

Master Builders Australia Inc's National Code of Practice for the Building and Construction Industry

FOREWORD

I am pleased to introduce the Master Builders Australia's National Code of Practice.

MBA is one of Australia's strongest trade associations and has shown leadership in the way it has developed this Code, in co-operation with the Trade Practices Commission.

The Commission believes that trade associations such as the MBA have a valuable role in providing information, advice, training and other assistance to their members. Indeed, the development of this National Code of Practice is just the most recent example of the MBA's excellent work.

This Code will, I believe, go a long way in ensuring that both the building industry and their clients, Australian business and consumers, can enter into building contracts in good faith, with an expectation of fair play and honesty.

The Code deals with business ethics, best practice and accountability. It provides avenues of redress, at reasonable cost, should disputes occur. I expect it will lead the Australian construction industry to higher standards, greater efficiency and more affordable services.

The MBA worked closely with the TPC to develop the Code, which is underpinned by trade practices principles.

I am pleased that MBA has indicated full commitment to the Code and also the educative and training package with which it is associated. This educative program will ensure that trade practices are recognised, understood and implemented by all in the industry.

The Master Builders Australia Code of Conduct is a significant step forward for the Australian construction industry.

- **Mr John Broome, Deputy Chairman of the Trade Practices Commission.**

ABOUT MASTER BUILDERS AUSTRALIA

Master Builders Australia Inc was established over 100 years ago as a federation of State and Territory Master Builders Associations, representing employers within the building and construction industry to influence, promote and protect the interests of its members.

The Australian Master Builders movement comprises contractors and sub-contractors and suppliers in all sectors of the industry including commercial, civil and industrial, general contracting and housing. The movement is represented in each State as follows:

- Queensland Master Builders Association
- Newcastle Master Builders Association
- Master Builders Association of New South Wales
- Master Builders Association of the ACT
- Master Builders Association of Victoria
- Master Builders Association of Tasmania
- The Master Builders Association of South Australia
- Master Builders Association of Western Australia
- (Northern) Territory Construction Association

Its guiding principles are freedom of association, enterprise, competition and independent endeavour to the benefit of the economy and the quality of life in our nation.

This Code of Practice furthers these principles by providing for the promotion within the industry of the following objectives:

- to lift the standards of all facets of the building and construction industry including the promotion of world best practice in all stages of project procurement and delivery;
- to set standards of acceptable behaviour in a code of commercial ethics;
- adherence to the Governments' Codes and Guidelines;
- understanding of and compliance with both the spirit and the letter of the law;
- equitable complaints and disciplinary procedures and processes;
- development to the utmost potential of the industry's human resources;
- change in culture of the industry through the development of the non-adversarial "partnering" concept, continuous improvement and benchmarking of industry performance;
- continue to actively pursue the reforms within the industry to prevent a recurrence of past undesirable practices;

- develop a culture which stimulates free and open competition between all parties to the project; and
- to provide the model for all participants in Australian industry.

To this end Master Builders Australia has instigated the following recent reforms and initiatives in the industry:

- the introduction of Partnering to Australia as an alternative non-adversarial approach to commercial building with \$2 billion of commercial projects being partnered today.
- the implementation of award restructuring and the introduction of competency based training with its inherent benefits to the community of a more flexible multi skilled workforce.
- the establishment of Build-a-Job and other training initiatives jointly with the ACTU and/or the CFMEU) to provide longterm unemployed young Australians with a structured training and employment program to get them back into the workforce.
- the promotion of growth and efficiency in the industry by access of Australian contractors to the world market. As the Commonwealth Export Access Providers to the building and construction industry Master Builders Australia has engaged specialist export Facilitators to administer the Commonwealth's Export Access and NEIS programs.
- the promotion of Quality Assurance in the industry by the provision of accessible and affordable training including the provision of model quality Assurance manuals, inspection and test plans, and workshops for both contractors and subcontractors in all sectors of the industry.
- the production (in conjunction with Standards Australia) of the Australian Domestic Construction Manual as a best practice document bringing all the regulations, standards, administration and technical aspects associated with the housing construction process together in one easy to use document for the benefit of contractors, regulators and consumers.
- the production (in conjunction with NATSPEC) of a plain English National Housing Specification.

Master Builders Australia is committed to achieving world best practice for the industry which it believes will reap enormous and continuing benefits for the Australian economy.

More particularly Master Builders Australia is committed to documentation that all can understand, the setting of quality standards as contained in this code, the delivery of a building on time and within the contract price, elimination of causes for disputes and the introduction of dispute mechanisms which are quick, inexpensive and fair.

PART ONE - INTRODUCTION

1.1 Preamble

This Code sets out standards of conduct for the activities of Members of the Australian Master Builders movement.

