AUSTRALIAN CONSTRUCTORS ASSOCIATION

Senate Standing Committee on Education and Employment

Inquiry into Building and Construction Industry (Improving Productivity) Bill 2013 and related Bill

SUBMISSION BY AUSTRALIAN CONSTRUCTORS ASSOCIATION

SEPTEMBER 2016

SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT INQUIRY INTO BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013 AND RELATED BILL

SUBMISSION BY THE AUSTRALIAN CONSTRUCTORS ASSOCIATION (ACA)

BACKGROUND OF THE ACA

The Australian Constructors Association (ACA) represents leading construction and infrastructure contracting companies operating in Australia and is dedicated to promoting a sustainable construction industry.

The ACA member companies have a combined annual turnover from their Australian and international operations exceeding $100bn and employ in their Australian and international operations over 200,000 workers with many more being employed through subcontractors providing services to ACA members.

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

- Engineering construction incorporating public and private sector infrastructure
- Commercial and residential building
- Renewable and other energy generation systems
- Rail Infrastructure
- Water
- Contract mining
- Oil and gas operations
- Process engineering
- Telecommunications services
- Environmental services
- Maintenance and related services including facilities management

A list of ACA members is attached **(Annexure A).**

The ACA wishes to advise the Committee that, for a number of interrelated reasons addressed in more detail below, it fully supports the Bills the subject of the Committee's deliberations. The ACA's support has remained consistent throughout the number of occasions that the Senate has been asked to consider and approve the legislation.

THE NEED FOR CULTURAL CHANGE IN THE INDUSTRY

The ACA sees the legislation and the subsequent Building Code that will be developed to operate under it as important components in the ACA's drive to achieve a long term change in the culture of the construction industry, which will improve the safety and harmony of workplaces, as well as productivity. In this context, the ACA has adopted the following values which apply to all ACA members:

- **Supporting the health, safety and wellbeing of all people attending our workplaces.**
- **Acting with honesty and integrity towards our people, our clients and the wider community.**
- **Providing diverse, inclusive workplaces characterised by collaboration and respect.**
- **Empowering our workforces through providing learning and development opportunities to improve the productivity and capability of the Australian construction industry.**

The ACA submits that the industry is seen in a public context as dangerous, tough and male dominated. Further, the ACA believes that this image has been used by too many people as an excuse to mask inappropriate practices in the workplace such as bullying, intimidation and coercion that lead to poor safety and productivity outcomes.

In 2014, the ACA commissioned the RMIT University to assess health and safety cultures in Australia with the view to developing a Workplace Cultural Maturity Model and Safety Climate Assessment Tool to enable employers and employees to examine the culture in their workplaces and improve the approach to safety.

At p.28 of their report, the RMIT team made the following conclusions as to the cultural context of the Australian construction industry:

> ***"The Australian national culture is high in individualism and low in power distance. These characteristics are alleged to be good for H&S as workers should feel comfortable holding and expressing their individual H&S concerns, and feel comfortable engaging in H&S related communication with managers.***
>
> ***The Australian national culture is high in masculinity. This attribute is reported to have a negative impact on H&S because it is believed to encourage risk seeking, and to reduce the quality of relationships and communication.***
>
> ***The culture of the Australian construction industry is very 'masculine', which is reflected in the industry's work practices, gender balance and work related behaviours.***
>
> ***National cultures are believed to be related only weakly to H&S cultures and behaviour. Industry and organisational cultures are demonstrated to be much more influential.***

The Australian construction industry has certain characteristics that have a negative H&S impact, including:

- ***long work hours and poor work-life balance,***
- ***a heavy reliance on subcontracting,***
- ***non-standard work arrangements, and***
- ***a prevalence of small-to-medium sized businesses, many of which work as subcontractors to larger companies."***

The full RMIT report is available on the ACA's website www.constructors.com.au

Further, the ACA and its members have launched a workforce development initiative, *Build Your Career*, which uses real life stories of young people working in the construction industry to promote the industry to school students who are making subject and career decisions as well as their parents and school Careers Advisers. The initiative includes a website, www.buildyourcareer.com.au, which showcases the available career paths and aims to encourage diversity in the workforce. The success of this initiative and the push for greater diversity industry wide will be greatly reduced if industry continues to suffer from issues surrounding its image.

Evidence as to the adverse impact of the nature of the industry on diversity in its workforce has been identified by the Workplace Gender Equality Agency (WGEA) as follows:

- In a Fact Sheet issued in 2016, the WGEA found that full-time and part-time employment for females in the construction industry was (at 11.7%) the lowest of all industries for which data was available.
- In a Report issued by the WGEA in August 2016 it is noted that, while most industries employed women as a greater percentage of their workforces between 1995 and 2015, two industries actually employed women at a lower percentage of their workforces during those years. Not surprisingly, the construction industry was responsible for the greatest reduction of women in its workforce (down 2.8%) during this period.

The use of bullying, intimidation and coercion tactics to achieve industrial or commercial outcomes within the construction industry has been identified over at least the last 25 years through the 3 major royal commissions (Gyles, Cole and Heydon) that have been undertaken during this time.

The practices are not limited to representatives of unions of employees. However, the number of legal proceedings brought against unions and their representatives in relation to industrial activities, and the resultant fines, adverse judicial comments and publicity, identify the actions of union representatives at key worksites as having a significant impact on how the industry is perceived by existing and potential employees.

Importantly, the ACA submits that the continuation of these activities affects the ability of the industry to achieve a more diversified and skilled workforce, and they also potentially adversely affect safety and wellbeing for the individuals who are subject to these actions, as well as safety at worksites in general.

The ACA submits that a more concerted effort is required on the part of the industry and its participants to achieve greater diversity and resilience and, through this action, reduce the incidence of fatalities and serious injuries within the industry.

However, it is evident that the industry does not seem able to achieve this outcome on a long term basis without having an effective, empowered and resourced regulator to oversee its activities and take expeditious action to assist the industry to stamp out the inappropriate practices.

