MASTER BUILDERS
AUSTRALIA

Submission

to the

Senate Employment, Workplace Relations and Education Committee

on the

Workplace Relations Amendment (WorkChoices) Bill 2005

November 2005

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building australia

1.0 Introduction

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

1.2 Building and construction contributes around 6.5 per cent of annual GDP and 8.5 per cent of Australia's total workforce. The industry provides a major underpinning of general economic activity and employment as a result of important and widespread linkages with the rest of the economy.

2.0 Purpose of Submission

2.1 Master Builders supports the need for fundamental workplace relations reform. Master Builders' policy position is support for the establishment of a unitary system of workplace relations that is centred upon the achievement of genuine bargaining by employers and employees, underpinned by an appropriate safety net for disadvantaged workers.

2.2 Industrial relations plays a critical role in the productivity of the commercial building sector of the building and construction industry. As was illustrated throughout the Final Report of the Royal Commission into the Building and Construction Industry[1] (the Cole Report), the general industrial relations framework for the building and construction industry is not well suited to the contemporary demands and needs of the industry, the broader economy, and the community. The current framework works against achieving economic efficiency and higher productivity, it works against optimal labour market participation and against a training system which gives young Australians the opportunity to realise a rewarding career.

2.3 Master Builders' workplace relations policy calls for the adoption of workplace agreements that place decisions in the hands of employers and employees so that they can make arrangements that engender employment and greater sectoral and national productivity. They should be able to make those arrangements free from coercion or 'stand and deliver' bargaining tactics with

[1] http://www.royalcombci.gov.au/

the proper application of the rule of law. It is for this reason that Master Builders has consistently supported the legislation that emanated from the Cole Report that is the *Building and Construction Industry Improvement Bill* 2003 (BCII 2003), which did not proceed, and the *Building and Construction Industry Improvement Bill* 2005 (BCII 2005) that was passed by the Parliament on 7 September 2005 and which received Royal Assent on 12 September 2005.

2.4 A number of subject areas were omitted from BCII 2003 when BCII 2005 was enacted. These matters are subsumed into the general workplace relations reforms and critically affect building and construction industry reform and are matters that Master Builders supports. In order of priority these reforms are:

- regulation of rights of entry including for occupational health and safety purposes; (section 3 below)
- the impact of additional record keeping; (section 4)
- recognition of forms of agreement that reflect the project based nature of the building and construction industry; (section 5)
- the ability of third parties that are economically affected by protected industrial action to apply for a termination of the bargaining period; (section 6)
- the application of proper constraints on protected industrial action; (section 6)
- anti-pattern bargaining provisions; (section 7)
- the proper streamlining of the *National Building and Construction Industry Award* 2000 (NBCIA) so that its provisions are fair and transparent; (section 8) and
- the establishment of proper safety net wage rates for school based apprentices and trainees. (section 9)

2.5 This submission expresses broad support for the thrust of the *Workplace Relations Amendment (WorkChoices) Bill 2005* (the Bill). However, detailed comment is offered only in relation to the provisions that relate to the reforms set out in paragraph 2.4 of this submission.

3.0 The Broad Reforms – A New Unitary System – Interrelationship with Occupational Health and Safety

3.1 This Bill's provisions will introduce fundamental change to the industrial relations landscape. We understand that the Bill effects reform through the use of the corporations power of the Australian Constitution. This translates to a revised definition of 'employer' and 'employee' in proposed sections 4AA and 4AB of the Bill as a means to deliver the requisite constitutional underpinnings, as explained at pages 38 et seq of the Explanatory Memorandum (EM) for the Bill. Master Builders estimates that at least 30% of its membership is unincorporated. Accordingly, we support the transitional provisions that will enable those not incorporated to restructure their business to achieve the required status, albeit that it is the transitional provisions that add a greater level of complexity to the Bill. Master Builders believes that the process of small businesses embracing the required status should be accelerated by the application of appropriate incentives. We would urge Government to make the cost of incorporation deductible in the year in which the expenditure is incurred. This incentive will also assist those businesses which wish to operate as independent contractors by enabling them to have in place a business structure that better suits the establishment of an independent business.

3.2 At the same time, we understand that the use of the corporations power will exclude State and Territory legislation dealing with most aspects of industrial relations. The Bill will exclude State and Territory industrial relations legislation save for those items set out in proposed section 7C(3). The legislative note at the end of this provision deals with an issue that Master Builders believes to be critical to reform in the building and construction industry. The legislative note states that even though OH&S legislation will remain a non-excluded matter, the prerequisites set under Part IX of the Bill before a trade union representative may enter premises under OH&S legislation apply. The importance of this legislative note is made clear by the explanation at paragraph 83 of the EM. It is clear from the legislative note that the provisions in Part IX operate in effect to exclude certain rights relating to entry of premises that would otherwise be able to be exercised by union representatives. Master Builders strongly advocates that all union officials, before being permitted to enter premises for whatever purpose, must be "fit

and proper persons" and accordingly should hold a federal permit where that criterion applies. In order to ensure that this very important consideration is not subject to legal challenge, we recommend that proposed section 7(3)(c) should be amended so that the exclusion is explicitly made subject to the operation of Part IX.

