Master Builders Australia

Submission to Legislative Review

Building and Construction Industry (Improving Productivity) Act 2016

23 March 2018

MASTER BUILDERS AUSTRALIA

CONTENTS

Introduction	1
Background and Summary of Key Points	2
Why the BCIIP Act and related Agencies are necessary	5
Has the culture improved or changed?	15
TOR #1 – Full Service Regulator	21
TOR #2 – Independent Oversight	23
TOR #3 – Higher Penalties	25
TOR #5 – OFSC and NCC	28
TOR #4 – Improvements to Act and Code	29
Conclusion	34

Annexure A – Letter from J Gillard 2008

Annexure B – Table of Judicial Commentary

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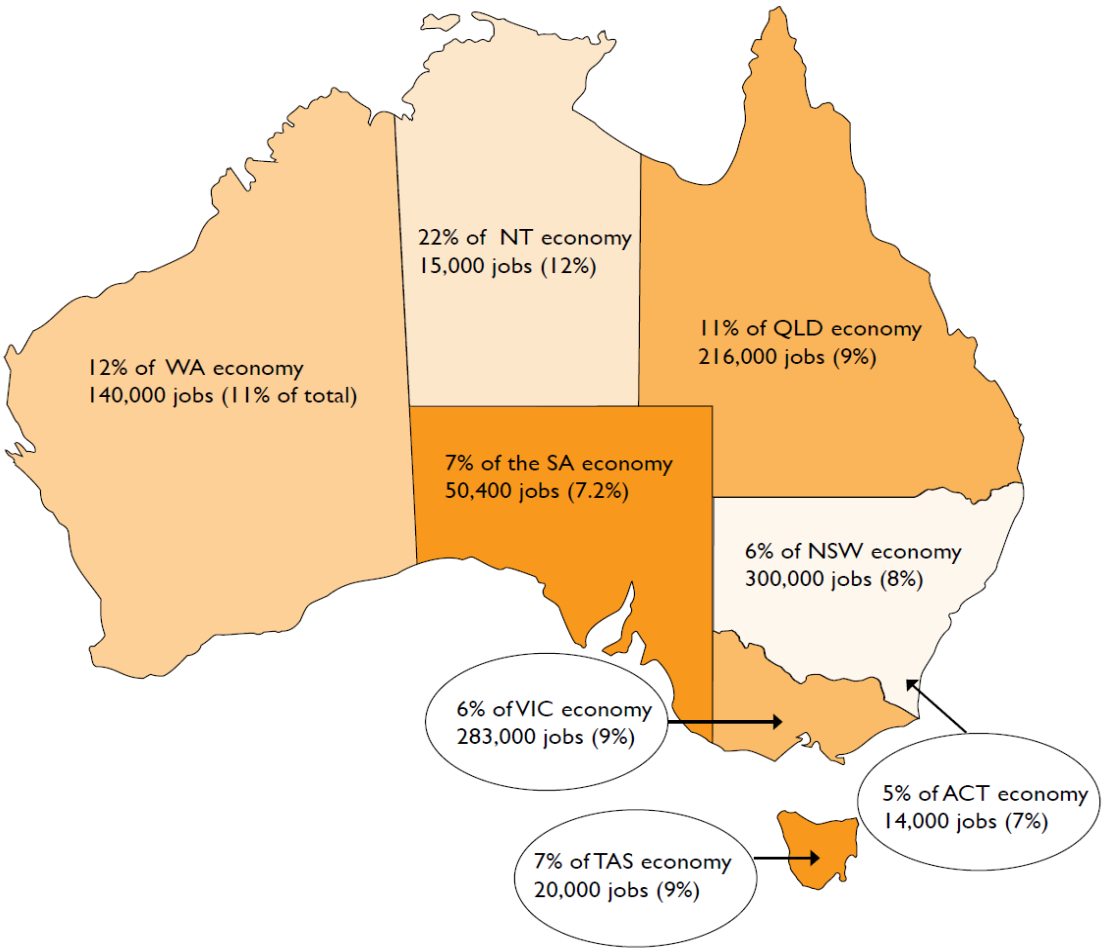
Introduction

1. This submission is made on behalf of Master Builders Australia Ltd.

2. Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 127 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

3. The building and construction industry is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and around 9 per cent of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of $2.6 trillion and for the number of people employed in the industry to rise by 300,000 to 1.3 million.



Picture 1: *Representation of the state by state breakdown of the economic and employment contributions attributable to the building and construction industry* (MBA – 2016)

4. The building and construction industry:

   - Consists of over 340,000 business entities, of which approximately 97% are considered small businesses (fewer than 20 employees);
   - Employs over 1 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
   - Represents over 8% of GDP, the second largest sector within the economy;
   - Trains more than half of the total number of trades based apprentices every year, being well over 50,000 apprentices; and
   - Performs building work each year to a value that exceeds $200 billion.

Background and Summary of Key Points

5. This submission is made to the legislative review ('the Review') of the *Building and Construction Industry (Improving Productivity) Act 2016* ('the Act' or 'BCIIP Act').

6. The purpose of the Review "*is to examine the operation of the BCIIP Act and develop recommendations to enable it to better achieve its main objective.*"

7. The objective referenced above is set at section 3(1) of the Act which identifies it as being

   > *"...to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively, without distinction between interests of building industry participants, and for the benefit of all building industry participants and for the benefit of the Australian economy as a whole."*

8. Master Builders **strongly** supports the BCIIP Act. As the key industry body representing employers in the building and construction industry ('BCI') across all three sectors (residential, civil and commercial) our members experience first-hand the culture and conduct that necessitates the need sector specific industrial laws of this type and the positive benefits they deliver to not only our members, but the community and economy more broadly.

9. Master Builders also supports the work of the entities that either enforce the Act and associated compliance obligations, or are underpinned by it. These entities include the Australian Building and Construction Commission ('ABCC') that administers the *Code of Practice for the Tendering and Performance of Building Work 2016* ('2016 Code') and the *Office of the Federal Safety Commission* ('OFSC') that administers the A*ustralian Government Work Health and Safety Accreditation Scheme* ('the Scheme').

10. The key points detailed in this submission are:

    - The BCI has a unique industrial relations history and culture that justifies the need for the Act and agencies;
    - There is no evidence at this time to suggest that this adverse culture and unlawful sector practices have diminished in such a way that would justify a weakening of the Act or powers given to related agencies;
    - It would be preferable that the additional functions in the Act flowing from its passage through the Senate in 2016 be given to more appropriate agencies, regulators or jurisdictions in order to better achieve the policy outcomes sought by these additional functions;

- However, the retention of these additional functions in the Act and maintenance of the status quo is far more preferable than the abolition of the Act in its entirety.

11. The key recommendations in this submission include:

    - That a review in similar terms take place at a future point when more data and experience with its additional functions and broader operation is available;
    - That the Review find that the history and culture in the building and construction industry justifies the need for the Act and related agencies;
    - That the Act and related agencies be retained;
    - To achieve their underpinning policy objectives in such a way that brings lasting and genuine cultural change, the Act and related agencies must be retained for a significant period of time and that to abolish them, or reduce their power, would inhibit positive and lasting industry cultural change;
    - While the 'full service regulator' approach is understandable, the related policy outcomes sought by this approach would be better achieved through more appropriate regulators;
    - The independent oversight of the regulator powers should remain, as should the capacity of those regulators to exercise those powers;
    - The higher penalties should be retained at a level that is at least that which currently exists, and consideration should be given to introducing higher penalties should they not provide an appropriate deterrent;
    - The OFSC should adopt the template SWMS as adopted and endorsed by Safe Work Australia and reconsider its approach to safety in building design.

12. Overall, Master Builders remains extremely supportive of the Act and the work of its related agencies.

13. There are many reasons why this view is held detailed throughout this submission. However, in summary, our support is founded in two main areas:

    - the need for industry specific industrial laws that recognise and address the ingrained and lawless culture of workplaces and building associations that have been a historical feature of building and construction industry; and
    - a desire to ensure that projects funded directly or indirectly by the Commonwealth are delivered in a way the ensures taxpayers receive value for money and the community can enjoy much needed public infrastructure, such as roads, schools and hospitals.

14. Our support for the Act and associated entities will remain a key Master Builders policy priority, this submission notes a number of minor areas in which the operation of associated entities can be improved in such a way as to better pursue the objective of s.3(1) of the Act. These are detailed later in this submission both generally and when addressing the relevant terms of reference.

15. When considering these improvements, we ask that the Review note Master Builders' general position that underpins this submission more broadly - that the retention of the Act in its current form is preferred to either its abolition or other alteration that would adversely impact the aim of s.3(1) or the ability of regulators to pursue this aim.

16. While the above position may be tritely stated, history demonstrates a capacity for the effect and intent of the Act to be significantly undermined by what might

ordinarily be seen as minor or insignificant changes to process or regulation – all while leaving a regulator in place.

17. The predecessor agency to the ABCC was Fair Work Building Construction ('FWBC'). Master Builders strongly advocated that FWBC was entirely inferior when compared to both the first iteration of the ABCC and the current regulator. This was because:

    - In February of 2009, the Minister for Employment and Workplace Relations advised that the obligations of the (then) 2013 Code affecting EBAs would be deemed as satisfied if the agreement met the requirements for approval under the Fair Work Act 2009. The effect of this directive was to render the 2013 Code and its obligations as essentially immaterial.[1]
    - The penalties available for breaches of the law applicable under the FWBC regime were one third of those under the BCIIP Act. This penalty level was an ineffective deterrent against the culture that is unique to the building and construction industry.[2]
    - The ability of FWBC to enforce the law to meet the public interest was completely undermined by the operation of certain sections[3] of the previous legislation. These provisions had the practical effect of allowing laws to be broken without consequence if this occurred during a dispute which was subsequently settled or resolved. FWBC was unable to continue proceedings as the parties involved in the dispute in which the law was broken had reached a commercial or industrial settlement. It was Master Builders' view that those provisions placed private commercial interests over the regulator's ability to enforce the law in the public interest and were entirely inappropriate.

18. These are but three examples of many areas where small alterations had significant and adverse consequences in terms of policy outcomes sought and the capacity for the regulators to meet the objectives of the Act. To this end, we caution the Review against making any recommendations for alteration that are not appropriately tested to ensure that a minor 'tweak' does not undermine the objects of s.3(1).

19. We also ask the Review to note that the Terms of Reference deal with matters about which there may be, at this point in time, a limited evidentiary base. This arises due to the manner in which the Act applies to building work and the times involved in project initiation and commencement. It is for this reason, for example, Master Builders understands that there have been no findings that involve the higher penalty provisions introduced the current Act.

