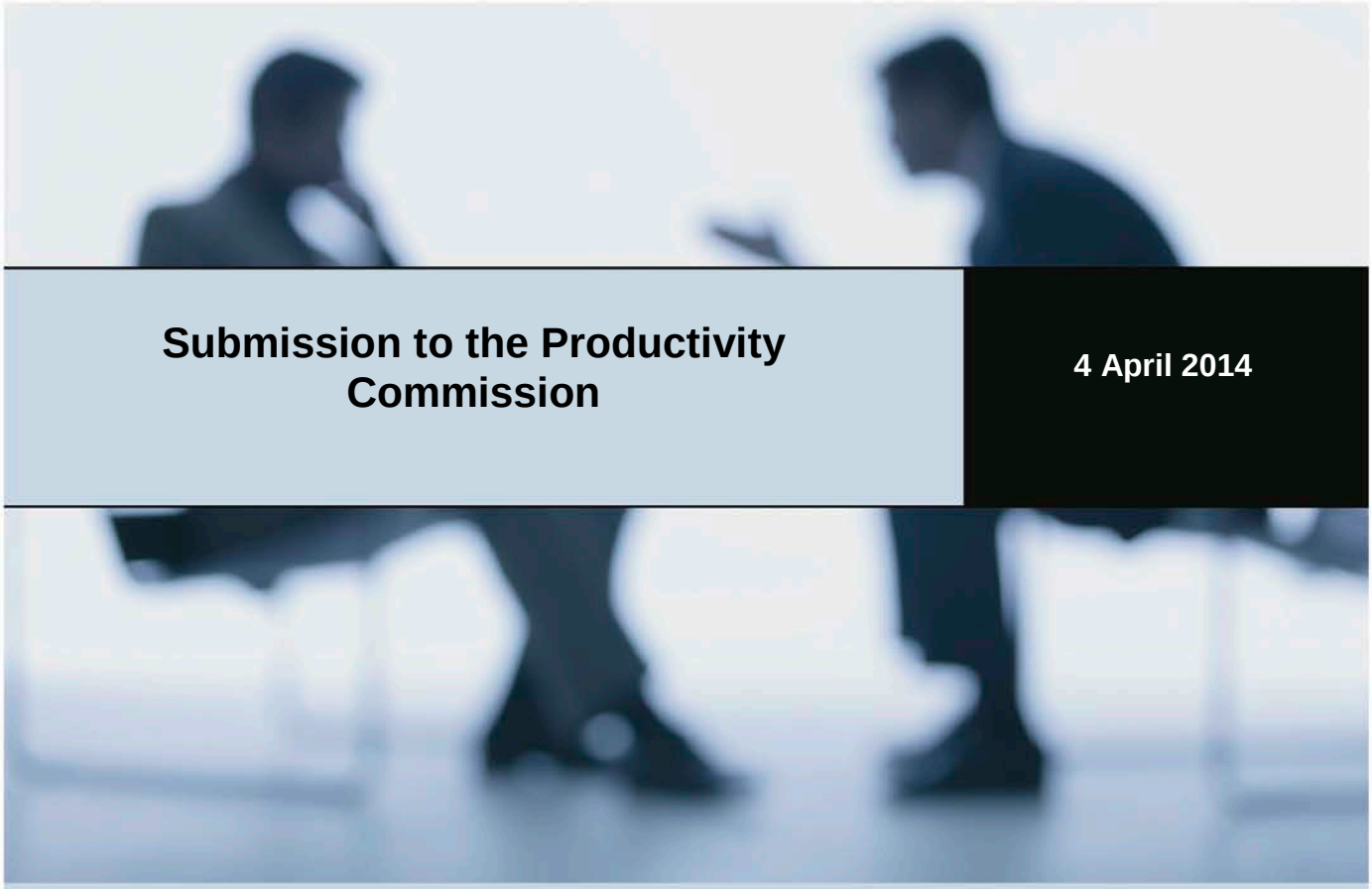


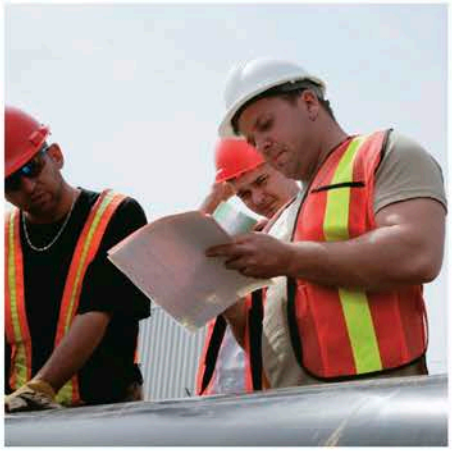
Submission to the Productivity Commission

4 April 2014

Public Infrastructure





AUSTRALIAN INDUSTRY GROUP

Productivity Commission Inquiry into Public Infrastructure

Introduction

The Australian Industry Group (Ai Group) broadly welcomes the draft findings and recommendations in the Productivity Commission's March 2014 Draft Report on Public Infrastructure.

