MASTER BUILDERS
AUSTRALIA

Submission

to the

Senate Employment, Workplace Relations and Small Business Committee

on the

Building and Construction Industry Improvement Bill 2005

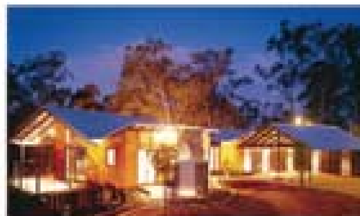
and the

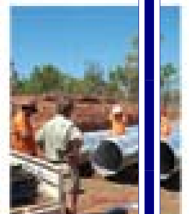
Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005

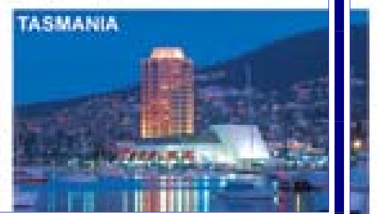
April 2005

Master Builders Australia Inc ABN 701 134 221 001

building australia







1. INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. Master Builders consists of nine State and Territory builders' associations with approximately 28,000 members. The building and construction industry contributes $81 billion of economic activity annually to the Australian economy.[1]

2. PURPOSE OF THIS SUBMISSION

2.1 Master Builders supports the introduction and passage of the *Building and Construction Industry Improvement Bill 2005* (the BCII Bill) and the related machinery Bill, the *Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005* (the machinery Bill).

2.2 The parts of the BCII Bill that were introduced on 9 March 2005 relate to:

- Chapter 6 – unlawful industrial action;
- Chapter 12 – increasing penalties, ie the enforcement provisions, especially in relation to penalties for so-called strike pay; and
- Chapter 13 – dealing with the jurisdiction of the Courts under the BCII Bill and the regulation-making process.

2.3 Obviously, the BCII Bill is a small part of the 2003 Bill and it is accepted that later in its legislative programme, the Government will introduce the balance of the BCII Bill and that it will emulate, to a large extent, the model established in the *Building and Construction Industry Improvement Bill 2003* (the 2003 BCII Bill) which lapsed in the face of the 2004 election consequent upon Parliament being prorogued. Why then was the BCII Bill introduced on 9 March 2005 with proposed sections 4-10 and Chapter 6 having effect from that date?

2.4 The answer to that question is contained in a speech by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews, MP[2]. The Minister first notes that the Construction, Forestry, Mining and Energy Union (CFMEU) is conducting national and State-based campaigns to force

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[1] ABS catalogue 8755 "*Construction Work Done"* November 2004

[2] Speech to Master Builders Association, Queensland, 2 March 2005 http://www.dewrsb.gov.au/ministersAndMediaCentre/mediacentre/detail.asp?keywords=&title=&creator=&type=&month=&year=&index=&show=3244

employers to renegotiate existing agreements well prior to their expiry dates. This campaign aims to negate the effects of the foreshadowed reform in general workplace relations law, but, specifically, in regard to the building and construction industry. The Minister reports on the Government's response to this union campaign:

> *"The Government will not sit idly by and permit long overdue reform of this industry to be impeded by unlawful union demands.*
>
> *To that end, I am announcing today that I will introduce into Parliament next week, legislation which mirrors the unlawful industrial actions of the BCIIB, including the substantially increased penalties contained in the BCIIB.*
>
> *The legislation is a specifically targeted measure to address the unlawful conduct of unions. The legislation is being given retrospective effect, so that it will apply to any unlawful industrial action taken by building unions as part of the current bargaining campaign.*
>
> *Unions and those taking unlawful industrial action will be liable to financial penalties of up to $110,000 for a body corporate or $22,000 in other cases. Also orders can be made to pay substantial (uncapped) compensation to persons affected by the unlawful action.*
>
> *Importantly, actions for breaches of unlawful industrial action provisions will be able to be taken by the Taskforce, and once established, the Australian Building and Construction Commission. It is important to note that the work of the Taskforce will continue until the ABCC commences operation later this year upon the passage of the BCII."*[3]

2.5 This submission, as stated, expresses support for this early work by the Government and outlines the rationale for this approach in the context of a current CFMEU campaign, using Queensland as an example. The submission does not provide general comment on the future of reforms as foreshadowed by the Government.