20. This is not a criticism of courts of regulators, but an inevitable consequence of the operation of the Act (in terms of coverage trigger points) and the timeframe required for this Review (12 months after taking effect).

21. For this reason, Master Builders recommends that the Government consider a further future assessment of the Act with terms similar to that of this Review.

Recommendation:

A further review, with similar Terms of Reference, be undertaken at an appropriate future point once all the provisions of the Act are operative in practice.

[1] *Refer **'Annexure A'***
[2] *See Fair Work (Building Industry) Act 2012*
[3] *See s.73 and s.73A*

22. We also ask the Review to note that where quotations below include words underlined, these are at the author's initiative for emphasis.

23. To assist the Review, we have *attached* hereto a sample of commentary taken from court judgements regarding the culture and practices in the industry (***Annexure B***). This includes cases from 2001 through to now, and is referenced various throughout this document.

Why the BCIIP Act and related Agencies are necessary

24. It is important for the Review to acknowledge and understand the background and circumstances behind the BCIIP Act.

25. There are a large number of sources that describe the conduct and history of registered employee organisations in, and the culture of, the building and construction industry.

26. One of the most recent was the Final Report of the Heydon Royal Commission[4] which devoted some 1160 pages to the building and construction sector alone. Of the five volumes in the Final Report, almost one and a half volumes were specific to the building and construction sector and the conduct of the CFMEU.

27. In respect of this conduct, the Royal Commissioner summarised:

> *"The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."*[5]

Then further observed:

> *"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."* [6]

And later:

> *"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."*[7]

28. Insofar as the need for an industry specific regulator, the Heydon Royal Commission observed:

> *"One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need. Given the high level*

[4] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015,*
[5] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1*
[6] *Ibid at para 2*
[7] *Ibid at para 3*

> *of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector."*[8]

29. And later:

> *"Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained".*[9]

30. It was also observed:

> *"Specialised treatment of a particular industry is not a novel concept: different areas of the financial services industry, for example, are subject to specialised laws and the supervision of a specialised regulator. Many professions are, likewise, subject to specialised laws that govern the manner in which their work is undertaken. It is not necessary to demonstrate in detail the public interest in that state of affairs. In the case of the building and construction industry, the justifications for special treatment have already been advanced".*[10]

31. The Heydon Royal Commission recommended as follows:

> *"There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of investigating and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants."*[11]

32. The above findings were made following broader commentary about the building industry, and particularly the CFMEU. They complimented observations from earlier commentary in the Interim Report[12] which made the following observations about the CFMEU:

> *"The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:*
>
> *(a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
>
> *(b) officials prefer to lie rather than reveal the truth and betray the union;*
>
> *(c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*

33. Noting that additional case studies were undertaken by the Commission subsequent to the Interim Report, it was found that:

> *"The case studies considered in this Report only reinforce those conclusions"*[13]

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[8] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 83*
[9] *Ibid at para 97*
[10] *Ibid at para 108*
[11] *Ibid refer to recommendation 61*
[12] *Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.*
[13] *Heydon Report, Chapter 5, page 396*

And:

> *"The evidence has revealed possible criminal offences by the CFMEU or its officers against numerous provisions of numerous statutes including the Criminal Code (Cth), the Crimes Act 1900 (NSW), the Crimes Act 1958 (Vic), the Criminal Code 1899 (Qld), the Criminal Law Consolidation Act 1935 (SA), the Corporations Act 2001 (Cth), the Charitable Fundraising Act 1991 (NSW) and the Competition Policy Reform (Victoria) Act 1995 (Vic)"*[14]

Further:

> *"The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia."*[15]

And:

> *"Nor is the conduct revealed in the Commission's hearing unrepresentative"*[16]

34. Of the seventy-nine recommendations made for law reform in the Final Report, seven were specific to the building and construction sector. These recommendations largely went to addressing the conduct displayed by building unions.

35. With respect to the CFMEU, the Heydon Royal Commission found that it is home to *"longstanding malignancy or disease"*[17] within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.

36. Similarly, the Cole Royal Commission found[18]:

> *"In the building and construction industry throughout Australia, there is:*
> *(a) widespread disregard of, or breach of, the enterprise bargaining provisions of the Workplace Relations Act 1996 (C'wth);*
> *(b) widespread disregard of, or breach of, the freedom of association provisions of the Workplace Relations Act 1996 (C'wth);*
> *(c) widespread departure from proper standards of occupational health and safety;*
> *(d) widespread requirement by head contractors for subcontractors to have union-endorsed enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects in State capital central business districts and major regional centres;*
> *(e) widespread requirement for employees of subcontractors to become membersof unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;*
> *(f) widespread requirement to employ union-nominated persons in critical positions on building projects;*
> *(g) widespread disregard of the terms of enterprise bargaining agreements once entered into;*

[14] *Ibid*
[15] *Ibid*
[16] *Ibid*
[17] *Heydon Royal Commission, Volume 5, p401*
[18] *Final Report of the Royal Commission into the Building and Construction Industry, Vol 1 – Summary – p 5-6*

(h) widespread application of, and surrender to, inappropriate industrial pressure;
(i) widespread use of occupational health and safety as an industrial tool;
(j) widespread making of, and receipt of, inappropriate payments;
(k) unlawful strikes and threats of unlawful strikes;
(l) threatening and intimidatory conduct;
(m) underpayment of employees' entitlements;
(n) disregard of contractual obligations;
(o) disregard of National and State codes of practice in the building and construction industry;
(p) disregard of, or breach of, the strike pay provisions of the Workplace Relations Act 1996 (C'wth);
(q) disregard of, or breach of, the right of entry provisions of the Workplace Relations Act 1996 (C'wth);
(r) disregard of Australian Industrial Relations Commission (AIRC) and court orders;
(s) disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;
(t) reluctance of employers to use legal remedies available to them;
(u) absence of adequate security of payment for subcontractors;
(v) avoidance and evasion of taxation obligations;
(w) inflexibility in workplace arrangements;
(x) endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and
(y) disregard of the rule of law."

37. The Cole Royal Commission also noted[19] a litany of different forms of inappropriate conduct in the building and construction industry. These included:

- industrial action, or threats thereof, on a site and other related or unrelated sites, if all subcontractors did not have a union-endorsed EBA;
- stoppage of work by a union because a subcontractor would not enter into a union endorsed EBA;
- harassment by union officials of a subcontractor because it would not enter into a union endorsed EBA;
- union officials restricting, or threatening to restrict, a subcontractor's opportunity to obtain work if it did not sign a union-endorsed EBA;
- unions taking industrial action on government sites to pressure a government to adopt a policy that contractors have a union-endorsed EBA in order to do government work;
- unions demanding that if all subcontractors cannot be required to have a union-endorsed EBA, EBA terms and conditions are to be applied by all subcontractors irrespective of other agreements;
- union officials pressuring head contractors to replace subcontractors on a site because they did not have a union-endorsed EBA;
- the threat by union officials to prevent subcontractors with Australian Workplace Agreements (AWAs) from working on site;
- disregard by union officials of the wishes of employees, or their failure to consult with employees;

[19] *Ibid – page 8-10*

- the initiation of a bargaining period by a union, although uninvited to do so by employees, and where no employees were union members
- interference by unions in industrial and safety issues where no employee had made a complaint and no employee was a union member;
- unions seeking to have subcontractors enter into a union-endorsed EBA, without seeking the views of employees, or where that was contrary to the wishes of employees;
- a union refusing to sign an agreement agreed by its members with their employer, despite the unanimous wishes of the members that it do so;
- agreement between a head contractor and a union about the appointment of a job delegate, without regard to the wishes of workers on site;
- the lack of flexibility in union pattern EBAs;
- the payment to workers, pursuant to a pattern EBA, of a productivity allowance, with no corresponding increase in productivity;
- head contractors and unions making agreements which overrule agreements made between subcontractors and their employees;
- agreements between head contractors and unions restricting the way subcontractors can conduct their business;
- unions insisting on the payment of a travel allowance to workers who did not travel in their work;
- a union taking or threatening to take industrial action in its own interests;
- union members engaging in sympathy action in support of matters not related to the site on which they are working;
- a union taking industrial action against an employer because of the public expression of an opinion with which it disagrees;
- unlawful industrial action by a union forcing businesses to move outside the state, or to determine not to work in that state;
- unions seeking to act as the arbiter of who can and cannot work in the industry or in an industry sector;
- union officials attempting to regulate an industry by seeking 'donations' from contractors to fund the salary of a union organiser;
- a union circulating 'approved subcontractor lists'.
- a union requiring a contractor to submit to a wage book inspection before permitting a contractor to start work;
- a union requiring a contractor to submit to a wage book inspection by a third party nominated by the union, but paid for by the contractor;
- union issuing notices purporting to have a statutory basis and authority, which they do not;
- the calling of unauthorised meetings by union officials;
- union officials acting with the apparent belief that their right of entry was effectively unlimited;
- the refusal by union officials to leave a site upon request by the head contractor or occupier;
- the making by unions of groundless, unspecified or disputed wage claims, and supporting such claims with threats of black bans or other industrial action;

- the failure of union officials to refer asserted breaches of awards and other industrial issues to the relevant authorities;
- the failure by a union to provide particularisation of wage claims, while maintaining pressure in support of the alleged claim;
- threats by a union to conduct wage book inspections to achieve its industrial aims
- payment by a head contractor of unpaid debts of its subcontractor, pursuant to an implicit or explicit union demand;
- a union pressuring a head contractor to withhold payments from a subcontractor, in turn placing pressure on the subcontractor to accede to the union's industrial aims;
- the employment by a contractor of a particular person at the behest of a union;
- the enforcement of union-endorsed EBAs or union membership by union delegates;
- a union asserting a right to dictate when work may take place on a site;
- a union asserting a right to require the engagement of unnecessary labour;
- a union asserting a right to determine who may work on a project;
- a union asserting a right to determine who will be employed as a crane operator;
- unions preventing access to site;
- unions preventing the removal of equipment from site;
- union officials using abusive language and intimidatory behaviour;
- demarcation disputes between unions, occasioning loss and delay;
- inadequate accounting procedures within a union;
- a union handling money received in settlement of wage claims differently from the way it represented that the money would be handled;
- the failure of unions to account to employers for moneys paid following book audits;
- a practice within the industry that the response to the unlawful or inappropriate exercise of power by a union is the payment of money or a 'commercial solution' rather than resort to the law;
- contractors paying money to a union (or to an organisation nominated by the union) in an endeavour to buy industrial peace;
- a union imposing informal 'penalties' upon contractors;
- the disguising of payments of money by contractors to a union;
- a union using industrial power to raise money for its own purposes;
- unions accepting membership fees in respect of employees who did not wish to join a union;
- unions demanding that they be paid money equivalent to membership fees for particular persons, even though they did not want those persons to join the union;
- head contractors bowing to, accepting and supporting demands made by a union on subcontractors by the application of commercial pressure;
- contractors paying union subscriptions for employees in order to enable those employees to work on a site;

