

6<sup>th</sup> April 2023

CCF2023-729

Mr Patrick Quinlan  
Employee Relations Inspectorate  
By email: [ccu@industrialrelations.nsw.gov.au](mailto:ccu@industrialrelations.nsw.gov.au)

Dear Mr Quinlan,

We write to take up the opportunity to provide feedback on the **Review of the NSW Building and Construction Procurement Guidelines**.

#### Operation of the Guidelines

As the largest procurer of civil infrastructure construction in New South Wales, the NSW Government has a vested interest - and an obligation to the people of NSW - to ensure the rule of law is enforced and that civil construction projects are delivered efficiently and effectively.

Many industrial disputes, both legal and illegal, begin with either allegations of under payment/non-payment of wages and entitlements, or safety breaches (real or insinuated). These disputes are common in the building and construction industry. These disputes often cause disruptions to projects and affect milestones and cost.

To minimise these occurrences a clearly defined standard is required, especially for NSW taxpayer funded projects. This standard became the Implementation Guidelines to NSW Code of Practice for Procurement: Building and Construction, together with the Federal Building Code 2016. With the demise of the Building Code 2016 and associated legislation, the Guidelines need to be retained more than ever.

The Guidelines generally provide a minimum enforceable standard not only in context of industrial relations, but also in work health and safety matters and financial management for all State Government funded projects. The Guidelines also create a scale by applying the same requirements to all participants.

CCF NSW's support the need to provide a Workplace Relations Management Plan for each project, binding the principal and subcontractors to the Guidelines. It ensures that all participants are aware of, and are committed to meeting their obligations under the Guidelines and any applicable legislation (both Federal and NSW, i.e., the Fair Work Act 2009 and the Work Health and Safety Act 2011) in an enforceable document.

Naturally, the Guidelines, however well-intentioned and well written, can only be effective when there is an authority such as the Construction Compliance Unit (CCU) which has the power to police and enforce the standards within the industry. With the abolishment of the ABCC, this is all the more important.

In our view, the Guidelines provide the CCU with an auditable benchmark that can be applied through the life of projects and give principal contractors and bigger subcontractors the ability to manage subcontractors, and to act in cases of proven non-compliance.

Our Members' report to us that their experience with the CCU has generally been very positive both at the tender stage, in the approval of Workplace Relations Management Plans, and in audits of their projects. However, we note that, so far the CCU has not been directly involved in the direct prosecution of breaches of the Guidelines, instead deferring that role to the ABCC,

We recommend the NSW Government remains committed to the Guidelines and its principles, and that the CCU will, in the absence of the ABCC and a Federal Building Code, act to protect critical NSW Government infrastructure project budgets and schedules.

To achieve this the CCU will need to be funded accordingly, so it can be capable of not only policing the NSW Code of Practice for Procurement: Building and Construction by having a site presence, but to have the resources and the budget for prosecuting breaches.

The Government's proposed increase in funding to \$1.3 million a year is an investment less than half of 1/1000<sup>th</sup> of a percent of what the State will expend on infrastructure per year. It is welcomed, but considered manifestly short of what will be necessary to provide proactive monitoring, reporting and compliance activities.

Whilst an incredible amount of case law has accumulated for the CCU to rely upon following many successful prosecutions by the ABCC in the Federal Courts, considering that the NSW Guidelines are almost identical to the former Building Code 2016, the average cost of prosecuting breaches in the Federal Courts can be over \$250,000. Thus, there is a necessity to have an additional budget item for the legal cost of prosecutions.

Further, the Government should also provide funding to increase awareness of the CCU and its operations.

#### Workplace Instrument Based Conduct

In relation to the application and adequacy of the Workplace Instrument Based Conduct provisions please find as follows:

- **Clause 5 – Covering prohibitions on workplace arrangements that restrict the efficient performance of work or require contractors to apply project specific conditions**  
After the abolition of the ABCC and the Building and Construction Industry (Improving Productivity) Act 2016 these provisions must remain. However, it poses a question whether the provisions of the Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction can legally force contractors to comply in the State Government funded work without facing adverse action proceeding under the Fair Work Act 2009. If it cannot, the State Government should consider legislation similar to the Building and Construction Industry (Improving Productivity) Act 2016 to strengthen the enforceability of the Guidelines.
- **Clause 8 – Dispute settlement, industrial action and strike pay**  
These provisions should remain, as they reflect the provisions of the Fair Work Act 2009, except for Clause 8.5. Therefore, we believe that a clarification is required regarding the legal standing of its application to EBA Dispute Settlement Procedure Clauses in the absence of the ABCC and the Building and Construction Industry (Improving Productivity) Act 2016.

- **Clause 10 - Freedom of Association and Right of Entry**

Our Members are adamant that the Guidelines must protect Freedom of Association and enforce Right of Entry obligations to the maximum extent of the law. The Fair Work Act 2009 already provides these basic rights and obligations. However, in the absence of the Building and Construction Industry (Improving Productivity), the Building Code 2016 and the ABCC, there is a risk that employers could be in breach of the General Protections/ Freedom of Association provisions of the Fair Work Act 2009 when implementing the NSW Guidelines.

CCF NSW Members provided feedback that they required more clarity in relation to the legal standing of the Guidelines and their implementation in the light of several provisions of the Fair Work Act. In particular the following examples were given:

- 1) Using Union delegates to deliver site inductions.
- 2) Prohibiting employees wearing union or any other logos, mottos or other indicia to company supplied property or equipment, including clothing.

While there is some Federal case law in relation to this issue under the Building Code 2016, (for instance, [Lendlease Building Contractors v ABCC \[2022\] FCA 192](#)) it is not clear whether these decisions could be applicable to the NSW Guidelines.

Thank you for the opportunity to provide feedback.

If you wish to discuss further, I can be contacted on 02 9009 4000.

Yours sincerely,



David Castledine  
Chief Executive Officer