

Important workplace relations issues for companies involved in the construction and related industries

Summary

- The Victorian Government has issued the *Victorian Code of Practice for the Building and Construction Industry 2014*. The Code is effective from **8 October 2014**. For businesses covered by the Code, it prohibits numerous restrictive and unproductive clauses in enterprise agreements and work practices. Businesses which do not comply with the Code are not eligible to tender for, or be awarded, Victorian State Government building and construction work. Contractors are required to ensure that their sub-contractors comply with the Code.
- The Victorian Code applies in addition to the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* which was published by the Federal Government in April 2014. The Federal Government's Building Code will formally come into effect when the *Building and Construction Industry (Improving Productivity) Bill 2014*, which is currently before the Senate, comes into operation. However, the Federal Government has announced that when the Code takes effect it will apply to enterprise agreements made after 24 April 2014.
- The Federal Government has announced that the Heydon Royal Commission into Trade Union Governance and Corruption will be extended until the end of 2015.

Victorian Code of Practice for the Building and Construction Industry 2014

Who does the Code apply to?

The [Victorian Code of Practice for the Building and Construction Industry 2014](#) ("Victorian Code") applies to businesses that carry out "public building and construction work", i.e. building and construction work on projects which are undertaken by, or on behalf of, a Victorian Government Department or public sector body.

The Code also applies to:

- Privately funded "building and construction work" that businesses covered by the Code carry out; and
- "Building and construction work" carried out by related entities of businesses covered by the Code.

"Building and construction work" *includes*:

- all organised activities concerned with demolition, building, landscaping, civil engineering, process engineering, mining and heavy engineering; and

- building refurbishment or fit out, installation of building security systems, fire protection systems, air conditioning systems, computer and communication cabling, building and construction of landscapes,

but excludes: mining operations, maintenance, landscaping such as lawn mowing, pruning and other horticultural activities, and cleaning buildings.

The Victorian Code replaces the 1999 Victorian Code of Practice for the Building and Construction Industry and the Implementation Guidelines that operated pursuant to the former Code.

When is the Code operative?

The Code is operative from **8 October 2014** in respect of building and construction work carried out on or after this date.

Are businesses required to ensure that their subcontractors comply with the Code?

Yes. Businesses covered by the Code are required to ensure that their subcontractors act in a manner that is consistent with the Code on public building and construction work.

General requirements

The Victorian Code requires that a contractor:

- reflect the objectives and requirements of the Victorian Code in induction content, and on a regular basis in pre-start and toolbox meetings;
- require and actively ensure compliance with the Victorian Code by any of its related entities;
- require and actively ensure compliance with the Victorian Code by any participant with whom it contracts, or enters into an agreement or arrangement to undertake public building and construction work.

Principal contractors must ensure that compliance with the Victorian Code is included as an integral component of their contract management procedures. Principal contractors must also ensure that all expressions of interest, tender and contractual documents clearly set out the requirements of sections 4.2 and 4.3 of the Victorian Code.

The relevant contractual documents, arrangements and agreements must allow authorised personnel of the Construction Code Compliance Unit (CCCU) of the Department of Treasury and Finance to monitor and investigate compliance, including allowing the personnel to:

- access sites, documents and personnel;
- inspect any work, material, machinery, appliance, article or facility;
- inspect and copy any record relevant to the project; or
- interview any person.

Relationship with the Federal Government's Building Code

The Victorian Code applies in addition to the requirements of the Federal Government's Building Code.

Legal obligations relating to employment

A business must comply with and demonstrate past compliance with all applicable:

- Legislation, industrial instruments, and court and tribunal orders, directions and decisions;
- Common law agreements between an employer and employee; and
- Enterprise agreements and awards.

Workplace arrangements

Any agreement, arrangement, practice or procedure which provides for or includes a provision that has any of the following effects breaches the Victorian Code:

- imposes or purports to impose limits on the right of a company to manage its business or to improve productivity;
- is designed to avoid a company's legal obligations;
- discriminates, or has the effect of discriminating against certain persons, classes of employees or contractors; or
- is inconsistent with freedom of association requirements set out in section 7.1 of the Victorian Code.

