

### WORKPLACE REFORM— THE CONTRIBUTION OF THE NATIONAL CODE OF PRACTICE AND IMPLEMENTATION GUIDELINES

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### INTRODUCTION

Industrial relations has been a key election issue.

On the eve of the election last Saturday Julia Gillard, the then Deputy Leader of the Opposition, said that industrial relations was the 'biggest' issue in the election:

*There has been no bigger issue in this country over the last few years than industrial relations and the extreme WorkChoices laws.<sup>1</sup>*

In the view of many commentators, the resounding election win to the Australian Labor Party (ALP) was because 'voters punished the coalition for its WorkChoices industrial relations reforms'.<sup>2</sup> However, the industry specific building and construction industry reforms were not subject to the same level of antipathy as the general workplace reforms. In the ALP policy document entitled Forward with Fairness—Policy Implementation Plan, it was made clear that:

*The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.<sup>3</sup>*

This paper outlines the role of the National Code of Practice for the Construction Industry and the related Implementation Guidelines<sup>4</sup> (Code and Guidelines) in establishing the current framework that delivers the rule of law to the sector. The paper does not set out a comprehensive history of the Code and Guidelines<sup>5</sup> but examines the role of these instruments in bringing about workplace reform and discusses some possible changes under an ALP Government. The manner in which the Code and Guidelines interact with some of

the other workplace reforms will also be touched upon.

### THE CURRENT REFORMS—WHY THEY ARE SUPPORTED

The Cole Royal Commission<sup>6</sup> comprehensively documented the workplace relations woes of the industry, specifically focusing upon unacceptable and unlawful behaviours of unions in the commercial building sector. The findings of the Royal Commission were supported by the work of the Interim Building Industry Taskforce which became the Building Industry Taskforce (the Taskforce) and then the Australian Building and Construction Commissioner (the ABCC) subsequently. Both taskforces published a report that thoroughly and objectively documented the unacceptable face of the building and construction industry and the ABCC has continued to publish reports about unacceptable conduct.<sup>7</sup>

The Royal Commissioner recommended comprehensive industry specific reform that has, in large part, been introduced, including a comprehensive overhaul of the then existing Code and Guidelines which were noted as not being appropriately enforced 'or, perhaps, at all'.<sup>8</sup> The Code has not changed since 1997 but the Implementation Guidelines contain the teeth of the reforms and have changed a number of times since Cole reported in 2003.

The Table below is an attempt to show the principal reform measures in industrial relations that affect the sector, all of which have created a plethora of new laws designed to bring about systemic change to the industry. The Table also indicates headline dates for changes to the Guidelines.

## BUILDING AND CONSTRUCTION INDUSTRY REFORM MEASURES

REFORM MEASURE	EFFECTIVE DATE
<i>Building and Construction Industry Improvement Act 2005</i> , administered by the Australian Building and Construction Commissioner (ABCC)	<ul style="list-style-type: none"> <li>• Stricter rules re unlawful industrial action retrospective to 9 March 2005</li> <li>• ABCC commenced 1 October 2005</li> <li>• Other provisions took effect 12 September 2005</li> </ul>
Building and Construction Industry Improvement Regulations 2005	<ul style="list-style-type: none"> <li>• 1 October 2005, as amended</li> </ul>
WRA as amended by the <i>Workplace Relations Amendment (WorkChoices) Act 2005</i>	<ul style="list-style-type: none"> <li>• New regime in operation from 27 March 2006</li> <li>• WRA amended in December 2006</li> </ul>
Principally the Workplace Relations Regulations 2006	<ul style="list-style-type: none"> <li>• WorkChoices regulations commenced operation on 27 March 2006, but have since been amended</li> </ul>
National Code of Practice for the Construction Industry Implementation Guidelines	<ul style="list-style-type: none"> <li>• 1 November 2005 changes significant</li> <li>• June 2006 reissue took into account changes brought about by the amendments to the WRA</li> <li>• Further revision in November 2006 to ensure side deals do not contain prohibited content</li> <li>• Industry Guidelines discontinued (announced by the Government on 12 December 2006)</li> </ul>
<i>Independent Contractors Act 2006</i> <i>Workplace Relations Legislation Amendment (Independent Contractors) Act 2006</i>	<ul style="list-style-type: none"> <li>• Commenced 1 March 2007</li> </ul>
Independent Contractors Regulations 2007	<ul style="list-style-type: none"> <li>• Commenced 1 March 2007</li> </ul>

