Introduction

Master Builders Australia welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvency in Australia.

About Master Builders Australia

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 130 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, namely residential, commercial and engineering/civil construction.

Australia's building and construction industry

Building and construction is one of the largest sectors of the Australian economy. Latest ABS figures indicate that the total value of building and construction work done over the year to June 2022 totalled $230.8 billion in value, an amount directly equivalent to 10.4 per cent of total GDP.

Our industry packs its biggest punch when it comes to the provision of full-time employment and support for small business. During August 2022, there were 1.24 million people employed in the building and construction industry. About 86 per cent of these jobs were full-time in nature, a far higher proportion than in the rest of the economy. This means that construction has consistently been the economy's largest provider of full-time jobs over many decades. During August 2022, there were 1.07 million full-time jobs in the construction industry – more than every sector of the economy outside of health and social services.

During the 2021-22 financial year, it is estimated that construction businesses paid out a total of $66.1 billion in wages and salaries to its employees, with gross operating profits in the industry amounting to $35.3 billion over the year. Industry turnover was $384.2 billion during 2021-22, a sum which includes sales from construction businesses to other construction businesses.

The most up-to-date ABS data indicates that as at 30 June 2022, there were a total of 445,253 construction businesses in operation across Australia. This is more than every other sector of the economy. The most striking feature of our industry's construction businesses is their size: of the total, the overwhelming majority (98.6 per cent) are small in size with less than 20 employees. More than half of our construction businesses (56.5 per cent) have no employees at all, typically operating as sole traders or partnerships.

The small size of construction businesses is reflected in their pattern of turnover. The majority (58.5 per cent) turn over less than $200,000 per year with about 1 in 5 (20.9 per cent) earning less than $50,000 annually. Just 1.4 per cent of building and construction businesses have annual revenues in excess of $10 million.

The structure of construction activity means that the support offered by it to other parts of the economy is strong. This is because there is a high domestic content to our industry's inputs including building materials, labour and professional services. As a result, it is estimated that for every $1 million worth of residential building activity the entire economy is better off to the tune of $3 million. Similarly, $1 million worth of building and construction activity is estimated to support a total of 9 full-time jobs across Australia's economy – including 3 jobs in other sectors outside of building and construction.

In terms of our industry's outputs, about $98.1 billion worth of civil and engineering construction was carried out over the year to June 2022. In addition to this, residential building work totalled $81.5 billion over the same period with $51.2 billion in non-residential building activity.

Latest figures show that work started on about 207,955 new homes over the year to June 2022, of which 132,100 were detached houses (64 per cent of the total). Over the same period, about 175,000 new homes were completed and became available to live in for the first time – meaning that a roof was put over the heads of an additional 454,000 Australians.

Over the year to June 2022, building work began on 4,275 new units of public housing – an increase of +15.7 per cent on one year earlier. At just 2.1 per cent, the share of new home building accounted for by the public sector is quite low by historic standards and this represents a key challenge going forward.

The building and construction industry is at the fulcrum of mentoring our nation's next generation of trades workers. Over the year to March 2022, a total of 20,776 new construction apprenticeships were completed with a further 52,682 new construction apprentices and trainees beginning their journey. At the end of March 2022, a record 121,172 construction industry apprentices were in training. Encouragingly, apprentice involvement in the industry has grown strongly over the last couple of years thanks to enhanced government support programs as well as favourable business conditions in the industry.

Background

This submission is made by Master Builders Australia to the Parliamentary Joint Committee on Corporations and Financial Services ('the Committee'). On 28th September, the Committee began an inquiry into corporate insolvency in Australia.

Terms of reference

The inquiry's Terms of Reference set out the specific issues to be investigated by the inquiry. Based on our reading of these, we identify the following seven streams of the inquiry's scope:

1. Trends in the use of corporate insolvency in Australia.
2. The way in which current insolvency provisions operate.
3. Additional areas where reform may be warranted.
4. Helping businesses access corporate turnaround facilities.
5. Issues relating to corporate insolvency practitioners.
6. The role played by government agencies in the insolvency process.
7. Any related corporate insolvency matters.

Our submission seeks to address these Terms of Reference as they best relate to the current characteristics of Australia's building and construction industry. As a result, some areas of the inquiry's remit receive more focus from us than others.

Recent developments in the insolvency regime

In July 2018, a new 'ipso facto' regime took effect. Prior to this, notwithstanding any other contractual or statutory limitations, a party had the right to terminate a contract if the other party had become insolvent. Under the new ipso facto provisions, a business entering into insolvency arrangements, in certain circumstances, was offered greater protection, also known as 'safe harbour', so as to provide an opportunity to potentially get back on its feet financially. The right of counterparties to terminate contracts was thus removed in many instances as a result of the amendments.