This includes enterprise agreements, contracts of employment, employment policies, site practices and workplace conduct.

Sections 6 and 7 of the Victorian Code are **attached**. These sections deal with requirements relating to workplace arrangements, agreement content, freedom of association and right of entry.

Businesses should ensure that their agreements, contracts of employment and employment policies and procedures are reviewed to ensure that they do not breach the Victorian Code. They should also audit site practices and workplace conduct to ensure compliance. Ai Group's workplace relations advisers are able to provide detailed assistance with these tasks.

Freedom of association

Any agreement, arrangement, conduct, practice or procedure which does not promote freedom of association breaches the Victorian Code. A detailed list of prohibited freedom of association matters is set out in section 7.1 of the Code (**attached**).

Right of entry

There must be strict compliance with Part 3-4 (Right of Entry) of the *Fair Work Act 2009* and any applicable occupational health and safety laws relating to union right of entry.

A business must not invite a union official onto premises for any purpose.

Only union officials with right of entry permits are entitled to exercise right of entry.

Site security

Head contractors and subcontractors must implement site security and risk management processes and procedures to as far as reasonably practicable:

- determine and verify who is on site and who has attended the site at any given time; and
- ensure that only those persons authorised to be on site are permitted to access it.

On sites where a Workplace Relations Management Plan (WRMP) is required (see below), site security and risk management processes and procedures must include measures in the form of CCTV, a swipe card access system, photographic or biometric security system or similar, unless it can be demonstrated that this is not feasible in light of the particular circumstances of the project.

Workplace Relations Management Plans and Health and Safety Management Plans

A tenderer for public building and construction work where the total value of the construction project is \$10 million or more must submit a WRMP which meets the minimum requirements as set out in section 9 of the Victorian Code.

Additionally a successful tenderer for these projects must submit a Health and Safety Management Plan which meets the minimum requirements of section 12 of the Victorian Code.

Drug and alcohol testing

WRMPs must outline the approach that a tenderer will take to managing drug and alcohol issues in the workplace. This includes the tenderer outlining, in accordance with the minimum standards in the Model WRMP issued by the Victorian Government:

- how it will ensure that all subcontractors and their employees and workers agree to comply with the relevant policy (through contract or some other enforceable means);
- which objective medical testing method/s it proposes to implement to detect the presence of alcohol or specified drugs in a person's system;
- the medical thresholds against which positive or negative test results will be determined (noting that, subject to testing detectable levels, the acceptable level for all substances is zero);
- how persons will be selected for testing and the frequency of that testing (including general random testing, voluntary testing and for-cause testing);

- how persons returning a positive result will be prevented from working until it is safe for them to do so; and
- counselling and rehabilitation processes that may apply in the event of a positive test.

Collusive tendering and uncompetitive behaviour

A tenderer must not engage in collusive tendering or any other anti-competitive practices.

Industrial action

A company must take all reasonable steps to resolve industrial action which adversely affects, or has the potential to adversely affect, the delivery of the project and related contracts on time and within budget. A company must also take all reasonable steps to bring an end to unlawful industrial action, including by pursuing legal action where possible.

There are strict reporting requirements to the CCCU and the client:

- Threatened or actual industrial action must be reported to the CCCU and the client within 24 hours, and regular updates must be provided;
- Any request or demand by a union, whether direct or indirect, to engage in conduct which appears to be for the purposes of a secondary boycott under the *Competition and Consumer Act 2010* must be notified to the CCCU as soon as practicable but no later than 24 hours.

Reporting of Code breaches and sanctions

A business must notify any breach or suspected breach of the Victorian Code to the CCCU and the client as soon as practical but no later than 24 hours.