3.3 The recent decision in *Copeland v CFMEU* (Australian Industrial Relations Commission PR960005 dated 16 August 2005) is illustrative. When the CFMEU official the subject of proceedings in respect of the application to revoke his permit was found to have been acting on the basis of genuine safety grounds, there was no opportunity to progress the matter of the allegation that the official was obstructing the employer. The particulars of Part IX are welcomed as an appropriate constraint of the activities of trade union officials who should be required to adhere to appropriate standards of conduct when exercising their powers to investigate OH&S matters. Accordingly, we strongly support proposed section 228 which requires a permit holder exercising OH&S rights of entry to not obstruct or hinder a person or to not act improperly.

3.4 We note that the Cole Report showed a number of instances of abuse of occupational health and safety for right of entry purposes by union officials. The Building Industry Taskforce has in both its published reports[2] shown that this behaviour continues. Master Builders has clear policies on this issue, as recently set out in the ten year OH&S Policy Blueprint[3]; Recommendation 12 of the Blueprint is as follows:

> *"There be an urgent Commonwealth Government review of rights of entry under State and Territory based OH&S laws and that consideration be given to extending a revamped right of entry permit system to cover right of entry under OH&S laws."*

Part IX in effect represents the successful implementation of this Master Builders' recommendation and, accordingly, we reiterate our strong support for these changes to the law.

[2] Commonwealth of Australia, Final Report of the Royal Commission into the Building and Construction Industry February 2003 www.royalcombci.gov.au
Commonwealth of Australia, Interim Building Taskforce, *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*, March 2004 and Commonwealth of Australia, Building Industry Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce*, September 2005

[3] *Master Builders Occupational Health and Safety Policy Blueprint 2005 – 2015* – September 2005.

4.0 Minimum Wages and Conditions

4.1 The to-be-formed Australian Fair Pay Commission will set and adjust minimum wages and Australian Pay and Classification Scale rates of pay on a periodic basis. This function will be exercised for apprentices although their contracts of training will continue to be administered by the States and Territories.

4.2 The minimum wage and a number of legislated minimum conditions together comprise the Australian Fair Pay and Conditions Standard (AFPCS) for all employees as newly defined – referred to in paragraph 3.1 of this submission. This will, for the first time, mean that all contracts of employment for those employed by constitutional corporations will reflect the safety net terms and conditions expressed in the AFPCS. Essentially, transitional provisions have made complex the ongoing role of awards and the manner in which they form an Australian Pay and Classification Scale (APCS) for individual employees. It is imperative that there be plain English material made available by employer associations for training of employers. This training should be akin to the training that occurred when the Goods and Services Tax (GST) and the New Tax System legislation were introduced. The key to the ongoing role of how awards in particular become an APCS is set out in section 90ZD and the related provisions in subdivision G of division 2 of part VA of the Act. A plain English discussion of these essential provisions should be published by Government as soon as possible. This should form part of a Government funded training program to be rolled out by employer associations to their members.

4.3 Proposed section 91C(1) establishes a guarantee relating to the maximum ordinary hours of work. An employee will not be required by the employer to work more than 38 hours a week, over an averaging period, plus “reasonable additional hours”. Subsection 91C(5) contains a non-exhaustive list of factors that must be taken into account in determining what are reasonable additional hours for the purposes of proposed section 91C(1)(b). These considerations apply to each and every employee employed by a constitutional corporation, including the managing director. There should be an exclusion to the application of these provisions. There should be a monetary cap above which the provision should not apply. The record keeping that is involved with the

idea of having this guarantee applied to managerial employees is a matter that would add to the administrative burden of building and construction companies when the opposite is required. In respect of each managerial employee, in addition, a record of why they are working longer than the required 38 will need to be kept. This seems excessive and out of step with the requirements placed upon managers, particularly senior managers, to work beyond the usual 38 hours, a matter that is frequently agreed as part of the terms of the appointment.

4.4 This raises the issue of record keeping generally which is covered by the *Workplace Relations Regulations* at present. In particular Part 9A of the current regulations deals with the records that must be kept by employers. We look forward to the early exposure of new regulations that will clarify the issue of records that must be kept to satisfy section 91C and similar provisions. The regulations should be exposed in draft form to ensure that employers are able to comment on the type of regulatory burden proposed.