The Bills being considered by the Committee will provide a framework within which the industry and its regulator will be able to progress the necessary action to change the culture of the industry and achieve the diversity that is so important to the safety of its workers and the productivity of its businesses.

THE NEED FOR SPECIAL LAWS TO ACHIEVE EFFECTIVE REGULATORY CONTROL OF THE INDUSTRY

In endorsing the proposed legislation, the ACA has had regard to the significant powers and responsibilities that will flow to a re-established ABCC, and how those powers may impact on the general rights and responsibilities of both employers and employees in the industry.

Importantly, the ACA believes that, in examining the proposed legislation, the Committee should balance the arguments likely to be made (that the legislation is principally designed to target employees and/or their industry representatives and adversely affect their rights, or otherwise is not likely to generate productivity improvements or improve safety on worksites) with an analysis of the findings of the range of royal commissioners, court judgments and other reports which have assessed the need for the legislation and the attendant powers that will be available to the regulator if the legislation is passed.

The ACA invites the Committee to view the legislation as presenting a holistic approach to addressing the key systemic problems faced by the industry, and which does not discriminate between employees, employers or their representatives in terms of their compliance and operational responsibilities.

Further, the powers proposed are not dissimilar to those available to other agencies that are in place to regulate the rights of individuals and businesses e.g. the Australian Taxation Office, Australian Securities and Investments Commission, the Australian Prudential Regulatory Authority and the Australian Competition and Consumer Commission.

In examining the proposed legislation the ACA refers the Committee to the reports of the inquiries and reviews that all add their own relevance to the importance of the legislative concepts contained in the Bills. A non-exhaustive list of those inquiries and reviews is as follows:

- Industry Commission Report on Construction Costs of Major Projects, 1991.
- Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1992.
- Victorian Parliamentary Economic Development Committee Inquiry into the Building and Construction Industry in Victoria, 1992-1994..

- Productivity Commission, Work Arrangements on Large Capital City Building Projects, 1999.
- The Commonwealth Building and Construction Industries Action Agenda, 1999.
- Cole Royal Commission Report 2002.
- Inquiry by Murray Wilcox QC Inquiry into the Proposed Building and Construction Division of Fair Work Australia, 2009.
- Productivity Commission Inquiry into Public Infrastructure, 2014.
- Heydon Royal Commission into Trade Union Governance and Corruption, 2015.

An examination of the above inquiries and reviews discloses that issues relating to construction costs, productivity and illegal or unlawful activities have regularly featured as key issues that have been examined over the last 30 years.

The two most recent major inquiries into the industry exemplify the key problems which the ACA submits the proposed legislation will effectively address.

Wilcox Inquiry

Mr Murray Wilcox QC, appointed by the Rudd/Gillard government to review the former ABCC legislation, found that the level of unlawfulness in the industry required a regulator with effective powers. He said (at para 1.11)

> ***"The ABCC has made a significant contribution to improved conduct and harmony in the building and construction industry; but there is still some way to go. It is important the Specialist Division have adequate earmarked funds and be focussed on that industry".***

Mr Wilcox spoke about compulsory interrogation powers at para 1.23 of his report as follows:

> ***"It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove."***

Royal Commission into Trade Union governance and Corruption

More recently, in the final report of the Royal Commission into Trade Union Governance and Corruption, Justice Heydon said (Chapter 8, para 3): ***"The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry."***

It is also plain to see from the plethora of court judgments in recent years that greater regulation of the industry is needed. By way of example, in a judgment handed down last year, Justice Tracey of the Federal Court remarked that the CFMEU has a ***"deplorable***

attitude…to its legal obligations and the statutory processes which govern relations between unions and employers in this country*."*

His Honour went on to say that: ***"Their continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, had not had a deterrent effect".***

The problem created when industry entities with significant market power adopt an operational position of contempt for the rule of law and good industry practice is that other industry participants (corporate and individual) see that activity as being an industry norm which prevents them from maintaining and growing their businesses unless they submit to the market pressure applied, and so the problems become self-perpetuating. This has been shown to have had a very significant impact on the many thousands of small businesses that have been prevented from successfully tendering on major projects as subcontractors.

Those individuals and entities have seen and have assumed that inappropriate practices are simply the norm for the industry and this makes it increasingly more difficult to change the culture of the industry. It also provides the persons responsible for the inappropriate practices with a perceived view that their actions will not lead to effective regulatory/legal action, especially when the fines they incur are not met from their personal resources.

THE PRODUCTIVITY ISSUE

Much has been said as to the reliability of the findings in some reports and submissions as to the impact that various construction industry activities or regulatory processes have had on the industry's productivity. There has also been significant argument as to whether Australian Bureau of Statistics (ABS) reports support the effectiveness of the role of the former ABCC.

While instructive and reliable in general terms regarding industry productivity issues, ABS statistics generally refer to productivity across the whole of the construction industry whereas the ABCC operations were targeted at certain sectors of the industry, primarily major construction projects involving infrastructure and commercial developments, and often related to projects involving a government client. This targeting would appear to be directly correlated with the findings of the Cole Royal Commission.

The structure of the published ABS statistics does not easily enable a refined analysis of the impact of the ABCC because the statistics incorporate productivity applicable to areas such as the residential sector of the industry, including housing construction and renovations/additions. These sectors are not generally the subject of specific industrial activity and so the overall ABS productivity statistics would not present an entirely accurate industry position regarding the ABCC when residential data is included.

To assist the Committee in its examination of this issue, the ACA suggests that the Committee will obtain some guidance from the findings of Mr Murray Wilcox QC and the report of the 2014 Productivity Commission Report into Infrastructure costs.