Australia faces an urgent task to tackle physical infrastructure shortages around the country which are inhibiting industry from doing business and leading to excessive costs. Living standards in Australia cannot continue to rise unless the country takes meaningful steps to address our weak productivity performance, and one of the most important steps is to build and improve the nation's roads, rail and ports. Only then will Australian business be able to compete successfully in international markets in the years ahead and benefit from being situated close to the fastest growing economies in the world.

The Draft Report makes important recommendations to ensure that future infrastructure projects are subject to rigorous cost benefit analysis to ensure they are taken in the public interest and deliver vital infrastructure and value for money for taxpayers. On financing, we welcome findings for governments to explore new ways to finance projects to ensure investment takes place to equip Australia with the infrastructure we need to remain competitive and access international markets. We also support exploring appropriate user-charging of infrastructure, especially if it ensures those projects go ahead and are delivered.

Ai Group commends the Productivity Commission for acknowledging that outdated and onerous requirements imposed by governments on tenderers are unnecessarily adding to project costs. Adopting the Commission's recommendations to improve the tendering process and better define government projects before tendering would help alleviate unnecessary design costs on unsuccessful tenderers that currently add to the cost of all projects across the country.

This submission responds to two areas of the Draft Report:

- The section about Local Content in Chapter 11; and
- Chapter 12 – Industrial Relations.

Local Content

Draft Recommendation 11.7 is:

> *Australian, State and Territory Governments should remove the requirement for local content plans, such as the Australian Industry Participation plans, from tenders for all projects.*

Ai Group strongly disagrees with the Commission's draft recommendation that Industry Participation Plans should cease. Although there is considerable scope to streamline processes and substantially cut the regulatory costs involved, it remains critical that domestic businesses have real and fair opportunities to compete in providing goods and services to major Australian projects. Ai Group is not advocating that favouritism be shown to local suppliers, but rather, that they be given equal access to tender for these contract opportunities.

We support a national procurement strategy in which all levels of government follow a principled and coordinated approach to improve access for domestic suppliers to public sector contracts and to the provision of goods and services for major projects undertaken within Australia.

Ai Group member companies increasingly report being locked out of these types of contracts by barriers and distortions which include:

- An undue emphasis on upfront purchasing costs rather than whole-of-life costs (including, for example, ongoing maintenance, servicing and supplier relationships) in public sector procurement;
- An uneven approach to the enforcement and/or application of product standards, which often allows foreign suppliers to avoid the same quality and performance assessment that is applied to local producers.

To address these barriers that face local businesses seeking to participate in government contracts and major projects, Ai Group proposes that all government agencies and major contractors implement an approach that demonstrates their ongoing commitment to five major procurement principles:

1. **Value for Money** - Value for money looks beyond “least cost” and brings to bear a broader cost-benefit approach that considers whole-of-life costs, including in relation to maintenance, servicing, quality and ongoing supplier relationships.
2. **Clarity, Transparency and Improvement of Processes** - Procurement processes should be clear and transparent and be subject to ongoing improvement to reduce the costs of tendering and access for domestic suppliers, particularly small and medium-sized enterprises.
3. **Full and Fair Access** - Procurement processes should ensure that local suppliers have full and fair access to supply opportunities under direct government contracts and with prime contractors for major projects. This includes consistency in relation to conformity with standards and no preferential treatment of offshore suppliers.
4. **Full Opportunities for Local Suppliers** - Australian based suppliers should have full opportunity to compete for the provision of goods and services under government contracts both directly and indirectly through supply to prime contractors. For major projects, prime contractors should ensure that local suppliers have full and fair access to sub-contracting and supply arrangements.

5. **Supporting Industry through Effective Planning and Communication** - Large government purchasing activities and major project plans should be developed in a transparent way to ensure local industry is able to invest sufficiently to participate in major tenders. As much as possible, major procurement activities undertaken by Australian governments should be coordinated and staged to allow locally-based businesses scope to invest and achieve economies of scale by aggregating demand across the federation.

