

26 March, 2013

Practice Group(s):

*Labour, Employment
and Workplace Safety*

NSW Government Announces new Construction Guidelines

By Alice DeBoos and Matthew Parker

NSW Treasurer and Minister for Industrial Relations, the Hon. Mike Baird, has announced that new procurement Guidelines for the State's infrastructure projects will come into effect on 1 July 2013. In announcing the Guidelines, Mr Baird stated that he was responding to submissions on the draft Guidelines that called for consistency with its Victorian and Queensland equivalents. The draft was released late last year and submissions closed at the end of February 2013.

The new Guidelines will affect construction companies that tender for NSW Government infrastructure work and stipulate how these companies are to manage and implement various industrial relations standards on projects and in enterprise agreements.

The new NSW Guidelines largely mirror the Victorian equivalent and have not changed significantly from the draft released last year.

The important elements are:

- the Guidelines will apply to privately funded construction work of tenderers as well
- tenderers must demonstrate past compliance with all applicable legislation and industrial instruments
- tenderers must demonstrate best practice and compliance with relevant safety laws and submit a Work, Health Safety Management Plan or Site Specific Safety Management Plan
- tenderers must not enter in arrangements that restrict the efficient performance of work or contain provisions that restrict productivity improvement
- tenderers must commit to taking all reasonable steps to bring to an end unprotected industrial action, including by legal action where possible
- the Guidelines also expressly prohibit:
 - sham contracting
 - arrangements designed to avoid strike pay, relax right of entry requirements, avoid compliance with legislation and court orders or undermine freedom of association obligations
 - coercion or pressure to make over-award payments
 - various other arrangements contrary to the objectives of the Guidelines.

Like in Victoria, the NSW Guidelines place restrictions on the content of enterprise agreements which go well beyond the requirements of the law. While tenderers may have an agreement which complies with the Fair Work Act and the Commonwealth Building Code 2013, the same agreement may well fall foul of the new NSW requirements.

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A Construction Compliance Unit will be established to monitor and ensure compliance with the NSW Guidelines with proven breaches being reported to the Treasurer and Minister for Industrial Relations. The Construction Compliance Unit may, in certain circumstances, investigate and report on alleged breaches and may refer matters to the relevant authorities who have power to impose sanctions.

All contractors submitting Requests for Tender and Expressions of Interest from 1 July 2013 will need to be fully compliant with these Guidelines with compliance also being expected with respect to privately funded work. Current enterprise agreements approved by the Fair Work Commission before the commencement of the Guidelines on 1 July 2013 will be considered acceptable for procurement purposes and deemed to be compliant. However, enterprise agreements approved on or following 1 July 2013 will need to comply with the Guidelines.

The NSW Government have indicated that they are in the process of developing Model tender and guidance materials in order to assist Government agencies and their contractors in complying with the Guidelines.

Implications for Contractors and Employers

Once the new Guidelines are implemented on 1 July 2013, contractors will need to ensure compliance with the very strict requirements set out therein. This includes ensuring that enterprise agreements made after that time do not include numerous clauses now considered to be commonplace in the industry. It is also important to note that contractors will not achieve compliance with the NSW Guidelines by virtue of their compliance with the National Code of Practice for the Construction Industry and its Implementation Guidelines now replaced by the Building Code 2013. The NSW Government has indicated that it does not consider the Building Code 2013 to be an impediment to the implementation of these new Guidelines.

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