GOVERNMENT PROCUREMENT AS A VEHICLE FOR WORKPLACE RELATIONS REFORM: THE CASE OF THE NATIONAL CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY

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ABSTRACT

The use of public procurement as a vehicle for achieving public policy objectives can conveniently be traced to the Fair Wages Resolution which was adopted by the British House of Commons in 1891. This technique was subsequently adopted in many jurisdictions, and finds clear expression in the International Labour Organisation ('ILO')'s *Labour Clauses (Public Contracts) Convention 1949 (No 94)* ('*Convention No 94*').[1] This article describes the British model and its international progeny, and then examines a controversial and unusual Australian mutation in the form of the National Code of Practice for the Construction Industry ('Code') and the various iterations of the associated Implementation Guidelines ('Guidelines') which have been adopted since 1998. It suggests that the Code and Guidelines, especially under the Howard Government, constitute a perversion of the traditional use of public procurement as a vehicle for the implementation of public policy in the industrial context. That is because they were directed to the curtailment of the rights of workers and their organisations rather than protecting employment standards and promoting collective bargaining. The article argues that the Code and Guidelines sit uneasily with accepted notions of the rule of law in a number of respects, and with certain aspects of Australia's obligations in international law. It also discusses the Fair Work Principles ('FW Principles') which have applied to all aspects of procurement by the Commonwealth since January 2010, and suggests that they embody an approach to public procurement and the promotion of social objectives which is rather more in keeping with international best practice than that reflected in the Construction Industry Code and Guidelines.

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1 *Convention (No 94) Concerning Labour Clauses in Public Contracts*, opened for signature 29 June 1961, 183 UNTS 208 (entered into force 20 September 1952) ('*Convention No 94*').

I INTRODUCTION

The Howard Government adopted a number of strategies which were directed wholly or partly to effecting behavioural and cultural change in the construction industry. They included the enactment of the *Building and Construction Industry Improvement Act 2005* (Cth) ('BCII Act') and the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices').[2] They also included reliance upon Commonwealth procurement policy to drive 'reform' in the industry. This was done through the adoption and implementation of the Code and several iterations of the associated Guidelines. The Rudd and Gillard Governments adopted less intrusive versions of the Guidelines, but certainly did not abandon reliance upon procurement policy as a vehicle for workplace regulation. The adoption of a modified version of the Howard-era Guidelines by the Victorian Government in 2012 also suggests that the more interventionist approach to 'reform' through procurement is far from being of purely historical interest.

The use of government procurement as a vehicle for the attainment of public policy objectives is not new: it was endorsed by the British House of Commons as long ago as 1891, and in 1949 received formal recognition at the international level through the adoption by the International Labour Conference ('ILC') of *Convention No 94*, and accompanying Recommendation No 84.

A leading British authority on government contracting had this to say about the rationale for the use of government procurement as a regulatory technique:

> Government contracts may…be employed…in support of policy by the incorporation in such [ie procurement] contracts of conditions imposing obligations upon the contractor, collateral to the main purpose of the contract as a means of procurement, to conduct his affairs in specified ways in accordance with the policy to be implemented. In this respect the government contract appears as a quasi-administrative or regulatory instrument which can be used, within the restricted field of procurement, in support of legislation or as an alternative means of implementing policy.[3]

In the industrial context, procurement has conventionally been used to protect and to promote the interests of workers — for example by seeking to ensure that employers observe terms and conditions of employment that accord with appropriate industry standards; by requiring formal recognition of workers' rights to form or join trade unions; and promoting regulation of terms and conditions of employment through collective bargaining. The approach adopted by the Howard Government was rather different. Instead of being used to protect and promote the interests of workers and their organisations, procurement was used to try to regulate their behaviours in a manner that was in many respects inimical to their interests.

This article examines the Code and Guidelines in the context of the conventional approach to the use of government procurement as an instrument of public policy. It

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2 Of course Work Choices had application beyond the construction industry, but it had a particular impact in that industry — especially in relation to right of entry by union officials, unprotected industrial action and coercive behaviour. For more detailed discussion of both the BCII Act and Work Choices as they applied to the construction industry, see Anthony Forsyth et al, *Workplace Relations in the Building and Construction Industry* (Butterworths LexisNexis, 2007). See also Breen Creighton and Andrew Stewart, *Labour Law* (5th ed, Federation Press, 2010) ch 24.

3 Colin Turpin, *Government Contracts* (Penguin, 1972) 254.

looks first at the Fair Wages Resolutions that were adopted by the British House of Commons in 1891, 1909 and 1946, and at the translation of the last of these into the international arena through *Convention No 94*. It then examines the adoption of the Code and Guidelines, their development and implementation through the period of the Howard Government, and the revision of the Guidelines by the Rudd and Gillard Governments in 2009 and 2012. It suggests that the Code and Guidelines may have helped effect a measure of behavioural change in the construction industry, but that in doing so they compromised accepted notions of the rule of law, and are inconsistent with Australia's international obligations in certain respects. They also sit uneasily with the approach that has been adopted by the Rudd and Gillard Governments in relation to procurement more generally.

II INTERNATIONAL CONTEXT

The Fair Wages Resolutions

The Fair Wages Resolution of 1891 stated that:

> [I]n the opinion of this House it is the duty of the Government in all Government contracts to make provision against the evils which have recently been disclosed before the House of Lords' Sweating Committee,[4] and to insert such conditions as may prevent the abuses arising from subletting [subcontracting], and make every effort to secure the rate of wages generally accepted as current for a competent workman in his trade.[5]

This was replaced by a further Resolution in 1909,[6] which was in turn superseded by a third (and final) Resolution in 1946.[7] The 1909 iteration required that contractors should 'under penalty of a fine or otherwise' observe wages and hours of labour that were 'not less favourable than those commonly recognised by employers and trade societies…in the trade or district where the work is carried out'. The 'fine' option was never implemented, and was not replicated in the 1946 Resolution.

The 1946 Resolution extended to 'conditions of labour' as well as to wages and hours, and made the endorsement of collective bargaining more explicit than its predecessor. It also provided for referral of disputes about the application of the Resolution to 'an independent tribunal for decision';[8] required that contractors

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4 First Report from the Select Committee of the House of Lords on the Sweating System, Parliamentary Papers 1888, No 361.

5 United Kingdom, *Parliamentary Debates,* House of Commons, 13 February 1891, vol 350, col 647. On the origins of the 1891 Resolution, see Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007) 42–9. For an assessment its efficacy, see B Bercusson, *Fair Wages Resolutions* (Mansell, 1978) ch 5.

6 United Kingdom, *Parliamentary Debates,* House of Commons, 10 March 1909, vol 2, cols 415–58. For detailed analysis of the 1909 Resolution, see Bercusson, above n 5, chs 6–10.

7 United Kingdom, *Parliamentary Debates* House of Commons, 14 October 1946, vol 427, cols 619–718. For detailed analysis of the background to, and requirements of, the 1946 Resolution, see O Kahn-Freund, 'Legislation Through Adjudication: The Legal Aspect of Fair Wages Clauses and Recognised Conditions' (Pt 1) (1948) 11 *Modern Law Review* 269; O Kahn-Freund, 'Legislation Through Adjudication: The Legal Aspect of Fair Wages Clauses and Recognised Conditions' (Pt 2) (1948) 11 *Modern Law Review* 429.

8 In practice, complaints were invariably referred to the Industrial Court, established under the *Industrial Courts Act 1919* (Cth). This tribunal was subsequently reconstituted as the Industrial Arbitration Board and (after 1975) the Central Arbitration Committee.

recognise the freedom of their workpeople to be members of trade unions; and stipulated that a copy of the resolution be displayed at all workplaces where work under a government contract was being performed.

The Resolutions did not have the force of law: they were 'merely a pious expression in the form of a resolution in the House of Commons',[9] and as such should be seen as 'socio-political rather than…legal instrument[s]'.[10] Their non-statutory character meant that in strictly legal terms, they could be enforced only through the inclusion of a 'fair wages clause' in relevant government contracts, with the implicit assumption that if a contractor failed to observe the terms of the Resolution, the department concerned could rescind the contract,[11] and/or sue for damages (assuming they could establish compensable loss).[12] However, the Resolutions also contemplated enforcement through administrative practice. This was reflected in para [2] of the 1946 Resolution, which required that before a would-be contractor could be placed on a list of firms to be invited to tender, the department concerned had to obtain from the contractor 'an assurance that to the best of his knowledge and belief he has complied with the general conditions required by this Resolution for at least the previous three months'. This clearly suggested that contractors who did not comply with the Resolution should be denied access to government contracts in the future.

In principle, these techniques could have been used to secure high levels of compliance. It is not at all clear that they did so in practice. There is not even anecdotal data as to the extent to which would-be contractors were denied access to further contracts, and Fredman and Morris suggest that there were no instances of rescission for breach.[13] There were, however, a not insignificant number of references to the Industrial Court/Industrial Arbitration Board in relation to alleged failure to observe the terms of the 1946 Resolution,[14] and at least some of these referrals produced outcomes favourable to complainant unions. However, attempts to use the arbitration

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9 Bercusson, above n 5, 358. In contrast, the United States of America *did* adopt legislative provision that was to essentially the same effect as the Fair Wages Resolutions. The first such measure was the *Davis-Bacon Act 1931*, which required contractors on federal construction projects to pay the local 'prevailing wage'. The second measure, the *Public Contracts Act 1936* (the *Walsh–Healey Act*), was of more general application. See further McCrudden, above n 5, 40–2; Herbert C Morton, *Public Contracts and Private Wages: Experience under the Walsh-Healey Act* (Brookings Institute, 1965).

10 Brian Doyle, 'Legal Regulation of Collective Bargaining' in Roy Lewis (ed), *Labour Law in Britain* (Blackwell, 1986) 109, 120. See also P B Beaumont, 'The Use of Fair Wages Clauses in Government Contracts in Britain' (1977) 28 *Labor Law Journal* 147.

11 Turpin (above n 3, 267) suggests that in doctrinal terms the fair wages clause was neither a 'condition' nor a 'warranty'. This meant that the question of whether a breach merited rescission would depend upon the nature of the breach and its consequences.

12 Since the fair wages clause constituted part of the contract between the department and the contractor, the doctrine of privity of contract operated to prevent employees who were meant to be the principal beneficiaries of the clause from obtaining relief in respect of any breach on the part of their employer – see *Simpson v Kodak Ltd* [1948] 2 KB 184.

13 Sandra Fredman and Gillian S Morris, *The State as Employer: Labour Law in the Public Services* (Mansell, 1989) 471.

14 Bercusson, above n 5, 293–309. See also Doyle, above n 10, 120–2, and the sources cited therein.

mechanism to promote and to protect the right to belong to a trade union appear to have been entirely ineffectual.[15]

Despite their lack of formal legal effect, and the limited character of the associated enforcement mechanisms, some observers considered that the Fair Wages Resolutions had a significant normative impact — Kahn-Freund, for example, suggested that up until the last quarter of the 20th century, 'no governmental measure had…done more to spread the habit of observing collective agreements' than the Resolutions.[16] Whilst other observers took a rather less sanguine view,[17] it is certainly the case that the Resolutions constituted an important affirmation of a number of highly significant principles. In particular, they provided clear endorsement of the idea that low pay, excessive hours etc should not be permitted to provide a competitive advantage to those who sought to perform work for government. They also lent significant support to collective bargaining as a means of regulating terms and conditions of employment, and evidenced a perception that the state should act as a standard-setter for the private sector by requiring its contractors to observe 'model' terms and conditions of employment.[18]

The 1946 Resolution was rescinded with effect from September 1983, and was not replaced by any comparable measure, legislative or otherwise. This reflected a perception on the part of the Thatcher (Conservative) Government that the Resolution constituted 'a damaging anachronism which impeded competitiveness, destroyed jobs and undermined established pay structures'.[19] The Resolution was also seen by the Government as being inconsistent with the principle that 'all public procurement was to be based on value for money, having due regard to propriety and regularity'.[20] It is interesting to note, however, that some construction industry employers favoured retention of the Resolution — especially to the extent that it supported standards set out in national level agreements.[21] Before rescinding the Resolution, the Government felt constrained to denounce *Convention No 94*, thereby achieving the dubious distinction of being the first country to ratify the Convention, and the first (and to date, only) one to denounce it.