An enhanced and harmonised approach to procurement across all levels of government would reduce complexity and cost and give Australian-based business opportunities that many are currently denied. This will not, as the draft Productivity Commission report says, lead to "perverse outcomes" or to increased costs. Indeed, the draft report notes that "local content rules in procurement policies do not appear to bind or add significantly to the final turnout costs of infrastructure projects." We also agree with the draft finding that "they may risk government not selecting the least cost bid on non-cost grounds." For the reasons discussed above, there is good reason to not always proceed with the lowest cost tender, given that it may not represent the best value for money over the whole life of a project or once ongoing costs are considered.

Industrial Relations

Ai Group agrees with much of the content of Chapter 12 of the Draft Report.

We support the Commission's recommendation for the nation-wide adoption of a building code or guidelines modelled on the Victorian Government's construction industry IR guidelines. Unions routinely use the commercial risk faced by contractors as a lever to secure industrial concessions. An appropriate building code would break this cycle because contractors and unions would understand that code-compliance is essential to work on Government projects.

We also support the Commission's recommendation for increased penalties for unlawful industrial relations conduct in the construction industry. Such higher penalties are provided for in the *Building and Construction Industry (Improving Productivity) Bill 2013*. The Bill needs to be passed by Parliament without delay.

However, we believe that the Draft Report does not:

- Sufficiently recognise some major industrial relations problems which are evident on public infrastructure projects;
- Give sufficient weight to the very large amount of evidence which was heard by the Royal Commission into the Building and Construction Industry (Cole Royal Commission) of inappropriate and unlawful conduct in the industry and the recommendations made by the Commission to address the problems;

- Sufficiently recognise the importance and success of the reforms introduced immediately after the Cole Royal Commission, including the ABCC, the *Building and Construction Industry Improvement Act 2005*, and important recommendations of the Royal Commission implemented through the *Workplace Relations Act 1996*;
- Recognise the significance and negative consequences of **industry-wide** pattern agreements in the construction industry, which are not typically negotiated by head contractors and need to be differentiated from project-specific greenfields agreements negotiated by head contractors.

Draft Report Section 12.3 – A framework for understanding the role of industrial relations in construction

Section 12.3 identifies various key facets of the IR system in construction.

One important area which is not focussed upon is the role of **industry-wide** pattern agreements. These agreements apply to many thousands of employers and are far more prevalent in the construction industry than pattern agreements reached by head contractors for particular projects and typically processed as greenfields agreements. There are thousands of agreements currently in operation in the construction industry which reflect the terms of industry-wide pattern agreements.

The assertion on page 421 of the Draft Report that "The head negotiator is the main negotiating party on the employer side" is, we submit, often not correct. **Industry-wide** pattern agreements dominate agreement-making in the construction industry in Victoria and some other States, and industry-wide pattern agreements are not negotiated by head contractors but rather by various State-based employer organisations.

Far from negotiating these damaging **industry-wide** pattern agreements, head contractors and their representative bodies such as Ai Group and the Australian Constructors Associations have been very critical of the content of these agreements. For example, between March 2011 and August 2012, Ai Group strongly opposed various clauses in a pattern agreement negotiated between the Victorian Branch of the Communications, Electrical and Plumbing Agreement (CEPU) and the Victorian Chapter of the National Electrical and Communications Association (NECA) in the following cases:

- Senior Deputy President Acton of Fair Work Australia (*ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014* [2011] FWA 2380);
- A Full Bench of Fair Work Australia (*ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014* [2011] FWAA 1447); and
- The Full Federal Court (*Australian Industry Group v Fair Work Australia* [2012] FCAFC 108).

Mr Stuart Wood SC represented Ai Group in each of the above cases.

The *ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014* was the first of around 800 identical 200 page enterprise agreements approved by Fair Work Australia / the Fair Work Commission reflecting the CEPU / NECA pattern agreement.

The CEPU / NECA pattern agreement is usually the first of several major construction industry pattern agreements to expire and over the years the concessions made by NECA (in response to demands made by the CEPU) have often flowed into other industry-wide pattern agreements negotiated by the CFMEU, AWU and other construction unions. The current CEPU / NECA pattern agreement expires on 31 October 2014.

