



Date: 26/2/09

By: Senator Brandis

**THE HON JULIA GILLARD MP**  
**DEPUTY PRIME MINISTER**

Parliament House  
Canberra ACT 2600

10 FEB 2009

I am writing to you in relation to the National Code of Practice for the Construction Industry (the Code) and its associated Australian Government Implementation Guidelines (the Guidelines) and their application to entities in the state and territory industrial relations jurisdictions.

As you will recall this issue was discussed at the 78<sup>th</sup> meeting of the Workplace Relations Ministers' Council (WRMC) on 5 November 2008. At that meeting I gave my in principle support to a proposed solution to problems associated with the application of the Code and Guidelines to state and territory industrial instruments. Further, WRMC Ministers agreed that senior officials would meet to develop the proposed solution.

I can now advise that I have agreed to the proposed solution outlined in **Attachment A**. While I note that there are still a number of issues of concern to some states in relation to the application of the Code and Guidelines I expect these to be considered in the coming months as part of the broader work of creating a national workplace relations system.

The practical effect and intention of the policy outlined in Attachment A is that state and territory industrial relations obligations will be considered as Code and Guidelines compliant including where these may conflict with elements of the Code and Guidelines. Specifically the Code and Guidelines will not be seen to override state and territory industrial instruments. To be considered Code and Guidelines compliant entities will have to comply with all of the requirements contained in their industrial instruments and with those elements of the Code and Guidelines which do not conflict with their legal obligations. This policy is effective from the date of this letter and I have asked my Department to contact the relevant state and territory officials to ensure that the appropriate procedures are established.

If you require any further information, please contact Jeff Willing, Branch Manager, Building Industry Branch, on (02) 6240 1988.

Yours sincerely

**Julia Gillard**  
**Minister for Employment and Workplace Relations**

## Application of the Code and Guidelines to State jurisdictions

### Background

The Code states (in part):

*All parties must comply with the provisions of applicable:*

- o *awards and workplace arrangements which have been certified, registered or otherwise approved under the relevant industrial relations legislation; and*
- o *legislative requirements.*

Section 8.1.1 of the Guidelines expands on this section of the Code to state:

*Section 8.1 requires compliance with*

- o *relevant legislation;*
- o *applicable court and tribunal orders, directions and decisions; and*
- o *industrial instruments.*

*An 'industrial instrument' is an award or agreement, however designated, that:*

- o *is made under or recognised by an industrial law; and*
- o *concerns the relationship between an employer and the employers' employees.*

Where these requirements conflicted with other elements of the Guidelines, past interpretation has given greater weight to the other requirements set out in the Guidelines thereby administratively overriding elements of State registered instruments and/or legislation. For example, the 'no restrictions on labour' requirement in s.8.10.4 of the Guidelines, was given greater weight than the casual conversion clauses in some State awards. Consequently many entities that are not governed by the federal industrial relations system and are covered by state industrial laws and/or instruments were considered to be non-compliant with the Code and Guidelines.

### **Policy Application**

1. Consistent with the Code and 8.1.1 of the Guidelines, entities operating under state and territory industrial relations jurisdictions that are complying with their legal obligations set out in relevant legislation ; applicable court and tribunal orders, directions and decisions; or industrial instruments; will be considered to be in compliance with the Code and Guidelines.
2. DEEWR will continue to provide written assessments, on request, of entities' Code and Guideline compliance.
3. The on-site behaviours of entities not subject to the federal workplace relations jurisdiction will have to comply with all of the requirements contained in their industrial instruments and with those elements of the Code and Guidelines which do not conflict with their legal obligations.
4. Bilateral Commonwealth/State Code Monitoring Groups (BCMGs) will be established to monitor compliance arrangements and, where necessary, refer matters to the Code Monitoring Group (CMG). BCMGs will build on the existing State-based Auslink 1 Project Code Monitoring Group to encompass all Commonwealth funded projects undertaken in each State/Territory.
5. BCMGs will be tasked with resolving any administrative issues associated with more effectively implementing the Code's requirement that "*Breaches of the Code in one jurisdiction will be regarded as a relevant factor by other jurisdictions when considering the suitability of parties for government projects*" (1997 Code, page 10).