Wilcox Inquiry

In his 2009 report, Mr Murray Wilcox QC was very clear as to his acceptance of the benefit of the work of the ABCC. At paras 3.23 and 3.24 of his report he said:

> **"3.23 However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO led to a reversal of the progress that has been made.**
>
> **3.24 One of the most impressive aspects of the ABCC's work, as recounted to me by several people in management positions (head contractors and subcontractors), is the speed with which the ABCC responds to requests for assistance. Apparently, it is not unusual for the ABCC to have somebody on a building site within an hour of receiving a telephone call. I was told that, once the ABCC inspector explains the parties' legal positions, the dispute often resolves itself. It would be a pity if amalgamation with the OFWO diminished this standard of service. That will happen unless steps are taken to guard the resources available to the Specialist Division from being gradually whittled away".**

Mr Wilcox also said:

> **"5.94 I accept there has been an increase in building industry labour productivity over the last few years, but only a modest one. I reach this conclusion because it is consistent with the ABS data. I believe, as the ACTU submission concedes, that part of this increase is ascribable to improved on-site industrial relations. And it is reasonable to attribute part of this improvement to the existence of the ABCC, and its promptness and skill in resolving on-site problems.**
>
> **5.95 The fact that the BCII Act/ABCC contribution to building industry labour productivity is much less than has been claimed does not mean it is insignificant. A multifactor annual productivity growth of up to 0.7%, in an industry that, on 2007 figures, accounted for about 7.5% of Australia's gross domestic product is nationally important.**
>
> **5.96 Human factors are also important. The CLA study is instructive. The positive answers to each of the quoted questions, about the effect of the ABCC, comfortably outnumber the negatives. It is not unimportant that, on balance, interviewees felt the ABCC had increased their level of job satisfaction and had had a positive effect on their working environment and sense of job security, site industrial relations and productivity and their personal relationships with people on the other side of the industrial divide".**

Productivity Commission Inquiry into Public Infrastructure

As previously submitted, the ACA believes that the problem created when industry entities with significant market power adopt an operational position of contempt for the rule of law and good industry practice is that other industry participants (corporate and individual) see that activity as being an industry norm which prevents them from maintaining and growing their businesses unless they submit to the market pressure applied.

Attached for the information of the Committee is the following additional information relating to the productivity issue:

- Chapters 8 and 9 from a Report prepared by Deloitte Access Economics as part of the ACA's submissions to the Productivity Commission Inquiry into Public Infrastructure **(Annexure B)**.

- Commentary on industrial relations issues contained in the Final Report of the Productivity Commission Inquiry into Public Infrastructure **(Annexure C)**.

The commentary in the Deloitte report identifies that there has been a direct correlation between the expansion or contraction of industrial related activity in the industry with the corresponding expansion or contraction of legislative or regulatory oversight that has occurred as federal governments with different policy positions have adjusted the regulatory model.

The Deloitte report identifies the real impact of effective regulatory control over the industry by differentiating the industry's position on productivity and industrial issues from other industries.

The extract from the Productivity Commission report demonstrates that the Commission accepted that there is a direct correlation between regulatory activity and the actions of various industry participants. Importantly, the Commission had this to say about the need for change in the industry (Overview at p.33):

> ***"The ABCC is likely to have had its primary impact on unlawful conduct and on local productivity and costs at particular sites. These are important effects that are hard to find in the aggregate data. Moreover, a major goal of reform is to ensure that parties are confident that IR regulations, agreements and contracts are observed.***
>
> ***Strengthening of regulatory responses is clearly needed, but the industry itself needs to embrace changed behaviour."***

IS THE CONSTRUCTION INDUSTRY DIFFERENT?

The various royal commissions and other inquiries and reports into the industry clearly suggest that the building and construction industry has unique characteristics and special circumstances that differentiate it from other industries and justify distinct legislative treatment that recognises such distinctive features.

There is a union presence in significant sectors of the industry that has evolved over time as a result of militant aggressive campaigning for employment entitlements that are superior to those generally present in other industries. This type of campaigning supported a culture of continual expectation for the expansion of entitlements by use of industrial strength, irrespective of other community standards and the state of the economy.

In the past, this culture thrived because of the particular vulnerability of employers in this industry due in part to the following factors:

- Time is a vital element in virtually all projects because construction contracts apply strict completion requirements that often do not take into account lost time for industrial disruption.

- The need to finish a particular job and collect progress or final payment places an employer in a position where it is easier to grant benefits so as to stave off deliberate delays, than to be engaged in a frustrating industrial dispute that leads to substantial financial losses in all events.

- The “critical path” nature of construction work leads to vulnerable situations where a stoppage with one contractor in one aspect of the project can cause a major hold up to multiply the time lost by different parties.

- The crucial nature of certain steps in the construction process allows inordinate industrial pressure to be applied to employers at particular crucial stages in construction. The obvious example is the “concrete pour” stage of construction and this situation has been exploited on many occasions over the years to derive the most damaging effects from stoppages of work. There are other similar stages that lead to employers being highly vulnerable at particular times.

- The number of different contractors normally working on a site can lead to worker envy of perceived better comparative entitlements of workers engaged on the same project, if exploited.

- The essential need to continually acquire new projects to replace completed projects, leads to a consciousness of vulnerability by employers that discourages them from doing anything that will attract disapproval by unions and workers. Reporting illegal industrial conduct can result in subsequent vindictive actions that can destroy a business. Being known to be in “bad grace” with a union can easily dissuade head contractors from engaging a sub-contractor bearing that reputation.

- Generally the place of employment is a temporary site that changes from time to time leading to workforce permanency being rare and lack of familiarity with other workers and employers being common. This factor reduces loyalty of workers.

- Employers rightly or wrongly do not view concessions granted by them to get a job finished, as concessions that will have a long term effect on that particular employer’s business. There is an attitude that getting the job finished is all important irrespective of setting standards that could flow on to the rest of the industry. In fact, concessions that may flow on to the rest of the industry may be viewed by some as being unimportant, as those concessions will have to be passed on by all competitors.

- Shortage of skills in the industry is leading to strong wage pressures, and when this is exacerbated by the pressures applied as a result of industrial action, there is a resultant blow-out in entitlements that is not fair to workers in other industries.