There has been a manifestly positive change in workplace culture engendered by these reforms, especially via the work of the current 'cop on the beat' the Australian Building and Construction Commission. Builders have been able to build without the constant distraction of workplace disruption. These are some of the positive results that have been delivered via workplace change:

- Less industrial disputation. Annual days lost in the construction industry fell to 15,200 in 2006. This compares to 89,400 in 2005 and an annual average well in excess of 100,000 in the previous 5 years. Working days lost per 1,000 construction employees fell from 154 in the year preceding reform to 14 in 2006–07.

- Costs related to disputation have fallen in line with the decline in working days lost i.e. in the order of 85 per cent from previous levels.

- Construction industry employees have increased aggregate earnings by \$18 million per annum via the benefits of fewer working days lost through industrial action.

- In the year following establishment of the Australian Building and Construction Commission construction output increased by 8.5 per cent in real terms, employment rose by 6.1 per cent, productivity rose by 2.3 per cent and hourly rates of pay increased by 5.1 per cent.

- Independent economic analysis of industry productivity by Econtech found building and construction reforms delivered a

large dividend to the Australian community.

- Econtech reported industry benefits via reduced construction costs, higher productivity and fewer strikes, and economy-wide benefits of lower inflation and higher economic growth:

- the cost gap between commercial and residential building fell from 10.7 per cent to 1.7 per cent in 2007

- the gain in labour productivity for the industry is estimated to be 9.4 per cent

- CPI is estimated to be 1.2 per cent lower than it otherwise would be

- GDP is estimated to be 1.5 per cent higher than it otherwise would be

- economic welfare gain is estimated at \$3.1 billion per annum

## AGREEMENT MAKING

Master Builders' overall vision for the industrial relations system is where direct employer and employee parties are empowered to enter into any lawful workplace agreement that suits the particular workplace. The detail of this policy was outlined in the Master Builders Blueprint launched by our National President in September this year.<sup>9</sup> It is the impact of new agreements in the sector that has assisted with change and which has provided a productivity dividend. Many of those new agreements were created because of the need for building industry participants to comply with the provisions of the Code and Guidelines in order to qualify to tender for Commonwealth Government work (in fact before even an expression of interest is able to be lodged).

Because of the fundamental impact that the Code and Guidelines have had on agreement making, Master Builders has been concerned that these major instruments of reform should continue to be applied. The prior Government was committed to promoting reform via its purchasing power. In that regard, the Implementation Guidelines are the means by which the Government has used its purchasing power to set the standards of workplace arrangements where building industry participants undertake work for the Commonwealth and its agencies and where there is an element of Commonwealth funding associated with State and Territory Government works.<sup>10</sup>

From 1 January 2004, the Code and Guidelines have been applied to all construction projects directly funded by the Australian Government and its agencies through grant and other programmes as well as

to indirectly funded projects, pursuant to the following thresholds:

- where the value of the Australian Government contribution is at least \$5 million and represents at least 50 percent of the total project value; or
- where the value of the Australian Government contribution for the project is \$10 million or more, irrespective of the proportion of Australian Government funding.<sup>11</sup>

The Code and Guidelines must also be applied in respect of private work that commences after first lodgement of an expression of interest or tender for Australian Government projects where the expression of interest or tender occurred on or after 1 November 2005. On Commonwealth work where the thresholds apply, the principal contractor must ensure that those who undertake work, subcontractors, as well as suppliers are also Code and Guidelines compliant. This requirement has meant significant penetration of Code and Guidelines compliant agreements throughout the industry. This has increased the reform 'reach' greater than could be expected through the normal channels of the law. This point is reinforced by the fact that principal contractors do not directly employ the majority of labour used on site where approximately 90% of labour is engaged by subcontractors.

