

# **Submission by Master Plumbers and Mechanical Services Association of Australia (MPMSAA) to the Senate Employment, Workplace Relations and Education References Committee on the Building & Construction Industry Improvement Bill 2003**

## **1. INTRODUCTION**

- 1.1 The Master Plumbers and Mechanical Services Association of Australia (MPMSAA) is a national employer organisation established by and registered under the Workplace Relations Act, providing representation and extensive services for a broad base of members across the plumbing and mechanical services sectors. MPMSAA member companies operate in general contracting as well as specialised service sectors.
  
- 1.2 The interest of MPMSAA in relation to the Committee's inquiry is a result of its significant membership base (within the plumbing, gas fitting, mechanical services, metal roofing, fire services, and asbestos removal) in the key trades/services sector operating within the building and construction sector with its resultant extensive involvement in industry workplace relations, occupational health and safety (OH&S) and industry recruitment, education and training.
  
- 1.3 MPMSAA has made a detailed submission on its response to the Cole Royal Commission and on the exposure draft Bill. MPMSAA supports the recommendations of the Cole Royal Commission and, in general terms, believes that the Building and Construction Industry Improvement Bill 2003 (the Bill) represents an appropriate response to those parts of the Royal Commission's recommendations relating to workplace relations and occupational health and safety. There are of course other key recommendations made by the Royal Commission, which are not contained within the Bill, but which MPMSAA would also like to see implemented (eg. security of payment).

## **2. THE NEED FOR INDUSTRY SPECIFIC LEGISLATION**

- 2.1 One of the Committee's terms of reference requires it to "...inquire into and report on whether the building and construction industry is so unique that it requires industry-specific legislation, processes and procedures".
- 2.2 It is the commercial, structural and physical characteristics of the building and construction industry that distinguishes it from other industries. At a commercial level construction projects represent a substantial risk for financiers, clients, head-contractors and sub-contractors. Contracts are however structured so as to pass on such risks from client to head-contractor and then on to sub-contractor, with the result that there is a disproportionate risk being borne by sub-contractors, (especially those operating as small businesses).
- 2.3 Further, the highly complex and specialised nature of construction activity has resulted in a high level of sub-contracting and this in turn has resulted in:
- the industry workforce being employed by sub-contractors;
  - most such sub-contractors operating as small businesses with a relatively small capital base;
  - reliance on cash flow being critical for the commercial survival of such firms.
- 2.4 Above all however, what makes the building and construction industry so unique is that, notwithstanding the commercial risks borne by sub-contractors, and notwithstanding the fact that such firms recruit, train and employ the majority of the industry workforce, the prevailing industrial relations regime does not enable these firms to negotiate their own workplace terms and conditions. Such terms and conditions are imposed on the sub-contractors through pattern bargaining. Building unions know the commercial pressure that contractors face to complete within specified time periods. Therefore those unions are willing to take a range of actions to ensure that industrial terms and conditions have general application across the industry, regardless of the circumstances of an individual firm. Much of such union action creates undue and inappropriate pressure on small business

people described by the Cole Royal Commission as unlawful. But given that the current general industrial laws are cumbersome, slow and uncertain for small business, an environment has been created where it is commercially more expedient to accommodate union demands than to risk builders' sanctions of payment of liquidated damages for delays caused by industrial stoppages. The industry is acutely aware of the devastating commercial consequences that may befall a small employer who seeks to enforce its rights under current industrial laws. As a result, a climate of fear may be engendered in small business people

- 2.5 Accompanying this climate of fear is the realisation of building unions that employers will not initiate action to enforce breaches of law and/or industrial agreement and this in turn has emboldened what can only be described as industrial lawlessness. As a result there exists within the industry an imbalance of power between the industrial parties, and this can only be redressed by industry specific regulatory intervention. That is why MPMSAA believes that a new legislative framework is more likely to produce the requisite structural and cultural change within the industry than the mere strengthening or policing of existing laws.
- 2.6 The evidence collected by the Cole Royal Commission reflects our understanding about the extensive "law unto themselves" union representation within the building and construction industry. Further, the numerous complaints and prosecutions undertaken by the Interim Task Force since its creation in October 2002 also provides contemporaneous examples of such unlawful conduct. Similarly, the convictions of Salvatore Manna and John Setka, together with the recent reports of physical violence amongst union members should also be borne in mind.
- 2.7 The rule of law is fundamental. It is important that all stakeholders within the industry are aware that they have rights and that the law will protect those rights. That is why MPMSAA supports the proposed Bill and in particular the establishment of the Australian Building and Construction Commission (ABCC). The industry needs a powerful watchdog that has the ability to call witnesses, seek documents, take cases to court, enforce judgements and enter building sites to investigate complaints of industry misconduct.

2.8 Finally, there are compelling economic reasons for establishing such an industry specific regulatory environment. The Econtech Study (commissioned by the Royal Commission) found substantial higher levels of efficiency in the housing industry relative to the commercial/industrial sector. Econtech identified that if the commercial sector were to be reformed so as to have the same productivity standard of the housing industry, GDP could be increased by 1.1%, CPI could be reduced by 1%, and the general community would gain \$2.3 billion in additional economic benefits.