2.6 Master Builders' preferences in relation to the model to be adopted in the balance of the BCII Bill to be introduced later this year was the subject of a recent comprehensive submission to the Minister for Employment and Workplace Relations. That submission is attached at Attachment A and expresses Master Builders' view of the importance of the reforms contained in the 2003 BCII Bill and how the balance of the Bill to be introduced should be structured.

[3] Id at page 4

3.0 THE CFMEU "GO EARLY" CAMPAIGN

3.1 The CFMEU campaign, with its disruptive tactics, is particularly evident in Queensland. We explore that issue in this part of the submission using what has occurred there as a case study. The tactics used by the CFMEU in that State also reveal that industrial disputation in the building and construction industry is not always translated into the official statistics showing working days lost through industrial disputes. This is despite construction industry disputes constituting an extremely high percentage of the total number of working days lost recorded by the Australian Bureau of Statistics (see Table 1 below).

Table 1
Construction Industry Working Days Lost 2000-2004
(thousands)

Year to December	National Total	Construction Industry	Construction as a percentage of total
2000	469.1	108.8	23.2
2001	393.1	120.7	30.7
2002	259.1	101.6	39.2
2003	439.5	123.3	28.1
2004	379.8	120.1	31.6

Source: ABS Cat No 6321.0.55.001, December quarter 2004, released 17 March 2005

3.2 In Queensland, the current pattern EBA expires officially on 31 October 2005. The agreement with relevant Queensland unions anticipates the commencement of the bargaining process no later than three months before the agreement expires. However, the building unions wrote to the Queensland Master Builders Association (QMBA) in January this year seeking a new five year agreement based on a total wage increase of 23% over that period with associated increases in allowances. Similar approaches have been made in other States, but with different levels of claim. The unions in Queensland believed their claim to be a "modest" claim with a duration alleged to give stability and security to the industry, that is until 2010.

3.3 QMBA responded to the unions' claim and declared that there was no tangible gain for employers to commence negotiations outside the timing provisions and terms of the present agreement. Some serious shortcomings with the current agreement (both in its terms and the method of operation) were then identified that need urgent attention including:

- 36 hour week and compulsory shut down days;
- Complete disregard for any dispute settling procedures;
- Strike first mentality;
- Lack of sectionalisation for structural trade contractors; and
- Restrictive work practices.

3.4 The industry is particularly concerned with the complete breakdown in productivity and cash flow pressure caused by the 36 hour week model imposed in Queensland by the building unions. The shut down days and short weeks are unaffordable and unsustainable. The industry needs much greater flexibility in the implementation of the 36 hour week than is currently the case. Compulsory shut down days during the week need to be avoided wherever possible in order to restore productivity.

3.5 The 36 hour week model introduced by the NSW branch of the CFMEU and sought to be continued in the current NSW "go early" campaign has six Saturdays paid at double time to minimise the disruption to the industry while providing a significant benefit to the workers. However, the situation is not ideal, even in NSW.

3.6 Unions have the power to substantially restrict the days upon which work in the commercial building sector may occur. A current practice is for the union to require a "calendar" to be agreed 12 months in advance where RDOs and "lock-down" days are agreed where work is not able to be undertaken. This process has been applied in Victoria as a consequence of the CFMEU's campaign to roll-out a 36 hour week and a similar calendar is agreed for most Sydney projects where the 36 hour week campaign has been agreed to by most contractors. Added to the four-week Christmas shut down, public holidays and largely inactive weekend periods, the number of days upon which work is able to occur on commercial building sites is very low.

