



Application for interim and final
authorisation under section 88(1) of the
Competition and Consumer Act 2010
(Cth)

The Australian Constructors Association
on behalf of itself and Participating Constructors

Public version

9 April 2020

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1. EXECUTIVE SUMMARY

Background

1.1 This application is made to the Australian Competition and Consumer Commission (**Commission**) by the Australian Constructors Association (**ACA**), on behalf of:

- (a) itself;
- (b) all entities which are members of the ACA (a full list is provided at **Schedule 1** to this application); and
- (c) any other construction or building industry entity who in future wishes to engage in the conduct the subject of the application providing that the Commission is notified prior to the entity engaging in the conduct,

(collectively, the **Participating Constructors**).

1.2 Engineering and construction play a fundamental role in the Australian economy. In the year to December 2019, the value of construction work done was \$204 billion, with real value-added output to September that year being \$136 billion. In 2019, the construction industry contributed approximately 7.2% to Australian GDP. This work supports the employment of approximately 1.2 million Australians, representing almost one in ten of the total Australian workforce. The construction industry is one of the largest workforces in Australia. In the current climate, ensuring the longevity of employment levels in the construction industry is of vital importance and ensuring the livelihoods of construction industry employees is critical.

1.3 Additionally, the construction industry works tirelessly to ensure the ever-increasing quality standards of Australian construction. This includes assisting with large numbers of Government and private projects for the benefit of the general public, such as infrastructure, essential services, education and healthcare facilities.

1.4 In the current circumstances of the COVID-19 pandemic, ensuring that the construction industry can continue to provide its services to assist with new projects, such as infrastructure, utilities, and essential new healthcare facilities, or new services (such as food delivery to vulnerable consumers) is of vital importance. Further, the construction industry's ability to leverage jobs and economic activity across Australia is powerful and will remain important, particularly post this event, to provide confidence and to help kick-start the Australian economy.

1.5 The impact of the COVID-19 pandemic on the Australian construction industry is unprecedented. While the long-term impact is yet to be determined, it is already clear that the short-term effects are extreme and require substantial planning to ensure, particularly:

- (a) the health and safety of workers;
- (b) that the financial damage caused, including any enforced shutdown, is mitigated to the greatest extent possible;
- (c) that the viability and competitiveness of the industry is maintained as far as possible; and
- (d) that Participating Constructors can engage in a swift and efficient full re-commencement of industry activities at the appropriate time,

(collectively, the **Objectives**).

- 1.6 The international experience of the COVID-19 pandemic for the construction industry is varied, however, in many jurisdictions around the world construction projects have been instructed to close or uncertainty remains from authorities about how to classify or prioritise activities, as they seek to balance the need to maintain economic activity and limiting transmission within the community it seeks to protect. This experience points to the urgency of addressing the Australian position.
- 1.7 With an ever-changing situation emerging in relation to the COVID-19 pandemic, the Participating Constructors are conscious that the construction industry needs to be flexible and united (to the extent legally possible) in order to support the needs of construction employees, clients, Governments and the general public. In particular, the Participating Constructors are focused on ensuring that each Participating Constructor complies with social distancing and other preventative and mitigation measures to ensure the safety of its workers, that jobs remain available where possible, that clients do not face significant, undue delays to essential projects, and that construction industry participants are able to mobilise to continue to execute vital existing and new infrastructure including healthcare facilities as and when required by Governments or private entities. Additionally, the Participating Constructors (and participants in the industry, more generally) need to be prepared in the likely event that suppliers of raw materials, sub-contractors of essential resources, manufacturers and transport and other logistics operators face constraints as a result of the ongoing COVID-19 pandemic.
- 1.8 The construction industry is concerned to be as transparent as possible in its response to COVID-19. Whilst the Participating Constructors continue to abide by the directions and guidance of authorities and clients, including operating sites under adjusted and at times inefficient working arrangements, the Participating Constructors believe that it is important to engage the Government in discussions about various possible scenarios and scenario planning. This includes openly discussing with Government the support and commitments required through the current and emerging situation, a potential shutdown, and a subsequent recommencement of work, with full participation and a concerted effort to revitalise the sustainability of the Australian construction industry.
- 1.9 The ACA has already had some discussions with its key Government clients around the potential health and safety and supply chain challenges facing the construction industry as a result of the COVID-19 pandemic, as well as the likely requirements of those key Government clients for increased construction services (specifically in relation to ensuring a dramatic increase in the ability to provide much needed infrastructure, including healthcare facilities). The ACA understands from those discussions that various of its Government clients, particularly the New South Wales and Victoria State Governments, are encouraging the Participating Constructors to collaborate in providing information, advice and assistance to the Government in an open and transparent way, to allow the Government to find the best responses to the COVID-19 crisis, for the construction industry as a whole.
- 1.10 For this purpose, the Participating Constructors seek urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to engage in the Proposed Conduct as described in section 3.8 of this application. The Proposed Conduct is intended to assist the Participating Constructors to provide the assistance requested by Government to quickly address the issues outlined in this application, with a view to ensuring that all work is undertaken safely, that jobs are saved and essential projects are able to be delivered quickly and efficiently while the pandemic persists.
- 1.11 The ACA understands that the New South Wales and Victoria State Governments are supportive of the Proposed Conduct (based on discussions with various of their State Government procurement and delivery agencies), although formal approvals of support are currently being obtained (this is taking longer than usual due to the current situation). The ACA is also liaising with the Federal and other State and Territory Governments, and