Many of these factors contributed to Commissioner Cole’s desire to break the cycle that linked commercial pressure, unlawful industrial action and damages. They are similarly identified in the reports of the Heydon Royal Commission and the Wilcox Inquiry.

The industry will be assisted in its efforts to break the cycle by the presence of a regulator that has strong investigative, compliance and enforcement powers and is prepared to exercise those powers in relation to employers in the industry as well as employees and subcontractors.

CONCLUSION

In summary, the ACA submits that, if passed by Parliament, the effect of the legislation will be to achieve the following:

- **Provide a platform to substantially reduce the incidence of illegal or unlawful activity in the industry.**
- **Lead to improvements in productivity.**
- **Reduce the cost of construction with flow on benefits for the Australian community.**
- **Lead to a reduction in stress levels at worksites with consequential benefits for workplace health and safety.**
- **Enable a change in the culture of the industry that will support the long term sustainability of businesses (in particular small businesses) and the achievement of a more diverse and stable workforce.**

The ACA recommends that the Committee endorse the Bills before it for passage through the Senate as soon as possible.

For further information, the ACA's Executive Director, Mr Lindsay Le Compte, may be contacted on

27 September 2016

Annexure A

Members of the Australian Constructors Association:

- Acciona Infrastructure Australia Pty Ltd
- BGC Contracting Pty Ltd
- Bouygues Construction Australia Pty Ltd
- Brookfield Multiplex Australasia
- Clough Limited
- CPB Contractors Pty Limited
- Downer EDI Limited
- Fulton Hogan Group Ltd
- Georgiou Group Pty Ltd
- Grocon Pty Limited
- Hansen Yuncken
- John Holland Group Pty Ltd
- Laing O'Rourke Australia Construction Pty Ltd
- Lend Lease Building Pty Ltd
- Lend Lease Engineering Pty Ltd
- McConnell Dowell Corporation Limited
- Probuild Constructions (Aust) Pty Ltd
- UGL Limited
- Watpac Limited

8 Industrial disputes

Industrial disputes are a factor which can reduce the efficiency of delivering infrastructure projects.

It is generally accepted that the level of industrial disputation is affected by, amongst other things, the industrial relations settings of the day and the broader economic environment.

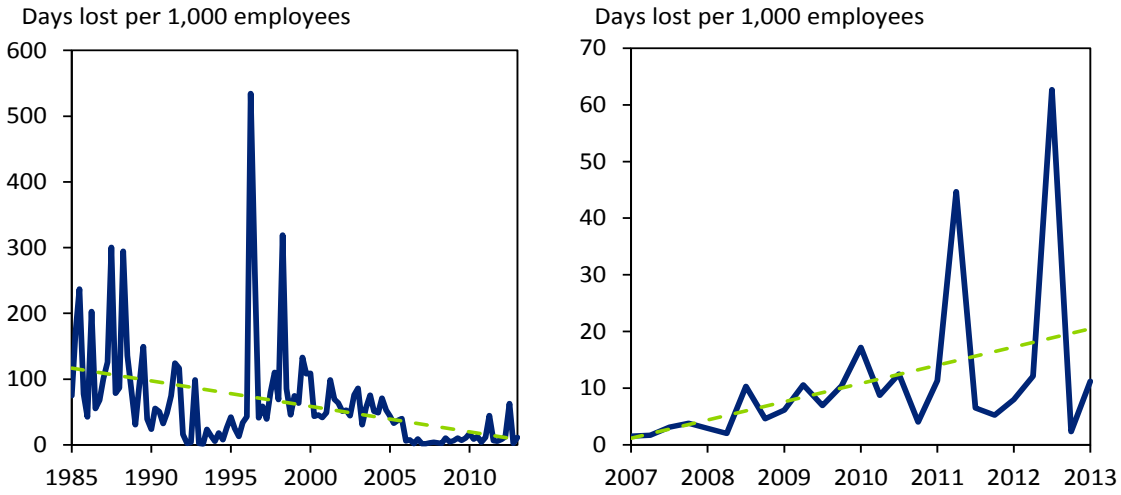
This chapter reviews the available statistical evidence relating to industrial disputes in the construction sector, as well as providing an overview of the views of ACA members on these issues.

8.1 Broad trends in disputes

Over the past three decades, industrial disputes in the construction industry generally trended down.

That long term trend is illustrated in the left hand panel of Chart 8.1. Yet, closer inspection of Chart 8.1 reveals that the downward trend in days lost due to industrial disputes has not been a linear one. In particular, the 1980s saw an especially elevated number of days lost due to industrial disputes, which by 1995 had reduced significantly. Days lost then rose again for a number of years, before commencing another decline in the early 2000s.

