

Master Builders Australia

Submission to Productivity Commission
on the Draft Report –
Inquiry into Business Set-up, Transfer and Closure

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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 33,000 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.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

- 2.1 Master Builders welcomes the opportunity to provide a response to a number of the key issues raised in the draft report of the Productivity Commission's [Inquiry into Business Set-up, Transfer and Closure](#). We commend the Productivity Commission for the depth and quality of its work.
- 2.2 This response builds on our original submission to the inquiry and emanates from our review of a number of the key elements of the draft report.
- 2.3 Attachment A to this submission is our submission to the Senate Economic References Committee on Insolvency. Master Builders, in that submission, highlights the importance of the current inquiry. We ask that the matters set out in that submission be taken into account by the Productivity Commission in the finalisation of the current inquiry.

3 Central Concern: Less Regulation

- 3.1 The central themes of the inquiry – the incidence of business entry and exit, and strategies for reducing business entry and exit (particularly relating to regulation) – are of central importance to the building and construction industry.

- 3.2 As we highlighted in the original submission, the building and construction industry accounts for almost eight per cent of gross national product, and more than nine per cent of employment, in Australia. At the same time, owner-occupied housing and other property investments account for more than two-thirds of the asset portfolios and the wealth of ordinary Australians.
- 3.3 The inquiry is also important for the building and construction industry given the entry and exit rates for the industry relative to the national average. While business entry rates for the building and construction industry are around the national average (both around 14 per cent per annum) the exit rates are noticeably different (15 per cent compared to 13 per cent). This issue is elaborated in Attachment A.
- 3.4 A key theme of our original submission related to the burden of regulation imposed on businesses, especially small businesses, in the building and construction industry, and the implications for housing supply and affordability.
- 3.5 The compliance and reporting burden of regulation diverts scarce resources away from entrepreneurial and innovative activities into (often unproductive) form-filling. This point has been echoed in messages emerging from focus groups conducted by Master Builders with builder-members on, inter alia, the priorities for regulation reform.
- 3.6 As one builder told us:
- Battling with regulations and bureaucrats is taking me away from building my business. I should be out winning jobs and doing business.*
- 3.7 Further in the words of another builder:
- Have a look at everyone who regulates the building industry: the ABCB; Standards Australia; the Banks (as sources of finance); the insurance companies (given they provide insurance cover, when you can get it); local governments (God help us); and, the various State fair trading and consumer protection agencies. (No wonder) you have to price red tape into your quote.*
- 3.8 Anecdotal evidence provided to Master Builders by our builder-members indicates regulations add between eight and twelve per cent to the cost of construction of the average Australian residential dwelling.

3.9 Against this background, Master Builders was looking to the Productivity Commission to make bold recommendations for rationalising and reducing the regulatory burden imposed upon business, especially small business, and for facilitating reform of the broader regulatory processes. In this regard, the primary recommendation in this context (Draft Recommendation 3.1) does not go far enough.

3.10 While Draft Recommendation 3.1 usefully reminds readers of the numerous reports and studies previously undertaken by the Productivity Commission which touch upon regulation review and reform, Master Builders would have anticipated more definitive recommendations of direct benefit to industry, and the building and construction industry in particular. These comments are given further impetus by the statements in the draft report which emphasise the restrictions imposed by government regulation. An example is at page 270 of the draft report where it is noted that:

Government assistance for business is less effective in the face of broader, persistent regulatory impediments.

3.11 As we argued in our original submission, there are a number of priority areas where further meaningful action is required, all of which will contribute to reducing the regulatory burden imposed on businesses in the building and construction industry. These include:

- substantially reducing State, Territory and local Government variations to the National Construction Code (NCC) (discussed at paragraphs 7.8 to 7.10 of our original submission);
- eliminating the differential classification and treatment of employees and sub-contractors within and between jurisdictions (discussed at paragraphs 7.11 to 7.15); and,
- improving third-party regulatory processes, especially where these regulations and their associated requirements are imported and/or referenced in federal Government et al regulatory instruments (discussed at paragraphs 7.16 to 7.22).

3.12 Master Builders recommends the Productivity Commission re-examine these proposals for their inclusion in the final report of the inquiry and, at the same

time, prioritise the leading practices from prior reports that the Commission believes should be implemented.