None of the Australian jurisdictions has adopted any equivalent to the Fair Wages Resolutions. To some extent this may reflect a perception that it was not necessary to do so in light of the fact that throughout most of the 20th century the various State and

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15 Bercusson, above n 5, 342–5.

16 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens, 3rd ed, 1983) 198. See also Beaumont, above n 10.

17 See, eg, Bercusson, above n 5, chs 12–18.

18 See, eg, Fredman and Morris, above n 13, 11. For legislative endorsement of the Resolution, see the *Housing Act 1957* (UK); *Films Act 1960* (UK); *Public Passenger Vehicles Act 1981* (UK); and *Independent Broadcasting Authority Act 1973* (UK). See further K W Wedderburn and P L Davies, *Employment Grievances and Disputes Procedures in Britain* (University of California Press, 1969), 199–210.

19 Fredman and Morris, above n 13, 459, referring to a statement in the House of Commons by the Secretary of State for Employment of the day — United Kingdom, *Parliamentary Debates*, 16 December 1982, House of Commons, vol 34, cols 499–508.

20 ILO, *General Report of the Conference Committee on the Application of Conventions and Recommendations,* ILC, 97th Session, 2008, Report 22 (ILO, 2008) [100].

21 Stephen Evans and Roy Lewis, 'Labour Clauses: From Voluntarism to Regulation' (1988) 17 *Industrial Law Journal* 209, 215.

Federal wages board and conciliation and arbitration systems ensured that virtually all employees were entitled to the terms and conditions that had been agreed or determined for the relevant trade or industry, without the need for recourse to regulatory techniques like the British Resolutions.[22]

Despite the absence of any formal equivalent to the Fair Wages Resolutions, the various Australian jurisdictions have, over the years, required the insertion of labour clauses in procurement contracts.[23] Furthermore, as will appear presently, the FW Principles that have applied to entities tendering for all significant Commonwealth procurement contracts since 1 January 2010 operate as a form of 'fair labour clause'. It is important to note, however, that the FW Principles do not extend beyond observance of pre-existing obligations. In other words, they do not contemplate raising the level of wages etc to 'best practice' standard, and are not expressly directed to extending the reach of collective bargaining.[24]

The Labour Clauses (Public Contracts) Convention 1949 (No 94)

Convention No 94 and accompanying Recommendation No 84 were clearly modelled upon the 1946 Resolution. Indeed, it is most unusual for law and practice in a single ILO member to exert such a profound influence upon the form and content of an ILO standard-setting instrument.[25]

According to the ILO's Committee of Experts on the Application of Conventions and Recommendations ('CEACR') in its 2008 General Survey:

> The idea behind the adoption of an ILO standard on labour clauses in public contracts is that public authorities, in contracting for the execution of construction works, or for the supply of goods and services, should concern themselves with the working conditions under which the operations in question are carried out. The concern stems from the fact that government contracts are usually awarded to the lowest bidder and that contractors may be tempted, in view of the competition involved, to economise on labour costs. In such contexts, it is generally recognised that governments should not be seen as entering into contracts involving the employment of workers under conditions below a certain level of social protection, but, on the contrary, as setting an example by acting as model employers.[26]

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22 For discussion of early support for the notion that the Commonwealth should serve as a model employer, see Gerald E Caiden, *Public Employment Compulsory Arbitration in Australia* (Institute of Labor and Industrial Relations, 1971) 19–20.

23 For an indication of past practice in this area, see Department of Industrial Relations, *Status of ILO Conventions in Australia 1994* (Department of Industrial Relations, 1994) 210–11.

24 It is clear that simply enjoining compliance with national laws, 'including those dealing with wages, hours of work and other conditions of employment', is not sufficient to establish compliance with *Convention No 94* — see ILO, *General Survey Concerning the Labour Clauses (Public Contracts) Convention, 1949 (No 94) and Recommendation (No 84)* ILC, 97th Session, 2008, Report III (Part 1B) (ILO, 2008) [41].

25 See, Doyle, above n 10, 120. A further instance of such dominant influence is furnished by *Convention (No 155) Concerning Occupational Safety and Health and the Working Environment*, opened for signature 22 June 1981, 1331 UNTS 279 (entered into force 11 August 1983), which was strongly influenced by the *Health and Safety at Work etc Act 1974* (UK) c 37, and by the Report of the Committee on Health and Safety at Work ('The Robens Report') (Cmnd 5034) (HMSO, 1972), upon which that measure was based.

26 ILO, above n 24, [2].

This logic is reflected in art 2(1) of the Convention, which requires that all contracts to which it applies include 'clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on' by collective agreement, arbitration award or national laws or regulations.[27]

It is clear from art 1(3) that the Convention applies to subcontractors and assignees in the same way as to principal contractors, whilst art 4 provides that laws or other instruments that are intended to give effect to the provisions of the Convention must: be brought to the attention of all persons concerned; require the posting of notices at workplaces 'with a view to informing the workers of their conditions of work'; require the keeping of adequate records of time worked and wages paid; and provide 'a system of inspection adequate to ensure effective enforcement'. Furthermore, art 5(1) stipulates that 'adequate sanctions shall be applied, by the withholding of contracts or otherwise, for failure to observe and apply the provisions of labour clauses in public contracts'.[28]

According to art 1(1), to come within the scope of the Convention: at least one of the parties to the contract must be a public authority; the execution of the contract must involve both the expenditure of funds by the authority and the employment of workers by the other party to the contract; and the contract must be awarded by a central authority of a member of the ILO for which the Convention is in force. In terms of content, the contract must be for: the construction, alteration, repair or demolition of public works; the manufacture, assembly, handling or shipment of materials, supplies or equipment; or the performance or supply of services.

It is, however, permissible to exempt 'contracts involving the expenditure of public funds of an amount not exceeding a limit fixed by the competent authority after consultation with the organisations of employers and workers concerned'.[29] This is obviously intended to enable ratifying countries to exclude contracts for minor works, or occasional supply contracts, from the reach of any measures that may be adopted to give effect to the Convention.

In the Australian context, art 1(1) would clearly encompass construction work directly commissioned by the Commonwealth through a Commonwealth department or agency.[30] *Ex facie*, however, art 1(1) would not extend to situations where work was wholly or partially funded by the Commonwealth, but where it was actually commissioned by an entity (such as a privately operated public utility, a sporting body

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27 Article 2(2) deals with the situation where conditions of labour are not regulated in the manner contemplated by art 2(1).

28 Article 3 provides that where workers are not already covered by occupational health and safety legislation, adequate measures should be taken 'to ensure fair and reasonable conditions of health, safety and welfare for the workers concerned'.

29 Article 1(4). See further Henrik Karl Nielsen, 'Public Procurement and International Labour Standards' (1995) 3 *Public Procurement Law Review* 94, 95 and 101.

30 *Convention No 94* does not define the term 'public authority', but it is clearly intended to denote entities that can in some meaningful way be said to perform public functions, and that are distinguishable from those that are purely 'private' in character. See further ILO, above n 24, [59]–[62].

or a charitable trust) that was not a 'public authority' in the relevant sense. Paragraph [1] of Recommendation No 84 goes some way to address this possibility:

> In cases where private employers are granted subsidies or are licensed to operate a public utility, provisions substantially similar to those of the labour clauses in public contracts should be applied.

This would not, however, meet all situations where a Commonwealth authority funded construction (or other procurement) activity, but was not actually a party to the relevant contract. There would, of course, be nothing to prevent a ratifying country from applying labour clause requirements in such situations — the point is that compliance with the Convention does not *require* that they do so. As appears below, the Guidelines *do* extend to situations where construction activity is funded by the Commonwealth (provided the amount of the funding exceeds the prescribed monetary limit), even though the Commonwealth is not directly a party to the contract. They also apply to privately-funded construction activity on the part of those who wish to tender for federally-funded work in the industry.[31]

Unlike the 1946 Resolution, *Convention No 94* does not make any express reference to the 'freedom' of workers to be members of trade unions. However, it was adopted at a time when there was a high level of awareness of the importance of protecting such freedoms — as reflected in the adoption of the pivotal *Right to Organise and Collective Bargaining Convention 1949 (No 98)* ('*Convention No 98*')[32] at the same session of the ILC, and of the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)* ('*Convention No 87*')[33] just a year earlier. This suggests that the Conference probably did not consider it necessary or appropriate to make specific reference to freedom of association in *Convention No 94*.

Both *Convention No 87* and *Convention No 98* form part of the ILO Declaration on Fundamental Principles and Rights at Work ('Declaration') which was adopted by the ILC in 1998. This instrument adopts a 'rights-based' approach to the promotion and protection of the rights of workers in a globalised economy, rather than relying on the more traditional techniques of standard-setting exemplified by *Convention No 94*. In the 2008 General Survey, the CEACR noted that the more rights-based approach was 'just emerging when *Convention No 94* was adopted'. This led the Committee to suggest that had that technique been more mature in the late 1940s, 'the approach taken then to a recognised threat to working conditions might have been different than the contract-based approach used by *Convention No 94*'.[34] This course of reasoning appears to have helped confirm the Committee in its view that the Convention 'may need to be revisited', and that such a 'revisitation' would provide an opportunity to 'synchronise' the provisions of *Convention No 94* with the principles underlying the eight

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31 See further text accompanying n 74.

32 *Convention (No 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) ('*Convention No 98*').

33 *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 17 July 1948, 68 UNTS 17 (entered into force 4 July 1950) ('*Convention No 87*').

34 ILO, above n 24, [278].

fundamental ILO Conventions compliance with which is enjoined by the Declaration, 'thus making it a vital component in the ILO's Decent Work Agenda'.[35]

Convention No 94 has not been ratified by Australia, and in 1994 it was categorised as not being a suitable target for ratification on the grounds that it 'incorporates an approach to labour regulation which is out of sympathy with modern conditions'.[36] Nevertheless, it has been ratified by 60 of the ILO's 183 member-states — significantly, however, it has attracted only three ratifications in the last 25 years,[37] and none appear to be in prospect.[38]

As with all ILO standards, ratification is one thing, compliance is quite another:

> [T]he application of the Convention lacks in many cases uniformity or coherence. According to a rough estimate, no more than 15 member States, accounting for one fourth of the total number of ratifications received to date, are in full compliance with its requirements. Another 15 member States, often several decades after ratification, have still not adopted any implementing legislation. As regards the remaining [ratifying] countries, they apply the Convention partially, in particular as regards the nature and stringency of the obligations applicable to tenderers and contractors.[39]

The CEACR attributed this state of affairs to the fact that:

> [T]he idea of including labour clauses in public contracts is not widely accepted among member States. According to what appears to be the prevailing view among the member States that have not ratified the Convention, but also a certain number of ratifying countries, public procurement legislation is not meant to regulate labour matters while public contracts fall squarely within the ambit of general labour legislation in so far as the social conditions of their execution are concerned… The rationale for the Convention, ie the notion that the State should act as model employer and offer the most advantageous conditions to workers paid indirectly through public funds, does not seem to enjoy great

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35 Ibid [313]. In addition to *Convention No 87* and *Convention No 98*, the Declaration requires adherence to the *Convention (No 29) Concerning Forced or Compulsory Labour,* opened for signature 28 June 1930, 39 UNTS 612 (entered into force 1 May 1932); *Convention (No 105) Concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 4648 (entered into force 17 January 1959); *Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 2181 (entered into force 23 May 1953); *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *Convention (No 138) Concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, 1015 UNTS 14862 (entered into force 19 June 1976). In addition, *Convention (No 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 37245 (entered into force 19 November 2000) is treated as part of the 1998 Declaration, even though it was adopted in the following year. Australia has ratified all of these Conventions, apart from No 138.

