



20 January 2009

Hon Murray Wilcox QC
Wilcox Consultations Secretariat
Department of Education, Employment and Workplace Relations
Location Code 10M32
GPO Box 9879
CANBERRA ACT 2601

Dear Mr Wilcox,

I write to you following our recent submission to your review (made jointly with the Australian Constructors Association), reporting on matters related to the transition from the Office of the Australian Building and Construction Commission (ABCC) to the Specialist Division.

Thank you for your contribution to our PIR Conference in Canberra on 8 December. In your presentation to the Conference you posed a number of questions that are central to your review. One of those questions related to the future of the National Code of Practice for the Construction Industry (the Code) and the related Australian Government Implementation Guidelines (the Guidelines).

In response to the issues raised by you in relation to the Code, I thought it would be helpful if we provided you with a supplementary statement specifically addressing the importance of the Code and its relevance to the Government and industry.

The 1992 the Gyles Royal Commission into the NSW Building Industry was the first to recognise the importance of Government purchasing power in regulating behaviour in the construction industry. The Royal Commission found that action by the construction unions, aided and abetted by major contractors, allowed "industry standards" to develop that imposed significant costs on the industry's clients and ultimately the general public.

The thrust of the Gyles approach, later adopted by Commissioner Cole, was that contractors did not have an unfettered right to undertake Government-funded construction work. If contractors wanted to secure Government-funded work then they would have to demonstrate that each was playing its part in ridding the industry of the unlawful and unethical practices that tainted the industry at that time.

Historically, unions in the construction industry have used the commercial risk faced by the contractor as a lever to secure concessions, often obtained through coercion. This resulted in a legacy of restrictive work practices and cost burdens that infected subsequent projects and ultimately became an expense borne by the industry's clients.

As Commissioner Cole pointed out in his Final Report “there is a tendency for the interests of Government as regulators and their interests as clients to come into conflict,”¹ and when this occurs the interests of public sector clients in securing timely completion of projects usually prevails over compliance.

Therefore, the importance of the Code and Guidelines in breaking this cycle cannot be understated. Essentially the Code and Guidelines imposed a new commercial risk on contractors that far outweighed the costs of caving in to the unlawful demands of unions. The threat of being removed from tender lists for public sector construction work was a much greater risk than the short-term benefits to be gained from breaching industrial laws and agreements to secure relief on a distressed project.

Because the Federal Government as a major client of the industry provides funds for building and construction activity, it has the capacity through its purchasing power to influence the behaviour of participants in the industry.

At the PIR conference you posed the question, “what would be lost if the Code disappeared”. This is an extremely important question because in essence the Code and Guidelines do little more than require a contractor or other service provider, to act lawfully and it could be argued that in that respect the Code and Guidelines are redundant.

What is missed in this argument is the importance of imposing a commercial risk on industry participants that ensures the costs of acting in breach of workplace laws and regulations far outweighs the penalties that may be imposed by a court – that is the threat of being removed from future tender lists. To be removed from future tender lists would have catastrophic implications for a major contractor. Billions of dollars of work is at stake.

This development has also empowered contractors to remain steadfast when faced with union coercion to break industrial laws and regulations. Code compliance is essential to protect the commercial life of a construction contracting company. The unions have come to realise that it is pointless trying to coerce a company to breach the Code because the company has no choice other than to comply. Unions have also come to accept that the jobs of their own members rely on Code-compliance.

Code-compliance has become a given – a state of affairs that all participants need to accept and adhere to.

¹ Final Report of the Royal Commission into the Building and Construction Industry, Volume 7, Reform – National Issues Part 1, p73

As history has shown, tough laws and a strong investigation and prosecution agency do not guarantee results. How can a fine of a several thousand dollars and the loss of reputation compare to the loss of billions of dollars of work?

The huge commercial pressures which operate through the Code and Guidelines are extremely powerful.

I have offered these additional comments because it is important that you understand that it is not so much the content of the Code and Guidelines that is important, as the power that flows from commercial risk.

The Code and Guidelines are a flexible means of assuring lawful behaviour through self-regulation, supported by contractual obligations. Whilst there are some compliance costs to industry and Government, on balance, these are relatively low compared to the costs imposed by the industrial practices that marked the industry prior to the Royal Commission reforms.

I would be pleased to provide any further information which you may require.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Heather Ridout', with a horizontal line underneath.

Heather Ridout
CHIEF EXECUTIVE