The changes did, however, provide for an exemption of building contracts of at least $1 billion in value, which we note is due to sunset on 1st July 2023.

In 2018 when the amendments were introduced, Master Builders made submissions to Treasury which highlighted the operational and contractual nuances of the building and construction industry ('BCI') and potential impacts of the proposed changes.

A copy of Master Builders Australia's 2018 submission is attached, marked **Annexure A**. We continue to rely on those detailed submissions in the context of current 'ipso facto' arrangements and seek further regulatory amendments to give effect to a total exclusion of the BCI from the associated regime.

The key points raised by Master Builders during the 2018 Treasury consultations are extracted and summarised as follows:

- Regrettably, the BCI is more likely to be at risk of experiencing an insolvency event and, as such, any related regulatory framework disproportionately impacts our industry.
- Noting this, insolvency laws should account for the unique operational terms and underpinning structure of the BCI, particularly with respect to the function of contractual relationships within the sector.
- Failure to adequately account for sector specific nuances could have the effect of slowing construction projects, damaging productivity, increasing construction costs, reducing competition – all issues that, notwithstanding their effect on productivity, will likely lead to an increase in exits from the and insolvencies within the BCI.
- Standard form construction contracts are a key feature of the BCI, reduce disputation and parties are familiar with, and have equally opportunity to, negotiate their terms.
- Noting the importance and contribution of the BCI to the economy and jobs in Australia, it is appropriate that the regulatory framework be amended to adequately respond to Master Builders' concerns by establishing a 'carve out' exemption of **<u>all contracts for building and construction works</u>** from the ipso facto regime.

Temporary changes were also introduced to the insolvency framework in March 2020 in order to protect businesses from the stresses resulting from the pandemic. As a result, a permanent set of insolvency reforms for small businesses took effect at the start of January 2021.

- The new measures only apply to eligible incorporated small businesses with liabilities of less than $1 million.
- The reforms offer two new options, namely a debt-restructuring process and a simplified liquidation process.
- A 'class' of registered liquidator was also created.

The Simplified Liquidation allows for a streamlined creditors' winding up of an eligible company whose liabilities are valued less than $1 million. The event triggering the winding up process must have occurred on or after 1st January 2021.

Elements of Master Builders Australia response

This section sets out Master Builders Australia's response to the key themes of the inquiry as set out in the terms of reference. Given the current issues and challenges for our industry, our submission places greater focus on some themes compared with others.

Why we need a good insolvency framework

Even if a business does not end up becoming insolvent, the perception that it might can be hugely damaging. Creditor relationships become more challenging for businesses in this situation.

For example, the business's suppliers may completely refuse to sell to it on credit. If they do sell, restrictive conditions may be attached including larger cash deposits, higher interest charges and shorter payment times. Payment guarantees or the posting of collateral may also be insisted upon by some suppliers.

Similarly, customers may shy away from interactions with businesses that are perceived as being at risk. The consequences could include the outright loss of customers. In situations where transactions continue, builders' customers may withhold payment until the completion of the project.

Ironically, responses like these by external stakeholders can magnify the likelihood of actual financial distress being suffered by the business.

When a set of businesses across an entire industry or even the whole economy are viewed as being at greater risk of insolvency, the collective response of buyers, suppliers and financiers can result in significant reductions in employment and activity, resulting in permanent economic damage.

An inadequate insolvency framework can also have the effect of hampering entrepreneurship in the economy. People may be dissuaded from setting up new businesses when insolvency procedures are too onerous, too complicated or too punitive. Similarly, a lack of confidence in the insolvency process is likely to result in reluctance amongst suppliers to provide goods or services on credit, resulting in damage to the economy's supply chain.

An insolvency system which fails to provide businesses which can be salvaged with a reasonable opportunity to do so is a system which is in need of improvement. Similarly, a system which does not properly protect employees, customers, suppliers and creditors from unsound businesses is one in need of reform.

What should good insolvency provisions look like?

Master Builders would recommend that the Government take care to ensure that a regulatory balance is maintained to maintain a system of safeguards and disincentives to those who seek to do the wrong thing or use the law in a way that deliberately avoids legal or commercial obligations.

We would also caution against any regulatory change taking a 'one size fits all' approach, particularly given the specific nuances unique to the building and construction industry. Any modifications have the capacity to deliver positive outcomes as well as unintended consequences. For example, a small 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 subcontractor receiving payment thereby creating circumstances where they are particularly susceptible to an insolvency event.

If the small sub-contractor is not paid, or if they receive a demand for payment from another party, this may cause financial difficulties. Concurrently, if the small 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 subcontractors so engaged on the same project.

