



The HR Nicholls Society Inc.

Reforming Australia's Industrial Relations



**SUBMISSION BY THE HR NICHOLLS SOCIETY ON THE DRAFT
GUIDELINES TO THE VICTORIAN CODE OF PRACTICE FOR THE
BUILDING AND CONSTRUCTION INDUSTRY.**

The Victorian Government released its draft industrial relations Guidelines for the building and construction industry on October 7, 2011. Public submissions for comment and feedback closed on October 28, 2011.

The HR Nicholls Society supports the aims of the Government in seeking to improve industrial outcomes and behavioural change in the building sector through its use of its purchasing power to achieve better productivity and compliance with the law.

However it seems to the Society that the draft Guidelines would fail to substantially achieve these goals.

The draft guidelines are subservient to the current National Code of Conduct.

The draft Guidelines are subservient to the current national code which is substantially watered down version of the Howard Government's Code.

Because of a ministerial direction released by the then Deputy Prime Minister, Julia Gillard, on July 9, 2009 the Guidelines can be subverted simply by reaching an agreement between the parties. (see attached letter from Mr Jeff Willing, of the Department of Employment, Education and Workplace Relations to the ACTU secretary, Mr Jeff Lawrence.)

This will mean that any registered FW Act agreement will be deemed compliant with all versions of the Guidelines.

Previously one of the features of the National Guidelines was that an industrial agreement was not compliant just because it was approved by a tribunal.

The building industry strenuously objected to these changes. In an industry letter to the then Deputy Prime Minister, Julia Gillard it was stated:

“The industry is most concerned about this development, the specific effect of which is to close down the 2006 Guidelines prematurely. The decision has significant commercial implications for major contractors and has created uncertainty concerning their capacity to manage industrial risk on Government funded projects, plus risk that will be required to be managed on some private projects in accordance with the terms of the Guidelines.”

A copy of the letter is attached.

Recommendation 1.

- That the Victorian Government bases its Guidelines on the 2006 Howard Government guidelines and that it not be subservient to the federal code.
- That because an agreement is approved by Fair Work Australia, it does not mean it is code compliant.
- That the Victorian Guidelines spell out specifically what sort of clauses in agreements will not be code compliant to facilitate agreement making that will not be in breach of the guidelines.
- That all agreements by submitted to the Monitoring and Compliance Unit to ascertain if they are code compliant before being ratified.

The HR Nicholls Society, while appreciating that the Victorian Government is seeking to improve the value to taxpayers in the building and construction industry we believe the draft Guidelines offer insignificant protection to the construction industry operating in the private sector.

To further improve the overall productivity of the sector in both the private and public sectors to the benefit of all Victorians the guidelines should apply to the those companies operating in the private sector.

Recommendation 2.

- The companies seeking to tender for Victorian Government building and construction work undertake to use the principles of the Victorian Government Guidelines in their private sector work.
- That if companies fail to apply the guidelines in the private sector that they are then exempt from tendering for state Government projects.

Another concern for the HR Nicholls Society is that the draft Guidelines allow for a waiver of the guidelines.

Section 3.3 (e) states: The client may waive elements of these implementation guidelines in limited circumstances based on a public interest test as per the National Implementation Guidelines. Any decision to waive any element must be fully documented.

The Society believes these waivers have the potential to disrupt the operation of the Guidelines by having them consistently used by the parties to an agreement to subvert the intent of the Guidelines.

Recommendation 3.

- That the waiver provisions of the draft Guidelines be dropped.

Conclusion

The HR Nicholls Society applauds the Victorian Government in its efforts to improve industrial practices in the building and construction sector.

However we believe the current draft Guidelines will not adequately facilitate improved behaviour in this notorious industry in either the public or private sectors

Unless amended, the draft Guidelines will be similar to the current National Guidelines which have been shown to be ineffective.

ATTACHMENTS

Mr Jeff Lawrence,
Secretary
Australian Council of Trade Unions
Level 6, 365 Queen Street,
Melbourne, Vic, 3000.

Dear Mr Lawrence

I am writing in relation to the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (Guidelines)

On 9 July 2009 the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, released an amended version of the Guidelines (2009 Guidelines) that apply to all projects that were the subject of interest to tender or let for the first time on or after 1 August 2009. The relevant previous version of the Guidelines continues to apply to earlier projects for the life of the project.