36 DIR, above n 23, 198. Interestingly, in 1984 Commonwealth and State Labour Ministers had identified the Convention as a suitable target for ratification — Department of Industrial Relations, *Review of Australian Law and Practice in Relation to Conventions Adopted by the International Labour Conference* (Department of Industrial Relations, 1985). Furthermore, at least two jurisdictions (Victoria (1969) and ACT (1989)) signified formal agreement to ratification.

37 Norway (1996), St Vincent and the Grenadines (1998) and Armenia (2005).

38 ILO, above n 24, [282]–[283].

39 Ibid [175].

> popularity today, or at least does not find expression in the form envisaged in the Convention...[40]

A further factor that may have inhibited ratification of *Convention No 94* is the increasing integration of the global economy, with its emphasis upon removal of artificial barriers to cross-border competition, whether in relation to public procurement or otherwise. Amongst other things, this has helped generate a number of international agreements relating to procurement, including the World Trade Organisation's Global Procurement Agreement which came into operation in 1996; the Model Law on Procurement which was adopted by the United Nations Commission on International Trade Law in 1994; and a number of EU Directives on Public Procurement.[41] These instruments generally focus upon issues such as:

> (i) eliminating corruption; (ii) increasing efficiency and transparency in procurement processes; (iii) establishing equal treatment between firms of the same as well as different countries (to satisfy different disciplinary regimes); and (iv) increasing competition nationally and internationally with a view to improving the value received for state monies spent in public procurement.[42]

Inevitably, these developments have tended to divert attention from an instrument like *Convention No 94*, which is essentially protective in character, and which adopts a somewhat prescriptive approach to the attainment of its objectives. Indeed, these later standards were sometimes assumed to be inconsistent with the letter and/or the spirit of the Convention. Whilst rejecting this assessment,[43] the CEACR did acknowledge that:

> The globalisation of public contracting, in tandem with procurement reform, privatisation, deregulation and consolidation of opinion within the international community concerning workers' rights — expressed in many forums and also in the ILO's Declaration on Fundamental Principles and Rights at Work — raise the question of whether the approach to the standard of wages and working conditions set in *Convention No 94* and Recommendation No 84 could be improved.[44]

This did not lead the Committee to the view that the Convention should be regarded as irrelevant to modern conditions. Despite all of the challenges, the CEACR remained convinced that 'labour clauses that actually set as minimum standards the most advantageous conditions where work is being done, consistent with the notion of the State as a model employer, continue to be a valid means of ensuring fair wages and

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40 Ibid [174]. Note, however, that public procurement is extensively relied upon in a number of countries as a means of combating discrimination in employment and promoting equality of opportunity for women and other disadvantaged groups — ibid [24], [46]. See further McCrudden, above n 5, Parts II and III.

41 See especially Directive 2004/17/EC of 31 March 2004 on Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Service Sectors [2004] OJ L 134/1, and Directive 2004/18/EC of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L 134/114. See more generally McCrudden, above n 5, Part III; C Barnard, 'Using Procurement Law to Enforce Labour Standards' in G Davidov and B Langille (eds) *The Idea of Labour Law* (Oxford University Press, 2011) ch 16.

42 ILO, above n 24, [181]. See also the CEACR's review of the more important of these instruments, ibid, ch III.

43 See, eg, ibid [248] (on the EU Directives). See also Nielsen, above n 29, 97–101.

44 ILO, above n 24, [279].

conditions of work', and that 'the objectives of the Convention…[are]…even more valid today than they were 60 years ago'.[45]

The Committee went on to suggest a number of strategies that could be used to make the Convention more relevant to the globalised economy, including:

- Adoption of a program of 'promotion and dissemination' reaching beyond ministries responsible for labour and extending to the procurement and public contracting sector itself. Any such program should be developed and implemented in collaboration with relevant national and international organisations of employers and workers.
- Opening dialogue between the International Labour Office and relevant international financial and cognate organisations 'with the object of cooperating on national action consistent with obligations under *Convention No 94*'.
- Exploring the possibility of 'revisiting' the Convention to enable the ILO to respond to 'current challenges' such as 'the increasing role of public-private partnerships; the emergence of new actors, including professional bodies; the absence of specific binding national legal provisions concerning labour conditions in the execution of public contracts and the lack of effective enforcement measures'. Revision could also enable the Convention to be updated to take account of major developments in the area of public procurement, including the increasing role of (governmental and non-governmental) international actors and institutions; to facilitate better integration between the Convention and the eight instruments referred to in the Declaration; and to address some of the current limitations of the Convention, including the fact that it does not cover cross-border contracting, and 'the wide discretion in excluding contracts awarded by non-central authorities'.[46]

All of these proposals were underpinned by the assumption (para [314]) that 'the purpose and object of the Convention remain fundamentally sound', and that it is an 'underused instrument' that 'offers a unique opportunity and a normative platform on which the ILO could build a comprehensive standard for the promotion of decent labour conditions in public contracts'.[47]

The employer members of the Conference Committee on the Application of Conventions and Recommendations ('Conference Committee') in 2008 did not share the CEACR's views on the continuing relevance of the Convention. Instead, they characterised it as 'an out-dated and ill-conceived instrument which had never enjoyed wide support and the ratification record of which had long stagnated'.[48] Furthermore, 'the Convention was protectionist in nature and unduly interfered with sound public procurement policies and the most effective functioning of markets'.[49] In these circumstances, they were not prepared to support promotional activities or 'the adoption of the concepts set out in the Convention'. They were also opposed to any

45 Ibid [307]–[308].
46 Ibid [311]–[313].
47 Ibid [314].
48 ILO, above n 20, [103].
49 Ibid.

revision of the Convention to extend its scope to encompass new forms of procurement.[50]

Predictably, the worker members took a more positive view of the CEACR's proposals,[51] whilst a number of government members also expressed generally positive views about the continuing role of the Convention.[52] Overall, however, the lack of consensus that was evident in the Conference Committee's deliberations does not bode well for reinvigorated promotion of the Convention, let alone its revision.

It can be seen, therefore, that *Convention No 94* is very much in the tradition of the measures that were adopted in Britain between 1891 and 1946, and which were in part at least directed to providing support for the regulation of terms and conditions of employment through voluntary collective bargaining. It is also premised on the assumption that the state should serve as a model employer by according beneficial terms and conditions of employment to its own employees, and by ensuring that those with whom it enters into contractual relations accord terms and conditions to their employees that are at or above the going rate.

For those whose policy-positions are guided by market principles, this kind of reasoning entails a distortion of the market, and as such is to be eschewed. It is not surprising, therefore, that the Howard Government did not evince any interest in ratifying *Convention No 94*, or in adopting the principles upon which it was based. Indeed, as indicated, it went to the other extreme and used government procurement to promote objectives that were in many respects the antithesis of those that underpinned *Convention No 94*, and the Fair Wages Resolutions upon which it was based. As appears below, key aspects of those measures were in due course determined to be inconsistent with Australia's obligations in relation to respect for the principles of freedom of association.

III THE NATIONAL CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY AND THE INDUSTRY GUIDELINES[53]

Adoption

The Code was developed by Commonwealth, State and Territory Governments in the mid-'90s, and was formally adopted by the Australian Construction and Procurement Council and the Departments of Labour Advisory Committee in 1997.[54]

In terms of content, the Code is a fairly anodyne document consisting largely of high level statements of principle set out under headings such as: Clients' Rights and

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50 Ibid [80], [122], [133].

51 Ibid [123]–[124], [126]–[127].

52 See ibid [125] (Denmark), [128] (Italy), [131] (Spain) — cf [129] (Canada) and [130] (Lebanon). The British government representative [100] indicated that the United Kingdom had denounced the Convention because it was not consistent with the Government's procurement policy and national employment legislation, but, curiously, went on to express the Government's commitment to 'the principles of the ILO standards and *Convention No 94*'!

53 Parts of this section draw upon material which originally appeared in Creighton and Stewart, above n 2, ch 24.2.

54 The current incarnations of these bodies are, respectively, the Australian Procurement and Construction Ministerial Council and the COAG Select Council on Workplace Relations.

Responsibilities; Relationships; Competitive Behaviour; Continuous Improvement and Best Practice; Workplace Reform; Occupational Health, Safety and Rehabilitation; Industrial Relations; and Security of Payment. As concerns industrial relations, it stipulates that all parties must comply with the provisions of applicable awards, 'certified agreements' and legislative requirements, and goes on to deal in more detail with workplace arrangements, over-award payments, project agreements, freedom of association (and non-association), dispute settlement, strike pay, and 'industrial impacts'.

It is left to each jurisdiction, within certain parameters, to establish 'effective compliance and enforcement mechanisms to apply the national code'. This means that the 'teeth' of the Code are to be found in various codes and guidelines that have been adopted in order to achieve its objectives. All jurisdictions have adopted provision of some kind in this context,[55] although up until 2012, none had embraced the notion of guidelines with 'bite' with quite the enthusiasm exhibited by the Howard Government.[56]

In June 2011, the recently-elected Victorian Government announced that it would review the existing code and guidelines in that State. Four months later, it released a set of draft guidelines for public comment. This draft was clearly modelled on the June 2006 version of the Commonwealth Guidelines. In due course, in April 2012 a new set of guidelines was put in place which apply to all building and construction work which is subject to an expression of interest or request for tender on or after 1 July 2012, and which is undertaken by or on behalf of Victorian Government departments or public sector bodies. They constitute a less full-blooded rendition of the 2006 Guidelines than the October 2011 draft, but are certainly more robust than the current Commonwealth Guidelines.[57] In order to give effect to its new Guidelines, the Ballieu Government announced in March 2012 that it had appointed a former Federal regulator to oversee their implementation.[58] It is important to note, however, that para [3.9.1] of the Commonwealth Guidelines states that where both the Commonwealth and State or Territory guidelines apply to projects that are directly or indirectly Commonwealth funded then the Commonwealth Guidelines 'will prevail to the extent of any inconsistency'. The Victorian Guidelines appear to have been drafted in such a way as to avoid direct inconsistency with the Commonwealth Guidelines, but clearly para [3.9.1] has the potential significantly to constrain the content of State or Territory guidelines — given that few major publicly-funded construction projects are funded by State or Territory governments without some Commonwealth contribution.

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55 For a (somewhat dated) list of State codes and guidelines, see Forsyth et al, above n 2, 23.

56 For discussion of the Howard Government's attempts to force the States to give effect to its version of the Guidelines see John Howe, '"Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167, 176–8.

57 The revitalisation of some of the 2006 proscriptions prompted a prominent academic lawyer to warn that enforcement of these aspects of the Victoria Guidelines might run foul of the General Protections in Part 3–1 of the FW Act – see 'Enforcement of Victorian Construction Guidelines Could Lead to Adverse Action Claim, Says Stewart', *Workplace Express*, 3 April 2012.

58 See 'Hadgkiss Returns to Enforce New Victorian Construction Code', *Workplace Express*, 9 March 2012.

The first set of Guidelines under the National Code was adopted by the Howard Government in 1998. They were subsequently amended in December 2003, September 2005, June 2006 and November 2006. Each set of amendments was strongly influenced by the then-Government's attempts at legislative reform in the construction industry, and in the labour market as a whole. Prior to gaining control of the Senate at the October 2004 federal election, the Government had been unable to obtain legislative approval for some of its more radical policy positions, but had used the Code and Guidelines to implement many of those policies by non-legislative means in the construction industry. Upon assuming control of the Senate in July 2005, the Government was able to secure passage of both industry-specific legislation in the form of the BCII Act, and the more broad-based Work Choices legislation. However, as appears below, this by no means signalled the end of the Government's reliance upon the Code and Guidelines to drive cultural and behavioural change in the construction industry.

