



**SUBMISSION TO THE PRODUCTIVITY COMMISSION  
INQUIRY INTO PUBLIC INFRASTRUCTURE**

**December 2013**

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## **PRODUCTIVITY COMMISSION INQUIRY INTO PUBLIC INFRASTRUCTURE**

### **1. INTRODUCTION**

**1.1** The Australian Constructors Association (ACA) welcomes the opportunity to respond to the Issues Paper released by the Productivity Commission on 28 November 2013, as part of the Commission's Inquiry into public infrastructure financing, costs and productivity.

**1.2** The ACA congratulates the Government for issuing the terms of reference for the Inquiry. This is not the first inquiry of this kind that has been undertaken, but it is to be hoped that it will be the most significant in terms of its long term outcomes. The findings and recommendations of this Inquiry will lead to much needed improvements in the methods and costs of delivery of infrastructure across the country for the benefit of Australian citizens and the economy as a whole.

**1.3** The ACA and its members are committed to working with Australian governments and industry stakeholders to ensure that the Commission identifies all of the key issues and roadblocks to greater productivity within the delivery of infrastructure projects and construction projects in general.

**1.4** The ACA also urges all levels of government to commit to implementing the findings of the Inquiry. The recent announcement by the Federal Government as to Australia's current debt position is an important wake-up call for all stakeholders that it is past time that action is taken to address the current impediments to the efficient and cost effective delivery of Australia's infrastructure.

**1.5** It is important that this Inquiry does not suffer the fate of previous inquiries and reports that have promised much but have not comprehensively or consistently delivered the outcomes achievable. That is why the ACA calls on all Australian governments to use the COAG process to ensure that the findings and recommendations of the Inquiry result in quantifiable and long term improvements to the financing and delivery of major infrastructure in all Australian jurisdictions.

### **2. AUSTRALIAN CONSTRUCTORS ASSOCIATION**

**2.1** The ACA represents the nation's leading construction contracting organisations. A list of ACA members is attached (Annexure 1). The ACA is dedicated to making the construction industry safer, more efficient, more competitive and better able to contribute to the development of Australia.

**2.2** ACA member companies operate in a number of market sectors including:

- Engineering construction incorporating public and private sector infrastructure
- Commercial and residential building
- Contract mining

- Oil and gas operations
- Process engineering
- Telecommunications services
- Environmental services
- Maintenance and related services

**2.3** Association members operate globally, with member companies operating in Australasia, Europe, Asia, North and South America, Africa and the Middle East. Collectively ACA member companies have a combined annual revenue in excess of \$50 billion and employ over 100,000 people in their Australian and international operations.

**2.4** The ACA has four (4) key objectives:-

1. To require the highest standards of skill, integrity and responsibility of member companies.
2. To represent the interests of major contractors to government and other decision makers.
3. To enhance and promote the status of construction contractors and the industry which they serve.
4. To facilitate the exchange of technical information and encourage further research.

### **3. APPROACH TO THE INQUIRY**

**3.1** The purpose of this submission is to respond in broad terms to the Issues Paper released by the Productivity Commission. The ACA does not propose to respond in detail at this stage to all of the questions contained in the Issues Paper, but will identify the key issues from the ACA's perspective.

**3.2** As part of its more focussed response to the Inquiry, the ACA will provide at a future point in time further data and statistical evidence in relation to key areas of interest identified in the Issues Paper.

### **4. HISTORICAL PERSPECTIVE**

#### **General**

**4.1** The issues that are the subject of this Inquiry are not new. They have been evident for a significant period of time in various forms and are reasonably well known in terms of their structure and impact. An examination of the reports and papers referred to below demonstrates the significant knowledge of governments and industry, both in Australia and internationally, about the issues.

**4.2** However, what is also clear is that there has not been a consistent approach in Australia at state and federal government levels to coordinate and implement a long term and sustainable program of action to address the strategic issues now being faced. As a result, Australia has not been as well placed as it might have been to take advantage of the strength of its economy and to use that strength to develop and commit to a national infrastructure model to take the country forward following the global financial crisis.

**4.3** The ACA contends that this situation has occurred because governments in Australia have been unable or unwilling to plan significantly past each electoral cycle, and have not made infrastructure decisions on the basis of the long term benefits that may be achieved. That said, more recent work by COAG, as contained in the communique issued following COAG's 13 December 2013 meeting, indicates a degree of urgency in COAG's work to

address infrastructure issues and recognition by all Australian governments that coordinated action is required.

**4.4** The communique indicates that COAG has commissioned the following work on infrastructure:

- Practical options to accelerate project delivery, including how planning and approval timeframes can be fast-tracked.
- Advice on the next major transport reforms, including proposals for heavy vehicle charging and investment reform.
- Options to increase private sector investment in infrastructure projects.
- Ways to prioritise projects that improve productivity or unlock economic growth potential including in regional economies.

**4.5** The ACA also notes that the Federal Government has moved to legislate to establish Infrastructure Australia as a stand-alone statutory authority. The ACA commends the Government for taking this action as it sends an important message to the construction and infrastructure sectors that the government is serious about advancing the important issue of infrastructure delivery.

### **Summary of Australian and International Activities**

**4.6** In understanding how operational practices relating to project and industry costs have developed over time, it is helpful to briefly examine historical and contemporary approaches to the issues. Set out below is a snapshot of the findings of some, but by no means all, inquiries and reviews conducted in Australia and, more recently, in overseas countries.

**4.7** It will be seen that the same, or similar, issues frequently recur and only recently does it seem that governments have accepted the need to make fundamental changes to the structure of infrastructure projects and committed to those changes on a long term basis.