The Code owes its origin to the various Inquiries undertaken by government in the early 1990's into industrial lawlessness, collusive tendering and other unacceptable practices in the building and construction industry. These Inquiries were the culmination of a decade of rapid expansion in the industry accompanied by profound changes in both the building procurement and delivery systems, as well as a resurgence of union militancy.

In particular the *Royal Commission into Productivity in the New South Wales Building Industry* and the *Trade Practices Commission's Review of Home Building - Consumer Problems and Solutions* demonstrated the need for reform in the areas of industrial relations, contracts, dispute resolution, and information and education.

Although such Inquiries were directed towards the whole of the building and construction industry and not just builders and contractors, Master Builders Australia recognised that the industry must undergo immediate and substantial change from within, or suffer the consequences of government regulation.

In April 1994 Master Builders Australia entered into a Memorandum of Understanding with the Trade Practices Commission which provides as its principal aim the following:

“to achieve the common goals of continuance of industry reform and promotion of ‘best practice’ through an integrated range of national measures which are as follows:

- (a) the introduction of a comprehensive industry Code of Practice which would deal not only with best practice but identify industry behaviour which is unacceptable. The Code would encompass such matters as compliance with the Trade Practices Act, tendering ethics and disciplinary measures;
- (b) the development of new national conditions of contract for the domestic (housing) sector of the industry which are both understandable and operate fairly for all parties;
- (c) the establishment of industry training, educative and compliance programs with the focus on the needs of contractors, building suppliers and consumers;
- (d) the development of model Articles for its constituent members regarding prohibition of collusive practices by members.”

This Code of Conduct meets the above aims of establishing standards of conduct for the activities of Members engaged in the building and construction industry.

The Code provides members with a client driven focus which provides for fair competition to satisfy client requirements. It provides the infrastructure for industry self regulation at a great saving to the public purse.

The Code reflects a desire by responsible participants in the building and construction industry for a regulatory procedure that is both fair and transparent. It is a product of the recognition by mature participants in the industry that they must be accountable to their peers to ensure that the reform process continues and that the excesses of the past are not repeated.

Acceptance and observance of the Code is a condition of corporate membership of Master Builders Australia and members must ensure that its employees are conversant with the Code by their participation in the compulsory educative and compliance training programs of the MBA.

The Code is supervised and administered in three main ways:

- State and Territory MBA's will deal with initial complaints against their members;
- An Appeals and Complaints Board will deal with serious breaches of the Code by Members and with appeals from decisions of State and Territory MBA's by either clients, Members or government;
- A Codes Administration Committee will be responsible for its supervision, and will deal with the ongoing monitoring of the effectiveness of the Code as well as the preparation of reports on the Code's operation.

The Code will be implemented as part of the educative training and compliance programs.

Failure to comply with the Code will result in sanctions being applied under the provisions of Part Four.

Master Builders Australia hope that this Code will serve as an industry model providing both the impetus for reform and the standard for other industry participants such as the design professions, the principals and clients, and the unions.

1.2 About The Code

What is the Code?

This Code establishes the infrastructure for comprehensive standards of industry conduct and practice, and ensures the accountability of members of the Australian Master Builders movement for breaches of acceptable standards of industry conduct and practice.

It also provides a more flexible and cost efficient marketplace alternative to government regulation.

The Code does not deal with contractual rights and technical issues and is not a substitute for civil remedies any of the parties may have - those will still be dealt with by whatever procedures are contained in the contract, e.g. settlement by intermediaries, mediation, arbitration, litigation.

The disciplinary procedures in the Code relate to commercial ethics and behaviour.

Who does the Code apply to?

The Code applies to all members of Master Builders Australia. As there are two different types of members of Master Builders Australia (i.e. corporate members and

Association members) different parts of the Code apply to particular categories of membership. An illustration of this is that a complaint concerning a corporate member or a State or Territory MBA will be heard directly by Master Builders Australia, but a complaint against a member of a State or Territory MBA will be heard first by that State or Territory MBA to which the member belongs. If the person who made the complaint or the member is not happy with the way that State or Territory MBA handles the complaint, it is their right to appeal to Master Builders Australia and have the matter heard by the Appeals and Complaints Board.

Who can make a complaint?

Any client of a member, a member, a State or Territory MBA, and a government agency or body of the Commonwealth, State or territory.

Where can complaints be made?

Usually complaints are made to the Executive Director of the MBA in the State or Territory in which the problem arose. However, if desired, a complaint may be made directly to Master Builders Australia in Canberra in writing, and it will then be passed on if appropriate to either the relevant State or Territory MBA or to the Appeals and Complaints Board. A list of MBA offices is set out at the end of this Section.

Who will deal with the complaint?

Most complaints will be handled by the MBA in your State or Territory. However a complaint may ultimately end up being determined by an Appeals and Complaints Board.

What is the Appeals and Complaints Board?

