSR (including the return to work of injured employees)
- environmental management
- equal opportunity for employment.

## SECTION 8 Compliance and monitoring provisions for the Code and these Joint Guidelines

As noted in section 5, CMG deals with Code issues, including breaches, which have come to its attention. Following investigation, CMG may impose a sanction against a party found to be in breach of the Code. PJCMG will report to CMG.

### 8.1 | DTUP—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. It is intended that client agencies will have the support necessary to effectively apply the Code and these Joint Guidelines without detriment to their principal focus on successful project management.

It is DTUP's role to ensure that the Code and these Joint Guidelines are applied. DTUP ensures that the Code and these Joint Guidelines are formally applied to the project through inclusion in tender and contract documentation and by obtaining an undertaking of compliance from the successful tenderer. The South Australian Government Contract Superintendent is 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 his/her attention, the South Australian Government Contract Superintendent 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 these Joint Guidelines 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 PJCMG for further action.

Clients should, however, inform the South Australian Government Contract Superintendent of all breaches of the Code and these Joint Guidelines within 28 days. The South Australian Government Contract Superintendent will promptly inform PJCMG and CMG of all breaches of the Code and these Joint Guidelines. Serious breaches of the Code and these Joint Guidelines will also be referred by the South Australian Government Contract Superintendent to the appropriate regulatory body for investigation.

### 8.2 | DOTARS role as funding administrator

DOTARS, as the agency responsible for administering AusLink programme expenditure, will ensure that DTUP, as funding recipient, requires that parties subsequently engaged to undertake building and construction work apply the Code and these Joint Guidelines on the project.

### **8.3 | Exclusion of parties from tendering opportunities**

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

Information concerning the exclusion of parties from tendering opportunities can be obtained from CMG Secretariat (see section 9 for details).

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

## SECTION 9 Contact details

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

**The contact for the secretariat and for workplace relations and OHSR 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](mailto:leigh.quealy@dewr.gov.au)

**The contact for procurement and tendering matters is:**

Mr Guy Verney  
Asset Management Group  
Department of Finance and Administration  
Phone 02 6215 3617  
Fax 02 6267 3018  
Email: [guy.verney@finance.gov.au](mailto:guy.verney@finance.gov.au)

**The contact in South Australia is:**

Code of Practice Register  
Building Management  
Department for Administrative and Information Services  
Phone 08 8226 5209  
Fax 08 8226 5588  
Email: [buildingmanagement@saugov.sa.gov.au](mailto:buildingmanagement@saugov.sa.gov.au)

## APPENDIX A Acronyms

AWA	Australian Workplace Agreement
BOO	Build, Own, Operate
BOOT	Build, Own, Operate, Transfer
CA	Certified agreement
CMG	Code Monitoring Group
DEWR	Department of Employment and Workplace Relations (Australian Government)
DFA	Department of Finance and Administration (Australian Government)
DOTARS	Department of Transport and Regional Services (Australian Government)
DTUP	Department of Transport and Urban Planning (South Australian Government)
FMA Act	<i>Financial Management Accountability Act 1997</i>
BIT	Building Industry Taskforce
PFI	Private Finance Initiatives
PJCMG	Project Joint Code Monitoring Group
PPPs	Public Private Partnerships
OHS	Occupational health and safety
OHSR	Occupational health, safety and rehabilitation
The Code	The National Code of Practice for the Construction Industry
WR Act	<i>Workplace Relations Act 1996</i>