- head contractors acceding to union pressure to withhold payments from a subcontractor, in turn placing pressure on the subcontractor to accede to the union's industrial aims;
- a head contractor engaging a union-nominated delegate, who is allowed to exercise an inappropriate level of control over the site, such as determining which subcontractors may commence on site, performing site inductions or having responsibility for safety and compliance issues;
- head contractors ceding control to unions over the erection of cranes;
- a head contractor stopping a subcontractor from working as a result of a complaint by a union official, without the head contractor undertaking any investigation of the matter;
- a head contractor co-operating with a union to render ineffective the work of an industry task force;
- the unwillingness of contractors to take legal action against unions to protect their property or rights, or to recover loss;
- a head contractor and a subcontractor agreeing to disguise from a client payments to the subcontractor, which payments were required by a union;
- unions or head contractors applying pressure upon subcontractors in support of union membership on sites;
- union 'show card' days;
- unions asserting the right not to work with non-union labour;
- compulsion upon non-members to attend meetings called by union officials;
- the use by a union of occupational, health and safety (OH&S) issues as an industrial tool, intermingled with legitimate OH&S issues;
- the raising of alleged OH&S issues by a union in pursuit of industrial ends;
- unions making unqualified and incorrect assertions about OH&S processes;
- unions refusing to accept the results of repeated independent and expert safety inspections of a site;
- union officials failing to refer asserted OH&S breaches to the relevant authorities;
- union officials preventing persons from working on site to rectify asserted safety hazards;
- employers failing to observe proper OH&S standards;
- disregard of the provisions of agreements entered into;
- disregard of dispute resolution procedures, both legislative and agreed; and
- head contractors paying money to unions to entice them to adhere to dispute resolution procedures.

38. The Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1992 ('Gyles Royal Commission') found similar problems after examining evidence. These included[20]:

    - Involvement of reputed professional criminals by infiltrating the workforce with sham unionists; intimidation of workers, union delegates and subcontractors with violence or threats of violence; bribery; expulsion of troublesome workers; debt collecting; recovery of stolen property; theft deterrence and, in some cases, involvement in bomb hoaxes.

[20] *See summary in Final Cole Royal Commission Report Vol 4*

- Evidence of widespread theft of building materials, plant and equipment from building sites.
- Strong evidence that the Building Trades Group, in particular the BWIU, would threaten direct industrial action to further their objectives, irrespective of whether such action was legal.
- Limited observance of the law or law enforcement.
- 'No ticket no start' and closed shops; payment for lost time; bans and boycotts of all descriptions; intimidation, threats and abuse; abuse of safety legislation, rights of entry and book inspections.
- Conduct in breach of the Trade Practices Act.

39. Master Builders would encourage the Review to note the similarities in the types of conduct described in the above sections. They are virtually the same in each report.

40. This conduct has now been forensically examined before three separate Royal Commissions spanning four separate decades. The core issues and problems remain consistent throughout and those identified in the 1980s remain in existence in 2018.

41. The conclusion reasonably drawn is that the history and evidence from the building and construction industry clearly justifies the need for the Act and that lasting meaningful cultural change requires its retention on a long term basis.

42. It is also important to understand the **economic and productivity benefits** associated with the Act and associated agencies.

43. The link between productivity (and related broader economic benefits) and workplace relations is trite. In relation to the building and construction industry, there is a predisposition towards inflexible work practices, rigid RDO systems, a focus on 'one in, all in' attitudes, and entrenched 'pattern' bargaining practices.

44. This conduct manifests itself through high levels of industrial disputation (days lost), project delays (costs to community) and, cost overruns due to inflexible work practices. Disruption of construction sites can take many forms, with formal stoppages and strike actions being only the most visible examples. However, it is common for other less visible conduct to occur that causes delays which are just as costly, if not more so. These include:

- blocking access to work sites through a range of means, including the dumping of debris or materials at work gates, or parking of machinery or trucks for the same purpose
- delaying the delivery or use of materials (including concrete pours), by either preventing access to sites or preventing the further handling of materials once on site
- stopping the removal of waste from sites
- placing 'bans' on the use of critical equipment, such as cranes.

45. A 1999 report from the Productivity Commission made similar observations, noting:

> *"In the late 1980s, union market power was used to entrench many inefficient work arrangements, including: one-out-all-out, demarcation of work tasks, inflexible inclement weather practices and inflexible rostered days off (RDOs). Such arrangements, and associated industrial disputes, led to projects being significantly delayed. While many parties claimed that site-specific disputes have fallen, since 1995 the rate of dispute related delays*

> *has increased to the levels of the late 1980s. There appears to have been an increase in time lost due to industry-wide disputes which has offset and may be connected to the reduction in site-specific disputes."*[21]

46. A separate later Productivity Commission report from 2014 observed:

> "*In 1982, the National Construction Industry Conference argued that IR problems were a major issue facing the industry (IC 1991, p. 67). Participants in the Industry Commission's 1991 inquiry into construction costs considered that the IR system was an important driver of costs at that time (IC 1991), as did the 1992 Gyles Royal Commission into productivity in the building industry in New South Wales (Gyles 1992)."*[22]

47. In referencing the examples of industry conduct before the Productivity Commission, it observed:

> *"While some instances involved relatively short disruption, others were lengthy, involving multiple days or even weeks. The estimated costs incurred from such delays vary considerably, but can be substantial and borne by a range of parties (including principal contractors, but also a range of subcontractors."*[23]

48. It follows that an effective and strong regime of workplace regulation will therefore have a positive and beneficial impact on both productivity and the economy. This fact has been widely noted and, in relation to the building and construction sector, has applied variously throughout the periods in which the ABCC has operated (both in its first and second iteration) and in respect of its early predecessor agencies.

49. The Productivity Commission examined the impact of reforms to the sector in 2014, and considered them as far back so as to make a finding regarding the Building Industry Taskforce ('BIT') what was the predecessor to the first iteration of the ABCC. Is found:

> *"The more stringent IR regime commencing with the establishment of the Building Industry Taskforce (BIT) is likely to have increased productivity for parts of the industry, but these effects cannot be robustly identified in productivity for the entire industry. Days lost per employee are higher in construction than in most other industries, but are still very low by historical standards. They fell even further in the early years of the ABCC"*[24]

50. Similar comments can be found a report that considered the economic impact of the first iteration of the ABCC in NSW. It noted:

> *"Previous reviews have found that there was a reduction in construction costs for major infrastructure projects associated with the introduction and operation of the (now closed) ABCC. They focused on comparing costs that prevailed in the late 1990s and early 2000s to the performance of the construction costs in infrastructure up to around 2007. These studies found that the change helped the industry to avoid costs with a value of between 2 and 11 per cent of the overall project cost."* [25]

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[21] *Work Arrangements on Large Capital City Building Projects – PC – 1999*
[22] *PC Public Infrastructure report 2014*
[23] *Ibid*
[24] *Ibid*
[25] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*

51. It is also useful to examine relevant ABS taken from the period in which the first iteration of the ABCC operated (from 2005 to 2012). During that time the economic and industrial performance of the building and construction sector improved significantly, particularly when compared to other sectors.

52. ABS data[26] shows that from 2004-05 (the year before the ABCC started) to 2011-12 (its final year of operation):

    - the labour productivity index for the construction industry rose from 83 to 100 which represents a 20 per cent increase
        - in contrast the 16 Market Sector industries index rose from 90 to 100, which represents an 11 per cent increase
    - the multifactor productivity index for the construction industry rose from 89 to 100 which represents a 12 per cent increase
        - in contrast the 16 Market Sector industries index fell from 102 to 100.

53. While there is no doubt that the ABCC and Act (and their earlier iterations) have had a positive impact on the building and construction sector, these must be measured against the effect of 'unwinding' the Act and ABCC for various periods and the 'low base' from which these improvements are measured.

54. For example, a more contemporary analysis was undertaken in 2016 by Deloitte Access Economics. In a report "*Victorian Construction – Labour Costs and Productivity*"[27] it was found that:

    - unskilled labourers were earning around $151,000 per year and carpenters around $163,000 per year — more than double the average police officer, firefighter, soldier, teacher or nurse; and
    - productivity in Victoria's construction industry lagged behind the rest of the country for more than a decade.

55. A similar report [28]undertaken in Queensland examined the (then) current 'pattern' enterprise agreement favoured by the CFMEU and found:

    - Construction EBAs and wage growth levels (combined with restrictive work practices) therein compared with broader wage growth in the construction sector will add 11.9 per cent a year to the government's $10.7bn infrastructure budget, or $279 million a year from now to 2020, or $1.07bn over four years; and
    - About $550 million of that $1.07bn could have been spent on hospital upgrades and expansions over the period.

56. To be clear, Master Builders does not begrudge or criticise the capacity for organised labour to bargain for generous wages and entitlements of employment. Rather, it is our contention that outcomes only become problematic when combined

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[26] *Australian Bureau of Statistics data - Estimates of Industry Multifactor Productivity*
[27] http://www.mbavnews.com.au/2016-deloitte-report/
[28] http://www.masterbuilders.asn.au/media/media-releases/deloitte-report-warns-unions-driving-up-queenslands-cost-of-living; http://www.theaustralian.com.au/national-affairs/industrial-relations/outofcontrol-building-wages-add-1bn-to-projects/news-story/5665c0a07a18826c0ec8b11b90bb209b http://www.couriermail.com.au/news/queensland/master-builders-queensland-says-unionised-worksites-drive-up-cost-of-new-apartments/news-story/78616984868be2f4866744296fcbc137

with inflexible workplace practices, a rigid and complicated bargaining regime, and high levels of disputation.

57. Indeed, Master Builders would encourage the Review to note that the impact on workers themselves is unaffected by the Act and ABCC. As one reported noted in 2013:

> *"It would seem that the reduction in industrial disputes as well as the improvement in productivity in the construction industry did not occur at the expense of wages paid in the construction industry."*[29]

Recommendation:

That the Review finds that the evidence and history giving rise to the Act and related agencies justifies the need for the Act and related agencies.

Has the culture improved or changed?