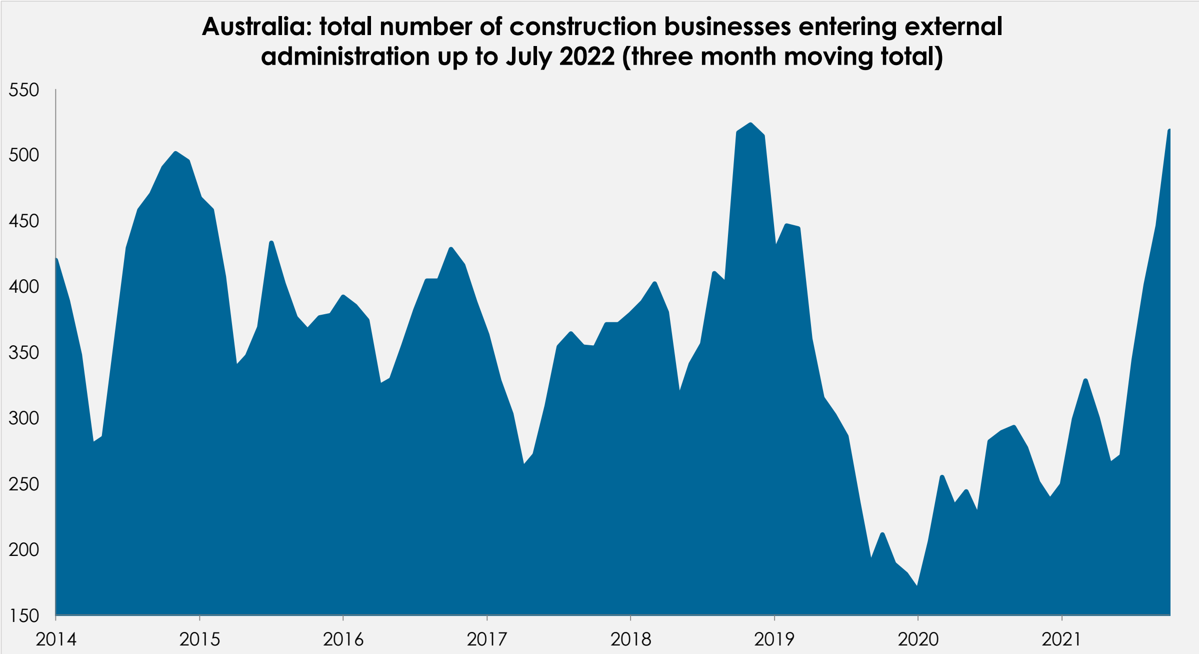
The situation described above demonstrates how entities in the industry are co-dependent upon each other and how the success or failure, and conduct of one party, has capacity to influence the other. This co-dependency exists in the industry to a greater extent than for other sectors and creates a degree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

Master Builders Australia believes that a well-designed insolvency system should offer potentially viable businesses the opportunity to turn themselves around in certain circumstances. This includes full transparency around the fact that the business is working though any insolvency procedures. Notwithstanding, , proper protection must be afforded to those that engage with the business, including its customers, employees, suppliers and creditors.

Recent trends in construction insolvencies

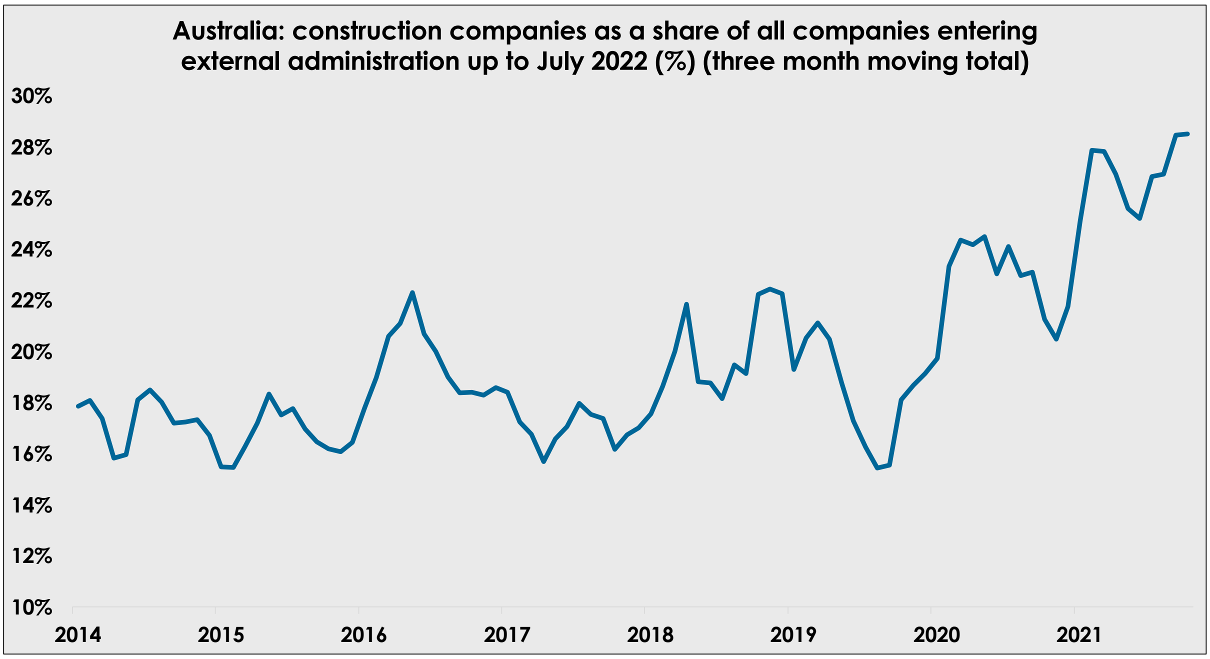
Official figures from ASIC relating to companies entering external administration have been published on a monthly basis since July 2013. The pattern of construction insolvencies over this period is illustrated in the chart below.

