

## Employment & Safety Alert

### Building Code 2013

February 2013

The Building Code 2013 commenced on 1 February 2013, replacing the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry 2009 and introducing new rules for contractors negotiating enterprise agreements with unions in the contract building sector.

The Building Code 2013 (the **Code**) and the "Building Code 2013 – Supporting Guidelines for Commonwealth Funding Entities" (the **Supporting Guidelines**) set out the workplace relations obligations of "building industry participants" (including contractors, subcontractors and unions) in respect of building work on Commonwealth funded, and some privately funded, construction projects.

The Code and the Supporting Guidelines are intended to "codify" the existing obligations in the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry 2009 (the **Implementation Guidelines**), but contractors involved in Government-funded construction should be aware of some significant differences between the old and new regimes, including new obligations.

#### New obligations

Several obligations in the Code were not included in the Implementation Guidelines.

The most significant new obligation is addressed to contractors concerned about the commercial risks of including terms in their enterprise agreements that are proscribed under the Victorian Government's Building Guidelines.

The Code provides that a contractor engaged in enterprise bargaining must not refuse to consider a claim by a union on the ground that a third party (such as the Victorian Government) has indicated that it will or will not procure services from a person covered by an industrial instrument that contains proscribed terms.

It also provides that the Code, the *Fair Work (Building Industry) Act 2012* (the **Act**) and other relevant federal laws provide the only statement of the matters that a contractor must or must not include in an enterprise agreement. This should provide contractors, particularly those operating in Victoria, with greater certainty about what can be included in their enterprise agreements.

Another new obligation appears to be included in response to recently expressed union concerns about the engagement of overseas-born workers in the construction industry. It provides that a contractor must ensure that it complies with Australian immigration law and that all its employees and independent contractors are lawfully entitled to be engaged.

The other provision that is new is the requirement that a contractor who is already subject to any version of the Implementation Guidelines will immediately be subject to the Code. This differs from previous practice, under which projects continued to operate under the version of the Implementation Guidelines that applied when tenders or expressions of interest were first called.

Although this provision reduces the administrative costs of complying with various iterations of the Implementation

Guidelines, it may also expose some contractors to a wider range of union claims when bargaining for enterprise agreements affecting legacy construction projects.

## Other changes

The Code has expanded several provisions in the Implementation Guidelines, effectively altering their previous effect.

Unregistered written agreements of any kind (excluding common law employment contracts) were deemed to be inconsistent with the National Code of Practice for the Construction Industry 1997 and the Implementation Guidelines.

The Code has altered this position to limit the prohibition to unregistered written agreements that provide for terms, conditions or benefits of employment. This leaves contractors exposed to bargaining for unregistered written agreements about a large number of other matters including community, welfare or charitable activities and environmental initiatives.

Similarly, the Implementation Guidelines required parties to strictly comply with legislated right of entry requirements. The Code merely requires parties to “comply” with all right of entry laws and notes that the relevant laws may not regulate all circumstances in which a union official (whether a permit holder or not) may enter a worksite. The Code provides that in some circumstances a union official may be invited to visit a site or a principal contractor may agree to allow a union official to enter a site.

This less restrictive regime may create difficulties for contractors who have relied on the strict application of right of entry laws to regulate their engagement with unions.

The Federal Government’s position in respect of project agreements also appears to have softened.

Under the Implementation Guidelines, project agreements were only appropriate for major contracts (that is, projects worth more than \$100 million) and funding entities were not to agree to project agreements or project awards in the absence of a clear and demonstrable benefit to the Australian Government. The only reference to project agreements in the new regime is in the Supporting Guidelines, under which it is simply acknowledged that “there may be some situations where project agreements may be appropriate.”

## Other comments

Contractors who are, or who are likely to be, involved with Federal Government-funded projects will be familiar with most of the obligations in the Code and the Supporting Guidelines. Nevertheless, it is recommended that contractors become familiar with the new regime generally, which includes the Act, the Code and the Supporting Guidelines, as well as the new and changed requirements discussed above.

The Fair Work Building Inspectorate has power under the Act to monitor compliance with building related legislation and the Code by building industry participants and to inquire into, and investigate, any act or practice by a building industry participant that may be contrary to the Code amongst other things. The Inspectorate has already demonstrated a willingness to exercise these powers.

Although there are no penalties for failing to comply with the Code, the Code Monitoring Group may impose sanctions where a party has failed to meet their obligations. Such sanctions may have significant commercial effects.

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