each has indicated its initial support for the Proposed Conduct. The ACA will update the Commission in the event that it becomes aware that there are any changes to the various Governments' positions in relation to this application. See further Schedule 2 to this application.


Application for urgent interim authorisation

- 1.12 The Participating Constructors consider that due to the fast moving and dynamic Government response to, and restrictions imposed by reason of, the COVID-19 pandemic, immediate steps are required to address workplace health and safety for construction employees and to ensure the financial viability of existing and future construction projects and construction industry participants. To ensure that active steps can be taken as quickly as possible, and as discussed in section 4 below, the Participating Constructors request that the Commission grant urgent interim authorisation.

2. PARTIES TO THE PROPOSED CONDUCT

Applicant

- 2.1 The applicant is the ACA. The full contact details of the ACA are:

NAME, REGISTERED OFFICE, TELEPHONE NUMBER AND ACN	CONTACT PERSON'S NAME, POSITION, TELEPHONE NUMBER AND EMAIL
Australian Constructors Association ABN 63 065 806 948 Level 2, 51 Walker Street, North Sydney, NSW, Australia, 2060 (02) 9466 5522	Lindsay Le Compte Executive Director Australian Constructors Association Phone: +61 2 9466 5522 Mobile:  Email : 

- 2.2 The ACA represents leading construction and infrastructure contracting companies. The ACA itself operates as a company limited by guarantee and is managed by a board comprising the chief executives and senior executives of the members. Membership of the ACA is available to any Australian contractor with an annual turnover in excess of \$1 billion, or international companies with a combined Australian and international annual turnover in excess of \$5 billion.
- 2.3 Members operate in a range of industries, including infrastructure construction, commercial and residential building, renewables, process engineering, contract mining, maintenance and associated services, oil and gas operations, telecommunications services and environmental services.

Address for service and correspondence

- 2.4 The ACA is represented by Ashurst for the purposes of this application. Please direct all correspondence and service of documents to:

Ross Zaurrini
Partner













Melissa Fraser

Other persons who propose to engage in the Proposed Conduct

- 2.5 The ACA is making this application on behalf of the Participating Constructors. At the time of making this application, the Participating Constructors are:

NAME, REGISTERED OFFICE, TELEPHONE NUMBER AND ACN	CONTACT PERSON'S NAME AND EMAIL	DESCRIPTION OF BUSINESS ACTIVITIES
Acciona Infrastructure Australia Pty Ltd ACN 140 915 251 174 Turner Street Port Melbourne, Victoria 3207 +61 3 9624 4200	Kirsty Mayer [REDACTED]	Development and management of services for infrastructure, water and renewable energy
Bouygues Construction Australia Pty Ltd ACN 144 013 801 Level 2, 77 Pacific Highway North Sydney, NSW 2060 +61 2 8458 1200	Adelina Dal Pra [REDACTED]	Supply of construction and engineering services including building, civil engineering, earthworks and infrastructure for mining services
Clough Limited ACN 008 678 813 Level 9, 58 Mount Bay Road Perth, WA 6000 +61 8 9281 9281	Peter Bennett [REDACTED]	Supply of construction, engineering, maintenance and operations services across oil and gas, petrochemicals, metals and minerals and infrastructure sectors
CPB Contractors Pty Limited ACN 000 893 667 Level 18, 177 Pacific Highway North Sydney, NSW 2060 +61 2 8668 6000	Jean Paul Wallace [REDACTED]	Supply of design and construction services across infrastructure, defence, building and resources sectors