Howe describes the BCII Act as 'a highly prescriptive and punitive piece of re-regulation'.[59] Amongst other things, it provided for the appointment of the Australian Building and Construction Commissioner ('ABCC'), and the establishment of an associated office. It also provided for the regulation of industrial relations in the construction industry in a manner that was even more restrictive of the rights of workers and their organisations than the more general reforms effected by Work Choices.[60]

Read with the Code and Guidelines, the BCII Act can be seen to have introduced a form of 'industrial apartheid' whereby employers, workers and unions were subjected to differential treatment simply because of the sector of the economy in which they happened to be engaged.[61] This in turn reflected a perception, fuelled by the Report of the Royal Commission into the Building and Construction Industry ('Cole'),[62] that there was 'widespread corruption and unlawfulness' in the industry, and that this was 'impeding productivity and competition'.[63]

In 2004 and 2005 the imminent passage of the BCII Act, and the adoption of increasingly aggressive iterations of the Guidelines, caused the ACTU and the Trade Unions International of Workers of the Building, Wood and Building Materials Industries to lodge a complaint with the Freedom of Association Committee of the Governing Body of the ILO ('CFA'). The CFA's decision in this case is discussed later in

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59 John Howe, '"Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model' in Arup et al, above n 56, 148.

60 The BCII Act was extensively amended by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), with effect from 1 June 2012. As of that date the 2005 Act was renamed as the *Fair Work (Building Industry) Act 2012* (Cth) ('FW(BI) Act'). Amongst other things, the ABCC was abolished, and its functions transferred (in modified form) to the Director of the Fair Work Building Industry Inspectorate ('FWBII'). The Director and the associated inspectorate now operate as 'Fair Work Building and Construction' ('FWBC').

61 In *Beyond Cole – The Future of the Construction Industry: Confrontation or Cooperation?* (2004) 51, the Senate Employment, Workplace Relations and Education References Committee described this regime as a form of 'quarantine' — quoted in Howe, above n 59, 159.

62 Commonwealth of Australia, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 1, [15–31].

63 Howe, above n 59, 147 and 162.

this article. For present purposes it is sufficient to note that in its initial response to the complaint, the Government explained that the purpose of the BCII Act was 'to reintroduce the rule of law in the industry',[64] whilst in a later response it asserted that 'the Guidelines are drafted for the purpose of assisting employers and employees to practically implement the recommendations of the Royal Commission, as well as progressing the Government's commitment to establishing higher standards of workplace relations behaviour, flexibility and productivity within the building and construction industry'.[65]

It must be recognised that this was by no means the first occasion upon which a particular sector of the workforce had been subjected to a regulatory regime that was ostensibly tailored to the particular circumstances of the relevant industry or sector — for example, at the time of its repeal in 1988 the *Conciliation and Arbitration Act 1904* (Cth) made special provision for industrial regulation of Commonwealth and Territory employees, Maritime Industries, the Snowy Mountains Area, Waterside Workers, workers engaged in Commonwealth Projects, and Flight Crew Officers. This was, however, the first occasion during peace-time that participants in an industry were denied the right to engage in the same range of industrial activities as other labour market participants simply because of the industry or sector in which they were located.

One of the changes contemplated by the BCII Act was the introduction of a Building Code. According to s 27(1) this was to be issued by the relevant Minister, and was to consist of 'one or more documents that together constitute a code of practice…that is to be complied with by persons in respect of building work'. This document was to be a 'legislative instrument' for purposes of the *Legislative Instruments Act 2003* (Cth). Amongst other things this meant that its content would be subject to parliamentary scrutiny, and to disallowance by either House of the Parliament.

It was apparently envisaged that one part of the Building Code would deal with occupational health and safety, and that another would consist of the Code and Guidelines. The Howard Government's enthusiasm for this aspect of the legislation appears to have diminished somewhat following its passage through Parliament — most likely because of an increased appreciation that keeping the Guidelines on a non-statutory footing meant that they could be changed without the need for parliamentary scrutiny, and potential disallowance.[66] This change of heart was reflected in a subsequent proposal that the Building Code would deal only with occupational health and safety. Eventually, even that suggestion was abandoned, and no Building Code was ever made under Chapter 3 of the BCII Act, and there are no indications that this situation is likely to change under its successor.[67] It remains the case, therefore, that the Code and Guidelines have no formal legal effect, save to the extent that they are given such effect through contract. It also remains the case that their content and application are not subject to any form of parliamentary scrutiny beyond the extent to

64 Committee on Freedom of Association ('CFA'), *338th Report of the Committee on Freedom of Association* (ILO, 2005) [429].
65 CFA, *342nd Report of the Committee on Freedom of Association* (ILO, 2006) [22].
66 See further Forsyth et al, above n 2, 23.
67 Interestingly, however, s 27 has been retained in the FW(BI) Act.

which the relevant Minister is answerable to the Parliament for the conduct of their Department, and that which is attendant upon Senate estimates hearings.[68]

The Guidelines were extensively amended by the Rudd Government with effect from 1 August 2009, and by the Gillard Government with effect from 1 May 2012.[69] The 2009 amendments removed some of the more gratuitously offensive aspects of the 2006 versions, whilst the 2012 amendments mean that the Guidelines are now generally consistent with the FW Act and other relevant legislative provisions — ie, they no longer try to impose formal requirements upon the construction industry that do not apply to employers and employees elsewhere in the labour market. The fact remains, however, that — like Australian labour law in general — the Guidelines still contain provision that is contrary to Australia's obligations as a member of the ILO, and as signatory to *Convention No 87* and *Convention No 98*. Furthermore, there are still a number of aspects of the Guidelines that sit somewhat uncomfortably with accepted notions of the requirements of the rule of law — particularly the absence of adequate parliamentary scrutiny, and of open access to judicial review of decisions taken under the Guidelines.

Scope and application

The Code states that the construction industry includes 'all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering'.[70] Paragraph [3.1.1] of the Guidelines further indicates that the range of activity which falls within the scope of the Code and Guidelines 'includes, but is not limited to' 'building refurbishment or fit out, installation of building security systems, fire protection systems, air-conditioning systems, computer and communication cabling, building and construction of landscapes'. On the other hand, para [3.1.4] provides that it does not include mining operations; the maintenance of building systems; landscaping 'such as lawn mowing, pruning and other horticultural activities'; and cleaning buildings. Nor does it apply to work that is carried out off-site.

This coverage is significantly narrower than under the 2005 iteration of the Guidelines, which extended to 'material supply contracts where the supplied material is integral to the construction of the project or to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site'.[71] This meant, for example, that the Code and Guidelines applied to the off-site prefabrication of concrete components that were then transported to the project

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68 In a Report to the Minister for Education, Employment and Workplace Relations in April 2009 entitled *Transition to Fair Work Australia for the Building and Construction Industry* ('Wilcox'), Murray Wilcox QC recommended (para [7.32(f)]) that the Guidelines 'ought to be made a disallowable instrument'. This reflected the position put by many submissions to his inquiry including those of major employers, State Governments, and the Combined Construction Unions (see [7.13], [7.23] and [7.31]). In a letter to the Minister dated 27 April 2009, the then-ABCC, John Lloyd, expressed concern at the loss of 'flexibility and adaptability' that might follow from 'Parliamentary scrutiny, and tribunal and court interpretation' of the Guidelines.

69 Except where otherwise stated, all pinpoint references to the Guidelines are to the May 2012 iteration.

70 Code, 2.

71 2006 Guidelines, [2.1.4].

site for incorporation in a building. Arguably, it even applied to the transportation process. It also applied to the manufacture of window-frames and any other 'component' (such as toilet bowls or light-fittings) that were intended to form part of the structure. Potentially, this meant that significant parts of the manufacturing, wholesale, and retail sectors had to be Code-compliant. To avoid this, the Guidelines were amended in June 2006 to make clear that they applied only to material suppliers 'whose principal activity or purpose is specifically or exclusively to manufacture and/or supply construction components'. The 2009 revision went further by removing all reference to off-site activity and supply contracts.[72] That position was retained in the May 2012 revision.

It will be recalled that art 1(4) of *Convention No 94* contemplates that contracts for sums not exceeding an amount fixed by the public authority following consultation with representatives of employers and workers, can properly be excluded from the application of the Convention. Similar reasoning is reflected in paras [3.2] and [3.3] of the Guidelines, which make clear that they apply: to *all* construction activity that is undertaken by or on behalf of a 'funding entity', irrespective of the value of the project;[73] and to all indirectly funded projects (for example through grants to State or local government) where the value of the Commonwealth's contribution is at least $5m and represents at least half of the total cost of the project, or where the Commonwealth's contribution is $10m or more, irrespective of the proportion of the total cost constituted by that contribution.

This clearly suggests that the Code and Guidelines apply to a very considerable proportion of all construction work in Australia. Moreover, their reach is extended even further by para [3.4.2], which provides that any party that is interested in undertaking construction work to which the Code and Guidelines apply must also comply with them in relation to *all* of their privately funded construction projects. This requirement applies to all expressions of interest or tenders for Commonwealth-funded projects that were submitted after 1 November 2005. Furthermore, entities that are 'connected with' or 'related to' a party seeking to undertake Commonwealth-funded work must also comply with the Code and Guidelines if they themselves are engaged in construction work (whether on Commonwealth-funded projects or not).[74]

It can safely be assumed that there are very few major participants in the construction industry that would not at some stage want to bid for Commonwealth-funded work, and indeed there would be relatively few smaller businesses in the industry that would not also wish to be engaged on such projects at some stage, either as a principal or as a subcontractor. This bears out the suggestion that a very substantial proportion of the construction industry is required to comply with the

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72 This change was introduced to give effect to a recommendation set out in Wilcox, above n 68, [1.31].

73 Paragraph [3.1] of the Guidelines defines 'funding entities' in effect to include all Commonwealth departments and agencies, Commonwealth authorities, and wholly-owned Commonwealth companies.

74 Entities are regarded as 'connected' where one can control or materially influence the activities or internal affairs of the tenderer; or has the capacity to determine or materially influence the tenderer's financial and operating policies; or is a member of the tenderer; or is 'financially interested' in the tenderer's success or failure (para [3.5.4]). According to para [3.5.5], entities are 'related' for the purposes of the Code and Guidelines when they fall within the definition of that term in s 9 of the *Corporations Act 2001* (Cth).

Code and Guidelines in relation to their construction activities, whether publicly or privately funded.[75]

Substantive requirements

The substantive requirements of the Guidelines are set out in sections 4, 5 and 6. At their core is the proposition (para [6.6.1]) that compliance with the Guidelines requires compliance with all applicable legislation, 'court and tribunal orders, directions and decisions' and industrial instruments.[76]

Starting from this basic position, the Guidelines deal with a broad range of issues, including the kinds of agreements and arrangements into which it is permissible for industry participants to enter; compliance with existing legal requirements; industrial coercion; freedom of association and workplace reform; right of entry for union officials; dispute settlement; strike pay; occupational health and safety; and security of payment for contractors and subcontractors. In contrast to the situation before the 2009 revision, they do not presently impose requirements or conditions that are more onerous than the applicable industrial legislation, although they do envisage the imposition of sanctions that are not available under such legislation.

For present purposes, it is proposed to look more closely at just three aspects of the Guidelines: workplace agreements and arrangements; freedom of association and workplace reform; and dispute-settlement.[77]

(i) Workplace agreements and arrangements

The capacity of employers and unions to choose the form of agreement that they wish to make, and the level at which it is negotiated, is a critical element of the guarantee of autonomous bargaining which is set out in art 4 of *Convention No 98*. It is, however, a principle which receives only limited recognition in Australian law.[78] It received even more limited recognition under previous iterations of the Guidelines — especially in relation to 'project agreements' and unregistered or 'common law' agreements.[79]

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75 The Code and Guidelines also apply to pre-commitment lease projects (para [3.6]), to Build Own Operate Transfer/Build Own Operate projects (para [3.7]), and to Public Private Partnerships and Private Finance Initiatives (para [3.8]).

76 'Industrial instrument' is defined in para [6.1.1] to include awards or agreements made under or recognised by an industrial law that 'concerns the relationship between an employer and the employer's employees' including, but not limited to 'freedom of association, employee entitlements and wages, and occupational health and safety requirements'.

77 More detailed treatment of these issues can be found in Forsyth et al, above n 2, ch 3 (dealing with the 2006 iterations of the Guidelines), and in Creighton and Stewart, above n 2, ch 24.2 (dealing with the August 2009 iteration).

