

REVISED BUILDING INDUSTRY GUIDELINES RELEASED

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The Commonwealth Government yesterday released a revised version of the Implementation Guidelines for the National Code of Practice for the Construction Industry (Guidelines). The revised Guidelines will apply to all projects that were the subject of an expression of interest or let for tender for the first time on or after 1 August 2009. The existing Guidelines will continue to apply for the life of any projects where expressions of interest or tenders were called prior to 1 August.

The revised Guidelines include amendments to reflect the *Fair Work Act 2009* (Cth) (Fair Work Act) and other more substantive changes which reflect some of the recommendations made in the Wilcox Report into building industry regulation, released earlier this year.

The Code of Practice for the Construction Industry remains unchanged.

THE ROLE OF THE CODE MONITORING GROUP

The government has not adopted the recommendation of the Wilcox Report that the Code and Guidelines become legislative instruments administered by the new Building Industry Inspectorate.

Instead, the Code and Guidelines will continue to be applied by the Code Monitoring Group (CMG). The role of the ABCC within the CMG has been downgraded and it is now a 'non-voting' member, as is the Fair Work Ombudsman.

The revised Guidelines will also allow the relevant 'Funding Entity' (usually the relevant Commonwealth Government Department) to waive elements of the Code and Guidelines in limited circumstances. Any such waivers will be subject to a 'public interest' test which includes the following considerations:

- the project is urgently required because of an emergency (such as a natural disaster or threat to public safety), or
- a tender process failed to provide a suitable Code-compliant tenderer.

COVERAGE OF THE GUIDELINES

In line with the recommendations of the Wilcox Report, the Guidelines now only apply to parties who participate in 'on site' activities. This includes work performed on auxiliary or holding sites separate from the primary construction site(s). The Guidelines will no longer apply to materials supply contracts.

The Guidelines will continue to apply to all directly-funded Commonwealth Government projects and indirectly funded projects where the Commonwealth's contribution is at least \$5 million and this is more than half the total construction value, and all projects in which the Commonwealth's contribution is \$10 million or more.

In addition, tenderers for Commonwealth-funded work where the Code and Guidelines apply must continue to be Code-compliant on all of their 'private' construction projects. This requirements also remains unchanged. Related entities must also continue to be Code-compliant.

WORKPLACE RELATIONS PRACTICES AND FREEDOM OF ASSOCIATION

Several practices that were previously listed as in breach of the Code are no longer referred to under the revised Guidelines:

- union site delegates undertaking or administering site induction processes rather than site management;

- employers being required to apply union logos, mottos or other idicia to company-supplied property or equipment;

- posters, helmets stickers or union logos or flags etcetera that imply that union membership is anything other than a matter for individual choice;

- ratios or other restrictions on labour. For example, limits on the number of permanent temporary or casual employees a company may employ, or the requirement that an employer consult or seek the approval of a union in relation to such matters;

- 'one-in, all-in' arrangements such as in relation to overtime;

- 'last-on, first-off' provisions;

- 'all-in' payments; and

- site allowances other than those provided for in a registered industrial instrument.

In addition, the following new matters are now specified as being in breach of the Code and Guidelines:

- discriminating against or disadvantaging elected employee representatives; and

- employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members.

New requirements also apply to dispute resolution procedures. The previous requirements that the 'status quo' continue to apply and that employees have choice in representation have been removed.

Project agreements will be permitted, but only in relation to projects with a value of \$100 million or more. This is significantly higher than the previous limit of \$25 million or more.

TENDER AND CONTRACT DOCUMENTS

Contracts with subcontractors must continue to include reference to the requirement they be Code-compliant and allow relevant inspectors to access site, documents and personnel to monitor compliance.

These requirements will no longer apply to contracts with materials suppliers.

The 'model' tender and contract documents provided by the government will be updated to reflect the requirements of the revised Guidelines and the *Fair Work Act*, though the updated versions are not yet available (these documents will be available at the government's Building and Construction Industry website).

IMPLICATIONS FOR EMPLOYERS

The revised Guidelines keep most of the existing Code compliance framework in place but will significantly 'relax' many of the rules which currently impose restrictions on certain conduct.

The extensive changes to the ranges of workplace relations practices previously prohibited by the Code is likely to result in major practical changes on building sites covered by the new Guidelines. Third-party involvement is likely to increase significantly and many current restrictions on union activities and involvement will no longer apply.

Employers should expect to see union pressure for a return of certain work practices and arrangements that are currently prohibited, in particular those relating to union site inductions and restrictions on the type of employees who may be employed.

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