This is a disciplinary tribunal established under this Code to ensure that complaints are dealt with properly and fairly, and to provide a right of appeal against decisions of State and Territory MBA's. Whilst senior and responsible members of the building and construction industry will sit on the Appeals and Complaints Board because of their experience and knowledge, representatives of the Trade Practices Commission and government will also be part of the Appeals and Complaints Board to ensure that each matter is dealt with properly.

Who will administer the Code?

The Code will be administered, reviewed and updated by a Code Administration Committee with the assistance of Master Builders Australia. Any enquiries concerning the operation of the Code should be directed to the Executive Director, MBA Inc, 3rd Floor, Construction House, 217 Northbourne Avenue, Turner 2601, Phone 06 249 1433, Fax. 06 249 1373.

1.3 State and Territory MBAs

Master Builders Association of ACT
 Level 1, 217 Northbourne Avenue
 TURNER ACT 2601
 Phone: 06 247 2099 Fax: 06 249 8374

Master Builders Association of NSW
 52 Parramatta Road
 FOREST LODGE NSW 2037
 Phone: 02 660 7188 Fax: 02 660 4437

Master Builders Association of Queensland
 417-419 Wickham Terrace
 BRISBANE QLD 4000
 Phone: 07 831 7033 Fax: 07 832 2361

Master Builders Association of South Australia
 47 South Terrace
 ADELAIDE SA 5000
 Phone: 08 211 7466 Fax: 08 231 5240

Master Builders Association of Tasmania
 59 Sandy Bay Road
 HOBART TAS 7000
 Phone: 002 232 377 Fax: 002 234 194

Master Builders Association of Victoria
 332 Albert Street
 EAST MELBOURNE VIC 3002
 Phone: 03 419 4555 Fax: 03 417 7006

Master Builders Association of Western Australia
 37 Havelock Street
 WEST PERTH WA 6005
 Phone: 09 322 5133 Fax: 09 322 5518

Newcastle Master Builders Association
 165 Lambton Road
 BROADMEADOW NSW 2292
 Phone: 049 526 877 Fax: 049 526 612

Territory Construction Association
 191 Stuart Highway
 DARWIN NT 0801
 Phone 089 819 666 Fax: 089 410 275

1.4 Code Format

There are three types of provisions in the Code:

- (a) **formal provisions** which lay down the Code's specific requirements which all members must adhere to;
- (b) **explanatory notes** which help in understanding how the Code operates (these words are usually in smaller print and may be in brackets); and
- (c) **headings and subheadings** which also are meant to aid in the understanding of the Code.

This type of format is considered appropriate to help in

the overall understanding of the intent of the Code, and as it has the potential to affect the reputation and livelihood of contractors it is necessary, in many places, to use formal, technical or legal language.

As well some words will begin with a capital letter which will usually mean it has a special meaning which can be found by looking at the Definitions contained in Section 1, e.g. wherever Council appears its special meaning from Section 1 is "Council means the council of MBA Inc" and not some other council of management. All of the above form integral parts of the Code and should be read together. However if any ambiguity or conflict arises the formal provisions (which include the Definitions) will override the headings, subheadings and explanatory notes.

1.5 Principles and Objectives

The guiding principles and objectives of this Code of Practice are:

- fair and equitable dealings with clients and other industry participants at all times;
- compliance, not only with the law, but with the minimum industry standards of conduct prescribed in this Code;
- accountability for any transgressions of this Code;
- promotion of an efficient competitive and ethical building and construction industry;
- providing the client with the confidence that using an MBA member is a better way of building; and
- provision of the framework to continue industry reform and in particular changing the adversarial nature of commercial dealings to that of the partnering concept of utmost good faith and fairness in all such dealings.

There is an overriding philosophy that certain types of commercial behaviour are unacceptable and those who choose to participate in such undesirable practices have no place in today's building and construction industry. All who gain their livelihood from the industry have a duty to ensure that the Code operates effectively.

1.6 Code Definitions

As part of this Code contains a disciplinary procedure which includes fines, suspensions and expulsion which could in severe cases lead to a loss of a contractor's livelihood it is necessary in some parts to use formal, technical or legal language. Therefore in this Code, some words have special meanings which are set out below (so that the Code is easier to read, in some parts of the Code a meaning will be repeated in similar but not identical language to that contained in a definition - but if there is any ambiguity in meaning, the words in the definitions will always take precedence):

"alternative disciplinary procedure"

means a disciplinary procedure (other than that provided in Section 4) established by MBA Inc pursuant to an agreement with any of the Commonwealth, State or Territory governments.

“Appeals and Complaints Board”

has the meaning subscribed in Section 4.1.

“Association Member” and “corporate member”

have the meanings subscribed in the Constitution of MBA Inc to those terms.