NAME, REGISTERED OFFICE, TELEPHONE NUMBER AND ACN	CONTACT PERSON'S NAME AND EMAIL	DESCRIPTION OF BUSINESS ACTIVITIES
Downer EDI Limited ACN 003 872 848 Level 2, 39 Delhi Road North Ryde, NSW 2113 +61 2 9468 9700	Sergio Cinerari 	Supply of engineering and infrastructure management services across minerals and metals, oil & gas, power, infrastructure, telecommunications, water and property sectors
Ferrovial Agroman (Australia) Pty Ltd ACN 150 820 116 Level 9, 65 Berry Street North Sydney, NSW 2060 +61 2 8736 9600	Michael Branscombe 	Supply of design and construction services across infrastructure, water and industrial sectors
Fulton Hogan Construction Pty Ltd ACN 010 240 758 Level 1 572, Swan Street Richmond, Victoria 3121 +61 3 9340 6200	Duncan Gibb 	Supply of construction products and services across transport infrastructure, water, energy, and telecommunications sectors
John Holland Group Pty Ltd ACN 050 242 147 Level 5, 380 St Kilda Road Melbourne, Victoria 3004 +61 3 8698 9400	Joe Barr 	Supply of origination, development and investment, design and construction, operations and management services across sectors including infrastructure, power and energy, health and aged care, education and research, infrastructure and water
Laing O'Rourke Australia Pty Ltd ACN 111 023 431 Level 21, 100 Mount Street North Sydney, NSW 2060 +61 2 9903 0300	Annabel Crookes 	Supply of design, manufacture and construction services for infrastructure facilities including buildings, transport, power, water and utilities, mining and natural resources, and oil and gas
Lendlease Building Pty Ltd	Dale Connor 	Supply of design and construction services across sectors including health, entertainment and recreation,

NAME, REGISTERED OFFICE, TELEPHONE NUMBER AND ACN	CONTACT PERSON'S NAME AND EMAIL	DESCRIPTION OF BUSINESS ACTIVITIES
ACN 000 098 162 Level 14, Tower Three, International Towers Sydney Exchange Place, 300 Barangaroo Avenue Barangaroo, NSW 2000 +61 2 9236 6111		education, commercial and industrial, retail, defence, correctional, hotels, aviation, and business solutions
Lendlease Engineering Pty Ltd ACN 000 201 516 Level 14, Tower Three, International Towers Sydney Exchange Place, 300 Barangaroo Avenue Barangaroo, NSW 2000 +61 2 9236 6111	Dale Connor 	Supply of design and construction services for civil infrastructure projects including roads, bridges, tunnels, rail, ports, dams, and earthworks
McConnell Dowell Constructors (Aust) Pty Ltd ACN 002 929 017 Level 3, 109 Burwood Road Hawthorn, VIC 3122 +61 3 9816 2400	Scott Cummins 	Supply of design, construction and maintenance services for building, electrical, marine, mechanical, pipeline, tunnelling and underground infrastructure in market sectors such as commercial building, mining, oil and gas, petrochemical, power, public infrastructure, transport, and water
Multiplex Australasia Pty Ltd ACN 146 787 395 Level 22, 135 King Street Sydney, NSW 2000 +61 2 9322 2400	Meg Redwin 	Supply of construction services in sectors including commercial, residential, education, health, retail, tourism and leisure
Probuild Group Pty Ltd ACN 615 206 794 Hage Partners Suite 9A, 82 Keilor Road Essendon North, VIC 3041 +61 3 9693 8222	Simon Gray 	Supply of construction planning and management services across multiple sectors including residential, entertainment and leisure, and education

NAME, REGISTERED OFFICE, TELEPHONE NUMBER AND ACN	CONTACT PERSON'S NAME AND EMAIL	DESCRIPTION OF BUSINESS ACTIVITIES
Salini Impregilo S.P.A ARBN 159 573 896 Level 19, 99 Walker Street North Sydney, NSW 2060 +61 2 9922 5458	Marco Assorati [REDACTED]	Supply of construction services specialising in water, railway, bridges, roads, airports, and buildings
UGL Pty Ltd ACN 009 180 287 Level 10, 40 Miller Street North Sydney, NSW 2060 +61 2 8925 8925	Jason Spears [REDACTED]	Supply of construction and maintenance services across rail and transport, communications, oil and gas, power and resources, water and defence markets