Chart 8.1: Industrial disputes in the construction industry

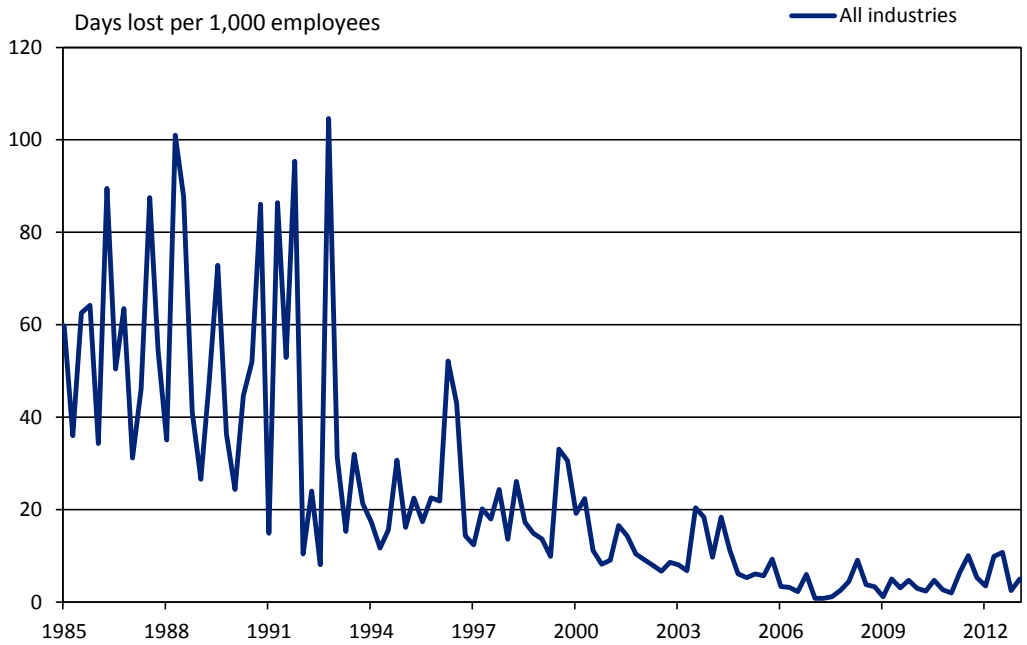


Source: ABS 6321.0.55.001. Table 2b. March 2013 and March 2008

By 2006, days lost per 1,000 employees in construction were observed to be near zero. However, the right hand panel of Chart 8.1 shows that a shift up in disputes is now being seen. **Over the past five years, the level of industrial disputes in the construction industry has trended up**.

The longer term downward trend since the 1980s in days lost due to industrial disputes has also been observed for other industries (see Chart 8.2). That is particularly true of coal mining and other mining where days lost due to industrial disputes have fallen very significantly since the mid- to late 1980s, but is also the case for other industries, including manufacturing, transport and communication, as well as education/health and community services.

Chart 8.2: Industrial disputes across all industries

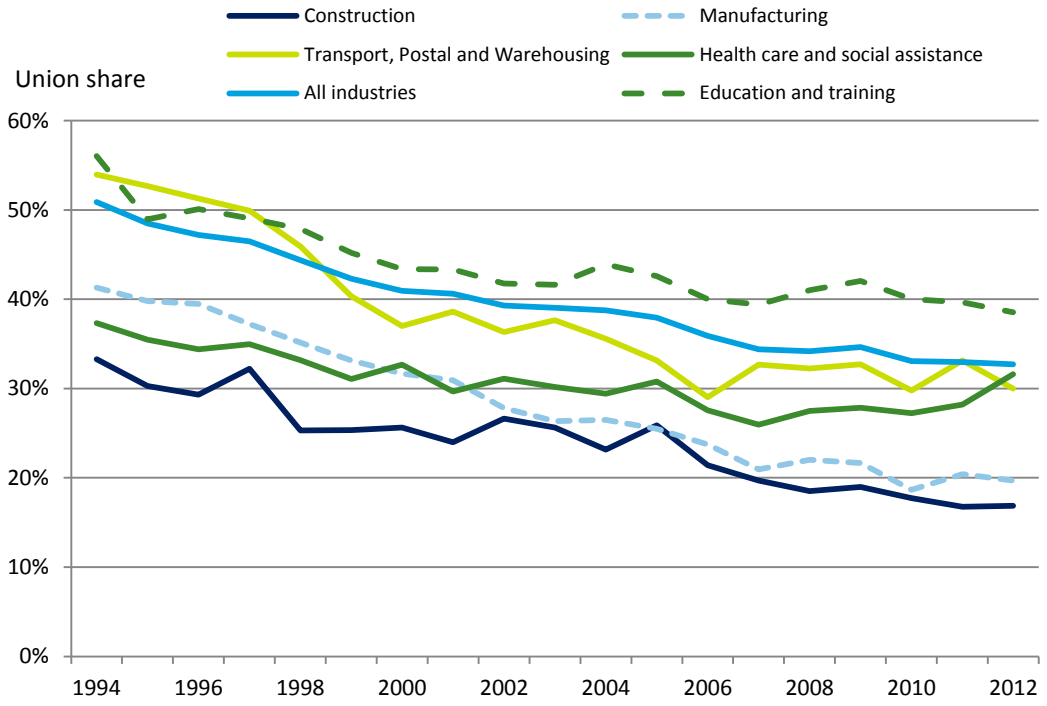


Source: ABS 6321.0.55.001. Table 2b. March 2013 and March 2008

In part, the reduction in days lost due to industrial disputes across industries can be traced to common structural forces at work in Australia, including changes over time to Australia's industrial relations regime.

For example, Chart 8.3 shows the substantial decline in trade union intensity over time in Australia. The trade union share of the workforce has fallen from around half of the workforce in the mid-1990s to around one third of the workforce. This trend decline in the trade union share is apparent for all industries, including the construction industry.