“Code” means this Code of Practice or any code of practice amending, replacing or supplementing the same.

a **“collusive arrangement or understanding”** includes conduct involving:

- unsuccessful tenderers fees;
- special fees;
- cover bids;
- collaboration between tenderers on contract prices;
- meetings and discussions between tenderers to discuss tenders to which the client or its representative is not invited; and
- the lessening of free and open competition.

“Complainant”

means the person or body making a Complaint.

“Complaint”

means a complaint or appeal referred to in Section 4.3, (but does not include, insofar as 4.3.1 (a) is concerned, any matter which is entirely the subject of an alternative disciplinary procedure, or any appeal in connection with the conduct or outcome of an alternative disciplinary procedure unless such alternative disciplinary procedure has provision for the Appeals and Complaints Board to hear and determine an appeal).

“Constitution”

means, according to the requirements of the context, the constitution, articles, memorandum, rules, by-laws, codes of behaviour and the like, of either MBA Inc or of a State or Territory MBA.

“Council”

means the council of MBA Inc.

“Ethics”

means those contained in Section 2.5 and any others declared from time to time by MBA Inc to be ethics for the purposes of this Code.

“Executive”

means the Executive committee of MBA Inc.

“Executive Director”

means the Executive Director of MBA Inc.

“Independent Chairman”

is a person appointed to the Appeals and Complaints Board pursuant to Section 4.1 (c) and shall not be a Member, director, officer, office bearer, shareholder or employee of a Member.

“Independent Person”

is a person appointed to the Appeals and Complaints Board pursuant to Section 4.1 and shall not be a Member, director, officer, office bearer, shareholder or employee of a Member.

“Industry Code of Practice”

means a code, rules, regulation, principles or guidelines relating to conduct or industry practice which is listed in the Schedule or which is declared by MBA Inc from time to time to be an Industry Code of Practice for the purposes of this Code.

“MBA Inc”

means Master Builders Australia Incorporated.

“Member”

means, according to the requirements of the context, any one or more of the following:

- a corporate member of MBA Inc
- a member of a State or Territory MBA (which is an Association Member of MBA Inc and has adopted this Code of Practice)
- an Association Member of MBA Inc which has adopted this Code of Practice.

“Observer”

means, according to the requirements of the context, either the person appointed to observe the proceedings of the Appeals and Complaints Board pursuant to Section 4.1(b) or the person appointed to the Code Committee pursuant to Section 5.

“Report”

means the report referred to in Section 5.

“Respondent”

means the person the subject of a Complaint.

“State or Territory MBA” means:

- Master Builders Association of the Australian Capital Territory
- Newcastle Master Builders Association
- Master Builders Association of New South Wales
- Territory Construction Association
- Queensland Master Builders Association
- Master Builders Association of South Australia
- Master Builders Association of Tasmania
- Master Builders Association of Victoria
- Master Builders Association of Western Australia
- and any other trade organisation or association which becomes an Association Member of MBA Inc.

Words in the singular include the plural and words in the plural include the singular according to the requirements of the context.

PART TWO - CODE REGULATIONS

2.1 Ethical Behaviour

All Members shall observe the following Ethics:

- (a) **Acceptable conduct** - To act at all times with honesty, integrity and responsibility and in the spirit of good faith and fair dealing.
- (b) **Sharp practices** - Not to engage in any conduct which is unfair, harsh or unconscionable, including but not limited to:
 - removal of fittings and materials contrary to contractual provision,
 - valuing variations or increasing prices otherwise than in accordance with a contractual or other entitlement, and
 - deliberately undervaluing provisional sums or prime cost items in order to subsequently increase the contract price.
- (c) **Lowering standards** - members shall not engage in any practice which might tend to lower the standards applicable in the building and construction industry including but not limited to:
 - supplying material to a lesser standard than specified,
 - knowingly specifying unsuitable materials, and
 - misrepresenting capabilities and experience.
- (d) **Observing the law** - To observe both the spirit and the letter of the relevant laws of the Commonwealth, States and Territories in which the member operates.

To understand the principles of fair trading legislation including but not limited to the Trades Practices Act by ensuring that all key management participate in the educative training and compliance programs conducted by MBA Inc.

To bring any known breach by a Member of the Code to the attention of MBA Inc without delay.

- (e) **Promotion** - To seek to further the objectives of the Code.
- (f) **Observance** - To observe the principles of the Code.
- (g) **New Codes** - Such other matters as may be declared by MBA Inc, from time to time, to be objectives, principles or ethics for the purposes of this Code.