There is no need to require Code compliance of subcontractors or others on private work.<sup>12</sup>

The use of commercial contracts to apply the desired reform has been highly successful because, through this means, the reform agenda becomes a part of the day to day processes required of contractors. Under the Guidelines, reform is

also extended to industrial instruments that are not registered under the Workplace Relations Act. Unregistered agreements must comply with the Code and Guidelines and this rule has been a boon for workplace reform. Unregistered agreements, including side deals and common law contracts, may not contain matters that would be, if they were included in a workplace agreement, prohibited content (as specified in the Workplace Relations Regulations 2006) hence restricting matters like bargaining agents fees from spreading via unregistered instruments.

In the Blueprint, Master Builders calls for the Guidelines to take the form of delegated legislation because of their success in requiring builders to enter into workplace agreements that reflect flexibility and because they have become a catalyst for breaking the old mould of agreement making conduct. The 'sign up or else' tactics of the past cannot prevail in the face of the requirements of the Code and Guidelines, as well as the Regulations which make it prohibited content for there to be conditions imposed in agreements that they be renegotiated.<sup>13</sup> It was formerly commonplace for an agreement to state that the employer was required to enter into a similar agreement with a union for a further period of time following the expiry of the then current agreement. The Guidelines at paragraph 8.2 are not as broad in their scope as this element of the Regulations. The relevant Regulation prohibits a clause relating to the renegotiation of a new agreement whether it is voluntary or not.

Clause 8.2 of the Guidelines is directed more towards prevention of pressure and coercion than in outright prohibiting the subject

matter. The relevant part of that clause states as follows:

*A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to, and/or the contents, or the form of their workplace arrangements.*

This is just one example of where the Code and Guidelines are dependent on the notion of prohibited content. Obviously, there will be a need for there to be an examination of those elements of the prohibited content Regulations which directly contradict ALP policy: an example is Regulation 8.5(8) which states that a term of a workplace agreement is prohibited content to the extent that it directly or indirectly restricts the ability of a person bound by the agreement to offer, negotiate or enter into an AWA. With the ALP policy clearly indicating that AWAs will be phased out<sup>14</sup> this Regulation is likely to be dumped. However, Master Builders urges the ALP to retain the notion of prohibited content in the workplace system as a necessary ingredient to the successful structure of the building and construction industry workplace reforms and in the operation of the Code and Guidelines.

This issue is vital for the operation of the Code and Guidelines and highly relevant in the context of reports about unions urging the ALP to act quickly to scrap the prohibited content rules via regulation.<sup>15</sup> Master Builders opposes moving quickly on this issue, especially given the impact that it would have on the operation of the Code and Guidelines. The pace of reform has been well articulated by the ALP and any moves to accelerate that change could have unforeseen and negative consequences.

## DELEGATED LEGISLATION

To be more specific about the Master Builders policy that the Code and Guidelines become delegated legislation, Master Builders has called for the Code and Guidelines to be issued as the statutory Building Code for the purposes of s27(1) *Building and Construction Industry Improvement Act 2005* (BCII Act). The subsection is as follows:

*The Minister may 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.*

The former Government did not make a determination under this provision. Master Builders wishes for the provision to be invoked. In other words, the Guidelines should become a permanent feature of the building and construction industry workplace laws. Master Builders first proposed this policy to the then Minister for Employment and Workplace Relations in February 2006.

This provision would, of course, permit the new ALP government to administratively bring about major change in the building and construction industry. The new Minister could make a decision to abolish the current Code and Guidelines and give additional strength to any new form of code and/or guideline by issuing a document or documents pursuant to this provision. Accordingly, fundamental change in the industry's workplace structures would not have to await the commencement of Parliament to introduce new provisions or repeal old law. Because of this issue Master Builders has discussions with the ALP about this matter as a major priority.