58. Having regard to the above backdrop, it would be logical for the Review to consider the extent to which the culture and conduct within the building industry and amongst building industry participants have improved or changed following the passage of the Act and re-establishment of related agencies.

59. The Review should resist, in Master Builders view, drawing any hard conclusions to this question given the comparatively short period in which the Act and related agencies have operated in their current form.

60. However, it is our experience that the types of conduct identified earlier in this submission remain common place in the building and construction industry. Feedback from members regularly describe instances of contemporary conduct, culture and practices that could easily be mistaken as instances set in the late 1970s. This feedback is supported by reference to contemporary evidence sources outlined below.

61. In the 2015–16 financial year for example, the courts issued $1.826 million in penalties in ABCC related cases. The vast majority were fines against the CFMEU ($1.732 million). The CFMEU have been penalised over $10 million in cases brought by the ABCC[30], the FWBC and their predecessors and building unions generally have been penalised over $12 million in total.

62. Despite this, the conduct continues. In its first full year of operation, the courts imposed more than $2.9 million in penalties in matters brought by the ABCC[31] and it has has approximately 39[32] current proceedings against building unions and industry participants for breaches of the law involving Adverse Action, Unlawful Industrial Action, Coercive Behaviour, and Right of Entry breaches.

63. There have also been a number of cases either dealt with by the ABCC, or reported publicly, that Master Builders would submit evidence the need for the Act and related agencies.

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[29] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*
[30] *"Latest penalty takes CFMEU fines past $10m mark" Courier Mail, August 4, 2017*
[31] *https://www.abcc.gov.au/news-and-media/industry-update/latest-industry-update/industry-update-november-december-2017/abcc-marks-first-anniversary*
[32] *https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases*

64. In May 2017, the CFMEU and one of its officials were penalised $86,000 after attempting to force two Brisbane construction workers to join their union or be turned away from the site.

65. The Federal Circuit Court found[33] that the two workers had been told they could not work on an apartment project in January 2016 unless they paid fees to the CFMEU.

66. The court found that a CFMEU delegate had demanded each worker pay $1,290 in union fees. However both workers left after refusing to hand over the money. When a site manager reminded the delegate that workers had a right to not be in a union, the CFMEU official had replied: *"everybody's got to be in the union, this is an EBA site".*

67. In handing down his penalty decision, Judge Jarrett found that the delegate had breached workplace laws by attempting to force the workers to join the union. The CFMEU was penalised $80,000 while the delegate was ordered to pay a total of $6,000

68. Judge Jarrett said the penalties reflected: *"the CFMEU's deplorable history of compliance with industrial laws".*[34]

69. On 5 September 2017, a Brisbane landscaping firm was penalised more than $40,000 after it terminated the contract of another company which did not have a CFMEU EBA because it did not want *"trouble"* with the union.[35]

70. The situation giving rise to the penalty occurred in 2014 when a CFMEU official told workers at the waterproofing company they were not allowed to work on a site because their employer did not have a CFMEU EBA. The waterproofing company's contract was then terminated by the company.

71. In the Federal Circuit Court, Judge Vasta said the decision by the Company to terminate the contract was because it *"did not want to have trouble"* with the CFMEU.[36]

72. Judge Vasta said the waterproofing company had been unlawfully discriminated against because it did not have a CFMEU EBA. The company had a valid EBA and a right to work at the site. The Judge[37] said:

> *"It beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site."*

73. The court imposed penalties totalling $101,745 for the breaches of the FW Act. The company was penalised $40,800 and its project manager $6,120. The CFMEU was penalised $47,175 and CFMEU site delegate Kurt Pauls $7,650.[38]

74. Judge Vasta[39] went on to say:

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[33] *Australian Building and Construction Commissioner v Barker & Anor [2017] FCCA 1143 (30 May 2017)*
[34] *Ibid*
[35] *Australian Building and Construction Commissioner v Dig It Landscapes Pty Ltd & Ors [2017] FCCA 2128 (5 September 2017)*
[36] *Ibid*
[37] *Ibid*
[38] *Ibid*
[39] *Ibid*

> *"This was a very clear and deliberate action to illustrate to [the waterproofing company] that it was the CFMEU who alone decided who worked on that particular site."*
>
> *"It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society."*

75. In May of 2017, a Senior CFMEU official was ordered to pay the maximum penalty of $10,200 for his conduct on a construction site at Fortitude Valley in 2015.[40]

76. The official admitted in the Federal Circuit Court that when he was asked for his right of entry permit he raised his middle finger and said he didn't need one. When a site manager attempted to record the incident, the Official admitted saying:

> *"Take that phone away or I'll f***ing bury it down your throat."*

77. He then squirted water at the person which struck him in the face, shirt and mobile phone. When another site manager asked the official words to the effect:

> *"What are you doing here, you are here illegally, why didn't you go through the right channels?"*

78. The official replied: *"I can do what I like."*

79. In a further case from May 2017, the CFMEU and seven of its officials were penalised $277,000 for unlawful conduct which halted work at the $1.2 billion Perth Children's Hospital project. [41]

80. The penalties arose in circumstances where the site was blockaded, one occasion where 400 people prevented a large concrete pour involving 45 trucks. The Court determined that CFMEU officials had organised, incited, and controlled the protest because the head contractor did not agree to a demand for an EBA.

81. Other incidents included a union organised a blockade which prevented 200 workers from entering the site, and a separate blockade where a CFMEU official admitted to attempting to prevent workers from entering the site by physical restraint.

82. In issuing the penalties, the Judge said that senior officials:

> *"clearly provided endorsements to the unlawful action and gave it what might be called a misplaced legitimacy in the minds of the CFMEU members".*

83. Justice Barker also took into account the "*prior extensive history of contraventions on the part of the CFMEU"* in determining the penalties imposed.

84. In April 2017, the Federal Court issued fines of $101,500 against the AMWU, CFMEU and AWU and three of their officials for their involvement in unlawful industrial action at a construction project in Victoria's Latrobe Valley.[42]

85. The unlawful action stopped work at the project for three days in March 2014, continuing on the third day in defiance of orders from the FWC that industrial action

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[40] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/judge-orders-maximum-penalty-against-former-queensland-cfmeu-boss*

[41] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/court-penalises-cfmeu-leaders-277000-perth-children%E2%80%99s-hospital-decision*

[42] *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2) [2017] FCA 367 (11 April 2017)*

stop. Whilst the officials contended the stoppages related to safety and therefore did not constitute unlawful industrial action, the Court found that *"[t]hat view was a mistaken one".*

86. The Court found instead that by involving themselves in the action, the officials *"took advantage of the employees' unlawful conduct to strengthen their hands in their negotiations with the companies*".

87. In the judgment, Justice Jessup singled out the CFMEU for what he described as its *"appalling"* prior record of non-compliance with industrial laws.

88. Justice Jessup noted the *"normalisation of contraventions"* by the CFMEU:

> *"has been the subject of comment by Judges on so many previous occasions that any further observation on my part here would amount to little more than stating the obvious*".

89. His Honour continued:

> *"…if there is any union in the industrial universe which should be acutely aware of the importance of understanding the boundaries of lawful conduct in the prosecution of disputes, it is this one. Self-evidently, it does not care to do so."*

90. The CFMEU was penalised $45,000, the AMWU $25,000 and the AWU $20,000. Officials were penalised a total of $11,500.

91. Also in April 2017, the CFMEU and ten officials were penalised $590,800 for co-ordinated unlawful industrial action across multiple construction projects worth nearly half a billion dollars.[43]

92. The coordinated unlawful action saw workers walk off the job at nine projects, including four hospitals and an aged care centre across Melbourne and Geelong in 2014.

93. The Federal Court decision highlighted that of the various stoppages:

> "*in no instance was there any suggestion of an issue or grievance, specific to the site or workers on it that justified, or even explained, the organisation of the industrial action"*.

94. Instead, the Court found the "*arrogant*" and "*high-handed*" approach of the CFMEU and its officials led to the irresistible inference that the unlawful conduct *"had the explicit object of inflicting commercial harm on* [the contractor]*".*

95. The Court also made comment about the "*transparently groundless invocation*" of workplace safety as a pretext for one of the unlawful stoppages. One official was penalised $7,600 for an "*unjustified and gratuitous*" disruption of work that had *"nothing to do with any issue or grievance which the workers [on site] had".*

96. In March 2017, the CFMEU and ten of its officials were given penalties totalling $242,000 after they blocked construction work on the $80 million Perth International Airport Arrivals Expansion Project. [44]

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[43] *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368 (11 April 2017)*

[44] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53, NORTH, DOWSETT AND RARES JJ*

97. In a majority decision, Justices Rares and Dowsett described the officials' conduct as *"a clear instance of them taking the law into their own hands",* further noting:

> *"The conduct of the CFMEU in this case brings the trade union movement into disrepute and cannot be tolerated".*

98. Late last year, during national protest action, a senior union official made the following comments in front of a rally causing public outrage[45] with respect to ABCC inspectors:

> *"Let me give a dire warning to them ABCC inspectors, be careful what you do. You're out there to destroy our lives."*
>
> *"We will lobby their neighbourhoods, we will tell them who lives in that house and what he does for a living, or she, and we will go to their local footy club, we will go to their local shopping centre, they will not be able to show their faces anywhere."*
>
> *"Their kids will be ashamed of who their parents are when we expose all these ABCC inspectors."*

99. In August 2017, the Federal Court handed down penalties totalling $430,000 for unlawful industrial action taken at the Lady Cilento Children's Hospital and two other Brisbane construction sites.[46]

100. The Court found the actions of CFMEU officials was part of a *"highly coordinated and deliberately orchestrated campaign"* and that the CFMEU had a prior history that "*reveal a lamentable, if not disgraceful, record of deliberately flouting industrial laws*" (and was) "*a recidivist when it comes to contravening industrial laws."*

101. In awarding the penalties, the Court noted that *"it (the CFMEU) continues to thumb its nose at the industrial laws"* and "*the CFMEU's record of past transgressions means that there is no reason to afford it any particular leniency based on its past behaviour."*

102. In 2016, senior building industry union officials reportedly used the words *'We've got to get our hands dirty'* and '*You've got to break a few eggs to make an omelette*' at a union rally where it is alleged a non-union worker suffering a terminal disease was subsequently assaulted by a union official. [47]

103. In March 2016, a case in Queensland found building union officials entered a lunch shed, removed workers food from a fridge, then padlocked the door to the shed saying it was "*only for the use of union members."* [48]

104. In August 2016, the CFMEU in Melbourne was found to have not followed proper right of entry rules and refused to leave when asked. The Judge found this a *"demoralising lack of respect either for the law or their roles as officials". [49]*

105. In April 2016, the CFMEU and 15 union officials in Adelaide were fined for breaching entry laws, coercive conduct, and related breaches. These included unauthorised

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[45] *"CFMEU boss John Setka threatened to expose personal details of ABCC inspectors" Genevieve Alison, Tom Minear and Matthew Johnston, Herald Sun, June 21, 2017*
[46] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/federal-court-penalises-cfmeu-cepu-430000-unlawful-brisbane-action*
[47] *CUB Dispute: CFMEU boss John Setka urged workers to get 'hands dirty' at rally" Galloway A, Herald Sun, 16 September 2016*
[48] *[2016] FCCA 488 (9 March 2016)*
[49] *[2016} FCA 817*

entry, accessing unsafe areas, becoming physical to force site entry, and coercion to force the flying of a union flag. [50]

106. We also refer to Review to ***Annexure B*** and note that building unions are by far the most penalised category of union in Australia and courts have observed, on a more than regular basis, a predisposition for them to break the law. Building unions are more than willing to take advantage of the considerable rights and benefits associated with being a registered organisation, however they demonstrate a serial reluctance to do so in a manner where rights are evenly balanced against associated relevant obligations. This is important to note given trade unions in other sectors seem able to operate within existing rules and do not need to engage in illegal behaviour to represent members.