2.2 Unacceptable Tendering Practices

(Former industry practices involving special fees, unsuccessful tenderers fees and cover bids fall within this category)

Without in any way limiting the operation of Industry Codes of Practice, Members shall not knowingly:

Collusive Tendering

- (a) - attempt to make,

- arrive at,
- give effect to,
- be concerned in,
- be a party to,

any Collusive Arrangement or Understanding;

(This may include from the definition but is not limited to conduct involving unsuccessful tenderers fees, special fees, cover bids, collaboration between tenderers on contract prices, meetings and discussions between tenderers to discuss tenders to which the client is not invited to participate. It is industry best practice and in everybody's interest to ensure that the client or his representative are present during these discussions for the following reasons:

- all the tenderers are afforded the opportunity to raise matters with the client which may affect the allocation of risk and the final tender price;
- each tenderer is provided with the same information to take into consideration when preparing its own individual tender;
- the client is afforded the opportunity of hearing proposals to improve the projects procurement or documentation, thus lowering the cost of the project;
- all the parties have the opportunity to clarify any ambiguities, omissions or technical issues and to better understand the best method of project delivery; and
- all the tenderers have the opportunity to question the client regarding the client's brief or projects requirements.

All reasonable steps should be taken to ensure the client's attendance, however where a client declines to amend a meeting, the client should, before the meeting takes place, be informed of the purpose of the meeting, the nature of any perceived ambiguities, discrepancies, omissions or other problems with the project or its documentation. As soon as possible after the meeting, prior to the close of tenders, a complete, unabridged and unedited copy of the minutes of that meeting should be circulated and a copy forwarded to the client. At such a meeting particular care must be exercised by all parties to ensure that collusive tendering practices do not arise.)

Misleading Conduct

- (b) engage in any conduct that is misleading or deceptive or is likely to mislead or deceive.

(This may include submission of tenders which deliberately omit relevant material or particulars so as to mislead the principal in comparable analysis of competing tenders)

2.3 Fair Trading

Without in any way limiting the operations of Industry Codes of Practice, members shall not knowingly:

Anti-Competitive Practices

- (a) supply, or attempt to supply, any goods or materials upon condition that the purchaser agrees to take other goods or services from a nominated third party.

Resale Price Maintenance

- (b) shall not engage or attempt to engage in the practice of resale price maintenance.

(Members involved in manufacturing must not stipulate minimum prices for which their goods must be sold)

2.4 Codes of Practice

(Some MBA’s and governments have introduced their own codes or guidelines for matters such as tendering and industrial relations. If they are listed in the Schedule at the back of this Code or MBA Inc decides in the future that a code is applicable then it is incorporated into this Code as well. Any breach of such code is then automatically a breach of this Code.)

All Members shall observe the requirements of Industry Codes of Practice.

2.5 Conflicting Codes

(This Code does not seek to replace those codes or rules of the State and Territory MBA’s which have often been developed to meet important regional requirements. All codes will operate together. However in the unlikely event of a conflict or ambiguity between provisions this Code will take precedence. As soon as MBA Inc becomes aware of such a conflict it will of course take the necessary action to resolve the difference.)

All Members shall also observe the objectives, principles and ethics of the State or Territory MBA of which they are members, to the extent that such objectives, principles or ethics are not inconsistent with those prescribed by this Code.

2.6 Observance of MBA Constitutions

(All the constitutions of Master Builders Australia and the State and Territory MBA’s have rules and regulations that members must follow.)

All Members shall observe the requirements of the Constitution of MBA Inc.

All Members shall also observe the requirements of the Constitution of the State or Territory MBA of which they are members, to the extent that such Constitution is not inconsistent with that of MBA Inc.

2.7 Compliance

(It is a condition of membership that Members agree to comply not only with the provisions of this Code but also abide by any disciplinary action following from a breach of this Code)

All Members the subject of a Complaint shall abide by and comply with a determination of the Appeals and Complaints Board.

PART THREE - ADOPTION BY ASSOCIATION MEMBERS

- 3.1 A State or Territory MBA shall become bound to the Code by executing a Deed of Adherence in the form prescribed by MBA Inc from time to time.
- 3.2 The agreement of a State or Territory MBA to be bound to the Code shall be irrevocable without the written consent of MBA Inc.
- 3.3 As soon as practicable after becoming bound to the Code, a State or Territory MBA shall:
 - (a) remove or amend any provision of its Constitution which is inconsistent with the Constitution of MBA Inc;
 - (b) amend its Constitution to include such provisions as may be prescribed by MBA Inc as necessary to give effect to the Code.
- 3.4 All Members shall display the Principles of this Code at a prominent place at their registered office or principle place or business.

PART FOUR - APPEALS AND COMPLAINTS HANDLING

Introduction

This part of the Code contains the machinery for dealing with complaints.

It is important to remember that this Code provides a means of roping-in other Industry Codes of Practice so that a breach of any of the codes can be dealt with by the disciplinary procedure contained in this Section.