Over the three months to July 2022, a total of 518 construction businesses entered external administration. This was 87 per cent higher than the same period in 2021 and represents one of the highest totals of the past ten years.

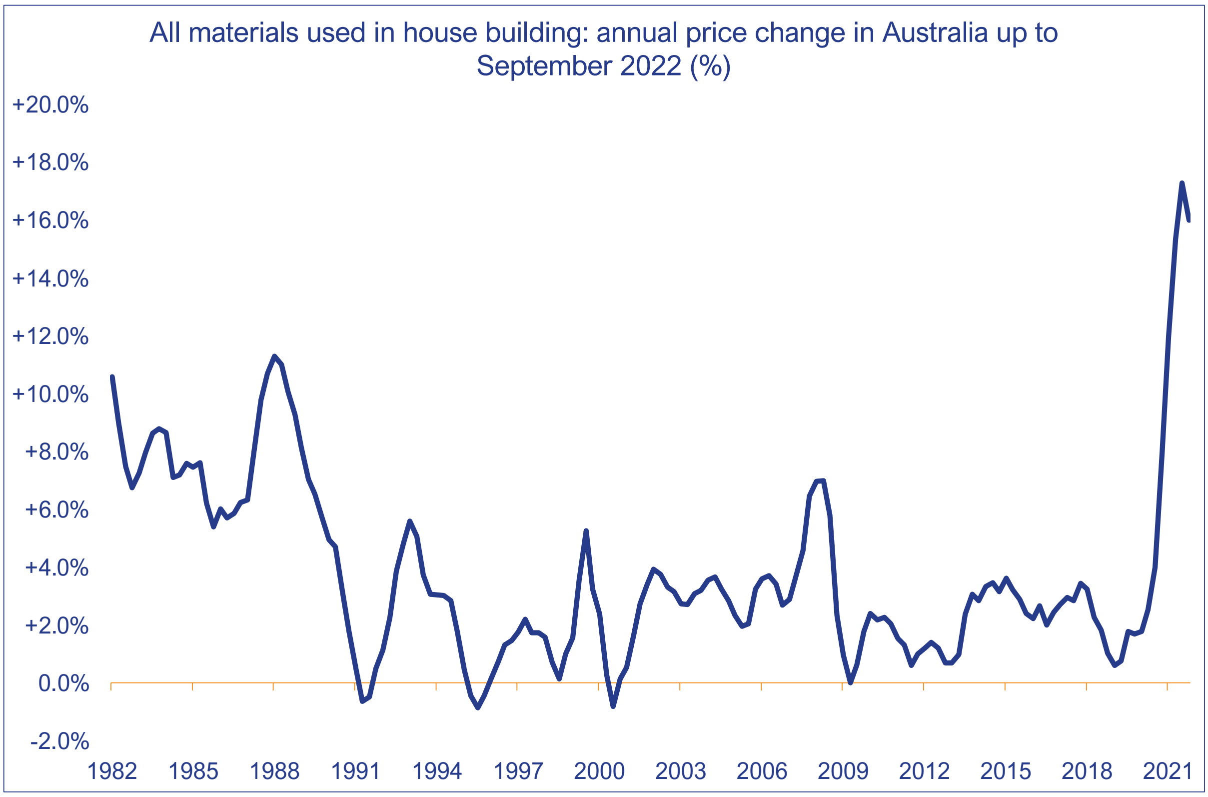


As the chart below shows, construction companies accounted for 28.5 per cent of all insolvencies across the economy over the three months to July 2022. The portion of company insolvencies accounted for by construction has grown strongly over the past three years. However, it is worth bearing in mind that construction accounts for more businesses than every other sector of the economy. It is therefore natural that it also accounts for the largest share of the company insolvencies that do occur.