78 See Breen Creighton 'International Labour Standards and Collective Bargaining under the *Fair Work Act 2009*' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) ch 3.

79 The restrictive approach to project agreements under the Code and Guidelines provides an interesting contrast to the situation in the United States, where early in his term of office President Obama rescinded a ban on project agreements put in place by his predecessor. He replaced the ban with an Executive Order empowering executive agencies to *require* the use of project agreements when awarding contracts for federally-funded construction projects valued at more than $US 25m. See 'Obama Moves Quickly to Axe Bush's Ban on Project Labour Agreements in Construction', *Workplace Express*, 18 March 2009.

Significantly, the 2012 iteration of the Guidelines continues to adopt a highly restrictive approach to unregistered agreements.

Project agreements have been a common feature of the construction industry for many years. In simple terms, they are agreements negotiated for purposes of regulating workplace relations at a particular site or project. They are normally concluded at or before the start of the project, at a point at which many of the contractors who will eventually work on the project may not yet have been identified, let alone engaged. Amongst other things, such agreements normally require that all contractors observe the terms of the agreement for their own employees, and endeavour to ensure that any subcontractors they may engage do likewise. Frequently, they provide terms and conditions that are more advantageous to workers (and unions) than those set out in the agreements that already apply to most of the contractors or subcontractors who are likely to come on site. This can impose significant cost burdens on such businesses. Not surprisingly, therefore, they are generally unpopular with contractors and subcontractors. They are also disliked by head contractors due to the fact that they can serve as a benchmark for similar agreements on other projects, or even for collective agreements throughout the industry.

These factors help explain why Cole recommended that project agreements should be available in only very limited circumstances, and that if they were not approved in accordance with the *Workplace Relations Act 1996* (Cth) ('WR Act') they should be 'deemed to be void, unlawful and unenforceable either directly or by incorporation in another agreement'.[80] This reasoning was reflected in s 64 of the BCII Act, but was repealed as part of the 2012 amendments to that Act.

Up until May 2012, the Guidelines essentially adopted the Cole approach to this issue. However, the Guidelines now 'recognise' that 'there may be some situations where project agreements may be appropriate', but still require that any such agreement 'be made and approved under the FW Act or in accordance with applicable State industrial law' (para [4.3.1]). Importantly, however, they do not need to meet any additional criteria, such as those formerly set out in para [4.3.1] of the 2009 Guidelines.[81] Despite this apparent relaxation of the regulatory requirements, the National Secretary of the Construction and General Division of the Construction, Forestry, Mining and Energy Union was quoted in March 2012 as saying that the changes would make little difference in practice due to the fact that it was 'incredibly difficult' to make project agreements under the FW Act.[82] Strictly speaking this may be true, but anecdotal evidence suggests that in many instances principal contractors in the industry are placed under industrial pressure to engage only subcontractors who have made enterprise agreements which reflect the *de facto* pattern agreement for the industry. In many respects, this practice achieves the same effect as a more formal project agreement.

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80 Cole, above n 62, 36.

81 These were very strict. Amongst other things, they stipulated that project agreements could be made only for contracts with a value in excess of $100m, and that they could be made only where there was 'a clear and demonstrable benefit to the Australian Government in doing so'.

82 'New Rules Ease Barriers for Project Agreements; Allow 'Green' Clauses', *Workplace Express*, 5 March 2012.

Previous iterations of the Guidelines also evinced strong disapproval of the use of 'unregistered written agreements' on construction projects.[83] In the August 2009 Guidelines such arrangements were stated (para [6.1.2]) to include 'an individual or collective agreement that has not been certified, registered, lodged or otherwise approved under an industrial law, but is concerned with the relationship between an employer and its employees and/or registered or unregistered industrial associations', whilst para [6.1.3] stipulated that the use of such agreements (apart from common law agreements between employers and individual employees) were inconsistent with the Code and Guidelines. Paragraph [6.1.3] (re-numbered as para [6.1.4]) is retained in the May 2012 Guidelines, as is a slightly modified version of the definition in para [6.1.2]. This definition is, however, subject to a new para [6.1.3] which excludes from the reach of para [6.1.2] voluntary written agreements between one or more unions and contractors concerning participation in: 'community, welfare or charitable activities'; 'incentives to promote the employment of women, indigenous, mature age or other groups of workers disadvantaged in the labour market'; 'workers' health and well-being initiatives'; 'waste-reduction, carbon pollution reduction and recycling initiatives'; 'programs to reduce bullying, sexual harassment or workplace discrimination'; 'initiatives to encourage fair, cooperative and productive workplace relations across the industry'; and initiatives to promote the take-up and completion of apprenticeships.

Amongst other things, this means that it would no longer be inconsistent with the Guidelines for employers and unions to enter into unregistered agreements concerning issues which it may not be possible to deal with in an enterprise agreement — for example, because the subject-matter does not 'pertain' to the employer/employee relationship as required by s 172(1)(a) of the FW Act.

The restrictive approach to the making of unregistered agreements which has characterised all iterations of the Guidelines can probably be attributed to the fact that by their very nature such agreements operate on an 'over-award' basis — that is, they take the relevant award or enterprise agreement as their starting point, and then 'improve' upon the terms and conditions set out in that instrument. Such 'improvements' may be secured by actual or threatened industrial action. By definition, such action would be unprotected if undertaken during the nominal life of an enterprise agreement,[84] and might also be unprotected after the expiry of an enterprise agreement if it related to matters that could not lawfully be included in an agreement under the FW Act.[85] Furthermore, unregistered agreements of this kind are generally 'owned' by the union(s) that negotiated them, thereby helping to legitimate their role in the management of the site. This was something to which Cole took great exception:

> It is the function of head contractors and major subcontractors to manage their businesses and to assume control of the processes necessary to achieve productive and successful outcomes for the benefit, not only of their companies and employees, but also for the industry and for the Australian economy as a whole. Head contractors, to a significant extent, and in critical areas have surrendered management control to the unions. It is the function of unions to represent, advance and protect the interests of their members in a

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83 For discussion of the legal effect of unregistered or 'common law' collective agreements, see Creighton and Stewart, above n 2, 344–6.

84 FW Act, ss 413(6), 417.

85 FW Act, ss 408–9.

variety of ways. *It is not the function of unions to manage or control the operation of building and construction projects.*[86]

Concern that unions might resort to industrial action in the course of negotiating unregistered agreements is reflected in the fact that both the Code and the Guidelines (para [6.3.1]) prohibit direct or indirect coercion or pressure to make over-award payments, whether that coercion or pressure emanates from a union, a contractor or subcontractor, or a 'consultant'. It is also forbidden to require, or attempt unduly to influence, subcontractors or suppliers to have particular workplace arrangements in place (para [6.2.1]). Both forms of conduct would be unlawful under ss 343 and 344 of the FW Act in relation to the making of an enterprise agreement,[87] and if they involved industrial action, would almost certainly be unlawful at common law. The point of their inclusion in paras [6.2] and [6.3] seems to be to provide an incentive to employers, contractors etc not to succumb to such pressure, lest they be excluded from Commonwealth-funded work in the future. As will appear presently, this aspect of the Code and Guidelines, and the cognate industrial legislation, is not consistent with Australia's international obligations.

(ii) Freedom of association and workplace reform

Paragraph [6.4.1] of the 2012 Guidelines states that 'contractors must adopt policies that are consistent with applicable industrial law to ensure that all those working on projects covered by the Code have their right to choose whether or not to join a union or employer association properly respected'. In adopting this approach, the Code and Guidelines are fully consistent with the modern Australian tendency to treat the right not to belong to a trade union as a corollary of the right to belong. It is important to appreciate, however, that *Convention No 87* and *Convention No 98* do not require this, and indeed make no reference to the right not to associate. This means that it is for each ratifying state to determine whether and how to recognise the putative right not to associate.[88]

Paragraph [6.4.2] goes on to list eight examples of conduct that is to be regarded as inconsistent with the Code:

- dealing with 'personal information' in breach of the *Privacy Act 1988* or the FW Act;[89]
- 'no ticket, no start' signs or 'show card' days;[90]

86 Cole, above n 62, vol 1, 4 (emphasis added).

87 They would also have been unlawful under the now-repealed ss 44–6 of the BCII Act.

88 See also ILC, 32nd Session Geneva, 1949, *Record of Proceedings* (ILO, Geneva, 1951) 468; ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (ILO, 5th ed, Geneva, 2006) [364]–[365], [367]. See also Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) ch 15.

89 This might, eg, include providing the names of new staff, job applicants, contractors or subcontractors to union representatives.

90 The 'ticket' or 'card' in question is a card which shows that the individual concerned is a paid-up member of the relevant union. Where such arrangements apply, individuals who do not produce a valid 'ticket' within a specified period (usually 24 hours) are not permitted to start work on the site. Anecdotal evidence suggests that whilst overt

- discriminating against or disadvantaging elected employee representatives;
- using forms requiring the employee to identify their union status or employers and contractors to identify the union status of employees or subcontractors;
- refusing to employ, or terminating an employee, because of their union status;
- employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members;
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate or to hire an individual nominated by a union; and
- any requirement that a person pay a 'bargaining fee' however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

Most, but not all, of this conduct would be unlawful under the 'General Protections' in Part 3-1 of the FW Act.[91] With the exception of the first dot-point, the list is identical to that in the August 2009 Guidelines. It is also similar to the list of proscribed practices in para [8.5.3] of the 2006 versions of the Guidelines, but with the addition of the right of union delegates to represent employees, and shorn of some of the more intrusive proscriptions in the former para [8.5.3]. These included a requirement that there not be any 'signs, or other notices such as posters, helmets, stickers or union logos or flags etcetera that imply that union membership is anything other than a matter for individual choice' or that employers not be 'required' 'to apply union logos, mottos or other indicia to company-supplied property or equipment, including clothing'.[92] Attempts by ABCC inspectors (see below) to enforce this requirement appear to have been largely ineffectual, but did serve as a source of much aggravation for both employers and unions.[93]

Under the heading 'Workplace reform', the June 2006 version of the Guidelines also provided that it was not permissible to include certain kinds of provisions in industrial instruments on the ground that they might not be 'conducive to the pursuit of workplace reform strategies'. The proscribed matters included:

- Provisions in agreements (or workplace practices) that fixed the number and categories (eg permanent, temporary, casual) of employees an employer might engage 'on a particular site, work area or within their company in general'.
- 'One-in-all-in' arrangements whereby, for example, if one worker was required to work overtime, then all workers in the relevant group also had to be offered overtime.

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adherence to the practice is less common than in the past, it has certainly not been eliminated.

91 See further Creighton and Stewart, above n 2, ch 17.5.

92 This proscription provides an interesting contrast to the approach adopted in *Australian Tramway Employees Association v Prahran and Malvern Tramways Trust* (1913) 17 CLR 680, where the High Court determined that a claim that union members should be permitted to wear a union badge on their watch chains on company-provided uniforms could give rise to an 'industrial dispute' for purposes of the *Conciliation and Arbitration Act 1904* (Cth), thereby enabling the matter to be dealt with in an arbitrated award under that Act.

93 Paragraph [5.5] of the *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* purports to constrain the content of agreements in much the same way as para [8.5.3] of the 2006 Guidelines.