The State and Territory MBA’s all have in place tried and proven dispute handling procedures, which will include initially attempting to mediate between the protagonists. It is important for the parties to maintain effective communication at all times during the tendering and building processes and in many cases disputes arise through no more than a failure to effectively communicate in a timely fashion.

It is also important to remember that this Code applies to the conduct and behaviour of Members and does not apply to contractual disputes.

Preventing and Handling of Contractual Disputes

Members are encouraged at all times to effectively and regularly communicate with the client.

Experience has shown that the majority of disputes are of a minor nature and often due to no more than a lack of understanding of the building process.

Master Builders Australia encourages the use of dispute prevention mechanisms such as the partnering process. With over \$3 billion dollars of building and construction

now being “partnered” in Australia it has proven to be a better way of building. More information on Partnering is available at your local MBA.

Disputes over contractual rights/obligations or technical matters should be dealt with under the contract between the parties (e.g. should a dispute arise under the National Housing Contract produced by MBA Inc and the Law Council of Australia, then the parties can have straightforward matters resolved by an Intermediary in a quick, fair and economical way). However this does not prevent a complaint being made in relation to the conduct of a member which gave rise to the dispute and which is alleged to be a breach of this Code. If the complaint is established, sanctions may be imposed on the Member under the Code, but it is not the function of the Code to adjust the contractual rights or obligations of the parties which is the role of the Courts or Arbitrator if applicable.

Code Breaches

Before lodging any complaint the parties should meet at least once to try and explain their concerns and to endeavour to mutually resolve the matter.

If this is unsuccessful then a written complaint should be made to the Executive Director of the appropriate State or Territory MBA setting out details of the complaint.

If a complainant is unhappy with the manner in which the complaint was handled or the outcome then this Code provides a right of appeal.

If the complaint is found to be justified then the Appeals and Complaints Board has wide ranging powers to impose sanctions.

4.1 Appeals and Complaints Board

There shall be established by MBA Inc an Appeals and Complaints Board whose members shall comprise:

- (a) each of the Executive from time to time of MBA Inc;
- (b) the person or persons, who having met the criteria for selection, have been appointed to the panel of Independent Persons pursuant to this Section 4.1;
- (c) where a complaint is made by a State or Territory Government or their respective statutory authorities, an observer appointed by that State or Territory Government, for the hearing and determination of that complaint; and
- (d) an Independent Chairman nominated by the Law Council of Australia and agreed to by MBA Inc.

In relation to (b) above the relevant criteria for selection are:

- requisite industry history and involvement in a building or construction related discipline;
- an ability to be well informed and objective and to exercise sound and balanced judgement on issues;
- the ability to objectively assess the relevant factors about the complaint from the point of view of both the complainant and the member.

The Executive Director of MBA Inc and the Deputy

Chairman of the Trade Practices Commission shall jointly maintain from time to time a panel of people who satisfy the above criteria.

4.2 Hearing of Complaints

4.2.1 All complaints other than those Complaints under Section 4.3.1 shall continue to be dealt with according to the current procedures of MBA Inc and the State and Territory MBAs or such procedures which may, in the future, modify or replace the same.

4.2.2 The Appeals and Complaints Board shall hear and determine the Complaints listed in Section 4.3.

4.2.3 No more than four members of the Appeals and Complaints Board shall hear and determine a particular Complaint, unless the Complainant and the Respondent otherwise agree in writing. The Executive Director of MBA Inc after receipt of a Complaint shall appoint four members of the Appeals and Complaints Board, (two of whom shall be selected from the MBA Executive, and one of whom shall be an Independent Person) to hear and determine that Complaint. So far as is practicable (but with due regard to considerations such as time, expense and location) the Executive Director shall rotate such appointments.

4.3 JURISDICTION OF APPEALS AND COMPLAINTS BOARD

The Appeals and Complaints Board shall hear and determine the following Complaints:

4.3.1 Original Jurisdiction

- (a) complaints by any client, government or statutory authority alleging a breach of the Code by a corporate member, or by a State or Territory MBA bound by the Code;
- (b) such other matters as may be designated as a complaint for the purposes of this Section by the Council of MBA Inc.

4.3.2 Appeals

- (a) complaint by a member of a State or Territory MBA against a decision of that State or Territory MBA which adversely and seriously affects the commercial interests of that particular member;
- (b) appeals by any member of a State or Territory MBA against that members disciplining or expulsion by a State or Territory MBA; and
- (c) appeals by any corporate members against their disciplining or expulsion by MBA Inc.
- (d) appeals by a Complainant against a decision of a State and Territory MBA.

4.3.3 Contractual and Technical Disputes

The Appeals and Complaints Board shall not hear or determine any dispute which is of a contractual or technical nature but may proceed to hear and determine a Complaint which arises out of the conduct of a Member in connection with such dispute.