3. THE PROPOSED CONDUCT

Overview

- 3.1 The construction industry is vital to the Australian economy, in particular in the current circumstances responding to the COVID-19 pandemic. This has been the focus of current interactions between the ACA, its members, and various Governments (which have all requested that the construction industry consider how it will respond to the COVID-19 pandemic in a manner to ensure Government requests can be fulfilled and existing essential projects can be delivered in order to ensure the Objectives).
- 3.2 The key role played by the construction industry can be seen through its impact on and involvement in:
- (a) **Employment:** the construction industry provides employment for approximately 1.2 million individual Australians, and wages earned from the construction industry support countless others (as noted, for the year ended December 2019, the construction industry contributed approximately 7.2% of Australian GDP). Given the enforced shutdowns for many businesses, the ability to safely continue operations to whatever extent possible will be essential for many Australians to continue their employment.
 - (b) **Development:** the construction industry is also responsible for delivering projects which support the Australian economy and aid the development of Australian society as a whole. This includes high standard living and office facilities, as well as essential infrastructure such as roads, rail, education and healthcare services.
 - (c) **Emergency response:** in response to the current COVID-19 pandemic, a number of countries (including China) have responded by engaging their respective construction industries to rapidly increase infrastructure construction, including essential healthcare or quarantine facilities. The Participating Constructors consider that this is also likely to be the case in Australia and many have already had early discussions with Government clients around response measures which may need to be undertaken within a short period of time.

- (d) **Strength of the supply chain:** beyond workers directly employed by the Participating Constructors, the construction industry supports a broad range of subcontractors and suppliers, many of which are significantly smaller than the members of the ACA. As such, the continuing operation of the Participating Constructors has significant follow-on impacts on the financial wellbeing of the supply chain, including the employees of those subcontractors and suppliers. Additionally, given the geographic reach of the Participating Constructors and the construction industry supply chain, this impact is felt across the whole of Australia, including in regional areas which might be impacted in different ways to the major Australian cities.
- 3.3 The Proposed Conduct is limited to discussions and arrangements between construction industry participants required to respond to Government requests for information, assistance or advice concerning the Government's response to the COVID-19 pandemic, and assist in implementing Government decisions where required. The Proposed Conduct is centred around the need for the construction industry to respond quickly, efficiently and constructively to Government requests for information, assistance and advice to assist the Government with setting its policy positions and making and executing decisions in response to the COVID-19 pandemic.
- 3.4 As the Commission is aware, the Australian Government, along with all relevant State and Territory Governments, is taking all appropriate steps to control the spread of COVID-19 within Australia. Over the last two weeks, this has involved the implementation of necessary social distancing restrictions and a ban on gatherings, particularly in enclosed spaces. Necessarily, this has also forced the closure or restructure of working conditions at a large percentage of Australian workplaces. In Australia, the construction industry has already sought to implement a number of initiatives to manage behaviours around hygiene, physical proximity, interaction on sites, and the responses when illness has impacted, or has threatened to impact, specific projects.
- 3.5 The Participating Constructors take these measures extremely seriously and are mindful of their obligations to the workforce and the wider community in which they operate. However, the Participating Constructors also recognise that as the rate of new infections continues to rise, and other mitigation initiatives are implemented in other sectors, it may not be possible to keep the entirety of the construction industry and all projects fully operational.
- 3.6 To date, the Participating Constructors have taken various forms of unilateral action in order to comply with the Australian Government restrictions and best provide a safe and healthy environment for workers, including:
- (a) implementing social distancing practices on all sites, including a 1.5-2 metre distance when working outside and no more than 1 worker per 4 square metres inside;
 - (b) individual risk assessments to ensure that the Government's recommended social distancing regulations are being implemented;
 - (c) implementing procedures for lifts and hoists, including ticketing systems to ensure social distancing;
 - (d) implementing restrictions around gathering or queuing on sites;
 - (e) increasing rules and restrictions around breaks, including additional separation of meal breaks and work groups, increased cleaning and sanitisation, and staggered working hours;

- (f) additions to site inductions, including measures to ascertain potential risk factors such as recent international travel or the presence of fever or symptoms of acute respiratory tract infections;
 - (g) enabling working from home where possible, in particular for vulnerable individuals;
 - (h) cancelling or postponing non-essential events where larger numbers of workers are required to congregate in person; and
 - (i) ensuring that all positive COVID-19 tests are immediately notified to the employer and, if the worker is employed by a sub-contractor, the employer notifies the head contractor.
- 3.7 The above measures notwithstanding, the Participating Constructors consider that these restrictions would be more reliably, consistently and effectively implemented in an environment where Participating Constructors could discuss and share information regarding best practice health and safety measures, as well as ensuring accountability for all Participating Constructors to require compliance with those best practice measures for the health and safety of all workers. Additionally, the Principal Constructors are concerned to ensure that they are able to respond quickly and efficiently to Government requests for information, advice and assistance, with respect to the impact of the COVID-19 pandemic. This requires collaboration between the Participating Constructors in compiling, collating, collecting and discussing the necessary data and information, in order to respond dynamically to those requests.