107. The Review may also consider some recent data from the ABS[51] that measures industrial disputation. This data indicates that since the BCIIP Act and ABCC has been restored in their second iterations, the level of sector specific disputation has experienced a downwards trend.

108. Clearly, it is too early to draw any firm conclusions from this data other than to categorise it as a possible 'green shoot'. Nonetheless, it shows:

Quarter	***Days lost (000's)***
December 2016	*15.8*
March 2017	*10.2*
June 2017	*12.3*
September 2017	*7.7*
December 2017	*4.1*

109. While the signs are positive, we caution the Review against drawing any firm conclusions from such a limited data set – it is simply too early to tell.

110. This said, Master Builders does submit that there are a number of conclusions that *can* be drawn from the content of this submission thus far. These are that:

- There is significant evidence and history to demonstrate beyond question that the Act and related agencies are necessary to ensure the object of s.3(1) can be achieved.
- There is significant evidence to conclude that building and construction sector industrial relations matters have capacity to impact broader matters including productivity and the general economy.
- There is significant evidence to conclude that the culture, conduct and practices that gave rise to the Act and ABCC (in current and earlier forms) remain a feature of the building and construction industry today.
- There is no evidence that this culture, conduct and practices have altered to the extent that would justify any 'relaxation' of the Act and associated processes.
- To the contrary, there is evidence that the when this has previously occurred (during, for example, the operation of FWBC and from studies of pre and post BIT era comparison) the culture, conduct and practices worsened.
- There is no evidence, at this time, to suggest that the culture, conduct and practices of building unions has altered or improved, or that there are any signs they will improve.

[50] *[2016] FCA 415 (22 April 2016), [2016] FCA 414 (22 April 2016), [2016] FCA 413 (22 April 2015)*
[51] *6321.0.55.001 - Industrial Disputes, Australia, Dec 2017*

Recommendation:

The Review finds that the evidence and history justifying the need for the Act and related agencies remains a feature of the building and construction industry today.

Recommendation:

The Review finds that the evidence and history justifying the need for the Act and related agencies has not improved to an extent that would warrant a significant weakening of the Act or agency powers nor justify their removal.

111. Master Builders further submits that the Review can further conclude that, irrespective of minor fluctuations in measurable data, the object of the Act will only be met if generational change to culture, conduct and practices can be implemented and consolidated.

112. For this to occur, the Act and related agencies must remain in place for a significant period of time in order to ensure the culture, conduct and practices are not merely supressed for short periods, but actually eliminated in a meaningful and lasting way.

Recommendation:

In order to achieve its overarching policy objectives in such a way that ensures meaningful and lasting improvements to industry culture and practice, the Act and related agencies must not only be retained, but be so for a significant period of time sufficient to ensure unlawful and ingrained attitudes and practice are eliminated and do not return.

TOR #1 – "Full Service Regulator"

113. The Terms of Reference ('TOR') under which the Review proceeds includes the following at item 1:

> *"The performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator 'function (i.e. reviewing building industry employers' compliance with wages and entitlements obligations as well as regulating building industry participants' compliance with freedom of association, right of entry and similar laws)."*

114. In addressing this item (and indeed, the majority of the other TOR items) Master Builders firstly notes our broad policy position with respect to the role and function of the ABCC. This position is to ensure that the core role and function of the ABCC as a regulator is at all times able to fulfil its obligations under the BCIIP Act, including through the use of appropriate powers to ensure compliance with the 2016 Building Code.

115. The practical basis for this policy position is that Master Builders is concerned to ensure that the BCIIP Act and related agencies are able to fulfil the core role for which they were created; that is, to uphold industry specific industrial relations laws; take steps to stamp out unlawful and illegal industry practices; and assist the industry in ensuring its workplaces are safe

116. We therefore say generally that any additional role, function or duties imposed under the BCIIP Act or affecting the agencies that does not assist achieve these core outcomes would be more appropriately by a more conventional agency, or undertaken by one that has appropriate jurisdiction and standing to achieve the same desired policy outcome.

117. We acknowledge earlier comments herein at paragraph 19 above regarding the limited period for which the Act and many of its new obligations have had practical effect.

118. In context of TOR Item 1, it is Master Builders' preference that the Fair Work Ombudsman ('FWO') should ideally be the appropriate regulator in terms of the education, investigation and enforcement of workplace entitlements in the building and construction sector. This function could easily be returned to the FWO, an agency that is responsible for these functions in every other sector of the economy.

119. Master Builders would observe that a carve out from FWO operations specific to the building and construction industry is confusing and inefficient (to the industry, workers and other regulators) and we question the need for this exception to exist. Further, given its size, background, experience and history, would be far more efficient and effective on a recovery per input basis than any other regulator.

120. Workers in the building and construction industry enjoy the same access to employment inspection and enforcement as workers in any other industry, in particular through the FWO as the regulator in our federal / national system, which now applies to the overwhelming majority of employment throughout Australia.

121. The Review should also note that:

- Significant additional inspection resources have been allocated to the FWO in recent years, by way of a funding increase;
- There was a significant increase during 2017 in the penalties that can be awarded against employers not meeting their employment obligations; [52]
- Unions have the capacity to raise instances of underpayment or non-observance of employment laws with the general, all industries inspectorate, the FWO, which will then take action; and
- The FWO annual report indicates that construction accounts for the highest proportion of all inquiries coming into the FWO at 15% [53] (the first step in inspection and enforcement).

122. Clearly, workers in the construction industry can and do access the inspection and enforcement services that are available in Australia.

123. We also note that during an earlier period where the first iteration of the ABCC was replaced with a (far less effective) regulator, a situation arose akin to that which presently exists. The replacement regulator was known as Fair Work Building Construction ('FWBC') and it held sector specific responsibility for the enforcement of entitlements under the Fair Work Act, Modern industrial Awards, and Enterprise Agreements.

124. To accommodate this additional responsibility, Master Builders understands an agreement was reached between the FWO and FWBC whereby its officers would exchange information relevant to the duties held under their respective Acts in order to fulfil those respective duties and desired policy outcomes.

125. It is our understanding that this agreement did not have any negative consequence for employees in the building and construction sector, and this could be considered

[52] https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/changes-to-help-protect-vulnerable-workers

[53] *FWO Annual Report 2016-2017, p.16 (https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/default)*

an alternative to simply restoring this function to FWO as the proper and conventional regulator.

126. Insofar as the other functions performed by the ABCC relevant to this TOR, it is Master Builders view that it is entirely appropriate that they continue insofar as they relate to the special obligations that apply to building industry participants under the terms of the BCIIP Act or associated Code.

127. These include industry specific obligations relevant to matters such as Freedom of Association, enterprise bargaining, right of entry, industrial action and coercion.

128. RECOMMENDATION:

129. While the 'full service regulator' approach is understandable, the related policy outcomes sought by this approach would be better achieved through more appropriate regulators.

130. However, the retention of these additional functions in the Act and maintenance of the status quo is far more preferable than the abolition of the Act in its entirety.

Recommendation:

While the 'full service regulator' approach is understandable, the related policy outcomes sought by this approach would be better achieved through more appropriate regulators.

However, the retention of these additional functions in the Act and maintenance of the status quo is far more preferable than the abolition of the Act in its entirety.

TOR #2 – Independent Oversight

131. The Terms of Reference ('TOR') under which the Review proceeds includes that following at item 2:

> *"The independent oversight of the compulsory examination powers, including: reporting requirements (e.g. the frequency these reports are required); and safeguards and public accountability in the application of these powers."*

132. Master Builders notes that there are minor differences between the oversight powers under this iteration of the BCIIP Act and earlier versions. The effect of these differences has been, in Master Builders experience, negligible or indiscernible.

133. Master Builders took no issue with amendments moved during the Parliamentary passage of the Act that altered oversight provisions. Indeed, we embrace the notion that they assist in demonstrating the proper protocols and procedures adopted by the ABCC when seeking to exercise its power and functions.

134. The reporting requirements apply to the Regulator itself and are not a matter about which Master Builders is able to comment, save for reiterating our support for all processes that assist the core obligations of the Act to be fulfilled.

135. We refer the Review to the background giving rise to the compulsory examination powers. The Heydon Royal Commission, after giving consideration to evidence before it regarding the necessity for such power, recommended as follows:

> *"Legislation be enacted conferring the building and construction industry regulator with compulsory investigatory and information gathering powers equivalent to those possessed by other civil regulators. The powers set out*

in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) appear appropriate in this regard.

There should be oversight by the Commonwealth Ombudsman of the powers exercised by the building and construction regulator in the manner provided for in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth).”

136. It is Master Builders experience that the necessity for the above powers are well founded. While detractors of the Act and related agencies focus on their potential use with respect to workers, it should be noted that these powers cover all building industry participants and their existence is a key part enabling the agencies to achieve the aims of s.3(1) of the Act.

137. Given the culture and history of the sector noted earlier above, it is often that case that building industry participants are subjected to coercion, intimidation, threats, standover tactics, thuggery and other forms of illegal behaviour if they speak out or are seen to assist regulators.

138. In many cases, the use of compulsory information gathering powers can give building industry participants the protection they need to assist the regulator without such assistance being viewed by others as ‘voluntary’.