Sanctions imposed on contractors for proven breaches may include:

- A formal warning;
- Referral of a complaint to the relevant industry organisation for assessment against its own professional code of conduct and appropriate action;
- Reduction in tendering opportunities at either an agency or government-wide level;
- Reporting the breach to an appropriate statutory body; and
- Publicising the breach and the identity of the party.

Federal Government's Building and Construction Industry (Fair and Lawful Building Sites) Code 2014

In Member Advice [Nat 007/14](#) Members were advised of the release by the Federal Government of the [Building and Construction Industry \(Fair and Lawful Building Sites\) Code 2014](#) (the Federal Building Code). The Code will formally come into operation once the [Building and Construction Industry \(Improving Productivity\) Bill 2014](#) (the Bill), comes into operation. The Bill is before the Senate and has not yet been voted upon.

For businesses covered by the Federal Building Code, the Code outlaws numerous restrictive and unproductive clauses in enterprise agreements. The Government has announced that the Code will apply to enterprise agreements made **after 24 April 2014**.

The Federal Building Code also outlaws certain types of conduct, arrangements and practices in relation to "building work" carried out by businesses covered by the Federal Building Code.

The Federal Building Code applies to businesses that carry out "building work" on projects which are wholly or partially funded by the Commonwealth Government.

The Federal Building Code also applies to:

- Privately funded "building work" that businesses covered by the Code carry out; and
- "Building work" carried out by related entities of businesses covered by the Code. (Related entities are defined in section 3 of the Code and include a wide range of related bodies corporate).

The definition of "building work" in the Federal Building Code is the same as the definition of "building work" in section 6 of the [Building and Construction Industry \(Improving Productivity\) Bill 2014](#), except for the transport and supply work described in paragraph 6(1)(e) of the Bill which is not covered by the Code.

The Federal Building Code extends beyond mainstream construction industry activities to cover, for example, repair work on buildings, structures and works and to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site.

The Federal Building Code applies in addition to the Victorian Code and the construction industry industrial relations guidelines issued by the New South Wales and Queensland Governments.

Royal Commission into Trade Union Governance and Corruption

The Federal Government has announced that the Heydon Royal Commission into Trade Union Governance and Corruption will be extended for a further year until the end of 2015.

Justice Heydon intends to hand down an interim report in December 2014 and a final report by December 2015.

During the Royal Commission, Ai Group has focussed on the many millions of dollars each year that flow to unions from some construction industry redundancy funds and from insurance companies which offer income protection insurance at inflated prices and pay large commissions to unions. Ai Group has also focussed on the role that industry-wide pattern agreements in the construction industry play in delivering these revenue streams to unions. A detailed plan to address the problems has been submitted by Ai Group to the Royal Commission.

The Royal Commission has heard detailed evidence about these revenue flows and the adverse implications of them for employers and the community. Hopefully the Royal Commission will make a series of strong recommendations to address these matters.

Further information and assistance

For further general information or assistance please call Ai Group's **BIZassistInfoline** on **1300 78 38 44**.

Ai Group's team of workplace relations advisers is well-qualified to provide detailed assistance to comply with the Code. Please contact our construction team on constructionteam@aigroup.asn.au.



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**EXTRACTS FROM THE VICTORIAN CODE OF PRACTICE FOR THE BUILDING AND CONSTRUCTION
INDUSTRY 2014**

**ENTERPRISE AGREEMENT CONTENT, WORKPLACE ARRANGEMENTS, FREEDOM OF
ASSOCIATION AND RIGHT OF ENTRY**

Sections 6 and 7 of the [Victorian Code of Practice for the Building and Construction Industry 2014](#), as reproduced below, identify various requirements for enterprise agreement content, workplace arrangements, freedom of association and right of entry. Please note that it is very important that businesses which may be bound by the Code take the time to consider all provisions of the Code. The topics in sections 6 and 7 are only some of the topics dealt with in the Code.