Outline of the Proposed Conduct

- 3.8 The Participating Constructors are seeking authorisation to share information and have discussions, and where required, enter into and give effect to, any arrangement between them or engage in any conduct, for the purpose of responding to a Government request:
- (a) for information, advice and assistance, to allow the Government to set policies and make decisions in response to the COVID-19 pandemic; or
 - (b) to expeditiously comply with a Government directive or implement a Government decision in response to the COVID-19 pandemic,
- (the **Proposed Conduct**).
- 3.9 Specifically, the Proposed Conduct will involve the Participating Constructors sharing information, discussing, and providing advice and assistance to Government, to allow Government to set policies and make decisions, about the following matters:
- (a) implementing or imposing measures to ensure the health, safety and livelihoods of workers in the Australian construction industry, including:
 - (i) developing best practice standards for all sites, as well as implementing social distancing and COVID-19 health and safety protections;
 - (ii) how to monitor compliance with developed best practices to ensure that Participating Constructors and other participants in the Australian construction industry comply with standards for the protection of all construction industry employees;
 - (iii) rotating, rostering and transporting staff during the COVID-19 pandemic; and

- (iv) retaining staff and capabilities during any shut down period to ensure that these resources are available to the Participating Constructors on re-commencement of work (when permissible);
- (b) prioritising and requiring the delivery of existing and future essential health infrastructure, and other essential or strategically significant services, including:
 - (i) delivery of existing healthcare projects and any new healthcare projects commissioned to deal with COVID-19, including to increase hospital bed capacity and the number of intensive care units, and assisting with the establishment of field hospitals and delivery of additional ventilation projects;
 - (ii) essential work required to upgrade utilities (eg, energy, transport or telecommunications infrastructure);
 - (iii) which sites or projects to keep open as long as possible and which to shut down and when;
 - (iv) how best to re-commence work (when permissible) if there is a shutdown of sites or projects and acceleration measures that could be deployed by Government on re-commencement;
 - (v) ensuring security of supply and access to resources, mitigating any shortages of resources, and sharing scarce resources (including staff, inventory, suppliers, sub-contractors, logistics providers and other resources) to ensure they are utilised where they are most urgently required to respond to the COVID-19 pandemic;
 - (vi) continuing to tender public projects during the COVID-19 crisis and, if so, the tendering framework or principles to be deployed by the Government; and
 - (vii) continuing to produce a strong pipeline of future projects to ensure the re-commencement of work is as quick and effective as possible; and
- (c) mitigating the financial damage to the Australian construction industry caused by the COVID-19 pandemic, in the interests of the long term viability and competitiveness of the Australian construction industry, including:
 - (i) the employee, financial, economic and other impacts of COVID-19 on construction projects;,,
 - (ii) any financial assistance or stimulus package(s) from Government required by the industry and how the Government might choose to distribute those among industry participants; and
 - (iii) other forms of relief that may be available to the construction industry, including for example measures to promote cash flow in the construction industry supply chain and protection for COVID-19-related disruptions.

Scope of the Proposed Conduct

3.10 The Proposed Conduct for which the Participating Constructors seek authorisation is limited in scope. In particular:

- (a) the Proposed Conduct is only intended to ensure the Objectives, and therefore any conduct which does not serve the Objectives would continue to be the unilateral responsibility of each of the Participating Constructors;

- (b) the Proposed Conduct is not compulsory and any Participating Constructor can opt out of any proposed collaboration which is the subject of this application; and
- (c) the Proposed Conduct is a temporary measure to assist Government to make fully informed policy decisions in relation to the immediate difficulties that the Australian construction industry is facing in light of the developing COVID-19 pandemic, and to assist in implementing those decisions where required. The Participating Constructors do not intend that the Proposed Conduct would continue for longer than necessary to assist the Government-directed response.