Industry-wide pattern agreements in the construction industry contain a myriad of restrictive, unproductive and overly costly provisions, such as:

- Clauses which make it very difficult for a contractor to engage a sub-contractor which does not have an agreement with the relevant union;
- Expansive union entry rights;
- Clauses which give unions an excessive amount of power over work practices and processes; and
- Union encouragement clauses which impede freedom of association.

Also, industry-wide pattern agreements lock employers into paying into redundancy funds and for union-sponsored income protection insurance products which delivers millions of dollars per year into union bank accounts.

Unions typically coerce head-contractors not to allow sub-contractors on to their sites unless they have an enterprise agreement reflecting the relevant industry-wide pattern agreement or have entered into a site specific enterprise agreement with the union. The coercion typically takes the form of threats of, and actual industrial action, bogus safety disputes and other disruptive and inappropriate conduct.

Even where a head contractor decides to implement a greenfields agreement for a project, the terms of the relevant industry-wide pattern agreement influence the terms of the greenfields agreement because the unions insist that the greenfields agreement include key clauses which they have secured in the industry-wide pattern agreement. Because greenfields agreements must be reached with unions, they are able to hold employers to ransom.

Ai Group does not negotiate industry-wide pattern agreements as they are damaging and inappropriate.

Industry-wide pattern agreements should be banned as recommended by the Cole Royal Commission. They have a major negative impact on construction costs and on productivity.

Several major construction industry pattern agreements expire on 31 October 2014 or in 2015 and if urgent action is not taken, unproductive, inflexible and overly generous provisions will be locked-in to thousands of enterprise agreements for the next 3-4 years. We strongly urge the Productivity Commission to recommend that industry-wide pattern agreements be outlawed.

Draft Report Section 12.5 – The impacts of industrial relations at the project level

Ai Group is very surprised that the Productivity Commission's consultations with individual construction businesses did not suggest that the IR environment was a major source of cost pressures or low productivity. This is in stark contrast to the views which are constantly relayed to Ai Group by project owners, head contractors and sub-contractors.

We propose that the Commission undertake further consultation before finalising its findings and recommendations, with particular emphasis on understanding the views and experiences of project owners and head contractors for major public infrastructure projects. It is project owners and head contractors which have the deepest knowledge of the impact of industrial relations on overall project costs.

Draft Report Section 12.6 – The aggregate effects of the IR environment on the construction industry

In analysing industrial disputes over time, it is very important that the Productivity Commission not overlook the very big change in industrial action laws which occurred in 2006. Secret ballots were introduced into the *Workplace Relations Act 1996* in March 2006 as a pre-condition for taking protected industrial action, and have been retained under the *Fair Work Act 2009*. This development obviously led to a major reduction in industrial action in all industries because unions could no longer organise lawful industry-wide strikes as each ballot is enterprise-specific.

Comparisons of the level of industrial disputation before and after March 2006 are not particularly meaningful, other than to highlight the great success of secret ballots in reducing industrial action in all industries.

Further, the ABS disputation statistics overlook:

- Many aspects of industrial disruption on sites which do not take the form of strikes, e.g bogus safety disputes and bans (as identified by the Commission on p.442 of the Draft Report);
- The fact that employers are often forced to implement unproductive and overly costly work conditions and practices in response to threats of industrial action (as identified by the Commission on p.442 of the Draft Report); and
- The fact that disputes are concentrated in parts of the construction industry (as identified by the Commission on p.442 of the Draft Report) - particularly major infrastructure.

Also, as discussed above, industry-wide pattern agreements have the effect of reducing industrial action in the industry but at a great cost to the community; a cost which is far too high. The *Fair Work Act 2009* includes very good laws which outlaw the taking of industrial action in pursuit of a pattern agreement, but these laws have had very little use since their introduction. The current major problem with industry-wide pattern agreements in Australia is not the taking of industrial action in pursuit of those agreements (because virtually no such industrial action has occurred), it is the demands made by the unions and the concessions made in response by the State-based employer organisations which negotiate those agreements.

Draft Finding 12.1 is:

> *"There is no robust evidence that the new industrial relations environment specific to construction had significant effects on the costs and productivity performance of the construction industry as a whole. However, for some segments of the industry and specific project sites, there remains evidence of unlawful conduct, overly generous enterprise bargaining arrangements, and other problematic industrial relations arrangements that are inimical to productivity and costs."*

Ai Group understands the reasons why the Productivity Commission has arrived at the above Draft Finding but we believe that the Draft Finding does not give sufficient weight to the importance of the very large amount of evidence which was heard by the Cole Royal Commission of inappropriate and unlawful conduct in the industry and the recommendations made by the Commission to address the problems.