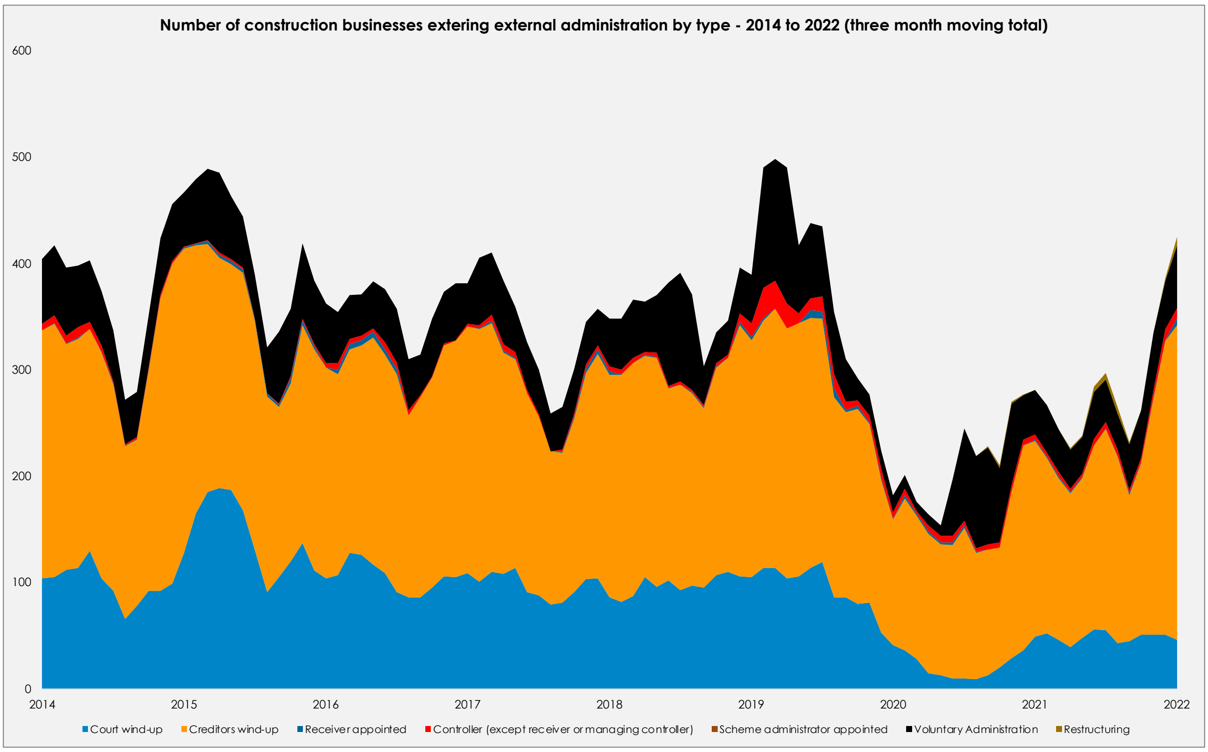
There are several factors behind trends in construction insolvencies over recent years. During the pandemic, the combination of very low interest rates and the accommodative approach of creditors drove insolvencies down to very low levels right across the economy. The reversal of these favourable conditions is one source of the strong increase in construction insolvencies over the past year.



One of the difficulties faced by construction businesses relates to fixed-price contracts. In the environment of low and stable inflation over the past two decades, there was little risk involved in agreeing to complete building projects for a fixed dollar amount. However, the sharp and sudden escalation in the cost of key building materials like timber, steel and other metals caught builders by surprise and meant that profit margins on fixed price contracts were eroded or completely erased in very many instances. This problem was exacerbated by shortages of key tradespeople which slowed down the completion of projects and resulted in further cost escalations. The financial consequences of absorbing large volumes of loss-making projects.



There are several ways in which external administrations of companies can be executed. For construction businesses, the most common method is through creditor wind-ups. Other common options include court wind-ups and voluntary administrations. Over time, creditor wind-ups have become more prevalent with court wind-ups now less frequent than in the past.



Shortcomings of the current insolvency framework

- Small businesses face difficulties real-time assessing their financial health.
- Licencing and insurance regulations can make it impossible for building and construction businesses to continue operating during insolvency.
- Current circumstances can result in large volumes of building work being delayed or unfinished.

Because so many of the businesses in the building and construction industry are very small in scale, **internal resources are typically minimal** with respect to management, strategy, planning and ongoing financial monitoring. This can mean that such businesses have greater difficulty in identifying when they are drifting towards a position of financial distress. The prospect of taking corrective action at an early stage is therefore missed in many situations. The construction industry's health would benefit if more support were available to its small businesses with respect to high-frequency financial health checks, business advisory services and guidance on anticipating and averting difficulties well ahead of time.