5.0 Workplace Agreements

5.1 Master Builders supports a range of agreements that may be applied in order to engender choice, individual or collective. Section 64 BCII 2005 has certain effects relating to project agreements. It makes clear that project agreements in any form are unenforceable unless certified under the *Workplace Relations Act* (WRA). Project agreements have traditionally provided standard employment conditions for employees employed in a number of different businesses on a particular building site or sites and provide a means for securing consistent outcomes for all participants in the project who are performing similar work. The Government believes that project agreements are a means for securing "pattern" outcomes. In the face of this position and in light of the fact that certainty of conditions and hence costs is vital for builders and their clients, Master Builders believes that there will be a high demand from builders for the two new types of Greenfields agreements established by the Bill. This is because from "ground zero" on a new project the certainty of labour costs must be assured. In particular we note that a new project will be a Greenfields site and that proposed section 95B secures this outcome – see paragraph 802 of the EM.

5.2 We understand that the Government is giving consideration to changing a vital element of the Greenfields's agreements that are contemplated by the Bill in line with Master Builders policy. It is noted that proposed section 101(1)(a) provides that the nominal expiry date of a Greenfields agreement is a date specified in the agreement that is no later than the first anniversary of the lodgment date of the agreement. If an agreement does not contain a nominal expiry date or sets out a nominal expiry date that is later than the first anniversary of the agreement being lodged, the nominal expiry date is to be deemed to be the first anniversary of the lodgment date of the agreement. In other words, twelve months after the making of the new types of Greenfields agreements, they reach their nominal expiry date and protected industrial action may be taken. We understand that the Government is considering a change to this provision so that the nominal expiry date of Greenfields agreements will be a maximum of 5 years. This will suit the building and construction industry where the certainty of costs, especially labour costs which make up approximately 50% of the cost of constructing a building, is paramount over the life of a project.

5.3 Master Builders supports simplification of procedures for the formalisation of agreements. It is important that transaction costs are reduced in order to promote enterprise bargaining. We note that proposed section 98(4)(d) will require information to be included in the requisite information statement to be supplied to the employees in the time period set out in proposed section 98(1). The information to be contained in the statement is to be published in the Gazette by the Employment Advocate. Master Builders recommends that the content of information statements be more accessible and that a discretion of the kind proposed is not vested in the Employment Advocate.

5.4 Master Builders supports a limitation on the calling up of superseded awards in workplace agreements. This issue has real currency in the building and construction industry, as many certified agreements incorporate by reference the NBCIA as at 31 December 1996. It is unfair to employers and employees that the document that is not readily available is incorporated in a current agreement. We note that proposed section 101C provides the basis upon which a workplace agreement may call up the terms of an award. Proposed section 101C(4) will prevent the practice just noted. If the requirements of proposed section 101C(3) are met then proposed section 101C(4) restricts

incorporation within the workplace agreement to the Award as in operation "just before" the agreement is made or as the Award is varied from time to time.

5.5 Proposed section 101D states that regulations are to specify the prohibited content in relation to workplace agreements. This compares with the clear list set out at page 23 of the brochure[4] that preceded the introduction of the Bill (the Brochure). Master Builders strongly recommends the early exposure of the Regulations as this will assist with certainty at a time when most builders are concerned about the mass of material that they must understand in order to comply with the law. This is particularly the case given that an employer will contravene a civil penalty provision if they lodge a workplace agreement containing prohibited content – proposed section 101E.

5.6 Master Builders calls for an urgent clarification of those matters which are prohibited. This is because there is a measure of consonance between the list set out at page 23 of the Brochure and a number of matters proscribed by the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* as revised in September 2005 (the Guidelines): see particularly section 8.9 relating to workplace reform.

5.7 The building and construction industry is at present moving apace to have workplace agreements comply with the Guidelines. To be required to make further changes on passage of the Bill would be a blow to productivity. We note that in respect of pre-reform industrial instruments a number of outcomes related to prohibited content are manifested by the Bill. Clause 15 of schedule 15 on page 604 of the Bill makes it clear that a term of a preserved state agreement is void "to the extent that it contains prohibited content of a prescribed kind." Master Builders has also examined Part 2 of schedule 14 on page 584 and following of the Bill. In our view, the prohibited content issue is only addressed by clause 8 in regard to pre-reform certified agreements. The only prohibited content expressed in the Bill, in our understanding, is the "anti AWA terms" defined in clause 8(2) on page 588 of the Bill.

[4] Commonwealth of Australia, *WorkChoices a New Workplace Relations System* 2005

5.8 Prohibited content is not a concept that appears to apply in respect of the ongoing role of Awards save in respect of a notional agreement preserving a State Award: see clause 38 of schedule 15 on page 619 of the Bill. In relation to a notional agreement preserving a State Award prohibited content provisions are void. However, so far as Awards dealt with under the major substantive provisions are concerned, we assume that prohibited matters will all be non-allowable. If this assumption is incorrect then it would seem appropriate to have a specific provision dealing with the issue.