- Arrangements whereby employees were selected for redundancy on the basis that the first to be terminated were those who had been employed for the shortest period — the so-called 'last on, first off' principle.
- Provisions that required employers to consult with, or seek the approval of, unions in relation to 'the number, source, type (for example casual, contract) or payment of labour required by the employer'.
- Provisions which purported to 'stipulate the terms and conditions for the labour of any person not a party to the industrial instrument'.
- Provisions prohibiting 'all-in payments': that is, provisions which prevented employers from making payments to employees (eg, by way of annualised salary) in lieu of award or statutory entitlements in relation to matters like annual leave or overtime (bearing in mind, of course, that any such payment could not lawfully derogate from the employee's statutory or award entitlements).
- 'Clauses that attempt to negate or render ineffective the application of the Code and Guidelines'. This was intended to prevent parties making agreements or entering into arrangements containing provision that was inconsistent with the Code or Guidelines, but trying to 'save' the rest of the agreement through the use of 'weasel words'. This was considered undesirable because of the risk that a superficial reading of such an agreement might mislead potential contractors and subcontractors who were not aware of the fact that the 'weasel words' were ineffectual.[94]

It is important to appreciate that it was perfectly lawful to deal with most, albeit not all, of these issues in agreements made under even the post-Work Choices iteration of the WR Act. In other words, the effect of the Guidelines was to prevent employers, employees and unions in a substantial part of the construction industry from doing what was lawful for those engaged in other industries and occupations, and in the 'Code-free' sector of the construction industry itself.

The determination of the Howard Government to use the Code and Guidelines to further its 'reform' agenda is further evidenced by its preparedness to amend the Guidelines when it became aware of some new industrial practice of which it disapproved. Moreover, it was not averse to doing this with retrospective effect, as was strikingly illustrated in November 2006 when the Guidelines were amended, without any prior announcement, retrospectively to prohibit the making of unregistered agreements that dealt with matters which constituted 'prohibited content' in terms of the WR Act and the associated regulations.[95] This was prompted by media reports of comments by the Victorian State Secretary of the Electrical Trades Union ('ETU') about a common law agreement that his union had struck with the National Electrical and Communications Association ('NECA') which had 'reinstated' various provisions that had had to be removed from the standard workplace agreement that was used in the industry in order to comply with Work Choices.[96]

Neither the 2009 nor 2012 versions of the Guidelines replicate the former para [8.10.4], or the proscription of ETU/NECA-type agreements. Instead, under the

94 2006 Guidelines, [8.10.4].
95 See further Creighton and Stewart, above n 2, 296–7.
96 See further Forsyth et al, above n 2, 22.

heading of 'Workplace reform', the 2012 Guidelines limit themselves to a number of fairly bland statements about the objects and virtues of the FW Act (paras [6.9.1] and [6.9.3]), whilst also noting (para [6.9.2]) that 'under the FW Act all parties are expected to demonstrate good faith when bargaining'.[97]

(iii) Dispute-settlement

The Code requires that parties must make every effort to resolve grievances and other disputes at enterprise level in accordance with the procedure set out in the relevant award or agreement,[98] while para [6.6.1] of the Guidelines imposes the further requirement that any 'significant' disputes or disagreements relating to workplace relations or workplace health, safety or rehabilitation must be reported to the principal contractor 'at the earliest opportunity', and that the principal contractor must report 'any dispute that may impact on project costs or timelines' to the Funding Entity. Where a 'dispute or disagreement' involves actual or threatened industrial action, the Funding Entity must report that fact to the Code Monitoring Group ('CMG') (para [6.8.1]). It is then for the CMG to decide whether the matter needs to be taken further in accordance with the implementation procedures described below.

The 2012 Guidelines include a new requirement (para [6.6.3]) that where a tenderer has an enterprise agreement that was made on or after 1 May 2012 the relevant Australian Government agency must require the tenderer to confirm in their submission that the agreement 'includes genuine dispute resolution procedures'. To meet the 'genuineness' criterion, the procedure must (para [6.6.5]) include as a minimum:

- the ability for employees to appoint a representative in relation to the dispute;
- in the first instance procedures to resolve the dispute at the workplace level;
- if a dispute is not resolved at the workplace level, the capacity for a party to the dispute to refer the matter to an independent third party, for example Fair Work Australia, for mediation or conciliation; and
- if the dispute is still not resolved, the capacity for an independent third party to settle the dispute via a decision binding on the parties.

This provision is identical to para [5.2.5] of the FW Principles. It is also very similar to the Model Term for Dealing with Disputes for Enterprise Agreements which is set out in Schedule 6.1 to the *Fair Work Regulations 2009* (Cth).

The most controversial aspect of all three provisions is that they envisage that the final stage of the dispute resolution procedure is to be unilateral, binding arbitration. This means that, in practical terms, any employer that wishes to tender for Commonwealth-funded construction work, or the provision of goods or services to the Commonwealth, and who has an enterprise agreement in place, must ensure that the

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97 On good faith bargaining under the FW Act, see Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA' (2011) 16 *Canadian Labour and Employment Law Journal* 1; Alex Bukarica and Andrew Dallas, *Good Faith Bargaining under the Fair Work Act 2009* (Federation Press, 2012); Breen Creighton and Pam Nuttall, 'Good Faith Bargaining Down Under' (2012) 33 *Comparative Labor Law and Policy Journal* 257.

98 FW Act, ss 146 and 186(6) respectively require that modern awards and enterprise agreements contain terms dealing with disputes under the award or agreement as the case may be.

agreement contains a dispute-settling term that provides for unilateral binding arbitration as its final step. This contrasts with the position under the FW Act, where it is quite permissible to make an agreement containing a dispute-settling term that did not provide for such arbitration.[99]

Implementation

(i) Responsibilities of industry participants

Like the three Fair Wages Resolutions, the Code and Guidelines do not have any independent legal effect. However, para [4.4.1] of the 2012 Guidelines provides that the contract for all projects to which they apply 'must incorporate the requirement for the contractor to comply with all aspects of the Code and Guidelines, and for all subcontractors and consultants associated with the project to comply'. This means that failure by contractors or subcontractors to observe either the Code or Guidelines could be sanctioned as a breach of contract. More tellingly perhaps, it could also lead to curtailment for a specified period of the capacity to tender for further work to which the Code and Guidelines apply.

Contracts to which the Guidelines apply must also allow inspectors to access relevant 'sites, documents and personnel' so that they can monitor compliance with the Code and Guidelines.[100] 'Inspectors' for this purpose includes the Director and FWBC inspectors.[101] There is, therefore, an inspectorate with responsibility for monitoring compliance with the Code and Guidelines, and for helping to advise industry participants as to their rights and responsibilities under them. This is entirely consistent with the approach required by art 4(b)(ii) of *Convention No 94*, but is in marked contrast with the Fair Wages Resolutions, where there was no inspectorate with the capacity to monitor and ensure compliance.

Section 5 of the Guidelines spells out the responsibilities of funding entities, recipients of grants and funds, and contractors, subcontractors and project managers. For example, para [5.1.1] requires funding entities to ensure:

- that the application of the Code and Guidelines is 'an integral component of construction project management procedures' within their organisation;
- that all expressions of interest, tender and contractual documents clearly set out the requirements of the Guidelines;
- that sanctions under the Code are enforced; and
- that the CMG is notified of any breaches of the Code or Guidelines within 21 days of becoming aware of those breaches.

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99 See FW Act, s 186(6); *Re Woolworths Ltd* [2010] FWAFB 1464. The Model Term is precisely that: it is a term that parties may include in their agreement if they so choose, but failure to do so does not mean that the agreement cannot be approved — so long as it includes a term that meets the s 186(6) criteria.

100 Guidelines, [4.4.2]. See further the Model Tender and Contract Documentation — May 2012,which can be accessed at <http://www.deewr.gov.au/WorkplaceRelations/policies/BuildingandConstruction/Documents/ModelTenderClauses2012>.

101 For the role of the ABCC, see Creighton and Stewart, above n 2, 142–4, 863–4.

Paragraph [5.1.1] also requires funding entities to ensure that they do not consider expressions of interest or tenders from, or provide work to, entities which:

> (a) have had an adverse Court or tribunal decision…for a breach of workplace relations law, work health and safety law, or workers' compensation law and the tenderer has not fully complied with the order; or
>
> (b) are on the exclusion list due to previous breaches of the Code and Guidelines, or
>
> (c) that have been assessed to be non-compliant by DEEWR.[102]

In the past, this last requirement was a frequent source of inconvenience and delay for industry participants. This was because contractors and would-be contractors had to submit all industrial instruments, including unregistered common law agreements, to the Department of Education, Employment and Workplace Relations ('DEEWR') for assessment as to whether they were Code-compliant. Such assessments sometimes took months to provide, and there were numerous instances of inconsistent assessments by DEEWR officials even within the same office, let alone across the country.[103] In October 2009 the then-Minister for Employment and Workplace Relations announced that all agreements that were made in accordance with the FW Act would be deemed to be compliant with the Code and Guidelines.[104] This is reflected in para [7.1.1] of the 2012 Guidelines, although DEEWR retains responsibility for assessing 'certified, registered, lodged or otherwise approved industrial instruments, and common law agreements' for Code and Guidelines compliance.

As concerns entities that actually undertake construction work, para [5.4.1] provides that 'all contractors, subcontractors, consultants and project managers undertaking work on projects covered by the Code and Guidelines must':

- comply with the Code and Guidelines;
- require compliance with the Code and Guidelines from all subcontractors before doing business with them…
- ensure that contractual documents allow Inspectors to access sites, documents and personnel to monitor compliance with the Code and Guidelines;
- ensure there is a work health safety and rehabilitation plan for the project;
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or project managers report such action to the Funding Entity;[105]
- respond to requests for information concerning Code-related matters made on behalf of CMG;

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102 Grant and funding recipients are placed under similar, but not identical, obligations under para [5.2.2] of the Guidelines.

103 See further Forsyth et al, above n 2, 22–3.

104 Department of Education, Employment and Workplace Relations, '2006 Guidelines and FW Act Agreements' (Press Release, 7 October 2009).

105 This obligation applies to both protected and unprotected industrial action. It is not clear, however, whether it applies to action (most obviously, picketing) that does not constitute 'industrial action' for purposes of the FW Act. See further Creighton and Stewart, above n 2, 772, 871.

- proactively ensure compliance with the Code and Guidelines by subcontractors, including by confirming this at site project meetings, and by making this a contractual obligation;
- where practicable, ensure contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention;
- ensure that CMG secretariat is notified of any alleged breaches, voluntary remedial action taken or other Code-related matters within 21 days of the party becoming aware of the alleged breach; and
- be aware that and ensure that sanctions applied under the Code and Guidelines are enforced including the exclusion of identified parties from work opportunities in accordance with Ministerial decisions.

(ii) Dealing with breaches of the Code and Guidelines

It is clear from the foregoing that the CMG plays a key role in the implementation of the Code and Guidelines. It consists of a Senior Executive Service representative from each of DEEWR, the Departments of Prime Minister and Cabinet, Finance and Deregulation, Defence, and Infrastructure and Transport, and the Office of the Federal Safety Commissioner. In addition, the Director of FWBC and the Fair Work Ombudsman are non-voting members (para [7.2.2]).

The principal functions of the CMG are set out at para [7.2.1]. They include:

- setting 'the strategic direction' for Code and Guidelines-related education and compliance activities of DEEWR and the FWBC;
- reviewing reports of alleged breaches of the Code and Guidelines that have been drawn to its attention;
- deciding possible sanctions to be applied for breaches of the Code and Guidelines; and
- 'making recommendations to Ministers on preclusion sanctions for breaches of the Code and Guidelines'.

They also include referring alleged breaches of the industrial relations aspects of the Code or Guidelines to FWBC for investigation, and referring alleged breaches of State and Territory laws dealing with issues such as work health and safety or security of payments to the relevant State or Territory regulatory authority (para [8.1.1]).

Where it is established that there has been a breach of the Code or Guidelines, the Funding Entity is responsible for seeking voluntary rectification of the breach, and also seeking advice on what remedial action has been taken (para [8.1.3]). This could include, for example, a contractor that had been permitting union delegates to conduct site-inductions agreeing not to do so in future. If the breach is not voluntarily rectified, then the CMG may decide whether to impose a sanction (para [8.2.1]).

Before imposing a sanction, the CMG must contact the party alleged to be in breach, and ask them to show cause why the CMG should not apply or recommend a sanction (para [8.4.1]). Having taken account of any response from the alleged contravener, the CMG will arrive at a decision. That decision, and the reasons for it, must be committed to writing (para [8.2.10]), and the party that is to be sanctioned given at least 14 days' notice of the intention to apply or recommend a sanction (para [8.4.1]).