139. When undertaking a review of the first iteration of the ABCC, Justice Murray Wilcox agreed with the above observation and went on to recommend that the powers be retained, noting:

> “*It is understandable that workers in the building industry resent being subjected to an interrogation process that does not apply to other workers…. 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.”*[54]

140. Master Builders also directs the Review to the numerous other agencies that hold the same compulsory information gathering powers as the ABCC, including:

- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Australian Prudential Regulation Authority
- Australian Transaction Reports and Analysis Centre
- Australian Taxation Office
- Inspector-General of Taxation
- Australian Security Intelligence Organisation
- Inspector-General of Intelligence and Security
- Office of the Australian Building and Construction Commissioner

[54] *Transition to Fair Work Australia for the Building and Construction Industry Report, March 2009, Page 3 Paragraph 1.23*

- Centrelink
- Medicare Australia
- Gene Technology Regulator
- Australian Pesticides and Veterinary Medicines Authority
- Human Rights and Equal Opportunity Commission
- Office of the Privacy Commissioner
- Australian Customs Service
- Australian Quarantine Inspection Service
- Australian Fisheries Management Authority
- Migration Agents Registration Authority
- Australian Communications and Media Authority
- Department of the Environment and Water Resources
- Great Barrier Reef Marine Park Authority
- Australian Maritime Safety Authority
- Australian Energy Regulator
- Office of the Inspector of Transport Security
- Civil Aviation Safety Authority
- Australian Maritime Safety Authority
- Australian Transport Safety Bureau
- Workplace Ombudsman
- Comcare
- National Offshore Petroleum Safety Authority

141. In many cases, the powers held by the above agencies can be exercised with less restriction and oversight than which currently applies to the ABCC.

142. Master Builders regularly notes that any citizen in Australia who pays tax, has accessed Medicare, or visited Centrelink, is subject to the same (if not more stringent) compulsory information gathering powers as held by the ABCC.

Recommendation:

The independent oversight of the regulator powers should remain, as should the capacity of those regulators to exercise those powers**.**

TOR #3 – Higher Penalties

143. Terms of Reference ('TOR') under which the Review proceeds includes that following at item 3:

> *"Whether the higher penalties under the BCIIP Act are acting as a deterrent to prevent contraventions of workplace relations laws by industry participants."*

144. Master Builders supports the higher penalties that exist under the existing Act and recommend they continue to at least this level.

145. The necessity for higher penalties was canvassed by the Heydon Royal Commission that noted:

> *"In an environment where union officials openly acknowledge that they will take industrial action to achieve the union objectives without regard to whether that action might break the laws governing protected and unprotected industrial action, there is a need for laws that expressly address what is prohibited conduct and provide strong penalties for contravention of them."*[55]

146. Master Builders strongly agrees with the Commissions observation.

147. Further, Master Builders has consistently argued that the previous level of penalties for unlawful industrial action were not high enough to act as an effective deterrent against it in the building and construction industry.

148. The Royal Commission also considered whether the level of penalties was appropriate for our sector. It observed:

> *"It is apparent …. that the present penalties are an ineffective deterrent to unlawful conduct on the part of the construction unions, and judicial officers have noted that the CFMEU appear to regard financial penalties as simply a business cost like any other. That suggests that higher maximum penalties could not be considered disproportionate to the harm caused by unlawful industrial action and coercion, particularly when the selection of particular penalties from case to case are subject to the usual judicial discretion."* [56]

149. As a result, the Commissioner recommended that:

> *"The Fair Work Act 2009 (Cth) be amended:*
>
> *(a) to increase the maximum penalties for contraventions of ss 343(1), 348 and 355 (coercion) and ss 417(1) and 421(1) (prohibited industrial action) to 1,000 penalty units for a contravention by a body corporate and 200 penalty units otherwise;"* [57]

150. The Productivity Commission Review of the Fair Work Laws also canvassed the question of whether or not penalties were set at a level that provided an effective deterrent.

151. It found that:

> "*there are several shortcomings in current arrangements that allow the excessive strategic use of industrial action*". [58]

152. The report recommended that:

> *"The penalties for unlawful industrial action (by any party) should be increased by a factor of three, as this would allow the FWC and the Federal Court more scope to apply penalties commensurate with the harm associated with such action."*[59]

153. Master Builders supported that recommendation and notes its adoption in the present Act under review.

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[55] *Heydon Royal Commission – Final Report*
[56] *Ibid*
[57] *Ibid*
[58] *PC Review of the Fair Work Laws 2015*
[59] *Ibid*

154. Further, the Review should also have regard to a recent decision of the High Court involving penalties and related personal liability. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 (14 February 2018), the High Court found that Courts may impose personal fines against Union Officials for their misconduct and breaches of the Fair Work Act, on top of fines to Unions. The decision affirms the Courts can force union officials to pay fines personally – rather than have the union pay them on their behalf.

155. In their reasoning, the High Court found that the Federal Court was not able to impose an order for 'non-indemnification' against penalties. However, they ordered that a proper construction of the penalty provisions of the Fair Work Act *did* allow the Courts to make a personal payment order against Union Officials.

156. It is Master Builders view that union officials will held more accountable for their behaviour on building sites. The High Court's ruling signals that union officials are not above the law. It means that unions will not be able to indemnify their officials by paying court fines on their behalf. Officials will now face the consequences if they break the law, just like everyone else in the community.

157. This said, Master Builders believes that there has not been sufficient time to allow an objective assessment of the deterrent value posed by the higher penalties under the Act in its current iteration.

158. This notwithstanding, Master Builders does note that since the Act and higher penalties took effect, there appears to have been no discernible improvement in terms of the attitudes of building unions and the conduct they regularly display. In many respects, this attitude to their conduct seems to have hardened – as outlined earlier in this submission.

159. It is therefore Master Builders contention that, if the threat of higher penalties has not generated an improvement in industry culture, the prospect of increasing penalty levels so as to be higher than current should be a live consideration of Government.

160. Further, the Review should also note that the earlier iterations of the Act contained higher penalties of a similar magnitude. As noted earlier, there were general improvements in terms of productivity and levels of industrial action when these penalties existed.

Recommendations:

That the current oversight and reporting provisions are appropriate.

That while it remains premature to assess the impact of the higher penalties contained in the Act, history demonstrates their utility.

The conduct and attitude of building unions have not been positively affected by the threat of higher penalties.

That the prospect of even higher penalties remain a live consideration for Government in the event a marked change in culture is not detected.

That the current penalty levels be retained to be at least their current levell**.**

TOR #5 – OFSC and the National Construction Code[60]

161. Terms of Reference ('TOR') under which the Review proceeds includes that following at item 5:

> *"The review will also examine the operation of the new provisions in the BCIIP Act including the provision which requires the Federal Safety Commissioner to audit Commonwealth funded building work against the National Construction Code's performance requirements in relation to building materials."*

162. We restate our general position that Master Builders is concerned to ensure that the BCIIP Act and related agencies are able to fulfil the core role for which they were created; that is, to uphold industry specific industrial relations laws and take steps to stamp out unlawful and illegal industry practices.

163. It follows that Master Builders does not believe that the OFSC should hold the additional function imposed on the OFSC in respect of the National Construction Code ('NCC'). There are several important other factors that cause Master Builders to reach this conclusion.

164. As the Review would be aware, the additional functions given to the OFSC arose at a time where community debate about the Non-conforming building products, or the use of building products in a non-compliant way (together 'NCPs') was extensive.

165. Master Builders cannot overstate the importance of addressing the issue of NCPs and have worked constructively with governments and regulators of varying jurisdictions to achieve this aim.

166. Master Builders also understands that the use of Government procurement policies to drive outcomes that compliment related policy positions is a common practice of all Governments. The Commonwealth is a significant contributor to the development of infrastructure and federally funded building work represents a large proportion of the total value of commercial sector work performed annually. We appreciate why the 2016 Code and is viewed as an appropriate lever to address the use of NCPs. Master Builders understands that the Senate voted to adopt the same view and considered the passage of the BCIIP Act as an appropriate lever.

167. However, the Commonwealth has little or no jurisdiction over NCPs. Indeed, the issue is almost entirely regulated by state and territory laws of varying descriptions, that underpin industry focussed agencies and regulators with specific technical expertise. They also have varying and jurisdictionally specific powers, processes and approaches to enforcement.

168. The NCC is applicable to all jurisdictions and developed at a national level by the Australian Building Codes Board ('ABCB'). The requirements of the NCC are not the sole genesis of the NCP problem – rather, it is the various approaches to its enforcement and related approvals processes that play a larger part of this question (amongst other significant reasons).

169. To this end, Master Builders would prefer that attempts by Government to address NCPs be the domain of the state and territories with whom this responsibility is properly vested, with the Commonwealth playing an oversight or coordination role.

[60] *Note that TOR #4 is dealt with hereunder.*

170. Although it may be too early to tell, we are nonetheless minded to say that the additional NCP function given to the OFSC may not represent a meaningful contribution towards ensuring the built environment is safe.

171. Indeed, the additional function held by OFSC may create further confusion and result in a contrary outcome. As it stands, there is some confusion amongst regulators, policy makers, industry participants and the community as to whom is responsible for what when NCPs are concerned.

172. The Review should note how easy it is for this confusion to arise, particularly when regard is had to the nomenclature of what are possibly the two most important industry regulators:

- the ABCC administering the 2016 Building Code
- the ABCB administering the National Construction Code

173. Putting aside the plethora of state/territory regulators for a moment, we simply observe that the potential for confusion is obvious.

174. In circumstances where the benefit of OFSCs additional NCC function is already questionable, and where confusion as to regulator role and responsibility is already high, the Review is right to consider whether this function should be retained or moved elsewhere.

175. Most importantly, Master Builders is concerned that this additional function will detract from the major role and purpose of the Scheme and the OFSC which is to work with industry and government stakeholders so the sector can achieve the highest possible occupational health and safety standards on Australian building and construction projects. Not only does the existing function confuse otherwise clear lines between what is a workplace health and safety matter and what is a building regulation matter, we hold the view that it brings no practical benefit on building sites in terms of industry OHS outcomes and, indeed, are concerned to ensure the contrary does not occur.

176. It is for reasons of this type that Master Builders does not believe that the OFSC should hold the additional function imposed on the OFSC in respect of the National Construction Code ('NCC').

Recommendations:

That in order to achieve the relevant policy outcome, consideration be given to shifting the additional NCC function from the OFSC to more appropriate regulators with greater expertise and capacity to achieve that outcome.

However, the retention of the Act and additional functions for associated regulators is preferable to the abolition of the Act and related agencies in their entirety.

