



2 May 2005

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Dear Mr Kovacic

I write in response to the invitation by the Minister for Employment and Workplace Relations to contribute to the review of the Australian Government Implementation Guidelines (the Guidelines) which underpin the National Code of Practice for the Construction Industry (the Code) and to comment on the Government's proposals to strengthen the Guidelines.

Renegotiation of enterprise agreements

In his letter of 18 March 2005, the Minister urges employers to resist pressure by unions to renegotiate existing agreements well in advance of their expiry dates. We support this call and have communicated the Minister's message to our members.

Employers have welcomed the Government's introduction into Parliament of the *Building and Construction Industry Improvement Bill 2005* ("the BCII Bill 2005") to protect employers from coercion to renegotiate existing agreements in advance of their expiry dates.

However, on 31 October 2005 thousands of construction industry agreements expire and many employers will initiate the process of negotiation shortly because they are legally obligated to do so. It is a standard provision in most agreements that the parties will commence negotiations for the new agreement three to six months in advance of its expiry. The right of companies to enter into legally binding agreements that are in conformity with the prevailing Code and Guidelines needs to be recognised.

Employers who renegotiate a new agreement are entitled to ask the Commonwealth to confirm that their new agreement, once drafted, complies with the prevailing National Code of Practice and Commonwealth Implementation Guidelines. Confirmation of compliance needs to be provided by the Commonwealth promptly. Once the Commonwealth has confirmed compliance, employers need certainty that compliance will remain for the life of the agreement regardless of any subsequent changes to the Code and Guidelines.

The timing of the Commonwealth's Review of the Implementation Guidelines places employers in an extremely difficult position. It will be very damaging for employers to delay the renegotiation of their agreements until after the Commonwealth has issued new Guidelines from 1 October. At that stage it will be close to the time when the unions will have the right to take protected industrial action. Also, as set out above, most agreements legally require employers to commence renegotiating their agreements much earlier than 1 October.

The prospect of a new National Code of Practice

The current National Code of Practice for the Construction Industry was developed by the Commonwealth, State and Territory Government in 1997 via the agency of the Department of Labour Advisory Committee (DOLAC) and the Australian Procurement and Construction Council (APCC) representing Australia's procurement and construction Ministers. In February 1998, the Commonwealth published Commonwealth Implementation Guidelines for the National Code of Practice for the Construction Industry to assist Commonwealth departments and agencies with the implementation of the National Code. In December 2003, the Government released revised Implementation Guidelines for the National Code of Practice for the Construction Industry.

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

In response to the recommendations of the Royal Commission into the Building and Construction Industry the Government introduced into Parliament the *Building and Construction Industry Improvement Bill 2003* ("the BCII Bill"), which provides, *inter alia*, for the Minister to "issue one or more documents that together constitute a code of practice (the *Building Code*) that is to be complied with by persons in respect of building work."

Consequently, there is the prospect that a new Building Code will be issued pursuant to the Bill once enacted. Given the Government's announcements that the Bill is likely to be enacted during the course of 2005, a new Building Code is likely to be issued during the life of enterprise agreements.

Any new Building Code and associated Implementation Guidelines could be significantly different to the existing Code and Guidelines. Employers with an agreement which complies with the prevailing Code and Guidelines at the time when the agreement was made, need to have that compliance recognised by the Commonwealth in its procurement policies and procedures. Certification of compliance needs to remain for the life of the agreement.

It is preferable that the Commonwealth engage the State/Territory Governments in developing any new Building Code.

It is also preferable that, if a new Building Code is to be developed, that the Government delay amending the Implementation Guidelines, until the Code has been developed and that the two integrated documents be released for implementation at the same time.

Proposal to require contractors wanting to undertake Australian Government construction work to comply with the Code and Guidelines on all projects, whether they are Government projects or not

In our earlier submissions to the Government concerning the Code we noted that the BCII Bill extends the role of the National Code far beyond standard-setting for contractors engaged on projects funded by the Commonwealth.

By using the Corporations Power under the Constitution, the Code's role extends to the regulation of all incorporated building contractors. Under the provisions of the BCII Bill, the Code would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. Further, the exercise of Section 241 – Delegation by Minister, of the Bill allows the Minister to delegate the power to issue or amend the Building Code to the ABC Commissioner, a Deputy ABC Commissioner, the Federal Safety Commissioner and various other persons.

The Minister's letter of 18 March reports that the Government is considering a proposal to require contractors wanting to undertake Australian Government construction work to comply with the Code and Guidelines on all of their projects, whether they are Government construction projects or not.

There are no protections within the Bill to ensure that the content of the Building Code remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code.

We have a similar concern with the process of implementing the current Implementation Guidelines or any revised Guidelines. The Guidelines has a powerful commercial impact on the capacity of an employer to win work that is directly or indirectly funded by the Commonwealth. There is a lack of transparency regarding how compliance with the Guidelines will be assessed, and how that determination can be reviewed or appealed.

Ai Group does not support the broad regulatory role assigned to the Code and Guidelines under the BCII Bill. We believe that the Code should remain a standard-setting document applicable to projects which are funded by the Commonwealth. Rather than using the Building Code and Guidelines to regulate the whole industry, any necessary regulatory provisions for the whole industry should be incorporated within the BCII Bill or set out in Regulations made under the legislation. This would provide an appeal mechanism for organisations adversely affected by decisions made by the Commonwealth pursuant to the law and regulations.