**4.8** The inquiries and reviews covered in this section of the submission are as follows:

- Australian Industry Commission - Inquiry into Construction Costs of Major Projects (March 1991)
- Infrastructure UK and HM Treasury – Infrastructure Cost Review (December 2010)
- Infrastructure UK and HM Treasury – Infrastructure Cost Review: Annual Report 2011-12 (April 2012)
- HM Treasury – Infrastructure Cost Review: Annual Report 2012-13 (June 2013)
- Infrastructure Australia – National Infrastructure Plan (June 2013)
- NSW Government – Better Value Infrastructure Plan (April 2012)
- European Commission - Connecting Europe Facility 2014-2020 (October 2011)
- Deloitte Touche Tohmatsu Limited – Funding Options: Alternative Financing for Infrastructure Development (April 2013)

### ***Australian Industry Commission Inquiry into Construction Costs of Major Projects (1991)***

**4.9** On 11 March 1991, the then Australian Industry Commission released its report into construction costs of major projects. The report had been prepared following terms of reference provided by then Federal Treasurer P.J. Keating on 18 October 1989. The Commission highlighted industrial relations as a major factor in construction costs stating that, at that time, ***“working days lost for the industry as a whole were substantially higher than the Australian average”*** (p1).

**4.10** The Commission also identified a range of other impediments. At p.4 of the report, the Commission notes that ***“Despite frequent reviews and commitments by governments to***

***change, approval processes continue to impose an unnecessary cost burden on proponents of major projects”.***

Also at p.4 the Commission states ***“Conformity among governments in administrative procedures and the standards employed is limited”.***

4.11 While the findings are obviously reflective of the situation at that time and those circumstances may have changed over time the findings are nonetheless instructive.

4.12 A summary of some of the relevant findings is as follows:

- In some areas Australian construction costs for major projects are comparable or lower than overseas but in other areas there are disadvantages of the order of 20 percent compared to the lowest cost developed country.
- Capital costs for those major projects for which data was available represented 40 percent of the unit cost of the final product while erection costs were around half of capital costs and labour costs accounted for about half of erection costs.
- Industrial relations problems, particularly in the central business districts of Sydney and Melbourne, and inefficient planning approval processes are the two most important factors subject to the influence of government which result in the capital costs of major projects in Australia being higher than necessary.
- Governments, being major clients of the industry, can hasten labour market reform by insisting that more efficient labour and management practices are adopted on government construction sites.
- Governments need to accelerate the reviews of regulations, standards and associated administrative procedures so as to reduce uncertainties and delays and reduce the costs resulting from variations in standards and regulations.

#### ***UK Government Infrastructure Cost Review 2010***

4.13 Progressing forward some 20 years from the Industry Commission inquiry, in the June 2010 UK Budget the UK Government announced that Infrastructure UK would carry out an investigation into how to reduce the cost of delivery of civil engineering works for major infrastructure projects.

4.14 In the foreword to the report produced as a result of the investigation, Lord Sassoon said (at p.3):

***“There should be little surprise that this study confirms that very substantial savings are available – at least 15 percent, which can deliver sustainable benefits of £2 to 3 billion per annum. This is £20 to £30 billion over the next decade”.*** (Emphasis added)

4.15 It is useful to include in this submission a substantial extract from the Executive Summary of the report as it succinctly identifies a wide range of issues and actions that were to be implemented in the UK to give effect to the report. The ACA submits that the findings of the UK investigation are entirely relevant for Australia. The relevant components of the Executive Summary are reproduced below:

***“The ability to deliver infrastructure investment priorities efficiently and effectively is crucial to achieving the UK’s growth objectives.***

***The weight of evidence confirms that the UK is more expensive than its European peer group and demonstrates that there are significant opportunities to reduce costs in the delivery of infrastructure.***

***There is no single overriding factor driving higher costs. However, the investigation has identified that higher costs are mainly generated in the early project formulation***

**and pre-construction phases and provided evidence of a number of contributing factors including:**

- **stop-start investment programmes and the lack of a visible and continuous pipeline of forward work;**
- **lack of clarity and direction, particularly in the public sector, over key decisions at inception and during design. Projects are started before the design is sufficiently complete.**
- **the roles of client, funder and delivery agent become blurred in many public sector governance structures;**
- **the management of large infrastructure projects and programmes within a quoted budget, rather than aiming at lowest cost for the required performance. If the budget includes contingencies, the higher total becomes the available budget;**
- **over-specification and the tendency, more prevalent in some sectors than others, to apply unnecessary standards, and use bespoke solutions when off-the-shelf designs would suffice;**
- **interpretation and use of competition processes not always being effective in producing lowest outturn costs, with public sector clients in particular being more risk averse to the cost and time implications of potential legal challenges;**
- **companies in the supply chain typically investing tactically for the next project, rather than strategically for the market as a whole; and**
- **lack of targeted investment by industry in key skills and capability limiting the drive to improve productivity performance.**

**Over many years in the UK there has been fragmentation of the construction industry and a significant shift towards the use of subcontracting. Compounded by the problems of infrastructure pipeline uncertainty and overly complex procurement approaches, this has increased transaction costs and deterred industry from a more strategic approach to investment in skills, technology and innovation.**

**The immediate challenge is to find ways for government and other infrastructure providers to work effectively with the construction supply chain to develop new business models that will improve productivity, achieve better supply chain integration and promote innovation.**

**Addressing these issues effectively will help reduce the costs of infrastructure and deliver significant benefits in performance and value for money. There is a clear opportunity to realise savings of at least 15 percent, which can deliver sustainable benefits of £2 to 3 billion per annum. This is £20 to £30 billion over the next decade.**

**While several industry and government reviews have recognised the need for change, few of the targets and recommendations set out in these reports have been fully met or implemented. The Government will develop the actions and proposed programme set out in this Report into a detailed implementation plan by March 2011.**

**Building on this initial report, the implementation plan will be designed around five key interlinked objectives to:**

- **create better visibility and continuity of the infrastructure investment pipeline, through publication of the future investment programme in the National Infrastructure Plan;**
- **implement effective governance of projects and programmes, particularly in the public sector, by ensuring clear accountability for key project decisions;**

- ***instil greater discipline in the commissioning of projects and programmes by ensuring greater objective challenge of the specification of requirements and cost estimates;***
- ***develop smarter ways to use competition by improving risk-based assessment of procurement options; and***
- ***create an environment that encourages industry and the advisory community to invest in efficiency and reduce the direct costs of construction by developing cost effective delivery solutions.***

***The Government has identified a range of actions to meet these objectives and will consider how these will be taken forward in the implementation plan. Key actions that have been identified include:***

- ***examining ways to extend planning and funding cycles for non-contentious maintenance and renewals;***
- ***finalising and implementing a new assurance process for all major projects and programmes; and***
- ***reviewing the ways in which contingency is assessed, allowed for and managed.”*** (emphasis added)

**4.16** Importantly, Infrastructure UK has now produced two annual reports detailing progress on the implementation of the initial report. This approach is essential if governments are to be held accountable for ensuring that the benefits to be derived from the recommendations in these reports are to be achieved, and achieved within a set timeframe.