TOR #4 – Improvements to Act and Code

177. Terms of Reference ('TOR') under which the Review proceeds includes the following at item 4:

> *"Any need for amendments that will streamline and clarify the application of the BCIIP Act, in particular when it interacts with other Commonwealth legislation (e.g. where the recruitment obligations regarding the employment of foreign workers in the BCIIP Act and the Code for the Tendering and Performance of Building Work 2016 overlap with obligations in the Migration Act 1958 or Australia's international trade obligations).*

> *This should include consideration of the Code for the Tendering and Performance of Building Work 2016 and whether technical amendments are required to clarify its application/improve its operation."*

178. At this point the Review will be very aware of Master Builders' overall position with respect to the functions of the ABCC and OFSC, and the policy outcomes the Act seeks to achieve.

179. It follows that the remaining additional policy outcomes sought via amendments made to the Act and 2016 Code pertaining to any matter other than workplace industrial or safety issues should be actively reconsidered. These include the functions that relate to (a) security of payment laws, (b) use of non-citizen labour and (c) building regulation (as mentioned above).

180. To be abundantly clear, Master Builders considers industry commercial conduct and improvements to building regulation as being significant and key issues for our members and the building and construction industry more broadly. Master Builders is actively engaged in addressing these matters on many fronts, including with other agencies, regulators and governments.

181. The question is whether or not the Act and related agencies are the most effective vehicles through which the related desired policy outcomes should be achieved – and we say the answer is no – particularly in light of other long-existing agencies.

182. The Review might also note that the Act and (current and previous iterations of) the 2016 Code require code covered entities to comply with laws, decision, directions and orders, including all designated building laws, OHS laws, migration laws, and competition laws.[61]

183. The inclusion within a Code of a statement affirming the need to comply with the law is not controversial. The laws apply irrespective of whether a building industry participant is a code covered entity or otherwise.

184. The 2016 Code has retained the statement, and then further re-states discrete aspects of existing laws in further, additional sub-sections within the Code. These are found within section 11.

185. It may be argued that this re-statement of a requirement that would otherwise be applicable to all building industry participants has little or no practical effect in terms of improved policy outcomes, however the period of time for which the Act and related agencies have operated in their current iteration means an assessment of these additional functions is difficult.

186. While Master Builders understands the basis for their inclusion in the Code, we would prefer they would be the responsibility of traditional and conventional regulators. A future review as recommended earlier would enable a more appropriate assessment.

187. The following sub-sections expand on the above position.

Security of Payment

188. In considering matters relevant to SOPA, it is important to recognise the unique circumstances and structural nuances that exist with the building and construction industry.

[61] *Code s9*

189. This is because there are many data sets that relate to the industry that, unless considered contextually, could cause incorrect or misconceived inferences to be drawn about the conduct of participants and related commercial conduct.

190. One such data set is the measure of business entity entrants and exits to the sector. On its face, the data suggests that these rates are comparatively high when compared to other sectors, and cause some to conclude that it is a sector where businesses have high failure rates. Media coverage of some recent high profile instances involving builder or head contractor insolvency cause many to subsequently conclude that failures are due to non-payment or delayed payment from being associated with such failures.

191. While it is acknowledged that the rate of insolvency in the industry remains high when compared to other sectors, there are many other factors that contribute to, or have the capacity to contribute to, the entry/exit levels that are contextually relevant as noted below.

192. Despite common perceptions, the overwhelming majority of the over 300,000 business entities in the sector are defined as small – some 98%. Of these, around 40% are non-employing entities and a similar proportion employs less than 5 employees.

193. Many of these businesses are specialist sub-contractors engaged as required during various stages of construction.

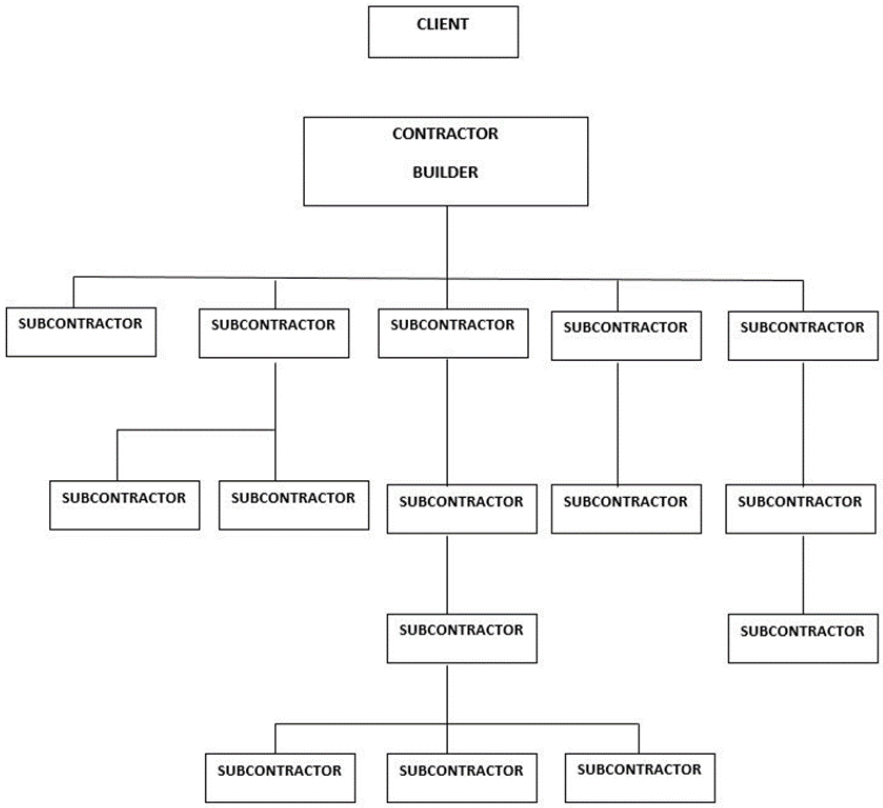
194. Building and construction work conventionally involves a client engaging a building contractor that will act as a 'project manager'. The building contractor uses sub-contractor companies to perform particular tasks at different stages of construction.

195. Sub-contractors often specialise in particular stages of construction work and it is common for them to also engage sub-contractors who are frequently specialists in particular types of work.

196. As a consequence entities in the sector are frequently established in order to obtain work and it is not uncommon for entities to cease existing once work is no longer available. In this regard, the level of entrants and exits are partly indicative of the way work is done in the industry.

197. It is relevant to note that the common practice for sub-contractors is to themselves also engage other contractors for particular work or aspects of it.

198. A graphical explanation follows:



199. The level of industry activity is dependent on other matters such as the amount of government investment in public infrastructure, changes in the property market, or general economic conditions. These factors, when combined with the structure noted above, create significant capacity to influence entrants and exits more so than other industries. Historical data supports this notion and indicates that the number of sector entities can fluctuate quite substantially.

200. Therefore, any analysis of the data should be careful to avoid concluding that building industry participants have greater susceptibility to failure than in other sectors. It is more likely that these higher levels arise due to unique structural elements of the industry, the way the work is done and the trade based nature of the work.

201. It is acknowledged that industry commercial conduct does play a role in entrant and exit levels and that a large part of such conduct relates to payment for work and service, including payment times.

202. Here too it is important to note that unique industry structure plays a role in this area given that the 'chain' of entities involved on a conventional construction project can be extensive and involve many levels from client through to specialist sub-contractor.

203. As noted above, the nature of the industry and its work means that sub-contractors at the end of the construction chain are more susceptible to the actions and conduct of contractors at the top of the chain that impact cash flow.

204. For example, a sub-contractor engaged on a project may be required to expend significant cash resources to purchase materials before work starts. Work may be performed and materials installed weeks ahead of the small sub-contractor

receiving payment thereby creating circumstances where they are particularly susceptible to an insolvency event. (That said, it should be noted that building industry participants increasingly utilise the Personal Property Securities Register).

205. If the sub-contractor is not paid, or if they receive a demand for payment from another party, this may cause financial difficulties. Concurrently, if the contractor suffers an insolvency event, it may impact on the principal contractor via its management of the project. This can be experienced in terms of project delays and their management of other sub-contractors so engaged on the same project.

206. The situation described above demonstrates how entities in the industry are co-dependent upon each other and how the success or failure, and conduct of one party, has capacity to influence the other. This co-dependency exists in the industry to a greater extent than for other sectors and creates a degree of cyclical vulnerability. This creates potential to put some entities at risk of insolvency events particularly during parts of the cycle where they are financially vulnerable.

207. The Inquiry ought to be aware that Australia maintains a unique regime of existing law that deals with payment between building industry participants. This regime is commonly referred to as a 'security of payment' (SOPA) regime as it creates regulatory parameters governing the terms and circumstances under which building industry participants must adhere insofar as their commercial practices.

208. New South Wales was the first State to introduce Security of Payment legislation in 1999.

209. The remaining States and Territories (first Victoria in 2002, Queensland 2004, then Western Australia, Northern Territory, Australian Capital Territory, South Australia and Tasmania) progressively enacted the legislation throughout the following decade. As a result, the legislative regime is as follows:

- NSW - Building and Construction Industry Security of Payment Act 1999
- VIC - Building and Construction Industry Security of Payment Act 2002
- QLD - Building and Construction Industry Payments Act 2004
- WA - Construction Contracts Act 2004
- NT - Construction Contracts (Security of Payments) Act 2004
- ACT - Building and Construction Industry (Security of Payment) Act 2009
- SA - Building and Construction Industry Security of Payment Act 2009
- TAS - Building and Construction Industry Security of Payment Act 2009

210. The regime is a patchwork of laws comprising 8 highly technical Acts with abundant State-by-State case law.

211. The legislation creates statutory rights in relation to construction work and related goods and services through procedural default provisions including:

- a right to progress payments
- a right to interest on late payment;
- a right to suspend work; and
- for the rapid interim adjudication of disputed claims. Rapid adjudication is conducted by an independent adjudicator with relevant expertise.

212. Determinations by adjudicators are not always binding depending on the jurisdiction (see jurisdictional differences below).

213. There is no uniformity in legislation giving rise to divergent obligations across the jurisdictions (arguably causing contractors and sub-contractors much confusion and uncertainty).