It has become apparent that there are some concerns or uncertainty for the parties in the constructions industry about negotiating agreements under the Fair Work Act 2009 (FW Act) because some of the proposed provisions may not be compliant with the earlier version of the Guidelines (most relevantly the 2006 Guidelines). In particular that these provisions cannot be negotiated because their inclusion would make the agreement no-compliant with the 2006 Guidelines and the company may be precluded from performing work on projects to which the 2006 Guidelines apply.

To ensure that parties are able to take full advantage of the benefits provided by bargaining in good faith under the FW Act, and to remove any doubt in that regard, the Minister has instructed the Department that in assessing registered FW Act agreements under the 2006 Guidelines primacy will be given to Section 8.1.1 of the Guidelines (or comparable clauses of earlier Guidelines) over all the other administrative elements. Section 8.1.1 requires compliance with, among other things, relevant legislation and industrial instruments. This will mean that any registered FW Act agreement will be deemed compliant with all versions of the Guidelines.

On this basis, in relation to agreements made under the FW Act, to be considered compliant with the 2006 Guidelines parties will have to comply with their FW Act agreement and with those elements of the 2006 Guidelines that do not conflict with their agreement, including in relations to the practical on-site application of these.

If you have any questions in relation to these matters please contact me on (02) 6240 1988.

Yours sincerely,

Jeff Willing,
Branch Manager

Building Industrial Branch
6 October 2009.

INDUSTRY LETTER

3 November 2009
The Hon Julia Gillard MP
Deputy Prime Minister
Parliament House
Canberra ACT 2600

Dear Deputy Prime Minister,

We write to you following recent advice issued by the Department of Education, Employment and Workplace Relations (DEEWR) in relation to the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines).

This advice was issued to a number of industrial organisations on or about 6 October 2009. DEEWR advised that you as the relevant Minister had instructed the Department that in assessing registered Fair Work Act agreements under the Guidelines primacy will be given to Section 8.1.1 of the Guidelines which, in effect, means that any registered Fair Work Act agreement will be deemed compliant with all versions of the Guidelines.

Your Government has gone to some lengths to consult with the parties on significant policy issues. The Committee on Industrial Legislation (COIL) was invited to advise the Government on the development of the 2009 Guidelines. However, on this occasion a significant policy change, with major implications for a wide range of infrastructure and other projects, has been made without consultation with employers or their representative bodies.

The decision also appears to be a significant departure from what the industry understood to be the Government's policy position – that the 2009 Guidelines would apply to all projects that were the subject of an expression of interest or tender let for the first time on or after 1 August 2009, and for projects initiated before this date the Guidelines in operation at the date of commencement of the relevant project would continue to apply for the life of the project.

Many bargaining claims able to be lawfully pursued by unions under the Fair Work Act are inconsistent with the 2006 Guidelines. However, hundreds of construction contracts representing billions of dollars in infrastructure spending contain commercial conditions requiring contractors to implement the 2006 Guidelines. The Department's advice provides no basis on which contractors would no longer be bound by enforceable contractual obligations currently applying.

From our informal discussions with the Office of the Australian Building and Construction Commissioner (ABCC) it appears that it was not consulted on the

proposed changes and we are unaware of what formal position the ABCC will adopt in enforcing the Guidelines.

The Government has not provided any guidance to employers on how they should manage a range of conflicting obligations which arise from your decision, particularly the extent to which agencies other than the Department will be bound by the decision or how employers on the ground should assess subcontractors' agreements.

The industry is most concerned about this development, the specific effect of which is to close down the 2006 Guidelines prematurely. The decision has significant commercial implications for major contractors and has created uncertainty concerning their capacity to manage industrial risk on Government funded projects, plus risk that will be required to be managed on some private projects in accordance with the terms of the Guidelines.

Our organisations seek an urgent meeting with you and/or officers of your Department, to discuss the implications of the decision and to develop a plan to manage the many significant commercial and industrial issues that arise.

Yours sincerely,

Stephen Smith
Director, National Workplace Relations
Australian Industry Group

Wilhelm Harnisch
Chief Executive Officer
Master Builders Australia Ltd

Steve Knott Chief Executive
The Australian Mines and Metals Association

Jim Barrett
Executive Director
Australian Constructors Association