#### ***HM Treasury Infrastructure Cost Review: Annual Report 2011-2012***

**4.17** The first implementation report contains an excellent analysis of the various ways of achieving the cost efficiencies identified in the 2010 Infrastructure Cost Review, most of which could easily be replicated in Australia.

**4.18** In the first implementation report, Infrastructure UK indicates that it focused on enabling work to identify and remove potential barriers to the efficient delivery of infrastructure. This included:

- Publication of an economic infrastructure pipeline incorporating a consolidated list of the Government’s funded construction pipeline (ACA notes that this has now been implemented in Australia for state and national projects that have been funded, but does not contain details of those projects that have been announced but not yet funded).
- Government and industry agreement on an Infrastructure Charter as a basis for setting out the behaviours required to improve collaboration and reduce costs.
- Development of a “route map” to enable public and private clients to select the most appropriate procurement strategy and drive consistent behaviours and practice across infrastructure programs or projects.
- Application of new approaches to the management of risk and contingency in public sector infrastructure projects.
- Formation of an Industry Standards Group to remove duplication and redundancy in technical standards for infrastructure assets (ACA notes that Standards Australia has recently formed a technical committee to review the AS4000 suite of construction contracts, but has not yet included relevant peak industry associations on that committee).
- Partnerships with industry to improve supply chain skills and capability and access cross sector efficiencies.



- A Memorandum of Understanding between agencies to pool data and access commercial intelligence.

4.19 All of the above make commercial sense and should be examined by the Productivity commission as part of its deliberations.

***HM Treasury Infrastructure Cost Review: Annual Report 2012-13***

4.20 The most recent annual report of the Infrastructure Cost Review confirms (p.5) that visibility of the infrastructure pipeline, longer term investment planning and a programme based approach are vital components in establishing more effective delivery environments.

4.21 The report contains a number of case studies designed to identify how progress is being achieved in the delivery of better value in infrastructure projects. This approach is consistent with work that has been undertaken by Infrastructure Australia that incorporates proposals for the assessment of key performance indicators for government agencies to test their management capabilities in delivering various projects (**See Efficiencies in Major Project Procurement: Volume 1: Benchmarks for Efficient Procurement of Major Infrastructure (June 2012) and Efficiencies in Major Procurement: volume 2: Consultations Outcomes Report (June 2012)**)

4.22 The HM Treasury report goes on to say that the measures referred to at p.5 of its report are key to unlocking the behavioural changes and improved capability required to improve infrastructure delivery and support sustainable supply chain growth. This is essential for implementation within Australia as it is evident that significant behavioural change is required to realise the benefits available in re-working the model for infrastructure delivery.

4.23 However, while the report indicates that there is evidence of improved behaviours and more successful outcomes it is stated that, ***“progress is not yet systemic and there is an inconsistent progression in different infrastructure sectors”*** (p.6).

***NSW Government Better Value Infrastructure Plan – April 2012***

4.24 The ACA supports the findings of the Better Value Infrastructure Plan (BVIP) and notes that the plan recognises (at p.2), again, the following issues that impact on the value achieved in current infrastructure provision:

- The lack of a coordinated and staged pipeline of projects that can be relied upon with confidence.
- Limitations in the effectiveness and efficiency of infrastructure procurement across the value chain.
- The complexity and layering of environmental and planning legislation across federal and state jurisdictions.

4.25 The report goes on to note priority issues identified by industry across the value chain relating to the procurement and delivery of infrastructure. The ACA endorses the issues identified as priorities for governments to address and notes that the NSW Government is implementing a range of new approaches to the financing and delivery processes for government infrastructure.

***Infrastructure Australia – National Infrastructure Plan (June 2013)***

4.26 Infrastructure Australia has produced a comprehensive assessment of the issues facing Australia if it is to be more productive in the Asian Century. That assessment highlights the challenges ahead and argues for bold reforms. It lists seven reforms required to be made to boost infrastructure performance and improve capital productivity. They are:

- Establishing a Single National Infrastructure Fund.
- Use Government Budgets Innovatively.

- Recycle Capital For New Infrastructure.
- User Pays – User Says.
- Reduce Layers of Government.
- Be World Leaders In Project Governance.
- Smarter, Leaner Infrastructure Procurement.

**4.27** The ACA supports the approach recommended by Infrastructure Australia in addressing the structural impediments to Australia’s historical approach to infrastructure funding and project delivery.

***European Commission - Connecting Europe Facility 2014-2020 (October 2011)***

**4.28** The Connecting Europe Facility (CEF) is a new European model aimed at supporting the development of high-performing, sustainable and efficiently interconnected trans-European networks in the fields of energy, telecommunications and transport.

**4.29** Approximately 50 billion euro will be made available between 2014 to 2020 to promote growth, jobs and competitiveness through targeted infrastructure investment using new financing instruments such as EU Project Bonds.

**4.30** It is interesting to note that the European Union, comprised of countries with many different economic positions and agendas, appears capable of advancing a program to make connectivity and operational progress for the benefit of the EU as a whole. There should be no valid reason why Australian Governments could not achieve similar advances.

***Deloitte Touche Tohmatsu Limited – Funding Options: Alternative Financing for Infrastructure Development (April 2013)***

**4.31** In a paper published earlier in 2013, Deloitte identifies the constraints placed on the financing of infrastructure projects. The paper discusses the trends and the impact that each has on infrastructure funding/finance, particularly with regard to the prospects for public-private partnerships.

**4.32** The Deloitte report identifies a number of key options for financing infrastructure developments. These include:

- Private Activity Bonds (U.S. facility operating on a tax free basis)
- U.S. TIFIA Loans (Issued pursuant to the Transportation Infrastructure Finance and Innovation Act 1998)
- Infrastructure funds with PPP allocations
- European Investment Bank debt funding facility
- European Governments Subordinated Debt Facilities
- UK Government Infrastructure Finance Unit Co-Lender Program
- UK Infrastructure Debt Platform
- Government Supported Debt Models in UK and France
- IDBI Indian Infrastructure Debt Fund
- Infrastructure Trusts (Recent development in U.S.)