Specifying that Government agencies can only accept tenders and/or expressions of interest from contractors which have in place Code compliant workplace arrangements

We do not object to the proposal that Government agencies only accept tenders and/or expressions of interest from contractors that have in place Code compliant workplace arrangements. However, our support for the proposal is conditional upon the Government

having in place a fair, efficient, transparent and independent process to enable contractors, subcontractors, consultants and suppliers, to seek a timely determination on the Code compliance status of their workplace arrangements. This must also include a mechanism to have that decision reviewed or appealed.

Ai Group strongly objects to the requirement in the Implementation Guidelines (December 2003) that contractors must require compliance with the Code and Guidelines by all subcontractors and material suppliers. Clearly contractors do not have the authority to determine Code compliance. This is the responsibility of the Commonwealth. To attempt to transfer this responsibility and its attendant risk to the contractor is unreasonable and unfair. The same argument can be applied to subcontractors, consultants and others lower in the contract chain, who are also assigned this risk.

This process could lead to a project grinding to a halt or the commencement date of a project being significantly delayed as attempts are made by contractors to assess the compliance of the workplace arrangements of a very large number of subcontractors. Assessing code compliance is not a straightforward task as the Commonwealth is well aware.

Expressly stating that unregistered agreements to which a contractor is a party must comply with the Code and Guidelines

We support, in principle, the proposal that unregistered agreements to which a contractor is party must comply with the Code and Guidelines. We assume that the Government's objective in dealing with "unregistered agreements" is to bring within the ambit of the Code and Guidelines written common law industrial agreements, exchanges of letters and so on.

However, every commercial contract between a contractor, subcontractor and sub-subcontractor, consultant and supplier that deals in part with the assignment of industrial risk (and most do), could be caught within the definition of "unregistered agreement". This is clearly not the intention of Government. Therefore, the definition of "unregistered agreement" needs to be carefully considered. The Government will not want the task of reviewing thousands of commercial contracts to determine if they are, or are not, Code compliant. Nor is it appropriate that it do so.

In addition, this provision should not be used retrospectively to harm a contractor who has entered into an unregistered agreement prior to the commencement of this new Guideline.

Clarifying the circumstances in which sanctions would be considered and the nature of sanctions which might be imposed following a breach of the Code and Guidelines

We support the need for the Guidelines to clarify the circumstances in which sanctions would be considered and the nature of sanctions which might be imposed following a breach of the Code and Guidelines. However, the Guidelines should also clarify who will make the decision on a breach and provide a transparent avenue for appeal, consistent with rights provided more widely under administrative law.

Code compliance approval processes

The December 2003 Guidelines document was designed to inform and assist Australian Government departments and agencies with implementation of the Code.

The Guidelines do not provide contractors, subcontractors or suppliers with sufficient guidance to enable them to determine if their workplace relations arrangements are Code compliant. In many respects the Industry Guidelines are a more informative document because they deal with compliance in much more detail. However, this document has also been prepared for Australian Government agencies as clients, in their dealings with industry partners.

The new Guidelines need to focus on giving advice to contractors, subcontractors and suppliers to assist them to determine whether their proposed agreements are Code compliant.

The Minister's letter of 18 March 2005 states clearly *"Only my Department can provide definitive advice about whether workplace relations arrangements comply with the Code and Guidelines"*. The letter goes on to say that the Department will be ready to assist companies wishing to develop Code compliant arrangements.

We believe that when the Department determines that an agreement is Code compliant, it should issue a certificate of currency that will operate for the period of the agreement. This will ensure that when a contractor or subcontractor bids for work on a project requiring Code compliance, the certificate will provide for the organisation to be quickly pre-qualified.

It will become imperative for companies to ensure that their proposed workplace relations arrangements are Code compliant and with many thousands of agreements expiring in October, the Department can expect to be inundated with requests for confirmation of Code compliance around that time.

Our own inquiries with the DEWR Code Implementation Team confirm that a company could expect a six week turnaround in assessing an agreement for Code compliance.

The current Guidelines require contractors, subcontractors, consultants and all employees undertaking work on the project to ensure that the workplace relations arrangements proposed for the project are consistent with the Code and Guidelines – a responsibility that they cannot possibly accept. The Federal Government needs to have an effective and efficient approval process in place to assess workplace arrangements for Code compliance.

The DEWR should establish workable protocols to quickly approve agreements for Code compliance. If the Department is unable to manage this workload it should consider:

- Authorising third party organisations to review agreements prior to registration and, if deemed to be Code compliant, to issue a certificate of currency;
- Accepting a statutory declaration from authorised organisations stating that the agreement has been reviewed for Code compliance and found to be compliant; and

- Accepting a statutory declaration from a company stating that the company has reviewed its agreement against a self-assessment checklist developed by DEWR to test for Code compliance and has found the agreement to be compliant.

It is quite clear that there needs to be a workable system in place before September to allow the large volume of agreements which will be entered into around that time to be tested for Code compliance.

Ai Group continues to support the Government's construction industry reform endeavours. However, the implementation of the reform program must be fair and balanced.

Should you require any further clarification of Ai Group's position, please contact Jim Barrett, General Manager – Construction on telephone 02 9466 5522.

Yours sincerely

A handwritten signature in black ink, appearing to read "Heather Ridout", is positioned to the left of a vertical line. The signature is cursive and somewhat stylized.

Heather Ridout
CHIEF EXECUTIVE