It is noted that in the building and construction industry, the capacity for industry participation and income generation is frequently dependent upon the **holding of a particular licence** in order to perform work. To this end, the capacity for a person to discharge bankruptcy obligations maybe jeopardised if a licence is removed, cancelled or suspended. We submit that throughout relevant consultation with industry and licensing associations there should also be a detailed discussion of this issue.

In some jurisdictions, builders who hold state-based licences and who access federal insolvency laws instantly and automatically suffer the **loss of their licences**. This immediately renders them unable to operate and almost certainly copper fastens their demise. The initiation of insolvency proceedings may also have unfavourable implications for the business's insurance cover and result in its operations grinding to an immediate halt.

As a result of existing arrangements, there have been situations where the automatic suspension of a builder's licence has occurred at a time when a substantial volume of building work was still in the process of being completed. For example, a homebuilder could be forced to cease operations immediately because of engaging with the insolvency process, resulting in work being stopped on new home building projects, including large scale ones. Under a better system, the homebuilder should be able to continue on with the work and delays to the process of building homes would have been avoided.

Role of Government and its agencies

- As one of the industry's biggest customers, government has a major impact on the financial health of the building and construction businesses.
- Government can help improve the capabilities of small businesses when it comes to financial monitoring and performance.

With respect to insolvency conditions in the building and construction industry, there are a number of important areas where government can make an impact.

First, government at all levels are major customers of the building and construction industry. This allows it to influence conditions in the industry for the better and reduce the incidence of financial stress encountered by businesses. Accordingly, governments should strive to act as 'model customers' of our industry. They can undertake this through such actions as paying earlier and making procurement more open to small businesses.

The sequencing of government-funded projects can also be used to shape healthier financial settings in the industry. The large swings that building and construction activity is prone to experience over time is often a source of financial stability for the industry's businesses. By accelerating the rollout of its projects at times when private sector demand is in retreat, the government can contribute to a steadier pattern of activity in the sector and neutralise one of the drivers of financial distress.

Their considerable financial resources put governments in a good position to provide supports to businesses with respect to monitoring their financial situation more closely, accessing high-quality advice and engaging in planning. Because early intervention is vital, we believe that many insolvency processes could be avoided completely if businesses became aware of financial red flags in a timelier way and were able to take action to deal with it.

As pointed out earlier, the small size of most building and construction businesses means that they typically lack the internal resources required to negotiate some of the stresses and difficulties that come their way. We believe that enhanced resources should be provided to allow more business support to such firms. This could be delivered through entities with which building and construction businesses have direct contact such as accountants, tax advisors and industry bodies.

Recommendations

In order to achieve better insolvency outcomes going forward, we believe that consideration should be given to the following proposals from Master Builders Australia.

- Consideration to be given to tailored support to building and construction businesses with respect to assessing their financial situation and early intervention should they move closer to financial distress.
- Increase educational resources and training for small with regard to real-time monitoring of their business's financial health as well as the range of tools available to address actual or potential difficulties.
- Research the insolvency procedures in each of the eight states and territories for building and construction businesses.
- Identify all of the barriers to continued operation faced by building and construction businesses after accessing insolvency procedures. This submission has identified issues around licences and insurance but there may to be others.
- More resources need to be provided to regulators so that decisions relating to distressed businesses can be actioned more quickly. Doing so will maximise the likelihood of returning the business to viability.
- Pending the full implementation and evaluation of the new Director Identity Number (DIN) regime, we recommend that no additional regulatory requirements are imposed on the building and construction industry in the interim.
- To avoid the duplication and doubling up of regulation, any future changes to the insolvency framework should be preceded by a detailed audit of existing provisions.

We would welcome any further opportunities to engage with the Inquiry in relation to its work and are happy to make ourselves available for further interactions with government and other stakeholders in this regard.

Annexure A: Master Builders Australia's 2018 Submission

23 May 2018

Australian Government
The Treasury
By email

Attention: **The Proper Officer**
Office of the Australian Treasury

By email: Insolvency@Treasury.gov.au

Dear Treasury,

MASTER BUILDERS AUSTRALIA Ltd (ABN 68 137 130 182) ('Master Builders') - SUBMISSION ON THE NATIONAL INNOVATION AND SCIENCE AGENDA: EXCLUSIONS FROM STAY OF ENFORCEMENT OF IPSO FACTO CLAUSES ('The Submission')

We refer to Treasury's request for submission on the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (the regulations), and the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (the declaration), our correspondence to Treasury dated 9 May 2018 and Treasury's reply of the same day.