**4.33** Clearly, there are many different options available for Australian Governments to adopt under a new approach to infrastructure financing and the above options (and others) need to be analysed by the Productivity Commission as part of its analysis of infrastructure financing in Australia.

## **5. WORKFORCE ISSUES**

### **General**

**5.1** There is no doubt that the workplace practices of employers and employees have the potential to have a significant impact on the cost of infrastructure projects in Australia, although they are only part of the large range of issues impacting on construction costs.

**5.2** The size, nature, location and complexity of major infrastructure projects results in a complex matrix of responsibility designed to address project risk including the risk of financial impacts from industrial activity. From the client's perspective, standard contractual arrangements on major construction projects provide for head contractors to accept responsibility for managing risks associated with labour costs and delays to completion timeframes, as well as for a range of other significant operational risks including workplace health and safety.

**5.3** Head contractors face substantial liquidated damages for delays as well as other high risk employee relations matters. However, head contractors are not usually the direct employers of a substantial component of the workforce on major projects and must rely on the roles of sub-contractors and others as part of the control of project outcomes.

**5.4** The workplace relations impact on infrastructure costs is not just a function of direct labour costs, although this is a significant component, but the result of a myriad of day to day workplace issues all of which may impact on productivity, but generally do not find themselves disclosed in public statistical documentation. Some of these issues are contained within enterprise bargaining agreements, while others manifest themselves through on-site actions.

**5.5** The reports and issues papers prepared by the 2001 Cole Royal Commission into the Building and Construction Industry extensively detail the key issues that impact on wage and other conditions of employment in the industry. The Cole Royal Commission reports contain a particularly rich mine of information that reflects the approach that had been prevalent in the industry at that time and which added significantly to the cost of projects when aggregated.

**5.6** The reports highlight various practices imposed on contractors through enterprise bargaining negotiations that add to daily operational costs which are inevitably passed on to clients, as well as other costs associated with negotiations for employers to agree to participate in and support various schemes including redundancy trusts, income protection insurance and top up insurance, amongst others.

**5.7** An examination of the various submissions made to the Cole Royal Commission by employers and employees and their respective industry associations provides further useful detail as to the impact of the industrial dynamics operating within the industry in Australia which impact on the cost of infrastructure projects.

### **Action Taken After Cole Royal Commission**

**5.8** The ACA notes that following the Cole Royal Commission the then Federal Government legislated a suite of structures aimed at providing a framework that would ensure a level playing field between employers and employees in terms of their ability to negotiate workforce issues as well as reasserting the requirement for industry participants to comply with the rule of law.

**5.9** The new structures included the establishment of an appropriately resourced and empowered industry regulator known as the Australian Building and Construction Commissioner, complementary legislation and guidelines designed to assist the industry to

shape its workplace relations negotiations. This was to ensure that only appropriate issues were included in enterprise bargaining agreements and industry participants complied with relevant responsibilities when tendering for and implementing government financed projects. This latter process was intended to support the findings of the Royal Commission as to the need to more effectively control the costs (both labour and operational) associated with construction projects.

**5.10** The ACA submits that the implementation of the Cole Royal Commission recommendations resulted in a settling down of the previous contentious industrial climate in the industry with resultant improvements in productivity and lowering of the costs associated with construction. This situation was reflected by a downturn in the number of industrial disputes notified as well as a moderation in the number of day to day worksite issues that had previously held up operational activity but which did not ultimately result in a formal industrial dispute.

**5.11** However, following a change of Federal Government, the regime implemented after the Cole Royal Commission has progressively been wound back, both in legislative, administrative and operational terms with the result that costs and industrial activity have trended upwards and are headed towards an unsustainable level.

**5.12** The ACA is concerned that this weakening of the controlling regulatory and administrative structures has resulted in a re-emergence of the industrial problems in evidence prior to the Cole Royal Commission as the equilibrium in the industry becomes more unstable and this is pushing up costs and delaying project completions.

### **Proposals For Change**

**5.13** The ACA is pleased to see that the new Federal Government, elected in September 2013, went to the election with a policy platform designed to re-focus the need for compliance with the rule of law in the industry and implement a common and strengthened approach to issues surrounding enterprise agreement negotiations and site activities.

**5.14** The ACA is fully supportive of the current proposals to revitalise the regulator by re-establishing the office of the Australian Building and Construction Commissioner, as well as legislating for a number of other changes that effectively return the industry to the position of reasonable stability it was accustomed to after the Cole Royal Commission.

**5.15** The ACA is fully supportive of the right of a union to appropriately represent its members. However, there are many opportunities under existing legislation and industrial agreements for that right to be exercised in a way that does not advance the interests of the union's members, or is used for purposes intended to disrupt activities on work sites for the purpose of placing contractors under operational pressure to agree to certain action to maintain industrial peace.

### **Key Workplace Issues Affecting the Cost of Projects**

**5.16** When employee and employer representatives work cooperatively together to address operational issues there is clear evidence that projects are able to be completed on time and on budget.

**5.17** However, where the cooperative arrangements break down, or issues external to the core relationship are allowed to gain a foothold on sites, legislative and regulatory structures should be in place to prevent inappropriate activity being undertaken to the detriment of the parties and productivity and cost on projects.

**5.18** One of these areas of concern relates to pattern bargaining on an industry-wide basis. Pattern bargaining was identified in the Cole Royal Commission as having a potentially significant effect on the cost of construction.

**5.19** This form of bargaining was described as a bargaining process in which unions or employers attempt to achieve common outcomes across different enterprises in an industry or sector, for example by the adoption of standard agreements, or a specified wage increase, the effect of which is designed to regulate the employment relationship of a large number of employees and their employers.

**5.20** Information before the Royal Commission indicated that pattern bargaining displaced, or nullified, the scope for genuine enterprise level bargaining about wages and conditions and increased the cost of projects by from 13 percent to as much as 20 percent or higher.