Chart 8.3: Trade union share of workforce

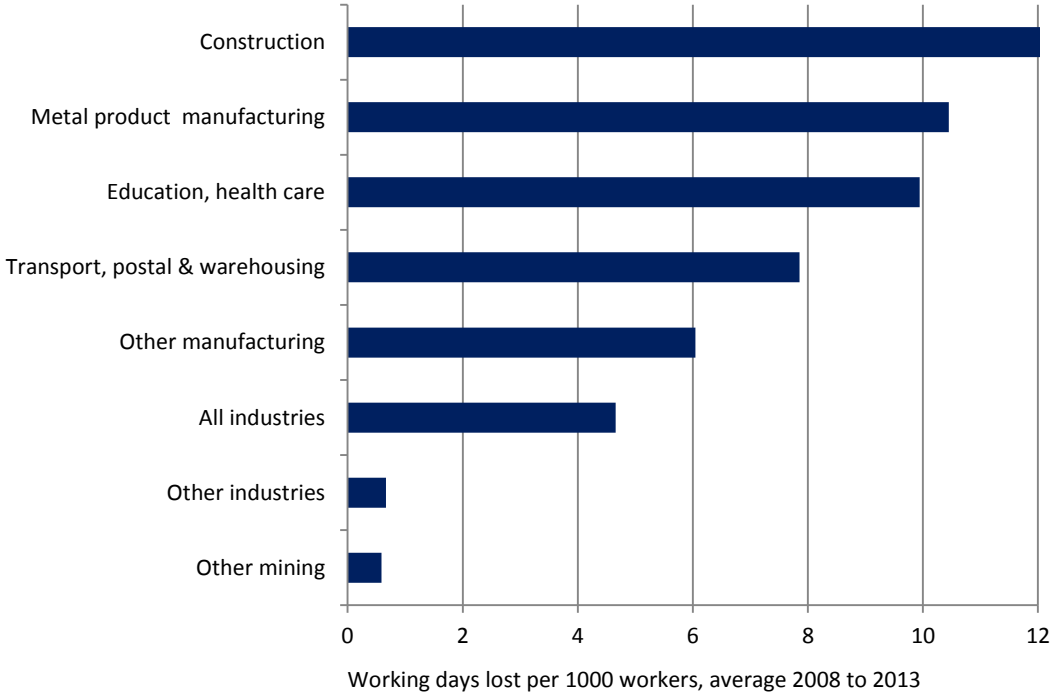


Source: ABS 6310.0

Despite the reduction in trade union membership in the construction sector over time, recent years have seen a renewed increase in measured disputes.

As Chart 8.4 shows, **the increase in working days lost due to industrial disputes in recent years has been more pronounced for the construction industry**. The average number of working days lost per 1,000 workers in the construction industry has been the highest of all industries since 2008, and is now again significantly above the average for all industries.

Chart 8.4: Working days lost per quarter by sector, average 2008 to 2013



Source: ABS 6321.0

The reversal of the downward trend in working days lost in the construction industry in recent years coincides with significant changes made to the industrial relations and regulatory regimes since the change of Federal government seen in 2007.

Earlier measures such as the introduction of the Building and Construction Industry Improvement Act 2005 and the Australian Building and Construction Commission have been eroded in more recent years, coinciding with the recent increase in working days lost for the construction industry.

8.2 ACA members' views and experiences

The survey of ACA members conducted for this report provides important contextual evidence of the experience of ACA members relating to the construction of public infrastructure.

On their experience of **industrial dispute activity over the past five years**, a number of ACA members noted that they had not individually experienced a change in the number and characteristics of significant industrial disputes (as per the ABS definition) in the delivery of public infrastructure over the past five years. However, one respondent who had experienced an increase in both the frequency and length of industrial action over the past five years stated that increasingly aggressive union behaviour, such as failing to follow or ignoring laws and directives, had been experienced over the past five years. Similarly, another respondent with a similar experience stated that the frequency of industrial disputation altered markedly following the Fair Work Act and Construction Code changes that were implemented by the Federal Government in October 2009 and beyond. It was

also noted by some respondents that Queensland had emerged as an industrial relations 'hot spot'.

On their experience of **industrial dispute activity over the past ten years**, changes to the regulatory and institutional regime were cited by several respondents as having initially improved the level of industrial dispute activity. Specifically, these changes included the introduction of a revised national code of practice, introduction of the ABCC, and the introduction of the Work Choices industrial relations legislation. One member stated that the economic downturn had reduced industrial dispute activity, while another stated that there had been no change experienced in the past ten years.

The ABS data on industrial disputes noted above is based on stoppages of work of ten working days or more. ACA members were also asked about their experience with **on-site industrial actions** which would not be defined as an industrial dispute.

On-site industrial actions during the delivery of public infrastructure were considered as a source of pressure on project costs but respondents found it difficult to specifically quantify that cost. Examples of such industrial actions and issues included dealing with union right of entry visits where there is conjecture about whether procedures have been properly complied with, union complaints and allegations about otherwise lawful and allowable changes to work patterns and behaviours, and about the arrangements of properly engaged and legitimate subcontractors.

It was stated that these types of activities placed upward pressure on costs due to:

- the need to engage specialist industrial relations resources where they might not otherwise be required;
- time spent by managers, supervisors, and others on industrial issues rather than on the core focus of their roles; and
- the need to cover industrial relations risk by ensuring EBAs were in place for all projects and all subcontractors (thereby increasing the need to engage with unions).

Similar general observations were made about changes in on-site industrial actions over the past five years, with respondents citing factors such as the watering down of the ABCC (and lack of regulatory accountability), and repeal of the Workplace Relations Act, as examples that led to increased union activity.

Are there differences in how work practices and industrial relations affect different types of construction?

By type of infrastructure (roads, railways, ports, water supply and storage, energy, communications) – respondents generally were in agreement that there were differences by type of infrastructure. Reasons given included that the specific union involved can differ by type of infrastructure (which has an impact on work practices), with one respondent stating that there were far less disputes in road and rail infrastructure works than projects involving building construction. One respondent noted that some types of infrastructure are different as characterised by their scale or nature of construction, while another noted that industrial relations risk is generally higher the less direct delivery undertaken by the head contractor. One respondent also noted that higher profile civil construction draws increased industrial impacts.

By the value of the project – respondents were unanimous in stating that the larger the project by value the greater the interest of unions and industrial relations risk, with industrial disputes more likely. It was stated that unions may feel that the 'stakes are higher' with a higher profile for a high value project. Disputes may relate to contents of agreements, the use of a project agreement rather than an existing agreement, increased site allowance and many other terms and conditions of employment.

By the project duration? – a minority of respondents stated that there was generally no difference, while others thought that there were differences. The latter stated that longer projects may extend across Government and union leadership terms, with associated changes in industrial relations, while disputes over the content of agreements or their renegotiation were also stated to be more likely for longer projects.

Between different jurisdictions (including urban vs regional projects)? – a majority of respondents stated that there were differences, with urban industrial activity generally more coordinated and CBD projects thought to be more likely to be targeted due to higher visibility. A minority of respondents experienced fewer differences. One respondent stated that Victorian projects cost approximately 20-30% more due to expected terms and conditions for infrastructure projects. Another respondent noted a recent trend of industrial issues also carrying into regional projects, while traditionally urban projects had greater prospect of industrial issues.

