

Queensland Government Submission to
The Senate Standing Legislation Committee on
Education and Employment

***Building and Construction Industry (Improving
Productivity) Bill 2013;***

***Building and Construction Industry (Consequential
and Transitional Provisions) Bill 2013***

17 January 2014

TABLE OF CONTENTS

Introduction	3
Unlawful industrial action in Queensland	3
Introduction of the Queensland Guidelines	4
WRMPs	5
Future Industry Reform	6
Workplace instrument-based conduct	6
Conclusion	7

Introduction

On 14 November 2013, the Federal Government introduced the Building and Construction Industry (Improving Productivity) Bill 2013 (Bill) into Parliament.

On 4 December 2013 the Senate referred the Government's approach to re-establishing the Australian Building and Construction Commission (ABCC) to the Education and Employment References Committee for inquiry and report by the last sitting day in March 2014 (27 March 2014).

The Building and Construction industry plays a vital role in the Queensland economy and the delivery of important infrastructure projects. The Queensland Government welcomes the opportunity to provide commentary and feedback on the building and construction industry.

The Queensland Government applauds the decision to re-establish the ABCC as a strong and effective industry regulator. Since the abolition of the ABCC Queensland has witnessed a dramatic increase in the level of unlawful industrial activity in the building and construction industry. Unlawful industrial action and disregard for Right of Entry laws have impacted on building costs and industry productivity. The Queensland Government is confident a re-established ABCC, in tandem with the activity of the State's own industry watchdog, the Building Construction Compliance Branch (BCCB) within the Department of Justice and Attorney-General, will ensure the restoration of respect for the rule of law to deliver improved productivity across the industry.

The increase in working days lost through industrial disputation in the Queensland Construction industry has coincided with the introduction of the FW Act; changes to the Implementation Guidelines to the National Code of Practice for the Construction Industry; introduction of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012; and the abolition of the ABCC.

The abolition of the ABCC in particular has seen resurgence in intimidation and unlawful industrial action on building sites with unions engaging in illegal strike activity without facing prosecution.

Unlawful industrial action in Queensland

In calling for the implementation of a Queensland Code of Practice, the Queensland Master Builders Association (QMBA) and Australian Mines and Metals Association (AMMA) jointly reported that Queensland's commercial building and construction sector had, during 2012, experienced one of the most difficult periods of unlawful industrial conduct in its history.

In 2012 15,000 days were lost at the site of the Queensland Children's' Hospital (QCH) project in South Brisbane. The QCH project was stopped for more than 60 days resulting in an estimated loss of almost \$300,000 a day to the Principal Contractor (Abigroup) and as the client, the taxpayers of Queensland lost around \$7.4 million.

The issue of lost time due to illegal industrial activity highlights flaws in the industrial relations system which allows stoppages to continue after Fair Work Australia has made orders relating to a return to work.

In the QCH dispute, AbiGroup secured a six-month stop order on unprotected industrial action in Fair Work Australia (FWA) and an injunction in the Federal Magistrates' Court against the unions and named individuals, including Mr Robert Carnegie, on 5 and 7 September 2012 respectively.

Despite the stop order and injunction, workers did not return to work until 3 October 2012 due to the presence of picket lines established at the entrances to the QCH construction site.

In 2013, another major project involving head contractor Laing O'Rourke experienced unprecedented union-led disruption, particularly as a consequence of the abuse of right of entry by union officials. The unions involved include the Construction Forestry Mining and Energy Union (CFMEU), Builders Labourers Federation (BLF) and the Electrical Trades Union (ETU). The company reported 40.25 days lost to unlawful industrial activity in the first year of their enterprise agreement.

In February 2013, Laing O'Rourke was awarded a wide ranging injunction against three unions and six union officials from the CFMEU, BLF and Communications, Electrical and Plumbing Union (CEPU). The Federal Court extended this injunction on 15 February restraining the CFMEU, the Queensland BLF, the CEPU and their officials from advising or inducing sub-contractors not to carry out work on the site, pending the determination of the project consortium's substantive application.

The Federal Court found that there was a serious issue to be tried that the unions and officials had taken adverse action against the company under section 340 of the Fair Work Act (Cth) (FW Act) because the company has workplace rights. The court also found that there was a serious issue to be tried that the unions and officials had also contravened sections 45D and 45E of the Competition and Consumer Act (Cth) by hindering or preventing the subcontractors from supplying services to the head contractor, or by entering into an arrangement with them not to do so. Including the CEPU in the orders, the Federal Court found there was an inference on the evidence that the CFMEU and the BLF had employed a strategy of using alleged safety problems at the site as a pretext for interfering with the construction schedule of the project, in a bid to pressure Laing O'Rourke to resolve outstanding industrial issues.

On 28 October 2013 unprotected industrial action commenced on two John Holland projects, Gallipoli Barracks at the Enoggera Army Base and the QUT Creative Arts Precinct. Orders to return to work were issued by the Fair Work Commission however neither site returned to work for several weeks.

Unfortunately this type of behaviour is a strong feature of Union disregard for the rule of law. This behaviour will continue until there are changes to the FW Act and the establishment of the ABCC.

Introduction of the Queensland Guidelines

In response to increasing union militancy and unnecessary and unlawful disruption to construction sites, the Queensland Government introduced the Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry (The Queensland Guidelines) effective from 1 July 2013.

The Queensland Guidelines aim to ensure value for money on State government funded infrastructure projects through:

- a) Proactive management of workplace relations;

- b) Cost efficiency and productivity improvement;
- c) Workplace health and safety and rehabilitation; and
- d) Innovation and continuous improvement.