### **3. SCOPE OF THE BILL**

3.1 The Bill does not define the industry but rather the meaning to be given to “building work”. It expressly seeks to exclude the housing sector from the purview of its proposed regulatory regime.

3.2 MPMSAA believes that an exclusion of the housing industry is appropriate. It is within the commercial/industrial sector of the building industry that inappropriate industrial conduct occurs.

3.3 This is primarily because workplace arrangements within the commercial sector are more of an employer/employee type compared to the greater use of independent contracting that occurs in the housing sector. As a result union activity is stronger in the commercial/industrial sector rather than housing, and much of the industrial conduct and behaviour that was considered by the Cole Royal Commission related to this sector.

### **4. PATTERN BARGAINING**

4.1 Further to the comments made above (para. 2.3), the most harmful impact of pattern bargaining is that a small contractor is unable to tender for work on a major project unless it signs up to a pattern agreement in relation to work that it will carry out on all sites, whether on major projects or otherwise. Thus, the terms of a pattern agreement follow the small contractor around for the life of the pattern

agreement (usually three years). This fact, coupled with the inability of a small contractor to have any input in the negotiations of the terms of such an agreement to suit the circumstances of its particular business, makes pattern bargaining immoral and unsupportable. It is also adverse to producing an efficient economic outcome.

- 4.2 MPMSAA therefore strongly supports the provisions in the Bill that will banish such agreements.

## **5. OH&S**

5.1 The unique and complex nature of the industry requires careful management systems to be carried out by a range of on-site parties. Risks of injury and accidents are greater compared to most other industries because of use and handling of machinery, equipment, materials and substances. Further, the high requirement of manual tasks together with working on heights and in confined spaces increases on-site risks, especially injury from falls. This explains why the industry has such a poor OH&S record relative to other industries (39% of all accidents yet only 7% share of employment – NOHSC data). A more nationally consistent approach is required.

5.2 The industry's characteristics as well as its OH&S record provides further reason for supporting that part of the Bill that involves the creation of the Federal Safety Commissioner (FSC). MPMSAA supports the role of the FSC for all these reasons and also because it will be an independent body that will identify genuine OH&S disputes and not allow OH&S to be used as a pretext for industrial disputes. The FSC should therefore play a pivotal role in promoting education and training to prevent accidents as well as enforcing any breaches, thereby improving the industry's safety record. However great care will need to be taken in ensuring that the FSC's role and function does not create confusion with current state and territory based legislation impacting on the building and construction industry.

## **6. SECURITY OF PAYMENT**

- 6.1 Whereas MPMSAA notes that the Bill seeks to primarily incorporate the recommendations of the Cole Royal Commission relating to workplace relations and OH&S, we nevertheless believe that the recommendations relating to Security of Payment also constitute a critical component of any industry reform package. MPMSAA views the recommendations of the Royal Commission as a package, if a cultural change is to be made to industry conduct and practices. Given the disproportionate commercial risk being borne by sub-contractors (see comments above) MPMSAA wishes to underscore the Royal Commissioner's observations that security of payment problems are a direct consequence of the head-contractor entering into an unfavourable contract with a client and frequently involve underpayment of sub-contractor claims "where less than the amount is paid in the knowledge that the cost and time taken to recover the debt through the courts is too long and expensive to be worthwhile" (Volume 12, p. 231). This in turn has created cash flow problems throughout the contract chain and a major reason for the high level of insolvencies. Indeed, as Commissioner Cole observed in developing his conclusions "the costs of that problem (ie. security of payment) are significant enough to warrant government action...(and) ...the traditional remedies under corporations law are not sufficient" (Vol.12, p. 238).
- 6.2 It is for these reasons that MPMSAA urges the Committee to recommend that the Commonwealth enact the model legislation regarding security of payment as annexed by the Royal Commissioner to his Final Report.

## **7. CONCLUSION**

- 7.1 MPMSAA believes that the Bill will provide appropriate means for changing the industrial conduct and behaviour of the building and construction industry and will enhance opportunity for industry productivity and efficiency. It is appropriate that the Bill's foremost objective should be the restoration of the rule of law on-site and there is ample evidence that such an industry specific legislation is urgently needed.

- 7.2 It is common knowledge that the current workplace relations regime and existing institutions are unable to redress the unique industrial exploitation of OH&S problems confronting the industry. The Office of a National Safety Commissioner could redress this deficiency through effective leadership on OH&S issues.
- 7.3 However, whilst we understand the need to primarily focus upon workplace relations and occupational health and safety, MPMSAA also believes that the Commonwealth should look to providing a national pattern for model legislation drafted by the Royal Commissioner in relation to Security of Payment to achieve consistency between all State and Territories.
- 7.2 MPMSAA will be pleased to provide oral evidence to the Committee to further substantiate its viewpoints.