For greenfield versus brownfield projects? – the majority of respondents reported that there was generally no significant difference. One respondent stated greenfields projects were inherently more difficult from an industrial relations perspective, particularly given the enterprise bargaining power handed to unions by the Fair Work Act from 2009 onwards.

Potential solutions to reduce the level of industrial disputes

ACA members were asked for their suggestions of potential solutions to reduce the level of industrial disputes and on-site industrial actions in the future (including examples of best practice). ACA member suggestions have been grouped below under broad themes.

Institutional reform

- Reintroduction of building and construction industry reforms that were implemented in 2005 following the Cole Royal Commission, including an effective Construction Code and a willing and able regulator such as the Australian Building and Construction Commissioner.
- Amendments to the Fair Work Act so that 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 ABCC to vet all new industrial instruments for prohibited content and code compliance before approval can be given by the Fair Work Commission.
- Have a central body involved in overseeing Greenfields Agreements negotiated with employers and unions.

- Employee representatives/delegates training be overseen by a Government agency with involvement by both union and employer trainers, and paid for by the union with the employer to meet the cost of wages for the duration of the course.
- Enforce strict right of access provisions in legislation. Greater penalties for unsanctioned action and provision for recouping loss to contractors for delay and disruption caused by the action.

Right of entry for union officials

- Genuine stoppages of work for health and safety issues need to be monitored and overseen by a central body.
- The Fair Work Commission should have an active role in removing right of entry permits for union officials who act unreasonably when exercising a right of entry or otherwise disrupt work.
- 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, clauses which provide for union meetings and clauses which provide for union access to inductions.
- Introduce a requirement that union officials must provide 24 hours' notice when exercising a right of entry for WHS purposes and must also provide 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 or notify disputes.
- A union official's right to enter should be conditional upon the official acting reasonably and not disrupting work.
- Higher level of 'reference checks' for persons to become authorised Officers to enter premises for inspection of pay breaches and OH&S breaches.

Regulation of union behaviour and other matters

- A union official should only be permitted to hold discussions with employees during meal times or other breaks and in a room nominated by the occupier of the premises.
- The occupier of the worksite should have the right to determine the location of union meetings provided that the location is reasonable and does not breach a person's freedom of association rites.
- Anti-bullying legislation should be applied to union officials.
- Simplify unfair dismissal laws, including genuine redundancy definition.
- Remove reverse onus of proof and narrow scope of adverse action laws.
- Fair Work Commission orders to cease unprotected industrial action must be abided by and immediate breach if ignored. Presently, an employer must go to the Federal Court to enforce the Order at significant financial cost and time to the employer.

> *There are many more suggestions that could be added but essentially in Australia we need to be aware that on many infrastructure projects our work practices, hours of work and hourly rates of pay for blue collar workers are out of step with other countries in which we operate.*

9 Conclusions

The analysis in this report has highlighted some key trends in the delivery of public infrastructure projects in Australia:

- Consistent with the demand cycles of recent years, relative costs in engineering construction rose notably up until the GFC, but have moderated some of their gains since then.
- Construction sector wages relative to other sectors grew notably across the same period, but have not fallen back (implying that non-wage costs have seen a more substantial relative decline).
- That wage growth has been stronger when one examines EBAs where union impacts are more evident. Wage rises from EBAs have grown faster than wages in general to a much greater extent in the construction sector than in any other sector.
- Although there is some sign that construction sector productivity relative to other sectors also rose, it did so to a rather smaller extent than relative wages did. That productivity boost is also now fading (in part because measured productivity moves with the economic cycle), while the increase in relative construction wages has not.

Other things equal, that combination says that there has been more going on in construction sector costs – particularly wages – than just the demand cycles of the past decade.

It is also worth highlighting that the rate of engineering construction cost increase has been notably higher for public sector projects (the focus of the Commission's review) than private sector projects. Given the significant demand seen for resources investment, and the combination of a rising $A and high import component for resources projects (pushing down local currency costs of imported materials and equipment), one might have thought this would be the other way around.

A loss of competitiveness in delivering infrastructure projects creates difficulties for the Australian economy going forward.

The persistence of higher construction costs will act as a barrier to infrastructure projects in the pipeline going ahead, and are now combining with less favourable demand conditions to result in what may be a notable downturn in major project spending. Indeed, the slowdown in construction now beginning looks set to slow the growth in Australia's capital base to the weakest seen in many decades.

Chart 9.1 shows the rate of growth in Australia's capital stock is moderating, and on current trends looks set to move much lower over the coming years.

Chart 9.1: Australia's capital stock

Source: Deloitte Access Economics, Business Outlook, December 2013

That presents the potential for problems further down the track as the resultant decline in the capital stock puts a barrier on future productivity growth for the nation.

Annexure C

PRODUCTIVITY COMMISSION REPORT INTO PUBLIC INFRASTRUCTURE – FINAL REPORT JULY 2014

Extract From Final Report – Pages 30-33

Industrial relations

The industrial relations (IR) environment in construction has long been seen as problematic. It exhibits greater than average levels of industrial disputes. There are concerns about excessive union control of work sites and expedient deals between head contractors and unions to buy industrial peace and preserve the market advantage of good relationships. Multiple reviews have found unlawful (and sometimes criminal) conduct in some parts of the industry — mainly involving larger commercial building projects rather than infrastructure projects. A prominent concern is that union and employer behaviour is not only fuelling unlawful conduct, but also frustrating productivity and raising costs.

The systemic problems affecting core parts of the sector have fuelled industry-specific arrangements, including IR building guidelines and the creation of industry-specific regulators.