Master Builders Australia

1. The following is a submission made on behalf of Master Builders Australia Ltd ('Master Builders').

2. 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 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.

3. The building and construction industry ('BCI') 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 percent of gross domestic product, and around 9 percent 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 or the number of people employed in the industry to rise by 300,000 to 1.3 million.

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.

5. Ensuring workplaces are safe and productive is the number one policy priority for Master Builders and our 33,000 members. The BCI is a significant part of the economy and community and is forecast to grow larger over the coming decade, and accordingly, an efficient and productive sector is a key element for our future success as an industry and key contributor to the Australian economy.

6. Importantly, the BCI has a number of attributes and nuances that make it unique. While these are both current and historical, they are important to understand, and particularly in context of this submission. A brief overview of these attributes is summarised below for context to the submission that follows.

Introduction and Summary

7. The BCI is a major driver of the Australian economy and makes a key 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.

8. The BCI is the second largest in the country, accounting for approximately 9.4 per cent of total economic growth on average per year since 1996 and the employment of more than 1.1 million people.

9. The BCI includes more business entities than any other industry (over 400,000) and is unique in terms of its operation and underpinning structure - which relies heavily on the relationships between different entities to create cost and time efficiency.

10. It is the position of Master Builders Australia that:

    - The Governments core goal of 'promotion of a culture of entrepreneurship and innovation … that will help drive business growth, local jobs, and global success' is admirable, appropriate, and beneficial to all Australians.
    - The BCI is an industry that is more likely to be at risk of experiencing and insolvency event, and as such the regulations disproportionately impact the BCI.
    - Noting this, the regulations and declaration should account for unique operational terms and underpinning structure of the BCI, particularly with respect to the function of contractual relationships within the sector. In their current form, they do not.
    - Failure to adequately account for sector specific nuances means that the regulations and declaration fail to achieve their core goal. They will have the effect of slowing construction projects, damaging productivity, increasing construction costs, reducing competition – all issues that, notwithstanding their effect on productivity, will likely lead to an increase in exits from and insolvencies within the BCI.
    - Noting the importance and contribution of the BCI to the economy and jobs in Australia, it is appropriate that the regulations and declaration be amended to adequately respond to Master Builders concerns, by:
        i. Establishing a 'carve out' exemption of all contracts for building and construction works; or,
        ii. Incorporating an interim safeguard mechanism to protect contracting parties.

Background - contractual relationships within the BCI and the function of ipso facto clauses

11. Building and construction projects are most often undertaken through contractor and sub-contractor arrangements with multiple layers of contractual arrangements between various businesses – all of which will be working on the construction project throughout its lifecycle.

12. With respect to the regulations, it must be understood that the size and underpinning structure of the BCI, as well as the nature of how construction projects are delivered, creates an inherent expansion of the effects of a company experiencing an insolvency event.

13. Within the BCI, contractual relationships between parties to a construction contract have a cascading effect. Where a relationship exists between a head contractor and subcontractor, further relationships result; for example, relationships between subcontractors and sub-subcontractors, subcontractors and suppliers, and sub-subcontractors and suppliers and so-on.

14. Because of this structure, payment for goods and works relies on appropriate actions between parties who have no direct contractual relationship. That is, payment from the owner to the head contractor, and then through the cascade of contractual relationships that follows. Any delay in payment between two parties will affect any party below them in the cascading chain of relationships, and damages will likely be disproportionate to the subcontract value if the subcontractor is responsible for a critical path activity.

15. It is common for contracts in the BCI to contain clauses allowing termination in the event a party to the contract experiences an insolvency event (an ipso facto clause). Ipso facto clauses protect the overall financial viability of construction projects by acting as a risk mitigation lever for all parties within the contractual supply chain.

16. For example, where a subcontractor experiences an insolvency event, a head contractor may mitigate the risk posed by delays - often in the millions of dollars on large projects - by terminating the contract and replacing the subcontractor before significant delay or loss is incurred. The effect is that a head contractor can protect their own ability to deliver a project on time and within budget. Where a head contractor experiences an insolvency event, an ipso facto clause allows a subcontractor to terminate the relationship and mitigate their risk of loss of income - much in the same way that a head contractor aims to mitigate loss caused by delay.

17. Under the regulations, these rights are non-existent.

18. The effect of the regulations in their current form will be that construction costs will rise to account for uncontrollable risk in the labour supply chain. This will likely:

    - An increase in the costs of construction;
    - Preferential treatment of more substantial contractors who are less risk of an insolvency event;
    - Increased security/guarantee requirements demanded by head contractors;
    - Increased instances of small-businesses inability to pay wages of employees, business loans or mortgages
    - An increase in the risk of (and therefore occurrences) insolvencies due to increased exposure to delay costs; and
    - Ultimately, deterrence of smaller businesses from entering or staying in the BCI.