4 Two Specific Issues

4.1 Standard Form Contracts

The discussion at page 218 of the draft report has been overtaken by the introduction of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015.

4.2 Business Structures

Figure 4.4 contains very useful data. However, the construction of the graph makes it difficult to follow the various percentage figures. We would ask that these be made more discernible and any more research in relation to the rationale for the adoption of differing structures by sector be published. This is because this material is very useful in other contexts, for example as highlighted in the text at page 293 of the draft report.

5 Phoenix Activity

5.1 The draft report also addresses (at pages 379 – 384) the issue of what are sometimes called ‘phoenix companies’ – that is, firms which have previously failed, for whatever reason (but in the main illegitimate), re-engaging in business in a new corporate form. The Commission, in the draft report, seeks comment on the merit, or otherwise, of allowing courts of competent jurisdiction to ‘pierce the corporate veil’ to require parent or related companies to pay the debts of insolvent or related entities, and the complications which this approach may involve.

5.2 Master Builders supports measures which would operate to act against the fraudulent ‘phoenixing’ of companies. Our policy on phoenix company activity was communicated to the then Government at the time of the release of the Cole Royal Commission Report into the Building and Construction Industry.^[1]

5.3 The Royal Commissioner discussed at some length the issue of fraudulent phoenix company activity in the building and construction industry. That

^[1] Final report of the Royal Commission into the building and construction industry February 2003 <http://www.royalcombcgi.gov.au/hearings/reports.asp>

discussion is commended in the current context. Master Builders supports measures which would operate to act against the fraudulent phoenixing of companies. Fraudulent phoenix activity involves the evasion of tax and other liabilities such as employee entitlements through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities and is, unfortunately, an activity that has been detected in the building and construction industry.

- 5.4 As stated at paragraph 5.2 Master Builders' policy on phoenix company activity was communicated to Government at the time of the release of the Cole Royal Commission Report into the Building and Construction Industry. Chapter 12 of Volume 8 of his report is devoted to this subject. At the time, Master Builders supported a number of the recommendations that were made by the Royal Commissioner. Recommendation 106, in particular, related to the need for greater scrutiny of ASIC registers and better enforcement of the current law. The issue and recommendation is as follows:

There is evidence of persons associated with fraudulent phoenix company activity in the building and construction industry being appointed as directors of companies operating in the building and construction industry, although they are bankrupt and disqualified to act as directors, without being detected by the regulatory authorities.

The measures developed by the Australian Securities and Investments Commission to check all new company officers against the national Personal Insolvency Index and to check that current directors have not been declared bankrupt appear to address this issue and should be implemented without further delay.^[2]

- 5.5 The Productivity Commission's draft report reflects these sentiments (at Draft Recommendation 15.8), proposing section 117 of the *Corporations Act 2001* (Commonwealth) be amended to require, at the time of company registration, directors to provide a Director Identity Number (DIN), obtainable from the Australian Securities and Investment Commission (ASIC) based on a '100 point proof of identity'.
- 5.6 Master Builders agrees that the introduction of simple safeguards around identification of company directors would assist along the lines of the Cole Royal Commission recommendation just cited. Recommendation 15.8 could

^[2] Ibid Vol 8 Chapter 12 at 165

be expanded to encompass the Cole Recommendation as we do not believe all new company officers are subject to the relevant scrutiny. We note in particular, the introduction of a director identification number, underpinned by an identification process along the lines of the 100 point identity check required to establish a bank account, would enable the monitoring of director registration (including the detection of disqualified or fraudulent directors), the collection of data regarding director appointments over time (to establish patterns of director involvement in repeat business failures) and detection of possible fraudulent and phoenix activity by the Inter-agency Phoenix Forum and investors.

- 5.7 Whilst this measure alone will not solve the problem, it will assist with the current enforcement of the law, a matter that the Productivity Commission has indicated is the main problem with the issue of phoenix activity (p382 Draft Report). We commend draft recommendation 15.8 and its expansion as proposed above.

6 Conclusion

- 6.1 Master Builders would welcome an opportunity to further discuss this submission with the Commission.
- 6.2 We look forward to the release of the final report.