**5.21** Industry-wide pattern agreements need to be differentiated from project-specific pattern agreements developed by head contractors for major projects (typically in the form of greenfields agreements). Head contractors and subcontractors have supported the use of project-specific pattern (greenfields) agreements on major projects as industrial risk is reduced and working conditions can be aligned with the needs of the particular project.

**5.22** While it is unlawful under the *Fair Work Act* for a head contractor to coerce a subcontractor to make a particular type of enterprise agreement, provided that the adoption of the project pattern agreement is genuinely voluntary the law is complied with. Further, proceeding on a project pattern agreement basis avoids the potential risk that arises under an industry-wide pattern agreement of increasing labour costs across the industry.

**5.23** Some of the areas that need to be monitored or addressed by legislative or administrative means include:

- Greenfields Agreements should be able to be approved by the Fair Work Commission at any time if agreement is reached between the contractor and one or more unions which are eligible to represent any employees on the project and on application by the employer, or if agreement has not been reached between the contractor and the relevant union/s after a reasonable period of time (e.g three months of negotiations), provided that the Greenfields Agreement passes the Better Off Overall Test and meets the National Employment Standards.
- Greenfields Agreements must only contain matters that pertain to the relationship between an employer and its employees and must not contain any 'unlawful terms'.
- Where an employer initiates bargaining with union/s for a Greenfields Agreement, good faith bargaining obligations should apply to the bargaining parties, but good faith bargaining rights should not apply to unions which the employer has not initiated bargaining with.
- The current provisions of the *Fair Work Act* in the area of content of bargaining claims and enterprise agreements are too loose, resulting in unnecessary disputation and the potential misuse of the bargaining provisions to undermine key protections for contractors and employers in the Act (e.g. right of entry procedures and the right to engage subcontractors).
- Bargaining claims and enterprise agreements should only deal with 'permitted matters' and not any other matters. 'Permitted matters' should be defined as matters that pertain to the relationship between an employer and its employees.
- The list of 'unlawful terms' in the *Fair Work Act* should be expanded to include clauses which impose restrictions or limitations on the engagement of subcontractors, clauses which deal with right of entry for union officials (this is a matter that should be dealt with entirely by the Act to avoid undermining the laws); and clauses which are not 'permitted matters'.

- Before issuing a protected action ballot order, the Fair Work Commission must be satisfied that the applicant union is not pursuing any claims which are not 'permitted matters' or which are 'unlawful terms'.
- The Federal and State Governments should agree on a consistent set of procurement Guidelines which prohibit the inclusion of specified unproductive and inappropriate clauses in enterprise agreements. The general protections in the *Fair Work Act* should be amended to ensure that the enforcement of such Guidelines does not breach the general protections.
- The winding back of industrial legislation has resulted in the re-emergence of "nominated labour" activity. The *Grocon* dispute in late 2012 centred on this issue. The unions demanded that the company employ individuals nominated by the unions as work health and safety officers, not the persons that the company believed were the most qualified to ensure health and safety on the project.
- A union official should only be permitted to hold discussions with employees during meal times or other breaks.
- When investigating alleged breaches of workplace laws and instruments or holding discussions with employees, union officials must give the occupier at least 24 hours' notice of entry.
- When investigating alleged breaches of workplace laws and instruments, the union official must give details to the occupier of the alleged breaches at the time that notice is given of entry.
- The occupier of the worksite should have the right to determine the location of union meetings provided that the location is reasonable.
- Union officials should give 24 hours' notice of entry for WHS purposes unless the entry is for the purposes of investigating a breach of a WHS law and the alleged breach involves an imminent risk to the health and safety of workers. Notices of entry for WHS purposes are required to include details of the alleged breaches of WHS laws and why such breaches involve an imminent risk to the health and safety of workers.
- Where an enterprise agreement applies to a group of workers and a union is covered by the agreement, only the union covered by the agreement should have the right to enter the premises.
- Enterprise agreements should not be permitted to include provisions dealing with right of entry; this is an issue which needs to be dealt with by the Act.
- A union official's right to enter should be conditional upon the official acting reasonably and not disrupting work.

### **The Nature of Disputes and Their Resolution**

**5.24** A significant amount of relevant information relating to the dynamics of industrial disputes, their duration and the type of project targeted (and where), is contained within the reports and papers of the Cole Royal Commission. In more recent times there appears to be a growing tendency for industrial disputation to manifest itself at higher profile infrastructure projects that are located in areas that are likely to generate greater media or public interest such as some public hospitals.

**5.25** The primary causes of disputes may not have any correlation to activities on the specific site but may be related to other issues altogether with the specific site chosen on the basis of achieving maximum pressure or impact.

**5.26** In the absence of an effective regulator that is prepared to quickly intervene in industrial action, the issues are left to the parties to pursue through the mainstream legal system. While the existing legal system provides some options for addressing issues through the use of injunctions and related processes, the reality is that the real issues are often not resolved

at the time, but become entwined in drawn out civil legal battles that may last for years and are inevitably expensive for the parties who choose to take them on.

**5.27** From the ACA's perspective, the key issues that need to be implemented (in totality and consistently) to address the financial impact of industrial action by avoiding the development of problems in the first place, or addressing them expeditiously, are as follows:

- A commitment on the part of industry participants to comply with the rule of law.
- A commitment on the part of industry participants to employ representatives to properly and sensibly bargain and negotiate in respect of agreements and entitlements and address worksite issues responsibly.
- The establishment of an effective, well resourced, regulatory body such as the ABCC that is prepared to become involved early in industrial activity.
- Legislation that clearly identifies and addresses the problems that may occur and provides the regulatory system with appropriate sanctions (including fines and related sanctions) for employer and employee entities that fail to meet their legal responsibilities.
- An effective, Australia wide code or regime that sets out in clear and unequivocal terms that parties who do not comply with the requirements of the code can expect to be the subject of a range of sanctions that may lead to those parties being excluded from tendering for public infrastructure projects.

#### **Skill Shortages and Cost Pressures**

**5.28** The construction industry, in terms of major projects, is always going to be affected to some degree by the availability of sufficient qualified and skilled workers.