- 3.11 As clearly set out in sections 3.8 and 3.9, the Proposed Conduct is only to enable the Participating Constructors to provide information, advice and assistance requested by Government, to assist Government to make decisions in response to COVID-19 or to assist the Government in implementing those decisions. The Applicants are concerned to ensure conduct remains transparent and subject to appropriate oversight. Accordingly, the Participating Constructors intend that the Proposed Conduct occur through taskforces, such as the Construction Industry Leadership Forum (**CILF**) COVID-19 taskforce or any other taskforce established by or with one or more Governments. This will ensure that the Proposed Conduct is subject to Government oversight and that decisions can be recorded and reported to the Commission as necessary. Additionally, this would mean that no conduct could be engaged in that the relevant Government does not request, direct, recommend or approve.
- 3.12 Further, the Participating Constructors will prepare and implement operational protocols in respect of the authorised Proposed Conduct. The Participating Constructors expect this will particularly address the process for information sharing and reporting of activities and actions engaged in pursuant to the authorisation if granted by the Commission (including level of detail, mechanism of reporting, frequency of reporting, etc). The Participating Constructors would welcome Commission input into the proposed protocols.

Rationale for the Proposed Conduct

- 3.13 The direct purpose of the Proposed Conduct is to ensure that in the context of the COVID-19 pandemic, Government receives or has urgent, efficient access to construction industry expertise (ie, the best, clearest and most up-to-date information available) on which to base Government policy decisions regarding the Australian construction industry, and assistance where necessary to execute those decisions.
- 3.14 Providing this information, advice and assistance to Government, and implementing Government directives as required, will ensure that the following important objectives are achieved:
- (a) **Health and safety of Australian workers.** Sharing information about the impact of the COVID-19 pandemic will contribute to the safety of all Australian workers and mean that decisions can be made by Government with the benefit of as much information as possible. This will allow Government, for example, to generate standard health and safety regulations within the industry to deal with COVID-19, decide which projects to keep open and which to shut, how long to continue working before shutting down, how to get workers to work safely, and how to keep people safe at work.
 - (b) **Immediate delivery of critical and essential projects.** Projects which are essential to the Australian Federal, State and Territory Governments' responses to the COVID-19 pandemic, for example the construction and delivery of new healthcare facilities (possibly from existing facilities, such as hotels or student accommodation), or the delivery of upgrades to utilities or transport infrastructure to support the ongoing response are prioritised and delivered as quickly as possible.

- (c) **Prioritisation and streamlining of all other projects.** Work, both existing and new, is prioritised by Government in such a way as to ensure that those projects and sites which are considered most essential by Government are kept open for as long as possible and that disruption at those sites is minimised so far as possible.
- (d) **Efficient use of existing, scarce resources.** The Proposed Conduct will ensure that Government can direct the most efficient use of construction industry resources, including employees, in order to minimise supply shortages and insecurity of supply experienced during the COVID-19 pandemic, in turn minimising the impact on the delivery of essential projects.
- (e) **Support for Australian workers and the economy.** Keeping construction projects and sites open for as long as possible, requiring the deployment of workers to alternative sites where their skills can still be utilised and arranging for an efficient and effective re-commencement of work (when permissible) will contribute to keeping Australians in work for longer, ensuring the livelihoods of as many construction workers in Australia as possible, and contribute to the stability of the Australian economy during the COVID-19 pandemic.
- (f) **Stability of shutdown and re-start.** It is important that any shutdown of projects or sites in the construction industry, where required by Government, proceed in a professional, safe, planned and orderly manner and are managed in a way which causes as little disruption as possible to workers, suppliers and clients (and their business and employees). An uncoordinated approach risks raising the misconception that sites or projects are being shut arbitrarily and is likely to generate significant uncertainty and instability in the industry and across the wider Australian economy. Likewise, improved Government decision-making about a re-start will generate efficiency, stability and security (including the employment of all necessary health and safety practices to protect workers) in the industry and across the economy.
- (g) **Maintaining long-term industry health.** The COVID-19 pandemic risks causing irreparable damage to the current health, stability and competitiveness of the construction industry. The Proposed Conduct will assist Government to decide on policies, and make and execute decisions to maintain the long-term competitiveness of the construction industry as a whole, in the face of the enormous financial, health and economic challenges posed by the COVID-19 pandemic. In the absence of the Proposed Conduct, there is a significant risk that continued participation in the construction industry becomes unviable for many (both entities and employees) and they will leave the industry. It is important that the construction industry provide information, advice and assistance to Government with respect to where financial assistance or stimulus is needed, in a timely manner, to reduce what is otherwise a very significant risk of business failure across the industry.