4.4 Procedures of Appeals and Complaints Board

As soon as practicable after receipt of any Complaint the Appeals and Complaints Board shall conduct a hearing into the matter and make a determination.

In the hearing of a Complaint the Appeals and Complaints Board shall determine its own procedures subject to the following:

- (a) the strict rules of evidence do not apply;
- (b) the rules of natural justice must be observed;
- (c) any determination shall be in accordance with equity and good conscience;
- (d) a minimum of formality shall apply, but the Complainant and Respondent shall be entitled to legal representation subject to such terms and conditions as may be determined by the Appeals and Complaints Board.
- (e) the manner and procedures of dealing with a complaint shall be the most appropriate in all the circumstances having regard to the gravity of the allegations the subject of the complaint and the cost and convenience to the Complainant and Respondent. Such procedures may include, for example:
 - conducting hearings in the capital city of the State in which the complaint or appeal occurs;
 - conducting hearings by way of electronic facilities such as teleconferencing, facsimile, data exchange, or by way of exchange of submissions, documents and information by post.

4.5 Hearing and Determination

- (a) A hearing may proceed ex parte if the Appeals and Complaints Board is satisfied that the respondent is aware of the nature of the Complaint, the date set down for the hearing of the Complaint and has been afforded a reasonable opportunity in all the circumstances to make arrangements to attend or be represented at the hearing.
- (b) A determination of a Complaint shall only be made by those persons who heard the Complaint and consideration shall only be given to the evidence and arguments before the Appeals and Complaints Board.
- (c) Any member of the Board (including the Independent Chairman) and the Observer may question any person giving testimony at the hearing of a Complaint.
- (d) A determination shall be made by simple majority of the members of the Board and the Independent Chairman hearing the complaint.
- (e) The Independent Chairman shall have a casting vote.

- (f) If votes are tied the Independent Chairman:
 - may exercise a casting vote to resolve the matter, or
 - not exercise a casting vote, in which case the Complaint is dismissed.
- (g) A determination of the Complaint Board shall be published as soon as practicable and notified in writing to the Complainant and the Respondent.

4.6 Sanctions of the Appeals and Complaints Board

The Appeals and Complaints Board shall have power in determining a complaint to:

- (a) alter, reverse, or annul a decision of MBA Inc or a State or Territory MBA;
- (b) substitute its own decision for that of MBA Inc or a State or Territory MBA;
- (c) increase, reduce, alter or otherwise modify a monetary penalty or period of suspension imposed by MBA Inc or a State or Territory MBA;
- (d) impose a monetary penalty on a Member;
- (e) recommend to the Council the suspension or expulsion of an Association member (an Association member can only be suspended or expelled pursuant to the provisions in the Constitution of MBA Inc);
- (f) suspend or expel from membership (other than an Association member) and/or otherwise discipline a Member;
- (g) adjourn the hearing of any Complaint to enable the Complainant or Respondent to prepare and conduct its case;
- (h) if it is of the opinion that a Complaint should in the first instance be determined by a State or Territory MBA, direct that State or Territory MBA to hear and determine the Complaint in accordance with their procedures;
- (i) if it is of the opinion that it is more appropriate for a Complaint to be dealt with by an alternative disciplinary procedure, refer the Complaint to the body responsible for the implementation of such alternative disciplinary procedure;
- (j) determine that no further action is necessary on the Complaint;
- (k) suspend the operation or effect of any determination with or without conditions;
- (l) dismiss a Complaint without proceeding to a hearing if it is of the view it is of a trivial or vexatious nature; and
- (m) before proceeding to a hearing, direct the Executive Director of MBA Inc to endeavour to resolve a Complaint in the first instance by way of conciliation, mediation or other method of dispute resolution acceptable to the Complainant and Respondent.

The Appeals and Complaints Board may also make recommendations to the Executive, Council or Codes Administration Committee.

PART FIVE - CODE ADMINISTRATION MONITORING AND REVIEW

5.1 Codes Administration Committee

There shall be established a Codes Administration Committee whose members shall comprise:

- (a) each of the Executive of MBA Inc;
- (b) each of the Presidents of “Association members” of MBA Inc;
- (c) an observer appointed by the Minister for Consumer Affairs (Commonwealth);
- (d) an observer appointed by the National Public Works Council; and
- (e) such other observers representing Commonwealth, State or Territory Governments as may be appointed by the Executive from time to time.

The Codes Committee shall meet at least twice a year and at such other times at the Executive or Council deems necessary.

5.2 Role of the Committee

The role of the Code Administration Committee is to:

- monitor and report to the Council and Executive on compliance;
- prepare and submit to Council for approval, an annual business plan for the Code;
- collect data on complaints with a view to addressing systemic complaints;
- be responsible for public and membership awareness of the Code;
- publish an annual report on the operation of the Code in accordance with the criteria set out in Section 5.4.