There were four key pillars to the reforms introduced after the Cole Royal Commission:

1. The ABCC;
2. Industry specific legislation, the *Building and Construction Industry Improvement Act 2005*, which imposed tighter controls on unlawful coercion and industrial action, and higher penalties;
3. A rigorous construction industry industrial relations code / set of guidelines; and
4. Several important recommendations of the Royal Commission which were implemented via the *Workplace Relations Act 1996* and which are now matters dealt with in the *Fair Work Act 2009* (e.g. right of entry, genuine enterprise bargaining, etc).

We are also of the view that the Draft Finding does not give sufficient weight to developments which have occurred since the above four key pillars were substantially wound back by the Federal Labor Government from 2009, including:

- The replacement of the very effective 2006 Australian Government Implementation Guidelines for the National Code of Practice for the Building and Construction Industry, with weaker Implementation Guidelines in 2009, even weaker Implementation Guidelines in 2012, and finally a benign and ineffective *Building Code 2013*;
- The replacement of the *Building and Construction Industry Improvement Act 2005* with the much weaker *Fair Work (Building Industry) Act 2012*;
- The replacement of the ABCC with Fair Work Building and Construction; and
- The replacement of the *Workplace Relations Act 1996* with the *Fair Work Act 2009* which has given the unions:
    - much more power in the bargaining process;
    - the right to take industrial action in pursuit of a wider range of bargaining claims and include a wider range of matters in enterprise agreements;
    - wider entry rights to sites.

The above developments have led to a very substantial, negative change in the industrial relations environment on public infrastructure projects characterised by:

- Numerous unproductive, restrictive and overly generous provisions in enterprise agreements;
- Far less freedom for contractors to use sub-contractors which do not have agreements with unions;
- More unlawful industrial action;
- More industrial disruption; and
- More union threats and coercion;

compared to the environment between 2006 and 2008.

Undoubtedly, the above developments have had a significant negative impact on construction costs.

Draft Report Section 12.7 – The scope for improving the IR environment

Draft Recommendation 12.1 is:

> *"All Australian governments should adopt the Victorian building code guidelines (or ones with an essentially similar framework) for their own major infrastructure purchases. The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments."*

Ai Group agrees with the above recommendation. The Victorian construction industry IR Guidelines are based on the very successful 2006 Australian Government Implementation Guidelines for the National Code of Practice for the Building and Construction Industry, which implemented a key recommendation of the Cole Royal Commission.

The *Building and Construction Industry (Improving Productivity) Bill 2013,* which is currently before Parliament, will enable a national code to be implemented, modelled on key elements of the 2006 Implementation Guidelines and the current Victorian IR Guidelines. If this Federal Code is made, State and Territory Governments should ensure that their construction industry IR guidelines are as consistent as possible with it.

Draft Recommendation 12.2 is:

> *"The Australian Government should increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry."*

We agree with this recommendation. The *Building and Construction Industry (Improving Productivity) Bill 2013,* which is currently before Parliament, would achieve this. However, higher penalties are only part of the solution; the other provisions of this Bill are equally important, including:

- Re-establishing the ABCC with its former powers; and
- Implementing tougher laws to deal with unlawful industrial action, coercion and picketing.

Key changes to the *Fair Work Act* which should be the subject of findings and recommendations from this inquiry

In addition to Draft Recommendations 12.1 and 12.2, we urge the Productivity Commission to make the following important recommendations:

- The *Building and Construction Industry (Improving Productivity) Bill 2013* should be passed by Parliament without delay.

- The content of bargaining claims and enterprise agreements should be limited to matters pertaining to the employment relationship, as was the case before the *Fair Work Act 2009*. The definition of "permitted matters" in the Act should be tightened and the list of unlawful terms should be expanded to ensure that terms which restrict the engagement of subcontractors cannot be included in an enterprise agreement.

- **Industry-wide** pattern agreements should be outlawed.

- Union entry rights should be tightened to restore the arrangements which were in operation prior to the *Fair Work Act 2009*. The *Fair Work Amendment Bill 2014*, which is currently before Parliament, would achieve this.

- The current power imbalance with greenfields agreements for new projects should be addressed to ensure that unions cannot hold contractors to ransom and delay the commencement of projects until their demands are met. The *Fair Work Amendment Bill 2014*, which is currently before Parliament, is aimed at addressing this issue.