3.7 Following is an estimate of productive days used in New South Wales:

Weekdays	260
Less Annual Holidays	20
Less Personal Leave	12
Less Public Holidays	10
Less Inclement Weather	41
Less Rostered days off	13
Total	164

3.8 These figures assume that 32 hours are lost each 20 day cycle due to inclement weather. It also takes account of the method by which the 36 hour week is implemented in NSW. Instead of losing 26 weekdays to RDOs, 12 of the 26 are transferred to the six major long weekends (as mentioned in paragraph 3.5) and taken as 14.4 hours pay on a non-working Saturday. Accordingly, despite the low total of productive days, the situation is **worse** in Queensland and Victoria. For example, in Victoria there are fewer productive days because restrictive work practices such as applying time spent on de-watering after rain are taken to count as paid down time.

3.9 The Cole Royal Commission identified that the cost of these inactive periods is substantial for the following reasons:

- workers are effectively prevented or restricted from working at times of their choosing;
- fewer people are employed in the industry than should be the case;
- contractors are prevented from implementing more flexible practices which would make them more productive and give them a competitive edge;
- expensive equipment remains unused;
- projects take longer to complete than should be the case, to the cost of clients; and
- ultimately the economy[4].

3.10 The union maintains its pressure on employers by "rolling out" pattern certified agreements that facilitate the restriction of hours and which quash the notion that, for example, part time work may be undertaken. The NBCIA in turn contains no general part-time work provision, despite litigation taken by Master Builders to have part-time work provisions inserted[5].

3.11 There is no benefit in negotiating a new EBA with the building unions prior to the expiration of current arrangements. The unions want a new agreement now because they believe a new agreement will circumvent the proposed industrial relations reforms that will be introduced by the Commonwealth Government through the BCII Bill. Those reforms will significantly impact upon the industrial relations landscape of the industry and are designed to counteract the unlawful and intimidating behaviour of the building unions. Master Builders supports constructive and responsible unionism, but

[4] The Final Report of the Royal Commission into the Building and Construction Industry, Volume 8, Chapter 9 at page 64-65 http://www.royalcombci.gov.au/hearings/reports.asp
[5] Print PR92454 dated 26 March 2003 is one example

completely opposes union excesses and threatening behaviour as evidenced so clearly in the report provided by the Cole Royal Commission[6] and in the subsequent report by the then Interim Building Industry Taskforce[7].

3.12 In responding to QMBA's refusal to accede to their demands, the unions have made additional threats and claims upon the industry. This tactic is designed to frighten the industry into immediately signing the deal originally proposed as a new claim has recently been made against Queensland builders which makes the initial claim appear quite reasonable. The new claim includes:

- 30% wage claim over next three years
- Massive increases in fares allowance (up to $36 per day)
- BERT[8]/BEWT[9] increases to $90 per week
- Five weeks annual leave with three week shutdown at Christmas and two week shutdown in June School holidays
- Tool allowance increase from $27 per week to $40 per week
- New power tool allowance of $40 per week
- BUSSQ[10] increases to $131, $137 and $144 per week for each year
- Associated new allowances
- Career path increases that give an additional 15% wage increase to tradesmen who have less than five years' industry experience.

3.13 This list of claims is completely unsustainable and is being resisted by the industry. The Commonwealth Government's industrial relations reforms contained in the BCII Bill will provide greater opportunity for companies wishing to obtain more control and productivity on their jobs. New entrants will not have to sign union-based EBAs and existing contractors need to ensure that any new agreement provides greater flexibility and productivity in order that they are able to survive and compete in the future. Hence, the BCII's enforcement provisions are useful, particularly as the BCII Bill has a definition of industrial dispute at Clause 72 which is more extensive than the definition contained in the *Workplace Relations Act 1996 (Cth)* (WRA). Further, the definition of "building industrial action" in Clause 72(1) extends to disputes normally regulated within State or Territory jurisdictions. Whether or

[6] Supra Note 4.
[7] Cth of Australia 2003 *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce* Department of Employment and Workplace Relations, March 2004.
[8] Building Employees Redundancy Trust ACN 010917281
[9] Building Employees Welfare Trust ACN 108313622
[10] Building Unions Superannuation Scheme(Qld)

not the actions of the Queensland unions will be caught retrospectively by the provisions of the BCII Bill is at issue and is discussed later.