5.3 Role of MBA Inc

The role of MBA in relation to the administration of the Code is to:

- set up the Appeals and Complaints Board;
- ensure adequate training of membership to create awareness of Code regulations and sanctions for breaches;
- conduct periodic reviews of the effectiveness of the Code and its procedures and recommending amendments if necessary;

5.4 Reporting

The Codes Administration Committee shall monitor and review the operation and the effectiveness of the Code and it shall submit a Report to the Council annually on the following matters:

- (a) the effectiveness of the Code in preventing collusive tendering and promoting commercial ethics;
- (b) the effectiveness of educative, training and compliance programs, and the marketing of the Code to the industry;
- (c) the extent of compliance with the Code by industry participants;
- (d) whether the Code has given rise to any industry problems;

- (e) whether the Code has introduced any anti-competitive effects into the industry;
- (f) the effectiveness of the Appeals and Complaints Board;
- (g) the appropriateness of the Code’s principles and ethics;
- (h) the need for changes to the Code;
- (i) whether any further codes, rules, regulations, principles or guidelines relating to conduct or industry practice should be declared by MBA Inc to be an Industry Code of Practice, and in what States or Territories it should apply;
- (j) any recommendations to improve the benefits provided by the Code;
- (k) any other matter requested by the Executive or Council; and
- (l) any trends in Code violations that require remedial action (including but not limited to the need to establish standard penalties for certain types of breaches or to impose limitations on penalties). A database will be developed to collect such information.

As soon as practicable, after being requested by the Executive or Council, or whenever the Codes Administration Committee considers it necessary, a Report shall also be provided to the Executive or Council on any one or more of the above matters.

Any member of the Codes Administration Committee who objects to any of the content of a Report may provide written particulars of the reasons for such objection to the Council or Executive for consideration with the Report.

The Council shall produce an annual report on the Code and its administration and make it available to interested parties.

5.5 Publicity of the Code

The Code Administration Committee shall widely publicise the Code.

5.6 Compliance Training

The Code Administration Committee will ensure that all members receive adequate and ongoing training so that they are aware of the contents of the Code and the consequences of its breaches.

Training may include, but not be limited to:

- participation in seminars;
- one-to-one discussion;
- company specific training; and
- journal of articles and executive briefs.

5.7 Review and Evaluation of the Code

The Code and its administration may be reviewed and evaluated by the Council at the end of each year of its operation.

- The kind permissions of Master Builders Australia Inc to publish the National Code of Practice and of the Deputy Chairman of the Trade Practices Commission, Mr John Broome, to reproduce his Foreword are gratefully acknowledged.

Editorial Note:

The MBA's National Code of Practice is an important reform development for the industry. The Code should improve conduct and relationships and enhance confidence.

The MBA's Code might also give MBA members a marketing edge over non-members who are not bound (by membership) to comply with its strictures.

The Code is not intended to affect contractual relationships or to provide a mechanism for the resolution of contractual disputes - "this Code applies to the conduct and behaviour of Members and does not apply to contractual disputes". Whilst the Code does envisage potential for the lodgement of complaints "in relation to the conduct of a member which gave rise to the dispute", it also states "it is not the function of the Code to adjust contractual rights or obligations of the parties which is the role of the Courts or Arbitrator".

Yet, there would seem some potential the Code might have an impact upon legal rights regarding the performance of contracts. One can envisage contentions that a builder, by providing the Code to a potential client or even, perhaps, by holding itself out as being a member of the MBA, thereby represented it would behave in the manner prescribed by the Code. That is, a client might contend the builder had made representations that it would "act at all times with honesty, integrity and responsibility and in the spirit of good faith and fair dealing" and that it would refrain from "sharp practices" and from "lowering standards" etc (see 2.1 Ethical Behaviour). In the event of any (alleged) departure from those ethical standards, or for tactical reasons, a client might allege the builder thereby engaged in misleading and deceptive conduct, made representations about future matters etc in breach of the Trade Practices and Fair Trading Acts and, perhaps, negligently misrepresented the manner in which it would perform the contract.

With its members obliged to perform contracts in accordance with the ethical strictures of the Code ("good faith and fair dealing"), now the challenge for the Master Builders Australia is to spread those same requirements to the other industry participants. Particularly to the clients, of whom some do not always act with complete propriety. Indeed, as stated in the Code, the Master Builders Australia hopes "that this Code will serve as an industry model providing both the impetus for reform and the standard for other industry participants such as the design professions, the principals and clients, and the unions".

Despite any negative potential for clients to raise additional grounds of complaint in commercial dispute proceedings, and whilst there might (possibly) be some MBA members who feel aggrieved about the (unilateral) imposition of the Code's requirements, the MBA and its members are only likely to be strengthened by the Code.

The MBA is to be congratulated on this initiative.

- JT