The only sanctions that are expressly mentioned in the Guidelines are a formal warning, or preclusion from tendering for government work for a period of up to six months.[106] However, it seems clear that as well as complete exclusion, 'preclusion' from tendering can also mean curtailment of the capacity to tender, for example by limiting the capacity to tender to certain geographical areas or to contracts below a specified value. In addition, the Select Council on Workplace Relations, together with all Australian Government agencies, is to be advised of the imposition of sanctions (para [8.2.11]). This ensures that the imposition of sanctions is accorded a measure of publicity — as does the publication on the DEEWR website of details of sanctions that have been imposed.

A formal warning would indicate that 'future breaches may lead to sanctions such as preclusion from Government construction work' (para [8.2.5]). If the breach was of a serious nature, such as breach of a relevant statutory provision, the CMG could consider the application of a preclusion sanction, without first issuing a formal warning (para [8.2.6]). This would be done by way of a recommendation to the relevant Minister that a party be precluded from tendering for government work for a period of up to six months. Any such preclusion could be extended for further periods of up to six months in respect of any subsequent breaches (para [8.2.7]).

According to para [8.4.2], 'existing avenues for the review of administrative decisions can be used to process complaints arising from the Code'. However, it goes on to state that 'access to the Administrative Appeals Tribunal or to a review under the *Administrative Decisions (Judicial Review) Act 1977* are not available'. On the other hand, para [8.4.3] notes that 'judicial review of executive decisions…may be available under s 75(v) of the Constitution or s 39B of the *Judiciary Act 1903*'. Alternatively, according to para [8.4.4], 'parties may make a complaint to the Commonwealth Ombudsman, or seek internal review by the Secretary of DEEWR, who may review a CMG decision'.

The combined effect of this is that the most obvious, and most appropriate, means of review of decisions relating to the Code and Guidelines are *not* available to parties who are alleged to have breached them. Instead, a party that is aggrieved by such a decision must seek review by way of prerogative order. This means that they must establish the existence of jurisdictional error — no easy task in a context such as that under contemplation. Alternatively, they can complain to the Ombudsman or the Secretary of DEEWR. Conceivably, they might also be able to obtain relief by way of injunction and/or damages for breach of contract, although the range of situations where such relief would be a viable proposition is likely to be extremely narrow, and would, in any event, be of small comfort to those who had been wronged by being denied the capacity to enter into contractual relations in the first place.[107] The law of torts would also appear to offer little prospect of relief — except perhaps in extreme

106 Forsyth et al, above n 2, 36 also refer to 'publication of the details of the breach and identification of the party committing the breach' and 'a reduction in opportunities to tender for Commonwealth funded work for a specified period'. The 2012 Guidelines do not expressly refer to either option, although according publicity to breaches is clearly implicit in the notification requirements in para [8.2.11].

107 Cf *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

circumstances where the decision-maker could be seen to have been grossly negligent or to be guilty of misfeasance in public office.[108]

Wilcox described the absence of access to normal channels of judicial and administrative review as 'outrageous', and strongly urged that decisions taken under the Guidelines 'should be made judicially reviewable under the ADJR Act and administratively reviewable by the AAT'.[109] Both employer and union submissions to Wilcox also urged that normal procedures for review of administrative decisions should be available in relation to determinations under the Code and Guidelines.[110] The then-ABCC regarded this suggestion as 'unjustified', and warned that 'a move in this direction will reduce the flexibility and adaptability of the Guidelines'.[111]

In the event, sanctions have been imposed on only five occasions. In November 2006 three demolition companies in South Australia were precluded from government tendering for periods of three months each for engaging in collusive tendering practices. Also in November 2006, John Holland Group Pty Ltd was issued with a formal warning for using a site delegate to undertake site induction processes. Most recently, in September 2007, Baulderstone Hornibrook Pty Ltd was issued with a formal warning for the same 'offence'.[112]

There appear to have been no applications for relief by way of prerogative order, requests for internal review, or complaints to the Commonwealth Ombudsman in relation to the imposition of sanctions for breach of the Code or Guidelines. Despite this, and notwithstanding that no sanctions have been imposed under the Rudd or Gillard Governments, the fact remains that the enforcement regime that has been adopted in relation to the Code and Guidelines does not provide adequate safeguards for the rights of individuals and corporations. It also remains the case that the Code and Guidelines constitute a highly elaborate regulatory mechanism that applies to an important sector of the economy, and which lacks any legislative foundation.

IV THE FAIR WORK PRINCIPLES

As noted earlier, in July 2009 the then-Minister for Education, Employment and Workplace Relations released a set of FW Principles which were intended to ensure that 'procurement decisions are consistent with the Fair Work Act and its aims including promoting fair, cooperative and productive workplaces in which employees are treated fairly and with respect including respect for freedom of association and their right to be represented at work'.[113] These Principles replaced, and were much

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108 See, eg, *Farrington v Thomson and Bridgland* [1959] VR 293; *Tampion v Anderson* [1973] VR 715; *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Northern Territory v Mengel* (1995) 185 CLR 307; *Sanders v Snell* (1998) 196 CLR 329.

109 Wilcox, above n 68, [7.32(i)].

110 Ibid [7.13] (AiG and Australian Constructors Association) and [7.28] (ACTU).

111 Lloyd, above n 68, [33].

112 See also Forsyth et al, above n 2, 36. Note, however, that the authors describe a different basis for the John Holland formal warning than that which appears on the DEEWR website.

113 Julia Gillard, 'Contractors Must Meet Fair Work Principles to Secure Government Work' (Media Release, 31 July 2009). For further comment on the FW Principles, see John Howe, 'Government as Industrial Relations Role Model: Promotion of Collective Bargaining and

more far-reaching than, the relevant provision in the then-current Commonwealth Procurement Guidelines. The new Principles were warmly welcomed by a number of union leaders,[114] and it seems reasonable to suppose that they were intended at least in part to mollify unions who were unhappy at the fact that the recently-enacted FW Act was not more overtly 'worker-friendly' in relation to issues such as the permissible content of enterprise agreements and access to arbitration.

The FW Principles apply to requests for tenders or requests for expressions of interest issued on or after 1 January 2010 by Departments of State, Departments of the Parliament, prescribed agencies under the *Financial Management and Accountability Regulations 1997* (Cth), and Commonwealth authorities and companies which were required to apply them by Ministerial direction under the *Commonwealth Authorities and Companies Act 1997* (Cth). This means that they apply to procurement of construction services in the same way as procurement of any other goods or services — that is, for those departments and agencies to which they apply, they would operate as additional requirements to those set out in the Code and Guidelines. However, they do not apply to procurement of construction services with a value of less than $9m,[115] whereas the Code and Guidelines apply to 'all construction activity undertaken by or on behalf of Funding Entities, irrespective of the value of a project' (para [3.2.1]). The FW Principles are also inapplicable to 'Commonwealth funding provided through grants or other programs' (para [4.1.1]). This has the effect that some Government-funded construction activity is subject to both the Code and Guidelines and the FW Principles, whilst some is subject to the Code and Guidelines, but *not* the FW Principles.

In terms of content, the main requirements of the FW Principles are that:

- It is a condition of contract that suppliers will comply with 'all relevant workplace laws', including the FW Act, applicable awards and agreements, occupational health and safety laws, and workers compensation laws (para [5.1.3]). This essentially replicates para [6.1.1] of the Guidelines, and means that any breach of the relevant 'laws' would constitute a breach of contract as well as of the law concerned. There is, however, no provision for a separate enforcement regime such as that described earlier in relation to the Code and Guidelines. This is regrettable, and must inevitably compromise the efficacy of the FW Principles as a regulatory tool.
- Tenderers are required to provide details of any adverse decision of a court or tribunal relating to breaches of workplace relations law, occupational health and safety law, or workers' compensation law in the two years preceding the submission of a tender or expression of interest. They must also provide details of any order in relation to any such breach with which they have not fully complied. Failure to comply with this requirement *may*

Workplace Cooperation by Non-Legislative Mechanisms' in Creighton and Forsyth, above n 78, 191–5.

114 See, eg, the Federal Secretary of the Australian Workers Union and the National Secretary of the Australian Manufacturing Workers Union as quoted in 'New Mandate for Government Tenderers to Comply with Fair Work Principles, or Miss Out', *Workplace Express*, 28 July 2009.

115 Department of Education, Employment and Workplace Relations, *Fair Work Principles User Guide* (DEEWR, Canberra, 2010) [4.3.1(iii)].

result in a tender or expression of interest being excluded from further consideration, and (subject to limited exceptions) Commonwealth entities are forbidden from making supply contracts with tenderers who have not fully complied with any court or tribunal order against them in relation to breach of a relevant law.[116]

- Where a tenderer has an enterprise agreement made under the FW Act on or after 1 January 2010, that agreement must include a 'genuine dispute resolution procedure' (para [5.2.3]) which meets the criteria set out in para [5.2.5]. These are in turn identical to those set out in the May 2012 Guidelines discussed earlier.

  The inclusion of this requirement in the FW Principles was the subject of strident criticism from a number of employer organisations and sections of the media on the ground that it appeared to restore 'compulsory' arbitration 'by the back door'.[117] To some extent this is indeed the case, although it should be noted that no such requirement would arise if the employer did not have an enterprise agreement. This seems to provide an incentive for employers who wish to avoid the impost of compulsory arbitration to refuse to make an enterprise agreement. It seems unlikely that this would happen very often in practice, but the fact that it is even a theoretical possibility does not sit comfortably with the Principles' stated objects of ensuring 'fair, cooperative and productive workplaces' and respect for freedom of association and employees' right to be represented at work.

- Finally, tenderers must be required to provide 'confirmation' that they have 'consultation arrangements which encourage cooperation and engagement of employees and management', and that they 'understand and respect their employees' rights in relation to freedom of association and the right to representation at work, including that the tenderer allows its employees to be able to make a free and informed choice about whether to join a union and be represented at work' (para [5.3.2]).

Despite the absence of a rigorous monitoring and enforcement procedure such as that described above in relation to the Code and Guidelines, the FW Principles appear to be much more in sympathy with the objectives of *Convention No 94* than the Code and Guidelines. This is confirmed by the *Australian Government Procurement Statement* which was released on 28 July 2009. This *Statement* affirms the importance of ensuring that the Commonwealth obtains 'value for money' in the procurement context, and expressly acknowledges the virtues of 'competitive markets' for government services,[118] but goes on to recognise that the Government has a 'public responsibility to provide a model of fairness in the workplace for those who are performing work for the Commonwealth, whether as employees of a Commonwealth agency, or as employees of a contractor to the Commonwealth'.[119] Noting that public procurement is 'sometimes used as a vehicle to undermine the entitlements of employees', it expressly repudiates 'the adoption of contracting arrangements for this purpose', and affirms the

116 Ibid [5.1.5], [5.1.7] — cf [5.1.1] as described above.
117 See, eg, Mark Skulley, 'Labor Puts IR burden on Business', *Australian Financial Review* (Sydney) 14 April 2010, 1, quoting representatives of the ACCI and AiG.
118 Australian Government, Australian Government Procurement Statement (July 2009) 2.
119 Ibid 9.