3.14 The unions in Queensland have also sent a letter to builders who have Memoranda of Understanding (MOU), which underpin pattern bargaining arrangements in Queensland, advising that from 1 April 2005, the unions will no longer observe the MOU, an agreement that was intended to secure industrial peace.

3.15 In what Master Builders perceives as a deliberate attempt to destabilise the working hours on building sites, the unions are also encouraging their members to:

- take RDOs in a nine-day fortnight pattern from 1 April 2005; and
- apply for annual leave for the period 21 to 24 March, 15 to 17 June, 16 to 19 August and 1 November 2005.

3.16 The union has instituted action to reinstate what is known in the industry as "sacred Saturdays". These are the Saturdays prior to, generally, a scheduled Monday RDO and, hence, the Saturday cannot be worked whatever the circumstance. The existing pattern certified agreement contains the following relevant provisions:

> *2.8.9 On implementation of the 36 hour week unilateral job decision which restricts Saturday work on those Saturdays which fall due on the weekend prior to RDOs will not be taken on the basis that the QMBA/Unions will develop procedures to ensure that pressure is not placed on employees to work overtime on any Saturday.*
>
> *2.8.10 The Building Unions will not support site votes in relation to unilateral site decisions banning working of overtime on Saturdays before RDOs and support all sites remaining open unless notified by the builder.*

3.17 Clearly, taking industrial action in the face of these provisions means that the union is in breach of the current agreement, a matter articulated by QMBA in QIRC proceedings heard before Commissioner Brown on 7 April 2005.

3.18 The vast majority of EBAs contain an agreed RDO calendar for 2005 (as discussed at paragraph 3.6), common across the industry. This RDO calendar is a term of employment and must, therefore, be observed by

employers and employees alike. QMBA has advised the unions that it considers the union claim to work a nine-day fortnight as being inconsistent with the generally imposed EBA. Unauthorised and repeated absence of employees on working days deemed by the unions as the "new 9-day fortnight" would, potentially, cause massive disruption to the industry in Queensland. As of 7 April 2005, the CFMEU has indicated that it has postponed member action on this issue.

3.19 The unions have also advised their members to make application to their employers for annual leave and have distributed a pro forma leave application with recommended leave periods (see dates in paragraph 3.15) The unions arranged numerous stop work meetings on building sites to enable the promotion and distribution of the pro-forma applications. Some sites were revisited by union officers to reinforce the campaign. The unions recommended dates for taking annual leave are aligned with the 9 day fortnight campaign. The implementation of a 9 day fortnight would reduce the 'blocks' of RDOs that were otherwise due under the EBA calendar. The unions proposed annual leave dates in June and August offset the loss of RDOs on 15 June and August, which would no longer be available in a 9 day fortnight pattern.

3.20 Employers have been advised to reject these applications and to note the following conditions for taking annual leave:

a. An employee has no entitlement to take annual leave until the employee has completed 12 months continuous service since commencement or since the last entitlement to annual leave (anniversary).

b. Annual leave may be taken prior to an entitlement only with the consent of the employer.

c. Annual leave is available to employees no later than three months after an entitlement arises – in other words, 15 months after the employee's anniversary date. The time and duration of annual leave shall be determined after consideration of the employer's business requirements.

d. Employees must give employers at least 14 days' notice to take annual leave.

3.21 Commissioner Brown of the Queensland Industrial Relations Commission (QIRC) on a number of dates[11] heard an application from QMBA in relation to the "Annual Leave Campaign" orchestrated by the Queensland building unions. The QIRC supported the submissions of QMBA and stated its position in relation to the claim:

- Employees are entitled to make a claim for annual leave.
- Most employees will not have accrued any entitlement to annual leave because they have not completed 12 months continuous service since commencement or since the last entitlement to annual leave.
- While employees can request annual leave, employers do not have to grant annual leave if it interferes with the operational requirements of the company.
- Employers should consider each request and should not unreasonably withhold consent.
- Group applications for annual leave are particularly regarded as not "genuine" when they are so obviously part of a broader industrial campaign.
- Employers should notify their staff of their entitlements and reject any group applications for annual leave that have been made at the instruction of the union.
- Genuine cases should be considered on their merits and responded too accordingly.