6. Workplace arrangements and other related matters

6.1 Workplace arrangements

- (a) An agreement, arrangement, practice or procedure (however and wherever expressed) which provides for or includes a provision that:
- (i) imposes or purports to impose limits on the right of a participant to manage its business or to improve productivity;
 - (ii) is designed to avoid a participant's legal obligations;
 - (iii) discriminates, or has the effect of discriminating against certain persons, classes of employees or contractors; or
 - (iv) is inconsistent with freedom of association requirements set out in clause 7.1 of this Victorian Code,
- will be inconsistent with the objectives of the Victorian Code set out in section 1 and is therefore not in compliance with this Victorian Code.
- (b) Without limiting clause 6.1(a), the following provisions in any agreement or arrangement (however and wherever expressed) are inconsistent with the objectives of the Victorian Code set out in section 1 and are therefore not in compliance with this Victorian Code – provisions which:
- (i) prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time;
 - (ii) restrict the employment or engagement of persons by reference to the type of employment that may be offered by the employer. For example, an agreement or arrangement (however expressed) that prohibits or limits the employment of casual or daily hire employees;
 - (iii) require, or result in, discrimination between classes of employees because of the basis on which they are lawfully entitled to work in Australia;
 - (iv) require a participant to consult with, or seek the approval of, a union in relation to the source or number of employees to be engaged, or type of employment offered to employees;
 - (v) require a participant to consult with, or seek the approval of, a union in relation to the engagement of subcontractors;
 - (vi) prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor);
 - (vii) prescribe the scope of work or tasks that may be performed by employees or subcontractors;
 - (viii) provide for or permit unregistered written agreements;
 - (ix) limit or have the effect of limiting the right of an employer to make decisions about redundancy, demobilisation or redeployment of employees based on operational

requirements. For example, an agreement or arrangement (however or wherever expressed) whereby employees are selected for redundancy on a "last on, first off" basis, or by reference to the seniority of employees;

- (x) prohibit the payment of all-in payments and/or a loaded rate of pay (whether or not expressed as an hourly, daily, weekly or annual amount). An all-in payment includes, for example, an amount paid that represents payment for ordinary time and other matters such as overtime and annual leave loading. An all-in payment for the purposes of this clause does not include payments to subcontractors and mandatory superannuation contributions;
 - (xi) require, or have the effect of requiring, the allocation of particular work to individual employees only if that allocation is extended to other employees in the class of employees to which the employee belongs. For example, an agreement or arrangement (however expressed) that prevents an individual employee being selected to perform overtime unless other employees are similarly provided overtime);
 - (xii) provide for the monitoring of enterprise agreements by persons other than the employer and employees to whom the agreement applies;
 - (xiii) require the application to or display of union logos, mottos or indicia to company supplied property or equipment;
 - (xiv) directly or indirectly require a person to encourage, or discourage, a person from becoming, or remaining, a member of a union;
 - (xv) directly or indirectly require a person to indicate support, or lack of support, for persons being members of a union or any other measure that suggests that membership is anything other than a matter for individual choice;
 - (xvi) limit the ability of an employer to determine when, where, and by whom work can be performed to meet operational requirements;
 - (xvii) provide for the rights of a union official to enter premises other than in compliance with Part 3-4 of the FW Act and applicable occupational health and safety laws;
 - (xviii) provide for the establishment or maintenance of an area which is intended to be designated to be used by members or officers of a union in that capacity;
 - (xix) require, or have the effect of coercing or pressuring, a group apprenticeship scheme or similar provider to set particular terms and conditions, including the making of above-entitlements payments;
 - (xx) provide for a site allowance and the amount is not specified in either an enterprise agreement or award;
 - (xxi) prohibit or in any way limit the use of security or access systems of the kind described in clause 9.1(d) and (e) which maintain the integrity of a site; and
 - (xxii) directly or indirectly have the effect of negating or rendering ineffective the application of the Victorian Code.
- (c) Conduct by a participant or the implementation of an agreement, arrangement, procedure or practice (however or wherever described) which has or is likely to have any of the effects described in clause 6.1(b) is inconsistent with the objectives of the Victorian Code set out in section 1 and is therefore not in compliance with this Victorian Code.