Term of authorisation sought

- 3.15 The Participating Constructors propose to engage in a limited number of co-ordinated activities on a temporary basis in order to ensure the Objectives are achieved for the purpose of responding to the current COVID-19 pandemic. As such, the Participating Constructors seek authorisation for a period of 12 months from the date of a final determination by the Commission, noting that the Commission could revoke the authorisation at any time in the event of a material change in circumstances (for example, in the event that the COVID-19 pandemic subsided and the Proposed Conduct was no longer necessary).

4. **APPLICATION FOR INTERIM AUTHORISATION**

- 4.1 The Participating Constructors seek interim authorisation on an urgent basis.
- 4.2 As is obvious from current media coverage, the status of the COVID-19 pandemic in Australia is changing on a daily, if not hourly, basis. While the Participating Constructors have been unilaterally attempting to ensure they are contributing to the matters set out in section 3.13, the sharing of information and discussions between the Participating Constructors for the purpose of responding to Government requests for information, advice and assistance to Government in its policy and decision making, and assisting Government to implement those decisions, should commence as soon as possible.
- 4.3 The Participating Constructors submit that urgent interim authorisation is justified, for example, to ensure the Objectives are met and to serve the rationale set out in detail in section 3.14. Ensuring that, through the Proposed Conduct, the Government receives the benefit of the information, advice and assistance requested, and support in executing its decisions, for the purpose of mitigating the impact of the COVID-19 pandemic, protects the interests of 1.2 million construction industry workers, the Australian construction industry and the broader Australian economy.

5. **PROVISIONS OF THE CCA WHICH MIGHT APPLY TO THE PROPOSED CONDUCT**

- 5.1 The Participating Constructors compete in relation to the acquisition of construction supplies and raw materials, transport and logistics services, skilled employees, and the supply of construction services in a range of sectors to both Government and private clients. Accordingly, in the absence of authorisation, the Proposed Conduct risks giving rise to contraventions of the CCA, including provisions of the CCA relating to:
- (a) cartel conduct (Division 1 of Part IV), in that it may involve contracts, arrangements or understandings containing provisions which have the purpose or effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price or a discount, allowance, rebate or credit in relation to goods or services acquired or supplied or likely to be acquired or supplied by the parties, or have the purpose of preventing, restricting or limiting the acquisition or supply or likely acquisition or supply of goods or services by the parties (ss45AD(2), 45AD(3), 45AF, 45AG, 45AJ, and 45AK of the CCA); or
 - (b) contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that have the purpose, effect or likely effect of substantially lessening competition (ss 45(1), 46(1) and 47(1) of the CCA).

6. **PERSONS WHO MAY BE DIRECTLY IMPACTED BY THE PROPOSED CONDUCT**

- 6.1 The persons who would be directly impacted by the Proposed Conduct include clients (both public and private), suppliers, contractors, sub-contractors and employees of the Participating Constructors.

7. **COUNTERFACTUAL**

- 7.1 In the absence of the Proposed Conduct, there will very likely be restrictions on the ability of the Participating Constructors to respond to Government and assist Government with its response to the concerns discussed in section 3, resulting in information, advice and assistance not being provided to Government for its decision-making in a timely, efficient manner. Rather, if unable to engage in the Proposed Conduct such information, advice and assistance requested by the Conduct would be delivered in a fragmented, piecemeal fashion, more slowly and in a manner less able to be efficiently absorbed by Government

– and Government decisions could not be implemented as quickly or effectively in response to the COVID-19 pandemic. The implications of this are likely to be significant loss of employment, an inability to ensure the successful, timely and effective delivery of essential projects, and harm to the long-term maintenance of the viability and competitiveness of the construction industry. Participating Constructors would likely seek to address these issues unilaterally, however, this would be in a substantially less effective and timely manner than the urgent "industry response" requested by Government, for the purpose of assisting with making and executing its decisions.