19. These consequences are clearly unintended. However, notwithstanding, these will have an adverse impact on different parties involved in the BCI:

    - On ***small business***; by raising the barriers to entry of the industry, driving up costs and risk, and likely leading to increased exits may increase
    - On ***new entrants***; where viability of entrance will be reduced
    - On ***head contractors***; who will be required to assume more risk; and
    - On ***consumers***; who, with less competition and higher risk for undertaking of construction projects, will undoubtedly bare the increase in costs.

20. No matter where the entity experiencing the insolvency event sits in the contractual chain, these regulations will directly impact each entity involved – whether a contractual relationship exists between them and the insolvent party or not.

21. The inadvertent effect of these regulations will be opposite to that which it attempts to achieve; increased incidents of insolvency within the industry.

Resolving the imbalance - the need for a carve out for the Building and Construction Industry

22. To this end, Master Builders submits that the Government reconsider the application of the regulations to the BCI, and notes that a flexible approach to the adoption of its proposal as applicable to commercial contracts in the building and construction industry is required.

23. Master Builders position is that the regulations should be amended to better incorporate the terms of the explanatory statement as applied to the functions of the construction industry. Relevantly, the explanatory statement states:

> '*the ipso factor stay should not apply to certain kinds of arrangement where:*
>
> *… markets have evolved to depend on established systems and expectations and the ipso facto stay would significantly disrupt those markets.*
>
> *[and]*
>
> *… the ipso facto stay would lead to unintended consequences or would severely disadvantage some contracting parties'.*

24. It is Master Builders position that allowing for a complete 'carve-out' of the regulations over construction contracts is the most appropriate course of action to protect the BCI and its participants from the detrimental and damaging outcomes noted above. Affording such a carve out is the most appropriate way to meet the above stated objectives within the BCI.

25. Master Builders submits that, insofar as carve outs are already prescribed within the regulations and discussed within the explanatory statement for other circumstances, such a carve out should be phrased to capture all 'contracts that are for the provision construction work or related goods and services'. A functional definition of the phrase already exists within legislative instruments (such as each state or territories relevant Security of Payment Act) and defining this term would not be contentious.

26. Secondary to a complete carve out for contracts for the provision of construction work, a further, however significantly less palatable option would be the inclusion of a mechanism that allows ipso facto clauses in industry related contracts to be subject to a simple and interim safeguard mechanism before being considered void.

27. Such a mechanism may give the party who experiences an insolvency event a short timeframe (not more than five business days) in which it (or restructuring advisers acting on its behalf) could contest the termination of the contract if so initiated by the other party. This may involve invoking any dispute resolution process in the contract or seeking a determination from a judicial body or expert, where the appeal body has the capacity for agreement to be reached whereby the contract is preserved without the principal suffering adverse consequences for any termination action.

Conclusion of our position and acknowledgement of the disproportionate effect on the BCI

28. Insolvency statistics data suggests that rates of insolvency within the BCI are comparatively high to other sectors. It is therefore entirely appropriate to say that the regulations have the potential to affect at many more businesses in the BCI than any other sector. In making this submission, Master Builders acknowledges the importance of reform in the area.

29. In our submission to Treasury in June 2016[1], at paragraph 5.3, Master Builders stated:

    '*We would also caution against any regulatory change taking a 'one size fits all' approach, particularly given the specific nuances unique to the [BCI]. As noted below… These proposals have the capacity to deliver positive outcomes, as well as unintended consequences.'.*

30. This has been a long-held policy position of Master Builders, as is providing our support to measures that will increase the number of entrants, while concurrently reducing the number of exits from the BCI.

31. Master Builders understands that the regulations have been made with the important aim of reducing the rate of exits from all industries, as well as promoting the Governments goal of 'promoting a culture of innovation, growth, and entrepreneurship'. Master Builders supports these aims.

32. We maintain our position as stated in June 2016 and reiterate that it is our belief that the regulations in their current form will not only inadvertently and disproportionately affect the BCI but fail to achieve their aim and be damaging to productivity and business within the sector.

33. To this end, we invite the Government to consult further with Master Builders as it considers the implementation options set out in the paper.

Should you have any questions, please contact our office on (02) 6202 8888, or by email at enquiries@masterbuilders.com.au.

Yours faithfully,

MASTER BUILDERS AUSTRALIA Ltd.

[1] Submission to the Treasury on Improving Bankruptcy and Insolvency Laws Proposals Paper 10 June 2016 - https://www.masterbuilders.com.au/getmedia/ac2bfa40-7efb-4fda-85b1-d884be06e149/14-Submission-to-Treasury-re-Improving-Bankruptcy-and-Insolvency-Laws.pdf