6.0 Industrial Action

6.1 The Cole Report was clear in its assessment of the commercial vulnerability of employers in the industry. The Royal Commissioner identified the source of union coercive power. He found that head contractors and subcontractors are subject to severe cost penalties for delayed completion of construction projects. Industrial action causes immediate loss from standing charges and overheads, and potential loss from liquidated damages. These losses put pressure upon head contractors and subcontractors to give in to industrial demands. If the short term cost of the demands is less than the actual and projected loss on a particular project, the usual result is that the demand, whether or not it is lawful, is met. That is because of the short term project profitability focus of the industry which is highly competitive. Getting the work and performing the contract without triggering liquidated damages clauses is a matter of survival. It is this focus upon short term profitability that means an independent body that is empowered to take action to enforce the law is needed. Because the unions, operating in this environment, have little prospects of the employers taking appropriate sanctions against them the role of the independent body is vital. BCII 2005 establishes the required independent body to enforce the rule of law, the Australian Building and Construction Commission.

6.2 Builders remain vulnerable in the present environment, however, because of a number of competing pressures. Subject to sections 40 and 41 BCII 2005 protected industrial action under the WRA is not unlawful under BCII 2005. This means that unions have the current capacity to take protected industrial action against, for example, subcontractors (who are critical to the proper

staging of building work) in order to disrupt an entire project with the possibility, as indicated in paragraph 6.1, of the application of liquidated damages against the principal contractor and the targeted subcontractor. Accordingly, Master Builders strongly supports the provisions of proposed section 107J. This provision would require the Australian Industrial Relations Commission (AIRC) to suspend a bargaining period where protected industrial action is threatening to cause significant harm to a third party. We note, however, that the maximum period of suspension under the terms of proposed section 107J is three months (107J(3)). If the economic damage to a third party is serious (e.g. could lead to insolvency) then the AIRC must be compelled to terminate the bargaining period. A provision to that effect should be added to the Bill.

6.3 Master Builders urges the early passage of the third party damage provisions as proposed to be modified as set out in paragraph 6.2 of this submission. If this is not possible then Government should consider enacting the *Better Bargaining Bill* during the current Parliamentary session. The *Better Bargaining Bill* should be on the priority list of the business of the Senate. This will forestall some of the problems in the building an construction industry recently highlighted by the media[5].

7.0 Pattern Bargaining

7.1 Master Builders supports the concept of genuine bargaining. It is a notion that should override any use of what are essentially union stand and deliver agreements.

7.2 We note that the meaning of "pattern bargaining" from the *Better Bargaining Bill* has been inserted into proposed section 106B of the Bill. We note that proposed section 108D removes protected status from industrial action taken to support pattern bargaining. These provisions are vital for the building and construction industry's reforms.

[5] M Skulley – *Strike Action Looms as Builders Agreements Expire* Australian Financial Review 31/10/05 p3

8.0 Appropriate Award provisions

8.1 Clause 16 of the NBCIA contains a definition of redundancy that is misleading as it includes employee resignation. It is not a true definition of redundancy. Proposed section 116(4) requires that the community recognised definition of redundancy applies in the building and construction industry Award. It would be helpful if the manner in which the newly amended Award term was to be structured could be known in advance of the commencement of the new system. Accordingly the work of the Government's Award Taskforce should be made public and comments permitted before the AFPC considers the proposed changes formally.

8.2 The NBCIA inappropriately restricts the use of part time work and places restrictions on the period of engagement of causal employees. There is no rationale for restriction on flexibility represented by these provisions and Master Builders is supportive of Awards reflecting the needs of building employers. The Bill removes such restrictions and proposed section 116B makes it clear that such restrictions will no longer be permitted in Awards. These are appropriate provisions that should be enacted urgently.

9.0 Apprentices and Trainees

We note that the Bill vests the responsibility for apprentice and trainee wage setting in the Australian Fair Pay Commission. We support this reform especially in relation to apprentices and school based trainees as Master Builders has been involved in ongoing litigation that had its origins in proceedings that began in 2000 in order to secure appropriate safety net wages for these categories of worker.

10.0 Conclusion

10.1 Master Builders believes that the reforms established by the Bill complement BCII 2005 in changing the culture of the building and construction industry and the reforms are therefore supported.

10.2 We urge the Committee to recommend to Government that the anti pattern bargaining provisions of the *Better Bargaining Bill* or their equivalent in the Bill be introduced as a matter of urgency given the impact of the protected action that building unions are permitted to take post 31 October 2005 when the nominal expiry date of the many current pattern certified agreements was reached. This protected action has the capacity to cause severe economic damage to the industry and the restrictions on protected industrial action that the Bill rightly delivers are needed by the industry now.

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