**5.29** The cyclical nature of the industry in Australia, and the current unreliability of the pipeline of construction work, tends to force the major contractors to rely to a significant degree on sub-contractor organisations while maintaining a core group of employed staff.

**5.30** The industry has also suffered from having a poor overall culture compared to other industries. The level of fatalities and serious injuries that occur on projects from time to time, together with the perception created by unlawful industrial action has a detrimental effect on people considering whether they should seek to be employed in the construction industry. This has a potential impact on the size and availability of the pool of workers and thus a potential impact on construction costs.

**5.31** Nevertheless, the industry and, in particular, ACA member companies, is taking action to address the perceptions surrounding it in terms of workforce development and skills as well as safety.

#### **Key Workforce Issues**

**5.32** The ACA considers that the following are the key issues behind the cost of labour in terms of availability and skills:

- Prior to the recent slowdown in the growth of the resources sector the industry was faced with skill shortages in a number of areas because a significant proportion of the existing workforce were employed on resource projects and being paid significantly above market rates. This has tended to result in activity by employee representatives to lift local labour rates to similar levels to those paid on infrastructure projects.
- As infrastructure projects are potentially more complex than commercial projects there has been a tendency to employ only those persons with the necessary skill levels to undertake the work within project programs and safely. As there are a finite number of persons with the requisite skills they have been more costly to employ, although this is moderating following the slowdown in resource projects.

- The cost of fly in fly out and drive in drive out employees adds significantly to the cost of projects, but many employees would not be prepared to move to isolated areas for a significant time while they worked on a project so contractors have been required to meet the extra costs.
- The unreliability of continuity of employment is a mitigating factor for long term commitment to the industry and the consequent lead times to undertake university studies and trade apprenticeships means that potential employees cannot be guaranteed jobs when they complete their training. This results in many contractors determining not to directly employ as many workers, but to rely on obtaining workers from the general pool of workers as needed, or by engaging independent contractors.
- Union based enterprise bargaining agreements negotiated during times of significant activity have tended to be negotiated on the basis of increases year on year for up to 4 year terms with the consequence for contractors that when they face leaner times they must continue to pay workers at previously agreed premium rates. These costs are likely to be passed onto clients thus increasing the cost of projects.
- Section 457 visa employees are not the answer to the labour cost problem as their cost, in terms of salary and on costs, are more than local employees so it could not be said that employing these persons represents a cost saving to employers. However, these workers do possess the relevant skills at the time they are required whereas timeframes for specific projects prevent sufficient numbers of local employees from being up-skilled within reasonable timeframes.
- There has been reluctance in certain sections of the workforce to be prepared to travel significant distances to obtain work. This has also impacted on costs as contractors have been required to search further afield to employ staff. Significant adjustments to the previous arrangements for Living Away From Home Allowances has added substantial cost to projects and has militated against the attraction of the widest pool of experienced workers.

### **Scope to Reduce Labour Shortages**

**5.33** The ACA considers that there is scope for the industry to re-assess the level of skills required to perform various tasks on projects without compromising safety or productivity. However, this approach would also have to address the potential impact of what is called in industry circles a “dumbing down” of the workforce. Further, it may be argued that the industry requires a workforce that possesses greater, not lesser, skills in relation to infrastructure projects as opposed to, say, residential home building.

**5.34** While the various skills councils with coverage of the industry sectors and the Australian Workforce and Productivity Agency conduct annual environmental scans that provide excellent information as to actual or potential areas of skill shortages, there is a need for industry to more effectively coordinate its activities on a broader basis to ensure that an appropriate pool of skilled workers is available both now and into the medium to longer term.

**5.35** This will require cooperation between industry leading organisations representing industry sectors such as construction, mining, resources and related activities, clients and government agencies to develop the necessary processes for fast tracking skills development and targeting the occupations based on a more reliable pipeline of work than has previously been available. The ACA has already established a working party of member companies to assess this strategic approach.

**5.36** A greater focus on core skill requirements within the industry would better serve employees and employers. This would require coordinated action by governments and industry to properly identify future skill needs, target relevant personnel for up skilling and provide support for the training and employment of persons eg young people and women, amongst others, to attract them to the industry and up skilling opportunities.



**5.37** An example of an excellent program that was recently piloted and aimed at providing up skilled and qualified workers into the workforce at an expeditious rate is the National Apprenticeship Program. Under this program, workers are able to be fast tracked into completing studies and in becoming qualified and available for immediate start with industry employers. However, these programs will only be truly successful if government and industry are confident that work will be available for those who complete these programs. Again, a reliable pipeline of work will convince employers to invest in these options.

**5.38** There is also scope for industry, in conjunction with manufacturers, to assess the capacity for a greater level of construction activity to take place off-site or through prefabrication or emerging technologies. This approach is already evident in overseas jurisdictions and could result in significant cost savings if accompanied with appropriate changes to project designs and regulatory approvals as well as workforce industrial structures.

**5.39** The ACA also wishes to raise the issue of the effect of non-compliant product on infrastructure costs, particularly in relation to wages and lost time costs. The Australian Industry Group recently released a report titled “The Quest for a Level Playing Field – The Non-conforming Building Products Dilemma” in which it identified the impact on the industry of the use of non-compliant products.

**5.40** The ACA considers that the implementation of a more robust regime to address this issue would reduce costs on major projects when additional work is required to repair or replace goods and materials that have previously been incorporated into buildings or other structures.

## **6. MARKET STRUCTURE AND BEHAVIOURS**

### **General**

**6.1** The ACA notes that the Productivity Commission’s Issues Paper seems to imply that there is a certain amount of market dominance in existence in Australia with apparent difficulties for international entities to enter the local market for major projects.

**6.2** The ACA does not accept any proposition along these lines and submits that international players of significance (often with a market capitalisation much larger than Australian based entities) have operated in Australia for decades and have remained in the country or withdrawn on the basis of their own commercial decisions as opposed to the existence of strong local brands either in the past or in terms of the recent existence of the Lend Lease and Leighton groups.

**6.3** The ACA membership is comprised of eighteen entities which operate and compete in a variety of market sectors. These entities vigorously compete against other ACA members as well as other large local or international businesses for involvement in construction projects whether they are infrastructure, resources and mining or commercial in nature.