214. Master Builders have in recent years been on the record as supporting a move towards uniformity of the State/Territory based legislation. Notwithstanding this, their remains significant jurisdictional differences between the regimes:

- Victoria – excludes from statutory scheme most types of claims which do not relate to the contract price (eg time-related claims, such as for liquidated damages, and for latent conditions and non-agreed variations). Adjudications are binding and an adjudication certificate can then be registered as a judgment with the court.
- Western Australia & Northern Territory ("West-Coast model") – Permit a wider category of claims to be subject of adjudication. Determinations are binding in Western Australia, with the exception of the State Administrative Tribunal being able to review a determination on procedural grounds. In the Northern Territory, adjudications are binding and an adjudication certificate can then be registered as a judgment with the court.
- New South Wales – Unlike other jurisdictions, does not require payment claim to state that it is made under the Act, requires head contractors to include a supporting statement when making a claim. "Construction work" is defined very broadly with mining operations the only exception. Once a decision is handed down in favour of the claimant, if that payment is not made the claimant can sue for the assigned debt.
- Queensland – As in New South Wales, mining work is not included. An adjudication can be appealed in court for jurisdictional error only.
- South Australia – A recent decision in the Supreme Court of South Australia held that both the New South Wales and South Australian security of payment legislation are identical and should be interpreted the same way. 62
- Tasmania – Unlike the other States and Territories, the legislation applies to 'residential structures' regardless of whether the party for whom the work is carried out resides or intends to reside at the premises. This is in contrast with the other jurisdictions where a claim that involves domestic building work cannot be made if a resident owner is a part to the contract and lives or intends to live in the building. There is no right of appeal.
- Australian Capital Territory – Also very closely modelled on the New South Wales Act. Adjudication decisions may be appealed to the Supreme Court on a question of law.

215. The Review should also be aware that there have been further recent developments in matters affecting security of payment and associated regimes throughout the country. It has been observed that the regime has in one way or another been under constant review at the State or Territory level around the country for the last five or six years.

216. Considered contextually against the above backdrop, the utility of a further additional level of regulation is questionable (save for the additional incentive to comply arising from potential sanction).

[62] *See Tagara Builders Pty Ltd v AP&L Services Pty Ltd & Ors [2015] SASC 30*

217. History shows that more regulation is not always the answer. Indeed, the history and complexity of various SOPA regimes noted above demonstrates that despite continual review and a desire to pursue a 'crackdown' via 'tougher laws' - regulatory solutions are frequently ineffective and, particularly in terms of SOPA, possibly counter-productive.

218. We note this as the rapidly changing nature of the various SOPA regimes add further complexity in terms of (a) the ABCC and its capacity to ensure compliance with laws in each jurisdiction and (b) general knowledge and understanding of building industry participants on the ground, particularly those who may experience non-payment.

219. The Review should also note that the Commonwealth has no jurisdiction to deal with matters regarding industry commercial conduct and payments between commercial entities.

220. Having regard to the above, the question becomes whether or not the additional compliance systems under the Act and Code are delivering the desired policy outcome or just adding confusion and cost to what is an already complex and varied system of regimes.

221. Master Builders believes it would be premature for the Review to conclude an answer to this question at this time, notwithstanding our overall policy position regarding the Act and related agencies.

Recommendations:

That in order to achieve the relevant policy outcome, consideration be given to shifting the additional SOPA function from the 2016 Code to more appropriate regulators with greater expertise and capacity to achieve that outcome.

However, the retention of the Act and additional functions for associated regulators is preferable to the abolition of the Act and related agencies in their entirety.

Migration laws

222. Master Builders notes the adoption within s.11 of the 2016 Code of an expanded re-statement of obligations applicable under the Migration Act.

223. As noted with respect to other additional functions within the Code, Master Builders would consider that it would be premature for this Review to draw conclusions about their operation given what we expect to be a limited amount of relevant data from which to draw analysis.

224. We reiterate our over-arching view regarding the core objectives of the Act and 2016 Code.

Recommendations:

That in order to achieve the relevant policy outcome, consideration be given to shifting the additional migration function from the 2016 Code to more appropriate regulators with greater expertise and capacity to achieve that outcome.

However, the retention of the Act and additional functions for associated regulators is preferable to the abolition of the Act and related agencies in their entirety.

The Australian Building and Construction Commission

225. Master Builders would observe that the service standards maintained by the ABCC are overwhelmingly positive and responsive.

226. We would note that while debate about the re-establishment of the ABCC was in the public domain for some years, its actual technical re-establishment occurred in quite short order requiring a swift transition from FWBC to ABCC. Despite this, the agency maintained its operations throughout the transition.

227. Master Builders notes that the work of the agency and technical detail associated with applying the various iterations of the Act and Code can bring complexity. The provision of related advice to building industry participants in a simple and clear way is by no means an easy task.

228. Further, the role of assessing draft EBAs for Code compliance is not only a technical process, but one often associated with time 'pressures' given the participants to whom they have application and the importance of compliance to many sector business models.

229. Following the introduction of the 2016 Building Code, members did experience a degree of frustration in terms of the time taken to assess for compliance. In recognition of this, the ABCC was able to engage with industry bodies such as MBA and established a process to facilitate assessments that were pressing and urgent.

230. In more recent times, the extent of concern raised regarding assessment timings has virtually ceased.

231. Further, the ABCCs production of a voluminous amount of draft EBA clauses provided practical assistance in terms of agreement drafting. This said, these clauses did also create some apparent inconsistencies but these were resolved efficiently.

232. Overall, the feedback from members combined with Master Builders direct experience indicates that the ABCC as an agency is effective, responsive and cooperative in terms of assisting building industry participants achieve and maintain compliance with the Act.

OFSC and Scheme

233. The OFSC and Scheme is an important part of the Act and its policy objectives and should be retained.

234. Ensuring building and construction industry workplaces are safe is a key policy priority for Master Builders and the number one concern for our members on the ground.

235. Master Builders is a member of the OFSC Industry Reference Group. The IRG is a useful forum to maintain dialogue and interaction between industry and the OFSC to the overall benefit of the scheme, its operation and safety improvements.

236. Master Builders does acknowledge that some industry participants may misunderstand the scheme and consider its existence and obligations to represent a regulatory burden that is unnecessary or duplicative in nature. This is not a view that Master Builders shares.

237. A review of the OFSC and the Scheme was undertaken in 2014 and Master Builders provided a major submission as part of the process. It is understood that the recommendations flowing from that review have been implemented and have caused an increase in the extent to which building industry participants are satisfied with its work and operation.

238. Master Builders understands that around 427 companies are accredited by the Scheme, with around 25 or so extra companies gaining accreditation each year. Approximately 450 audits are performed each year by OFSC auditors.

239. Master Builders is aware that available data[63] demonstrates a significant improvement in safety outcomes once accreditation is achieved. These include:

- 88% of smaller accredited companies note an improvement in safety practices and culture;
- 28% have workers compensation premiums that are lower the industry average;
- 73% have seen a reduction in workers compensation premiums by an average of 41% after maintaining 6 years of accreditation;
- 59% have reduced lost time injury frequency rates after maintaining 3 years of accreditation;
- Accredited companies accounted for 4 of the total 35 industry fatalities in 2016, while undertaking work to an extent that it represents half of the total value performed in the sector.

240. The above outcomes are significant in that the building and construction industry is categorised as a 'priority industry' by Safe Work Australia and is known for undertaking work of a type that involves a factor of risk higher than other industries.

241. The underpinning theme in our submission to the 2014 Review was the need to avoid an outcome where safety becomes too focussed on paperwork to the expense of practical safety improvements on the ground. While the above data suggests this outcome has yet to pass, the Review should note that it remains a very real and ongoing risk.

242. As the Review would no doubt appreciate, building industry participants are subject to an extensive and expansive list of laws, regulations, codes and standards that are maintained at a local, State/Territory and Federal level. The obligations set within these regimes frequently require evidence of compliance and Master Builders is always concerned to ensure that 'red tape' does not suffocate efforts to provide safe workplaces and improvements to industry safety outcomes.

243. Two examples of where the Scheme could be improved relate to the use of Safe Work Method Statements ('SWMS') and design related risk management.

244. In terms of SWMS, the issue relates to the length, nature and utility of SWMS and the extent to which OFSC allows subcontractors to deviate from the requirements imposed by a head contractor. It is common for OFSC to require subcontractors to adopt a SWMS format that is consistent with their own (often of substantial length – up to 10 or so pages) rather than use an alternative which Master Builders believes is of equal utility in terms of safety outcomes (two pages).

245. Safe Work Australia has a page on its website that provides a variety of material which includes information relating to the category of work for which a SWMS is required, as well as the content essential to meeting the statutory requirements.[64]

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[63] *Supplied to OFSC IRG Members by OFSC*

[64] *Safe Work Australia, Publications and Resources, Construction Information Sheets - http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/construction-information-sheets - viewed 4 June 2015*

246. The Construction Work Code of Practice (Code of Practice) produced by Safe Work Australia indicates that the document is:

> *"a practical guide to achieving the standards of health, safety and welfare required under the WHS Act and the Work Health and Safety Regulations."*[65]

247. The Code of Practice also includes both a template for, and an example of, a SWMS[66]. That document is very useful to PCBUs and their workers to ensure that their documents are compliant with the WHS law and regulations where the harmonised system has been introduced and in Victoria.

248. Master Builders urges the OFSC to also adopt the SWMS template within the Code of Practice and, if it chooses not to do so, provide an explanation as to what objections it may have to using the document.

249. We encourage the review to find at the use of the SWA approved SWMS template is one practical way to reduce the focus on 'paperwork' and increase focus on practical measures to improve industry safety outcomes.

250. A second example is the focus on design related risk management. The need for attention on this concept is questionable given that the integration of design issues into the risk management process is suited to design consultants and not principal contractors.

251. Feedback provided to Master Builders is that the focus on this obligation does not have a positive impact on safety outcomes and represents an administrative burden that detracts from other safety matters.

252. Principal contractors are faced with a significant administrative burden each time a design change occurs because (in most instances) the design team which tendered and won the contract to design the government project lacks resources to coordinate the design to the level of detail necessary.

253. Consequently, many design drawings are updated during the construction phase, placing further administrative burdens on the principal contractor in terms of compliance with the Scheme.

254. Feedback is that accredited members suffer a substantial administrative burden because of the manner in which the audit criteria are applied. This factor negatively impacts site supervision.

Recommendation:

That the OFSC adopt template the template SWMS as endorsed and adopted by Safe Work Australia, and reconsider focus on design safety management in terms of its relevance to contractors and their capacity to improve safety outcomes in this regard.

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[65] Safe Work Australia, Construction Work; Code of Practice, November 2013 - http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/696/Construction-Work-V2.pdf

66 Ibid at pages 44 and 48

Conclusion

255. Master Builders appreciates the opportunity to make a submission to Review of the BCIIP Act and related agencies.

256. We would be happy to expand upon any of the content in this submission and encourage the Review to contact the officer identified in the content page as necessary.

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