3.22 A number of builder members have, in addition, also recently received a written request from the CFMEU to provide copies of time and wages records for investigation. The union has requested records for the past six years, the statutory time limit for recovery of wages. Their campaign is also an attempt to disrupt builders' businesses by applying tactics to divert resources that would otherwise be productively applied.

3.23 Despite proceedings referred to earlier, the QIRC has not rejected the "go early" campaign. On 9 March 2005, Commissioner Brown convened a mediation conference to canvas the views of industry parties on the matter of the renewal of the industry EBA. At the completion of that conference, the Commissioner recommended that Master Builders consider the formation of a bargaining committee to represent the industry in negotiations within the QIRC.

[11] QIRC Dispute Conferences re Annual Leave – 8 March 2005 (D109/05), 15 March 2005 (D118/05), 16 March 2005 (D120/05)

3.24 In order to determine a response to the Commissioner's recommendation, QMBA met with its policy bodies in March and April 2005. QMBA was instructed not to support the Commissioner's proposal for a negotiating committee.

3.25 At a conference on 24 March 2005 (attended by QMBA, the CFMEU, the BLF, the CEPU and representatives from four builders), the QIRC received submissions on this issue. Master Builders presented a submission which stated:

- The reference group did not support the formation of a negotiating committee to engage with the unions, under the auspices of the QIRC or otherwise.
- The QIRC could still provide a valuable service through convening a series of industry conferences with the registered industrial organisations.
- A series of conferences should be planned, each conference to address each of the core EBA issues. These include arrangement of ordinary hours, classification and post-trade competency, productivity and efficiency initiatives, dispute resolution, code compliance, sectionalisation and application, industry funds, and wage increases.
- Participation in the conferences is to be without prejudice, without industrial action and to be supported by other parties.

3.26 The CFMEU/BLF said they were disappointed with Master Builders' response and believed it was a time-wasting strategy. However, they also said they would engage in dialogue and supported the general thrust of a QIRC role in industry conferences.

3.27 It was revealed that neither the CFMEU/BLF nor the QMBA had issued a draft EBA that could be said to represent their interests. The unions submitted they had only prepared the log of claims, circulated to employers on 10 February 2005. The CEPU and ETU reported that they were at a further stage in their discussions with employers in their respective industries. The Commissioner stated he did not see any purpose in these two unions participating further in the proceedings and allowed them to withdraw.

3.28 Commissioner Brown's response to QMBA submissions can be best described as neutral. He did not endorse a series of QIRC conferences as the sole forum and said that other parties were entitled to engage in discussions separate from any proceedings within the QIRC.

3.29 Contrary to QMBA's request, the Commissioner was not attracted to "closed door" conferences and gave his opinion that industry conferences set up in the manner proposed by QMBA could be attended by any part which had a stake in the outcome. However, rather than set down a time for an initial conference, he directed parties to report back to him on 22 April 2005. The Commissioner said that QMBA and the unions, separately, should attempt to prepare draft documents and exchange information prior to the report back.

3.30 Given this attitude, it is difficult to determine whether the Building Industry Taskforce or the to be formed Australian Building and Construction Commission will be able to take action against the unions. The tactics used do not emulate "traditional" workplace relations tactics, but do constitute a drag on the industry's productivity and deliberate manipulation of the law to further a sectional interest. The case study, whilst not complete (principally because of timing issues), also illustrates the way in which unions operate in the building and construction industry and also their intention to register agreements before full passage of the BCII Bill – a matter that reinforces the appropriateness of the early introduction of the components of the Bill set out at paragraph 2.2 of this submission. We do believe, however, that at least in respect of the annual leave campaign, the BCII Bill's provisions may have effect. That proposition is analysed next.