**6.4** It should also be noted that a number of large construction companies operating in Australia are controlled by international companies with construction expertise, or have large international construction or related companies as major shareholders. This is in addition to those international construction companies that have established separate businesses in Australia.

**6.5** Over the years, many local and international construction companies have tendered and been successful on projects by way of joint venture or as members of larger consortia.

Accordingly, it is submitted that the success or otherwise of international construction businesses in Australia is more related to the level of local commitment they are prepared to inject by way of corporate structure, equity, finance, expertise, operational capacity, workforce structure and demonstrated long term commitment, as opposed to the suggested market dominance of specific local entities.

### **Barriers to Entry**

**6.6** The ACA submits that there are no industry based barriers to entry into the Australian construction market. If there are issues that may impact on the capacity of local or international entities to be successful in the Australian market, those issues are more likely to be in place as a result of the tendering and procurement practices of clients or the industrial landscape rather than the operation of the market in general.

**6.7** Earlier in this submission, the ACA identified a number of factors impacting on construction costs that are in the hands of government clients to address. These issues have been in place for some time and have previously been identified in reviews undertaken by governments in both Australia and the UK, amongst others. For the purpose of a discussion of issues in this area, the key items of concern to the ACA are discussed below.

### **Tender Costs**

**6.8** The tendering and procurement practices of government clients make tendering for many projects so prohibitive as to potentially be beyond the financial capacity of many individual entities to manage.

**6.9** On the basis of past experience with large projects, the ACA believes that respondents to expressions of interest (EOI) for large projects that are subsequently shortlisted could each expect to outlay between \$30m and \$45m to lodge quality responses as part of subsequent Request for Proposals (RFP) processes.

**6.10** Tender costs of the magnitude indicated above would have a substantial impact on the annual net profit of many businesses in the construction industry today, and are not a sustainable approach in the current difficult financial climate, particularly where constructors may be unsuccessful bidders on a number of projects throughout any year.

**6.11** While the Victorian Government is to be commended for trialling the reimbursement of some of the external costs of constructors in bidding for large projects, the actual amounts likely to be reimbursed compared to the real cost of bidding are far apart. The cost of tendering is invariably passed on to the client as part of the project cost so to avoid this situation clients need to re-think their approach to tendering and procurement requirements.

### **Shortlisting**

**6.12** The ACA is aware of some recent media discussion about the process of shortlisting tenderers for large projects in Australia when compared to shortlisting on projects in overseas jurisdictions.

**6.13** While it may be correct that in some overseas countries a shortlisting of 3, 5 or more tenderers may occur, the Productivity Commission should satisfy itself that the shortlisting processes and requirements in other jurisdictions are based on similar criteria and client expectations to those operating in Australia.

**6.14** The ACA believes that a commercial re-assessment of tendering for major public sector infrastructure is necessary as global changes in financing and tendering for infrastructure have moved on in recent times with adjustments to traditional tendering and procurement practices now being necessary to open the market and enable constructors to remain commercially competitive and viable businesses.

**6.15** The ACA submits that, with the recent announcements by Victoria and NSW of major infrastructure projects, governments need to have greater regard to the impact of their tendering decisions on industry. With the benefit of recent evidence that Australian governments have a renewed interest in infrastructure, now is an opportune time for Australian governments to make clear to industry that they will assess projects primarily on the basis of a competitive approach based on skill and capacity to deliver rather than primarily on lowest cost.

**6.16** If Australian Governments intend to maintain their existing position on tendering for major projects, the ACA submits that governments would receive better value for taxpayer dollars by determining a final shortlist of no more than two entities as this would generate real competition between the final two proponents while also providing the opportunity for a wider range of bidders to compete in early rounds of the process without having to expend vast amounts on initial bid costs.

**6.17** The key reasons why the ACA considers that this approach would be successful are as follows:

- Selecting two respondents for the final shortlist on a major project guarantees that significant effort would be generated in the development of the project teams and designs in response to the RFP stage because both entities will know they have an equal chance of being selected as preferred tenderer. It is only at this stage that the real competitive aspect of the project emerges and constructors are prepared to inject the resources into the bid. This is not guaranteed when three or more entities are included in the final shortlist.
- Where two tenderers are shortlisted they will have greater scope in the market to procure the best financing compared to the situation where the available pool of financiers is spread across a larger number of shortlisted tenderers.
- Unlike governments, which operate only within their specific jurisdictions, the industry responds to EOIs across Australia and not just on government projects. Consequently, constructors are spending time and financial resources on many projects across all jurisdictions without the expectation of being successful in any tender. This is ultimately an unsustainable position in that it reduces the available resources that constructors may invest in particular projects and, over time, actually could lead to a limitation of competition and innovation to the detriment of government projects.
- The absence of a coordinated, sustainable pipeline of work across governments places the industry in the position of making commercial decisions to respond to EOIs or RFPs in the absence of having certainty that the projects will proceed, or proceed within an expected or announced timeframe. This uncertainty weighs heavily on decisions made by industry participants when considering which projects to tender for. Constructors need certainty to be able to convince their boards and shareholders to permit them to commit their human and financial capital to bid for projects.
- As constructors allocate more and more resources responding to EOIs issued by government (and private sector) clients across Australia (with greater numbers of respondents being shortlisted on major projects) the more likely is the risk that the client will not receive the best value for money in terms of design innovation, construction innovation, quality of project and timeliness of delivery due to the lower level of resources that industry is able to inject over time into bidding processes. In short, the longer term capacity of the industry to take the risk of being shortlisted to more than two entities on major projects will be a diminishing return for governments.

- There is also concern that on large projects the client's capacity to properly service each of the shortlisted tenderers to enable them to advance their tenders to their best advantage diminishes as the number of tenderers on the shortlist increases past two.

### **Procurement and Project Management**

**6.18** The risk allocation and commercial terms ('**Commercial Framework**') applicable to a project are typically described by the contract documents including those specific to the project (e.g. Scope of Works and Technical Criteria, Project Brief, Specifications to the extent that they have been amended for that Project).