This point is reinforced when it is noted that in April this year the ALP released Australia's National

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From 31 January, the ALP has announced that the ABCC's responsibilities will be transferred to a specialist division within the inspectorate of Fair Work Australia, the proposed multi functioning workplace relations body that will also take over the role of a number of other organisations, including the Australian Industrial Relations Commission, the Australian Fair Pay Commission, the Workplace Authority and the Workplace Ombudsman.

Infrastructure, Report of the Australian Labor Party Inquiry into the Financing and Provision of Australia's Infrastructure where Recommendation 17 states:

*A Federal Labor Government should withdraw the current National Code of Practice for the Construction Industry and develop a new set of procurement guidelines that incorporate a best practice model requiring pre-qualifying contractors to meet appropriate minimum labour, safety, training and quality accreditation benchmarks.*<sup>16</sup>

Master Builders believes that the current Code and Guidelines, and to the extent possible, the way that prohibited content regulation complements their terms, should be retained. There is no need to replace the current Code and Guidelines with pre-qualification relating to safety as the Australian Government Building and Construction OHS Accreditation Scheme<sup>17</sup> administered by the Federal Safety Commissioner is a comprehensive pre-qualification system that has multi party support and which has now become widespread within the industry. Master Builders would support the rationalisation of all State and Territory based pre-qualification schemes, including for OH&S, under a harmonised Code and Guidelines. However, this will need considerable research and planning and is not a short term measure.

### **RETENTION OF THE ABCC**

The Master Builders' policy on the Code and Guidelines also links to our concern to retain the ABCC. This is Master Builders number one priority, as articulated in the industrial relations Blueprint.

The ALP has indicated that it will retain the ABCC until January 2010:

*Specifically the ABCC will retain all its current powers and its full resources for this period as outlined in the budget forward estimates.*<sup>18</sup>

From 31 January, the ALP has announced that the ABCC's responsibilities will be transferred to a specialist division within the inspectorate of Fair Work Australia, the proposed multi functioning workplace relations body that will also take over the role of a number of other organisations, including the Australian Industrial Relations Commission, the Australian Fair Pay Commission, the Workplace Authority and the Workplace Ombudsman.

The ABCC is responsible for investigating alleged breaches of the industrial relations provisions of the Code and Guidelines and has a major role in connecting that work with its other work relating to enforcement of the rule of law in the industry. In this area, however, the ABCC's powers principally come from contractual provisions rather than the BCII Act, with model tender terms requiring adherence to obligations such as the following:

*The Tenderer agrees to require that the Tenderer and its material suppliers, consultants, subcontractors and its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:*

*(a) inspect any work, material, machinery, appliance, article or facility;*

*(b) inspect and copy any record relevant to the Project and Works the subject of this Contract;*

*(c) interview any person; and*

*(d) request a party to this Contract to produce a specified document within a specified period in person, by fax or by post, as is necessary to allow validation of its compliance with the Code and Guidelines.*

*Additionally, the Tenderer agrees that its material suppliers, consultants, subcontractors and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.<sup>19</sup>*

The tenders that are now let which have provisions of this kind and which are integrally tied to the current version of the Code and Guidelines should, in Master Builders' view, be permitted to run their course, despite any changes to workplace laws. This provides the contractual certainty that builders need in order to properly cost their work and to operate under the appropriate conditions of tender.

## CONCLUSION

The BCII in particular has delivered a stable system of industrial relations to the sector where employers and employees have the capacity to make flexible workplace arrangements that are mutually advantageous. The Code and Guidelines have contributed significantly to the depth and speed of the reforms. Master Builders' policy is for the Code and Guidelines to be retained and strengthened by becoming delegated legislation. Because of the speed with which the Code and Guidelines arrangements could be changed under the provisions of BCII, this subject area is a major priority for discussions with the ALP.

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