However, to place these concerns in context:

- in the Commission's meetings with stakeholders and in submissions, most parties did not raise IR issues as a major source of cost pressures for civil and engineering construction, which is the dominant form of construction for public infrastructure
- while days lost per employee are higher than most other industries, they are very low by historical standards. They fell somewhat during the early years of the Australian Building and Construction Commission (ABCC), but then rose (albeit to levels that are still low by the historical standards of the industry)
- unionisation continues to fall, and is now at record lows
- higher productivity growth rates in the aggregate construction industry do not appear to be associated with the construction-specific IR arrangements that commenced in 2002
- while union bargaining power appears to have increased wages significantly for some projects and jurisdictions, labour earnings growth over the last decade also reflects labour shortages associated with increasing demands for construction. There is evidence that current enterprise bargaining rounds could lead to a reduction in labour costs

- an important aspect of the outcomes in IR is not regulatory. The competence of the parties to negotiate with each other is important. Governments can adjust institutions, but cannot directly improve the capabilities of the IR managers in construction companies.

Notwithstanding this, there are still considerable concerns. (emphasis added)

- Cases prosecuted by the Fair Work Building and Construction (and formerly the ABCC) continue to reveal unlawful conduct (mostly of a civil nature) and adverse IR cultures. Overwhelmingly the issues centre on general, rather than civil and engineering construction, with cases concentrated in Victoria and most often involving just one union, the Construction, Forestry, Mining and Energy Union. It is important in that context to avoid generalising the flaws and follies of an industrial relations environment spanning such a patchwork of businesses, unions, project types and jurisdictions.
- Most recently, allegations of bribery between constructors and unions have emerged, and are the subject of the Royal Commission into Trade Union Governance and Corruption.
- There is evidence of potentially excessive powers for some union officials and constraints on workplace flexibility likely to be inimical to productivity.
- Analysis of enterprise bargaining agreements (EBAs) suggest large and inexplicable variations in terms and conditions for employees. For example, there were large wage premiums associated with the construction of desalination plants throughout Australia. This might reflect the urgency with which these projects proceeded (and the resulting bargaining power bestowed on the relevant unions). More generally, some caution needs to be exercised when analysing EBAs, as they only can ever reveal part of the information set necessary to fully appreciate the bargaining environment at the time they were struck.
- The nature of the construction projects provides unions with significant leverage, which they sometimes abuse. Businesses are exposed to large delay penalties, and high costs if construction work is interrupted (such as a concrete pour).
- For particular projects, the nature of the project, the relevant union and delegates, the negotiating competencies of parties, and the incentives of the head contractor can lead to highly costly, combative and problematic outcomes. So while many projects may not be dogged by problems, some have involved toxic relationships.
- Further, the capacity for parties to negotiate enterprise bargains that suit the circumstances and preferences of individual businesses and their employees has been partly subverted. Various pressures by employee associations and the principal unions can lead to the implicit adoption of pattern bargaining, which leads to the same agreements across relevant parts of the entire industry. Greenfield agreements for a particular project struck between a union and a head

contractor can also stifle the potential for subcontractors to negotiate EBAs suited to their own circumstances. Each of these factors can inhibit productivity growth.

Most industry participants and business bodies argued for the replacement of the current industry-specific industrial relations regulator, Fair Work Building and Construction, with the preceding body, the Australian Building and Construction Commission (ABCC). The latter had greater coercive powers, higher penalties, and the capacity to still investigate matters where the union/s and an employer had reached an agreement after an industrial dispute.

The evidence that the ABCC stimulated material improvements in *aggregate* productivity or achieved cost reductions is weak. **But the debate about the aggregate productivity numbers alone misses several important points about the effectiveness of the ABCC. (emphasis added)**

The ABCC is likely to have had its primary impact on unlawful conduct and on local productivity and costs at particular sites. These are important effects that are hard to find in the aggregate data. Moreover, a major goal of reform is to ensure that parties are confident that IR regulations, agreements and contracts are observed.

Strengthening of regulatory responses is clearly needed, but the industry itself needs to embrace changed behaviour.

A sensible starting point is for all jurisdictions and the Australian Government to deploy the Victorian guidelines (or something akin to them) for their building codes of practice. Breaching the guidelines would potentially disqualify contractors from tendering for public infrastructure projects if they had mismanaged their industrial relations arrangements or had reached ‘sweetheart’ deals with unions that precluded competition from sub-contractors with lower wage costs.

The Commonwealth could encourage the Australia-wide adoption of such guidelines in several ways:

- where the Commonwealth is the procurer (say, as in the National Broadband Network), it would apply the new guidelines to its tenderers
- where the Commonwealth is a funder of state projects, it would require compliance with a code and guidelines embracing the Victorian principles as a precondition for funding.

In addition to this measure, there are also grounds for raising the ceiling for penalties for unlawful conduct. This would enable the Federal Court to set penalties more commensurate with the economic damage of industrial unrest, or to provide greater deterrence where there was recurring recidivism by an employer, employee or union for unlawful conduct.

Adoption of the guidelines and higher penalties would be likely to significantly improve the industrial relations environment and avoid industrial disputes and excessively generous enterprise bargaining agreements.

ACA NOTES

The reference in the extract to the Victorian Guidelines relates to the Victorian Code of Practice for the Building and Construction Industry released by the then Liberal/National Government in October 2014.

The Victorian Code stated that it had been developed for the following reasons:

- **to promote an improved workplace relations framework for building and construction work to ensure it is carried out lawfully, fairly, efficiently, productively and safely for the benefit of all persons;**
- **to assist participants to understand the Victorian Government's expectations and requirements for persons that choose to tender for public building and construction work and/or are awarded public building and construction work;**
- **to establish an enforcement framework under which persons who operate in a manner which does not comply with the Victorian Code may be excluded from tendering for or being awarded public building and construction work; and**
- **for the purposes of the Victorian Government achieving value for money on its spending on building and construction projects and fostering that approach generally across building and construction work.**

On 18 January 2015, the incoming Victorian Labor Government announced the abolition of the Victorian Code of Practice for the Building and Construction Industry (Victorian Code) and its monitoring body, the Construction Code Compliance Unit.