4.0 WILL THE BCII BILL APPLY TO THE QUEENSLAND UNION'S CAMPAIGN?

4.1 As stated, the BCII Bill replicates the enforcement of penalty provisions and a number of the provisions making some forms of industrial action unlawful as reflected in the 2003 BCII Bill. From the foregoing case study, it can be seen that clause 72 is at issue. This defines what is "constitutionally connected industrial action". Such industrial action is defined very broadly. The broad basis of the provision appears to be expressed so as to bring the largest possible number of employers and workers within the scope of the unlawful industrial action provisions contained in chapter 6 of the BCII Bill, founded on the corporations power. The definition of building industrial action in sub-clause 72(1), establishes the scope of unlawful building industrial action under Part 2 of Chapter 6 dealing with unlawful industrial action.

4.2 As indicated earlier in this submission, such action extends to State and Territory jurisdictions by reason of the fact that clause 4 of the Bill determines that an industrial instrument is also an industrial instrument of a State or Territory and that industrial action taken in respect of such an industrial instrument is covered in clause 72. This is reinforced by the notion of industrial dispute which, as also indicated earlier in this submission, is broader than the WRA definition of industrial dispute. Clause 73 defines building industrial action as unlawful. It is unlawful if it is industrially motivated and constitutionally connected and is not excluded action. Each of these terms needs to be examined.

4.3 To be "industrially motivated", clause 72 stipulates that it must include one or more of four elements. We believe that at least one element is fulfilled in relation to the Queensland case study regarding annual leave:

- Supporting or advancing claims **against** an employer in respect of the employment of employees of that employer;
- Supporting or advancing claims **by** an employer in respect of the employment of employees of that employer;
- Advancing industrial objectives of an industrial association; or
- disrupting the performance of work – clearly, here, the motivation by the CFMEU was to disrupt the performance of work in the building and construction industry at the least when it organised across-the-board annual leave applications.

4.4 Constitutionally connected action is also set out in clause 72 and, as articulated earlier, is extremely broadly defined. We believe that the action taken by the CFMEU is constitutionally connected.

4.5 We do not believe that the action taken by the union is excluded action as it is not protected action under the WRA as modified by the provisions of the BCII Bill or is not industrial action in relation to an individual AWA as set out in the second element of this defined item. Accordingly, it appears that there has been unlawful industrial action, because it is constitutionally connected, industrially motivated and is not excluded action as defined under clause 72.

4.6 Clause 74, therefore, would operate. Clause 74 prohibits a person from engaging in unlawful industrial action. This is a civil penalty provision where the maximum civil penalty that may be imposed is 1,000 penalty units for a body corporate and 200 penalty units in other cases. Clause 227 says that an eligible person may apply to an appropriate Court in respect of a contravention of a civil penalty provision, that is clause 74 in this instance, and an eligible person (see proposed section 227(6)) will include an inspector within the meaning of the WRA. It is unlikely that a person affected by the contravention, ie an industry member or a member of QMBA will take an action, but that is a possibility.

5.0 CONCLUSION

5.1 In Queensland, industrial action has been overt. In other States threats have been made[12]. The building unions in other States have not yet used similar tactics. Time will tell as to whether or not building unions in other States use unacceptable industrial tactics. From Attachment B, it can be seen that in other States other means are being used to "persuade" employers to "go early".

5.2 From the case study in this submission, it appears that, at least in respect of the annual leave campaign, the CFMEU in Queensland may be prosecuted under the BCII Bill.

5.3 Our principal contention is that the BCII Bill's provisions have prevented more "traditional" forms of industrial action, especially industry-wide strikes, from occurring. Hence, the Bill is to be supported.

[12] Article in *The Age* on 13 October 2004, P. Robinson *"Unions ready for deregulation war": "The Construction Forestry Mining and Energy Union said it would ignore moves to outlaw pattern bargaining and it would not obey laws forcing unionists to hold secret ballots before going on strike. Victorian secretary Martin Kingham said employers could negotiate industry-wide agreements next year in a "peaceful climate" or, by following the Government, in a climate of crippling disputes. He said: "If the employers go down that track they will be inviting a shitfight to end all shitfights."*