- 7.2 This would mean that the delivery of projects, including those health-related and other essential projects to assist with addressing the COVID-19 pandemic, and measures to ensure the health, safety and livelihoods of construction industry employees, would likely take longer, be less successful, or even compromised in their entirety, compared to what is likely to happen with authorisation of the Proposed Conduct.
- 7.3 The Participating Constructors consider that the key difference between a situation with the Proposed Conduct and a situation without would be a reduction in volume and quality of the information, assistance and advice readily available for Government decision makers responding to the COVID-19, a reduced ability to execute the Government's decisions effectively and expeditiously, and therefore, a reduction in the effectiveness of those Government responses.
- 7.4 On balance, therefore, the Participating Constructors consider that the situation with the Proposed Conduct has significant benefits for clients, workers, suppliers and the general public when compared against the situation without the Proposed Conduct.

8. PUBLIC BENEFIT

- 8.1 The Participating Constructors consider that the Proposed Conduct will result in significant public health and economic benefits as set out in detail in section 3.13.

9. PUBLIC DETRIMENT

- 9.1 The Participating Constructors submit that the Proposed Conduct will result in limited public detriment, which will nevertheless be outweighed by the public benefits set out above. Importantly, the Participating Constructors submit that the Proposed Conduct will not result in any substantial lessening of competition in any relevant market in Australia as the Proposed Conduct is specifically to address only the impact of, and uncertainty caused by, the current COVID-19 pandemic, and therefore the Proposed Conduct will cease once the current pandemic passes.
- 9.2 Additionally, the Participating Constructors consider that there will be limited public detriment as:
- (a) all of the Proposed Conduct relates to responding to a Government request for information, advice or assistance, to assist the Government's decision making, or assisting the Government to execute its decisions, in response to the COVID-19 pandemic;
 - (b) no conduct can be engaged in by the Participating Constructors which is not requested, directed, approved or recommended by Government;
 - (c) the Proposed Conduct is likely to result in better, more timely decisions-making by Government, and better, more timely implementation of those decisions;
 - (d) the Proposed Conduct is not compulsory, and any Participating Constructor can opt out of any proposed collaboration; and

- (e) the period of authorisation is for a limited period of 12 months only (from the date of the Commission's final determination) and can be discontinued in the event that the effects of the pandemic subside at an earlier date. Given the scale of projects delivered by the Participating Constructors and the existing uncertain nature of the course of the pandemic, the Participating Constructors consider that this timeframe is long enough to be effective and yet short enough to reduce any potential detriment caused to the public by the Proposed Conduct.

9.3 For clarity, the Participating Constructors **do not** intend to collaborate regarding the pricing of services to any clients, existing or new, but they may discuss with Government, appropriate forms of relief that may be required by participants in the Australian construction industry in light of the COVID-19 pandemic (for example, considering project delivery timetables or the Government's position in relation on liquidated damages) – although any decision in that regard remains a matter for Government.

10. **CONTACT DETAILS OF RELEVANT MARKET PARTICIPANTS**

10.1 The Participating Constructors have had initial discussions with key Government clients regarding the Proposed Conduct. A list of relevant market participants who have expressed initial support for the Proposed Conduct (although formal support may be pending given the current situation) has been included at **Schedule 2**.

11. **DECLARATION BY APPLICANT**

- 11.1 The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.
- 11.2 The undersigned undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application.
- 11.3 The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



Signature of authorised person on behalf of the applicant

Executive Director
Australian Constructors Association

Office held

Lindsay Le Compte

Name of authorised person

09 April 2020

Date

SCHEDULE 1
MEMBERS OF THE ACA

The ACA is currently comprised of the following members:

- (a) Acciona Infrastructure Australia Pty Ltd
- (b) Bouygues Construction Australia Pty Ltd
- (c) Clough Limited
- (d) CPB Contractors Pty Limited
- (e) Downer EDI Limited
- (f) Ferrovial Agroman (Australia) Pty Ltd
- (g) Fulton Hogan Construction Pty Ltd
- (h) John Holland Group Pty Ltd
- (i) Laing O'Rourke Australia Pty Ltd
- (j) Lendlease Building Pty Ltd
- (k) Lendlease Engineering Pty Ltd
- (l) McConnell Dowell Constructors (Aust) Pty Ltd
- (m) Multiplex Australasia Pty Ltd
- (n) Probuild Group Pty Ltd
- (o) Salini Impregilo S.P.A
- (p) UGL Pty Ltd

Further information regarding each of the members is available at <https://www.constructors.com.au/members/>.

SCHEDULE 2
MARKET PARTICIPANTS IN SUPPORT OF THE PROPOSED CONDUCT

NAME	CONTACT PERSON'S NAME, POSITION, TELEPHONE NUMBER AND EMAIL
New South Wales State Government	[Redacted for confidentiality]
Victorian State Government	[Redacted for confidentiality]