**6.19** It makes commercial sense for the parties to contracts to discuss and assess the nature and extent of project risks and how those risks may be minimised or apportioned through the contract negotiation process. How those risks may be addressed will depend on many factors including the nature of the project and the reasonable commercial responsibilities that should apply to individual parties.

**6.20** A sensible and reasonable approach to the Commercial Framework surrounding projects and the parties involved is important. It is likely to lead to the completion of the project on time and on budget and for any issues that may lead to a dispute being identified expeditiously and addressed in a process that avoids significant disputation or litigation and maintains the commercial and operational relationship between client and contractor.

### **Contractor Knowledge Prior to Committing Resources**

**6.21** Considerable time and money is expended in identifying and evaluating project opportunities and then participating in the subsequent stages of that client's procurement process for the opportunities that each company has decided to pursue.

**6.22** The issues are often incorporated in bespoke contracts containing an amalgamation of clauses and processes drawn from different tender documents. The larger and more complex projects are often associated with long gestation periods with the cost and time input stretched over a significant period of time, and the associated resources partly or wholly seconded into these opportunities over that time.

**6.23** Industry resources could be more efficiently allocated, at lower total cost, through the earliest possible advice from clients on their intended Commercial Framework for each project opportunity. This would assist contractors in separately and properly evaluating the 'go/no-go' decision in relation to an opportunity prior to committing significant resources to it.

**6.24** Historically, and dependent to some extent on the client's chosen delivery model, the sufficient information required to fully and properly evaluate the client's Commercial Framework is often not provided until the issue of a 'Request for Tender' (or equivalent phase). A further period of time then elapses (with costs associated with pursuing that project opportunity by that stage well committed and partly expended) before the proposed Contract has been digested and an initial view can be formed on the treatment of this Framework (eg by departure/qualification, time and/or cost allowances in the tender).

### **Key Contractual Issues**

**6.25** Particularly in public sector tenders, it is common for the relevant agency to require a conforming tender to be submitted without departure or qualification in order for an alternative tender to be considered. This can present a significant challenge to constructors in the event that the contract contains one or more items that fall outside of a constructor's Corporate Limits of Liability.

**6.26** Essentially the constructor has to then decide, with consideration to the time and money expended to date, whether to submit a tender (seeking internal approval to operate

outside of their Corporate Limits of Liability) or to withdraw from any further participation in the client's procurement process. Where Bid Bonds are provided, and conditions associated with this security are accepted prior to receipt of the contract, the decision whether to proceed is made even more difficult.

**6.27** The issues could be addressed by encouraging the parties to define the commercial framework early in their procurement process.

**6.28** These issues are further exacerbated by the fact that constructors are often not provided with examples of the proposed contracts, or contracts are drafted in such a way that they attempt to transfer all risk to the constructor with scant regard for the commercial impact. Contract risk should be borne by the entity most appropriate for the specific component of the contract for which they are responsible for delivering.

### **Contractual Dispute Resolution**

**6.29** The use of Dispute Resolution Boards (sometimes called dispute avoidance boards) is used extensively in large contracts across the world and is a generally accepted model for reducing or eliminating time and cost issues, and subsequent disputes, on projects.

**6.30** The use of DRBs in Australia, although limited to date, has the enviable record that all disputes have been resolved within the DRB process, with no disputes proceeding to arbitration or litigation. In addition, many potential disputes have either been avoided or amicably resolved within the DRB process, without crystallising into formal disputes. ACA has previously supported the DRB concept and released a paper (contained on the ACA website) setting out their benefits.

**6.31** Notwithstanding the existing contractual "model" clauses available for the implementation of DRBs, various parties appear to seek to circumvent dispute resolution clauses where it suits their particular commercial position, and this adds to the cost and timing of the resolution of disputes.

**6.32** There is evidence that many stakeholders do not have an adequate knowledge or understanding of the benefits of individual dispute resolution models, nor which model to apply to specific projects and this militates against selection and implementation of the best model for each project.

**6.33** This may result in the drafting of hybrid dispute resolution processes obtained from amalgamating parts of a range of different clauses without thought to the operational issues and problems that may be created. Bespoke contracts with an amalgamation of clauses drawn from different projects should be avoided.

**6.34** The effectiveness of the use and acceptability of DRBs requires further support to increase the use of the option. Provision should be made in the Standards Australia suite of contracts (AS4000) to include the use of DRBs as an alternative to formal litigation or arbitration.

## **7. CONCLUSION AND FUTURE ACTION**

**7.1** The ACA is committed to supporting the development of a sustainable infrastructure financing and delivery model for Australia. The reports and recommendations of inquiries and reviews referred to in the ACA's submission should provide the Commission with the key components of that model.

**7.2** Industry and other stakeholders need certainty of approach to ensure that projects are delivered safely, on time and on budget and based on a known and reliable pipeline into the

future. Cost and productivity gains will not be consistently achieved without market certainty and commitment to the forward pipeline being implemented outside the electoral cycle.

**7.3** The Commission should adopt a holistic approach in its investigation of the issues. There is no one fundamental component to the issues before the Commission that overrides any other. While some issues may be classified as a higher priority than others in terms of development, timing and delivery, the ACA submits that unless the circle of issues is closed there will always be those components that will prevent a consistent and reliable outcome from being fully achieved.

**7.4** The implementation of the Commission's recommendations is a key issue. Government and industry should establish processes aimed at ensuring annual reports against progress with recommendations. All parties have to accept responsibility for their part in achieving the outcomes and this process needs to be rigorously enforced on an ongoing basis.

December 2013

**MEMBERS OF AUSTRALIAN CONSTRUCTORS ASSOCIATION**

BGC Contracting Pty Ltd

Brookfield Multiplex Australasia Pty Ltd

CH2M Hill Australia Pty Ltd

Clough Limited

Downer EDI Limited

Fulton Hogan Construction Pty Ltd

Georgiou Group Pty Ltd

John Holland Group Pty Limited

Laing O'Rourke Australia Construction Pty Ltd

Leighton Holdings Limited

Leighton Contractors Pty Ltd

McConnell Dowell Corporation Limited

Lend Lease Building Pty Ltd

Lend Lease Construction and Infrastructure Pty Ltd

Lend Lease Engineering Pty Ltd

Thiess Pty Ltd

UGL Limited

Watpac Limited