In addition to the introduction of the Queensland Guidelines, the Queensland Government established the Building and Construction Compliance Branch (BCCB) within the Department of Justice and Attorney-General (DJAG). The BCCB is responsible for monitoring, auditing and reporting on compliance with the law (e.g. right of entry and freedom of association) on State funded infrastructure projects. The BCCB provides the Queensland Government with the means of directly confronting unlawful and unproductive industrial activity on State funded construction sites through its physical presence on site and at the tendering stage where it verifies the efficacy of the head contractor's Workplace Relations Management Plan (WRMP).

Since July 2013, 68 projects with a value of \$3.2 billion of Queensland Government-funded construction work are being administered under the Guidelines. An additional 47 projects valued at \$604 million are expected by 30 June 2014.

WRMPs

The Queensland Guidelines encourage improved productivity and performance in the building and construction industry through effective workforce management. This includes the requirement for a prospective tenderer on Queensland Government projects to submit a WRMP for building projects valued over \$10 million and civil projects over \$20 million. A WRMP requires the head contractor to explain how it will conduct workplace relations on site and in particular how it will deal with unlawful industrial action, including the threat of unlawful industrial action, to ensure workplace productivity is maintained and maximised.

The WRMP, which is not a feature of the Federal Code, establishes a framework to pro-actively deal with unlawful or inappropriate industrial activity that would otherwise lead to lost time, cost increases and/or loss of productivity. This proactive approach by the State government is aimed at ensuring there is value for money for Queensland taxpayers on public infrastructure projects.

Also through the tender process the prospective tenderer contractually commits to complying with the Guidelines on this job and on all future State Government and private construction work in which it engages. To date, 108 contractors have committed to the Queensland Guidelines through tender arrangements.

A head contractor's WRMP will form the basis for the BCCB's audit of the project. There has been a steady improvement in the quality of those plans as contractors become more familiar with the requirements of the Guidelines.

Anecdotal evidence suggests the Queensland Government's commitment to industrial reform in the building industry has increased industry confidence generally. Contractors are demonstrating a greater commitment to addressing non-productive on-site practices and ensuring greater protection for the right of freedom of association.

Since its commencement in August 2013 the BCCB has been responsible for overseeing compliance and advising on the requirements of the Guidelines.

Future Industry Reform

The Queensland Government supports a return to a strong regulatory environment to uphold the rule of law in the construction industry.

The re-establishment of the ABCC as an effective industry regulator would therefore involve:

- a) the re-establishment of the ABCC as an independent statutory body;
- b) the reinstatement of building industry-specific laws and associated penalties;
- c) the reinstatement of ABCC powers to compulsorily obtain information and documents; and
- d) abolition of the Independent Assessor.

The Queensland Government notes section 31 of the Bill which makes provision for external agencies to assist the ABCC. Under section 31, persons assisting the ABC Commissioner may by example include state government employees involved in education activities. The Queensland Government supports section 31 and expects the BCCB to work closely with the ABCC pursuant to that provision.

With respect to applicable Guidelines and compliance frameworks for the Construction and Building industry, the Queensland Government notes that similar Guidelines and compliance units to those introduced in our State have also been introduced in Victoria and New South Wales in response to unlawful and unproductive industrial relations practices. Feedback from contractors in Queensland strongly suggests that maintaining consistency across the three states' Guidelines is important as it alleviates unnecessary regulatory burden on the industry.

The Queensland Guidelines are currently based on the 2006 Federal Guidelines, and in the interests of national consistency and the reduction of red tape, the Queensland Government supports the re-implementation of a Federal Building Code and Guidelines based on the 2006 Implementation Guidelines to the National Code of Practice for the Construction Industry.

Workplace instrument-based conduct

Despite the establishment of state-based codes of practice and implementation guidelines, construction projects continue to suffer from unproductive work practices as a result of some clauses contained in enterprise agreements. Clauses that allow for paid stoppages of up to two hours; union encouragement clauses; the obligation to ensure sub-contractors' workers are paid at the same rate as head contractor's workers; the employment of 'non-working' delegates and the need for a head contractor to obtain approval from a building union executive before opening a construction site on a rostered day off are examples of such clauses. These practices drastically reduce productivity while driving up construction costs.

Currently the FW Act prohibits a party taking 'adverse action' against an employee or independent contractor because the affected party has a 'workplace right'. The inability of the Victorian government to preclude contractors who are party to an enterprise agreement containing unproductive workplace practices from tendering for a publicly-funded project was considered by the Federal Court in the 'New Bendigo Hospital' case. The decision of the Full Court of the Federal Court of Australia, while finding that the Victorian Government had not taken adverse action against the contractor in that case, leaves a State Government open to challenge should it take

action to exclude parties with productivity-restricting enterprise agreements from tendering for publicly-funded building work.

The Queensland Government strongly encourages the Australian Government to amend the adverse actions provisions of the FW Act to allow for State Codes of Practice to exclude parties with productivity-restricting enterprise agreements from tendering for publicly-funded building work.

Conclusion

The building and construction industry is one of the four pillars of the Queensland economy. It is vital to the State's economic performance that this industry is operating productively and efficiently. However in recent years there has been numerous instances of unlawful industrial action, union militancy and the return to workplace arrangements that hinder freedom of association and stifle productivity.

The Queensland Government supports the *Building and Construction Industry (Improving Productivity) Bill 2013*. The passage of the Bill is a step towards improving the productivity of the building and construction industry by addressing the threat of union militancy, unlawful industrial activity and blatant disregard for the rule of law.