6.2 Above-entitlements payments and related matters

- (a) The following conduct, arrangements, agreements, practices or procedures (however found or expressed) are inconsistent with the objectives of the Victorian Code set out in section 1 and are therefore not in compliance with this Victorian Code:
 - (i) organising or taking action, or threatening to organise or take action with the intent to coerce a participant into make above-entitlements payments;
 - (ii) exerting undue influence or undue pressure on a participant to make above-entitlements

payments;

- (iii) organising or taking action, or threatening to organise or take action with the intent to coerce a participant into making payments to a particular industry superannuation, redundancy or sick leave fund or scheme, or to support a particular product, service or arrangement; and
- (iv) applying, or attempting to apply, undue influence or undue pressure on a person to make payments to a particular industry superannuation, redundancy or sick leave fund or scheme, or to support a particular product, service or arrangement.

6.3 Dispute settlement

- (a) All reasonable attempts must be made to resolve grievances or matters under dispute at the workplace between the appropriate level of management and employees, and where applicable, union or other representatives.
- (b) Where a dispute or grievance is unable to be resolved in accordance with clause 6.3(a) and an agreement, arrangement, practice or procedure (however or wherever expressed) provides for arbitration or other binding outcome of a dispute, it must require a decision of the arbiter to be consistent with the Victorian Code.

7. Freedom of association and right of entry

7.1 Freedom of association

- (a) An agreement, arrangement, conduct, practice or procedure (however or wherever expressed) which does not promote freedom of association is inconsistent with the objectives of the Victorian Code in section 1 and is therefore not in compliance with this Victorian Code. This includes, but is not limited to, the following agreements, arrangements, conduct, practices and procedures:
 - (i) providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
 - (ii) the display of "no ticket, no start" signs, show card days or any other similar signs or practices that imply or suggest that union membership is anything other than a matter of individual choice;
 - (iii) the display of signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities;
 - (iv) employers unlawfully encouraging or discouraging employees to join a union;
 - (v) using employee representatives or officers of a union to undertake or administer site induction processes (a process which should be undertaken by site management). To the extent that such an arrangement, agreement, practice or procedure (however or wherever expressed) is contained in an existing enterprise agreement made before the application date of the Victorian Code, any such process must be overseen by, or also involve, site management;
 - (vi) discriminating against or disadvantaging elected employee representatives;
 - (vii) using forms requiring an employee to identify their union status, or requiring employers and contractors to identify the union status of employees or subcontractors;
 - (viii) refusing to employ an individual, or terminating an employee or subcontractor, because of their union status;
 - (ix) limiting an employee's freedom of choice in deciding whether to be represented and by whom in relation to a workplace dispute or grievance;
 - (x) employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members;
 - (xi) the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate or to hire an individual nominated by a union;

- (xii) requiring union or any other logos, mottos or other indicia to be applied to company supplied property or equipment, including clothing; and
- (xii) any requirement that a person pay a bargaining fee, however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

7.2 Right of entry

- (a) A participant must comply with all applicable laws to which that participant is subject, including Part 3-4 of the FW Act and any applicable occupational health and safety laws, that give a permit holder of a union a right to enter premises where work is performed and where the permit holder seeks to exercise that right.
- (b) A participant must ensure entry by a union official onto premises where work is performed is only in accordance with Part 3-4 of the FW Act and any applicable occupational health and safety laws.
- (c) A participant must not invite a union official onto premises where work is performed for any purpose.
- (d) Attempts to avoid right of entry requirements for a union official by allowing delegates or shop stewards to purport to exercise right of entry functions which, in accordance with the FW Act, can only be exercised by persons who hold right of entry permits, are inconsistent with the objectives of the Victorian Code in section 1 and are therefore not in compliance with this Victorian Code.