Government's expectation that 'in conducting their businesses, government contractors will meet public expectations of fair and reasonable workplace practices'.[120]

V THE CODE AND GUIDELINES IN PERSPECTIVE

Practical impact

There are no scientific data as to the practical impact of the Code and Guidelines. Even at an anecdotal level, it is impossible to distinguish between the impacts of the Code and Guidelines on the one hand and the BCII Act on the other. Nevertheless, employer submissions to the Wilcox Review evidenced a clear perception that the Code and Guidelines had exerted a positive influence upon behaviours in the industry, and were strongly supportive of retention of the Code and Guidelines.[121] They also indicated that employers treated code-compliance extremely seriously:

> In discussions, some employer representatives said the importance of the Guidelines was that they raised the stakes. Even if the Guidelines covered much the same ground as the BCII Act and the WR Act, *it was one thing to risk a penalty for a contravention of the legislation; it was another matter to shut oneself out of all Commonwealth funded work*. The employer representatives generally added that the unions knew it was imperative for the employer to remain 'code-compliant' (actually Guidelines compliant); this helped the employer resist any union pressure to break the rules.[122]

This last comment serves to highlight the fact that the unions in the industry — despite their reputation for militancy, and disregard for legal niceties — have been largely compliant in the face of Code and Guidelines requirements. To some extent this may indeed reflect a recognition that if employers were unable to secure Commonwealth-funded work, there would be fewer jobs for their members. It is also interesting to note that although some union submissions to Wilcox were sharply critical of various aspects of the Guidelines as they then stood,[123] there was also an overall acceptance that 'the government has the right to set internal guidelines for government procurement' and that there was merit in the government using such guidelines 'to promote good industrial practices, by preferring suppliers who pay decent wages and conditions, and who respect their workers' rights'.[124]

Even if the Code and Guidelines have had some positive impact upon behaviours, and culture, in the construction industry, it is not at all clear that the 'end' of cultural and behavioural change justifies the 'means' in terms of failure adequately to respect the rule of law, and the significant levels of inconsistency with Australia's international obligations which are described below.

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120 Ibid. See also the Department of Finance and Deregulation, *Commonwealth Procurement Rules: Achieving Value for Money* (Department of Finance and Deregulation, 2012) 3, which became operative on 1 July 2012, and which 'represent the Government's policy framework under which agencies govern and undertake their own procurement'. The Rules do not, however, make any express reference to the FW Principles.

121 Wilcox, above n 68, [7.8]–[7.18].

122 Ibid [7.11] (emphasis added).

123 Ibid [7.27]–[7.31].

124 Ibid [7.27].

International obligations

As noted earlier, Australia has not ratified *Convention No 94*. Consequently, there can be no suggestion that any inconsistency between the Code and Guidelines and the requirements of the Convention constitutes a breach of Australia's international obligations. Nevertheless, it is instructive to consider the requirements of the Code and Guidelines by reference to the terms of the Convention — not least because it is 'the world's only binding, universal and systematically supervised instrument' that deals with public contracting.[125]

In many respects, the approach adopted by the Code and Guidelines is consistent with the techniques that are contemplated by *Convention No 94*, and the 1946 Fair Wages Resolution. In particular, compliance with the Code and Guidelines is made a condition of contract for those businesses which undertake Commonwealth-funded building and construction activity in essentially the same way that art 2 of *Convention No 94* requires the inclusion of labour clauses in contracts that fall within the scope of that instrument. The sanctions that the two instruments contemplate in the event of breach are also essentially similar: rescission of contract and/or an action in damages, and preclusion from future contracting opportunities. Other similarities include that principal contractors are made responsible for ensuring compliance by subcontractors; that some contracts for amounts below a prescribed threshold are excluded from the Code and Guidelines, and may be excluded from the Convention; and both the Convention and the Code and Guidelines contemplate 'a system of inspection adequate to ensure effective enforcement'.[126]

That said, the two instruments are poles apart in terms of their core objectives. As indicated, the purpose of the Convention is essentially protective and promotional in character: in other words, it is intended to protect workers against abuses associated with using low labour costs to obtain a competitive advantage in public contracting, and to promote the regulation of terms and conditions of employment through collective bargaining. The principal purpose of the Code and Guidelines during the period of the Howard Government was to help give effect to the Government's industrial/political agenda by subjecting workers and employers in the construction industry to requirements that did not apply to any other sector of the economy: as noted earlier, this constituted a form of 'industrial apartheid'. Viewed in these terms, the Code and Guidelines could not plausibly be seen to protect or to promote the interests of workers and their organisations, or to encourage the regulation of terms and conditions of employment through collective bargaining. The changes effected in 2009 and 2012 mean that in substance the Code and Guidelines no longer impose substantive limitations upon the industrial behaviour of industry participants that go significantly beyond the relevant legislative requirements, but they still subject those participants to a regulatory regime which is markedly more onerous than that which applies to employers, employees and unions elsewhere in the labour market.

Ironically, the Code and Guidelines would probably not be adjudged to be inconsistent with *Convention No 94*, even if it had been ratified by Australia. That is because they comprise a regulatory regime that simply was not in the contemplation of the framers of the Convention, and that is so alien to the intent of that instrument that they are not even inconsistent with it! The Code and Guidelines do, however, appear

125 ILO, above n 24, xiv.
126 *Convention No 94* art 4(b)(ii).

to run counter to other international obligations that have voluntarily been assumed by Australia: notably those derived from the fact of membership of the ILO, and those incurred by the ratification of *Convention No 87* and *Convention No 98*.

As noted earlier, in November 2005 the CFA examined a complaint (*Case No 2326*) that had been lodged in early 2004 by the ACTU and the international trade union centre for the construction industry.[127] The complaint originally related to the Building and Construction Industry Improvement Bill 2003, but by the time the CFA came to examine the complaint, a much-modified version of that Bill had become law as the BCII Act. It will be recalled that the Government had originally intended that the Code would form part of the 'Building Code' that was contemplated by Chapter 3 of the BCII Act, but that it subsequently decided not to proceed with this proposal, and instead retained the Code on a non-statutory footing. This appears to have caused considerable confusion both for the complainants, and the CFA, as to the extent to which the Code would be subject to parliamentary scrutiny,[128] and as to the consequences of breach of the Code in terms of the imposition of monetary penalties.[129]

These confusions aside, the CFA had no doubt that the then-current Guidelines imposed restrictions on the autonomy of participants in collective bargaining in the construction industry that were not consistent with the principles of freedom of association (and by inference, art 4 of *Convention No 98* and art 3 of *Convention No 87*).[130] These restrictions related in particular to the kinds of agreements parties might make, and the range of matters with which they could deal:

> The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element of freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would

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127 ILO, above n 64, [409]–[457]. For further consideration of this case by the CFA see ILO, above n 65, [21]–[24]; CFA, *348th Report of the Committee on Freedom of Association* (ILO, 2006) [35]–[42]; CFA, *353rd Report of the Committee on Freedom of Association* (ILO, 2009) [41]–[45].

128 Both the complainant (ILO, above n 64, [421]) and the CFA (ibid, [449]) seem to have assumed that the Code would not be subject to Parliamentary scrutiny even when it was made part of the Building Code. This is not correct, as is clear from s 27(5) of the original BCII Act and now the FW(BI) Act. Indeed, as noted earlier, it was in order to avoid such scrutiny that the Howard Government decided not to make the Code part of the proposed Building Code.

129 ILO, above n 64, [449]. The monetary penalties contemplated by s 28(4) related only to failure to provide reports to the ABCC when requested to do so under s 28(2). This provision was repealed in 2012.

130 Relevantly, *Convention No 98*, art 4 protects the right of employers and unions to engage in autonomous collective bargaining. This includes the right to determine the content of agreements, and the level at which they are negotiated. *Convention No 87*, art 3(1) protects the right of organisations of employers and workers 'to organise their administration and activities and to formulate their programs', whilst art 3(2) enjoins the public authorities to 'refrain from any interference which would restrict this right or impede the lawful exercise thereof'. For summaries of the guarantees provided by *Convention No 87* and *Convention No 98*, see N Valticos and G von Potobsky, *International Labour Law* (Kluwer Law and Taxation Publishers, 1995) 94–100; Breen Creighton, 'Freedom of Association' in R Blanpain (ed) *Comparative Labour Law and Labour Relations in Industrialized Market Economies* (10th ed, Kluwer Law International, Alphen aan den Rijn, 2010) 291–301, 325–35.

> restrict this right or impede the lawful exercise thereof…The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in the case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc; these matters should not be excluded from collective bargaining by law, or as in this case, by financial incentives…in case of non-implementation of the Code and Guidelines.

Accordingly, the Committee asked the Government to:

> [T]ake the necessary steps with a view to promoting collective bargaining as provided in *Convention No 98*… In particular, the Committee requests the Government to review, with the intention to amend, where necessary, the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles. It further requests the Government to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining.[131]

These requests were subsequently endorsed by the CEACR in the context of their periodic examination of Australian compliance with *Conventions No 87* and *Convention No 98*.[132]

Not surprisingly, the Howard Government did not accede to either the CFA or the CEACR's requests for changes to the Code and Guidelines. The revisions to the Guidelines effected by the Rudd Government in 2009 did remove some of the more egregious breaches of ILO standards, especially in relation to the range of matters with which agreements could deal. The adoption of the 2012 iteration of the Guidelines means that they no longer contain any restrictions that go beyond those set out in the FW Act and cognate legislation. However, that does not necessarily mean that the Guidelines no longer breach international law. On the contrary, the FW Act itself is non-compliant in a number of important respects.[133] This in turn means that Guidelines which require adherence to that legislation would also be non-compliant.

VI CONCLUSIONS

The Code and Guidelines constitute a perversion of the logic of using public procurement as a vehicle for workplace relations reform as contemplated by the Fair Wages Resolutions and *Convention No 94*. Many features of the Code and Guidelines are in fact consistent with both the Resolutions and the Convention — but with the fundamental difference that those instruments were conceived primarily as a way of

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131 ILO, above n 64, [457(d)].

132 See, eg, ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 95th Session, 2006, Report III (Part 1A) (ILO, 2006) 42–3. The Committee was still sharply critical of (and still misunderstanding the character of) the role of the Code and Guidelines in 2012 — see ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 101st Session, 2012, Report III (Part 1A) (ILO, 2012) 60–1.

133 See, eg, Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 10; Shae McCrystal, 'Fair Work in the International Spotlight: The CEPU Complaint to the ILO's Committee on Freedom of Association' (2011) 24 *Australian Journal of Labour Law* 163; Creighton, above n 78, ch 3.

protecting workers against exploitation and promoting the regulation of terms and conditions of employment through collective bargaining, whereas the Code and Guidelines were used (especially by the Howard Government) primarily to constrain the industrial behaviour of workers and unions in the construction industry.

Not only is this approach at odds with the underpinning logic of the Fair Wages Resolutions and *Convention No 94*, it also fails properly to respect the rule of law, as evidenced by: lack of parliamentary scrutiny of the making, variation and operation of the Guidelines;[134] denial of access to adequate judicial review of decisions under the Code and Guidelines; failure to give effect to Australia's international obligations; and interference with the civil liberties of participants (particularly workers and unions). These areas of dissonance were particularly acute under the Howard Government between 2003 and 2007. Revisions of the Guidelines by the Rudd and Gillard Governments at least mean that the Guidelines no longer proscribe conduct that would be entirely permissible elsewhere than in the construction industry, but have still not adequately addressed concerns associated with lack of parliamentary and judicial review, or non-compliance with international law. These continuing failures appear all the more incongruous in light of the fact that the regulatory regime of which they are part was put in place in an avowed attempt to restore the rule of law in an allegedly lawless industry.[135]

The approach to promotion of best practice that is enshrined in the FW Principles appears to be more in keeping with the rationale for the Fair Wages Resolutions and *Convention No 94*. As such, the Principles constitute a more measured approach to the use of public procurement as a vehicle for the implementation of public policy than the rather 'blunt instrument' constituted by the Code and Guidelines as described in this article.[136]

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134 In this context, it is well to note Freedland's concerns about extra-parliamentary 'law-making', even where the objects of that process are entirely benign — see Mark Freedland, 'Leaflet Law: the Temporary Short Time working Compensation Scheme' (1980) 9 *Industrial Law Journal* 254; Mark Freedland, 'Labour Law and Leaflet Law: the Youth Training Scheme of 1983' (1983) 12 *Industrial Law Journal* 220.

135 See, eg, 'Summary of findings and recommendations', Cole, above n 62, vol 1, 3–5.

136 For interesting studies on the use of procurement as a social policy tool by State governments, see John Howe and Ingrid Landau, '"Light Touch" Labour Regulation by State Governments in Australia' (2007) 31 *Melbourne University Law Review* 367; John Howe and Ingrid Landau, 'Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design' (2009) 51 *Journal of Industrial Relations* 575.