Master Builders Australia

Submission to the Treasury

On

Competition Policy Review Final Report

26 May 2015

MASTER BUILDERS AUSTRALIA

Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

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1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 This submission responds to a number of the Recommendations contained in the *Competition Policy Review Final Report* (Final Report) released on 31 March 2015. It supplements discussions held with Treasury officials on 20 May 2015.

2.2 Discussion occurs under the headings used in the Final Report. The relevant Recommendation is first set out in italics and the Master Builders' response is then set out.

2.3 A number of the Recommendations are not addressed. The rationale is twofold. First where they relate to specific areas that are not relevant to the building and construction industry e.g. the recommendations in relation to pharmacies, taxis and liner and coastal shipping, parallel imports, extra-territorial reach of the law, and retail trading hours. Secondly, Master Builders fully supports the Recommendation and no further elaboration is required. We have set out some of the Recommendations and additional commentary where our support is proffered on the basis that the arguments that form part of the commentary should be emphasised by Government in the implementation stages of the Final Report.

2.4 In short, this submission focuses on key areas where Master Builders seeks to reinforce an aspect of a Recommendation or where disagreement is proffered. We emphasise that Master Builders believes the Review Panel has produced a Final Report of enormous value and consequence. The work of the Review Panel is highly commended.

3 Competition Principles – Recommendation 1

The Australian Government, state and territory and local governments should commit to the following principles:

- *Competition policies, laws and institutions should promote the long term interests of consumers.*
- *Legislative frameworks and government policies and regulations binding the public or private sectors should not restrict competition.*
- *Governments should promote consumer choice when funding, procuring or providing goods and services and enable informed choices by consumers.*
- *The model for government provision or procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and should encourage a diversity of providers.*
- *Governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities.*
- *Government business activities that compete with private provision, whether for profit or not for profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.*
- *A right to third party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest.*
- *Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.*

Applying these principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless:

- *the benefits of the restriction to the community as a whole outweigh the costs; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

3.1 The separation of policy issues from the procurement process is a difficult matter. The Government has enormous market sway in the area of

construction procurement. It has determined to use that market power to shape workplace relations in the building and construction industry. Master Builders submits that the social good that is generated from workplace reform through the use of Codes such as the proposed (and published in advance) *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014*[1] (2014 Code) outweighs the benefits otherwise to be gained from the separation of policy issues where other procurement decisions are at issue. The detailed analysis that is incorporated in the findings of the Productivity Commission report entitled *Public Infrastructure*[2] vindicates Master Builders' position.

3.2 The findings of that report, especially Recommendation 13.1 reinforces Master Builders' policy position. In short the most critical recommendation from the Public Infrastructure inquiry in the current context is that:

> *Australian, State and Territory governments should adopt codes and guidelines with an essentially similar framework to the Victorian Code of Practice for the Building and Construction Industry for their own major infrastructure purchases.*
>
> *The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments.*

3.3 To the extent that Government adopts the competition principles in a general sense as outlined in Recommendation 1 of the Final Report, the area of building and construction industry procurement should be specifically governed by the recommendations of the Productivity Commission. Workplace reform should not be detracted from by the application of the more general policy principles that might otherwise affect the introduction of the 2014 Code.

4 Road Transport – Recommendation 3

Governments should introduce cost reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and revenues used for road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, governments should take a cross jurisdictional approach to road pricing. Indirect charges and taxes on road users

[1] http://www.fwbc.gov.au/building-code-2014/

[2] http://www.pc.gov.au/inquiries/completed/infrastructure/report Accessed 12 February 2015

should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Australian Government grants to the States and Territories.

4.1 Master Builders submits that this recommendation should be subjected to detailed revenue analysis before implementation with the transparent assessment of the costs and the impact on revenues at different levels of government.

4.2 Master Builders is supportive of measures which promote infrastructure development. Road funding and measures which stimulate road construction are endorsed. But, as stated, at the implementation stage of this recommendation transparent, publicly accessible analysis should be published before the measures are made palpable.

5 Regulation Review – Recommendation 8

All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and should not restrict competition unless it can be demonstrated that:

- *the benefits of the restriction to the community as a whole outweigh the costs; and*
- *the objectives of the legislation can only be achieved by restricting competition.*

Factors to consider in assessing the public interest should be determined on a case by case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition law (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Recommendation 43) with a focus on the outcomes achieved rather than processes undertaken. The Australian Council for Competition Policy should publish an annual report for public scrutiny on the progress of reviews of regulatory restrictions.

5.1 Master Builders commends the general thrust of this recommendation. We reiterate the matters raised in section 3 about the 2014 Code.

5.2 See also our response to Recommendation 11, in particular the comments regarding the *Australian Government Guide to Regulation*, and the regulatory impact assessment process.

6 Planning and Zoning – Recommendation 9

Further to Recommendation 8, state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the rules can only be achieved by restricting competition.

The following competition policy considerations should be taken into account:

- *Arrangements that explicitly or implicitly favour particular operators are anti competitive.*
- *Competition between individual businesses is not in itself a relevant planning consideration.*
- *Restrictions on the number of a particular type of retail store contained in any local area is not a relevant planning consideration.*
- *The impact on the viability of existing businesses is not a relevant planning consideration.*
- *Proximity restrictions on particular types of retail stores are not a relevant planning consideration.*
- *Business zones should be as broad as possible.*
- *Development permit processes should be simplified.*
- *Planning systems should be consistent and transparent to avoid creating incentives for gaming appeals.*

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43) should be tasked with reporting on the progress of state and territory governments in assessing planning and zoning rules against the public interest test.

6.1 Master Builders supports Recommendation 9 to introduce competition principles in planning and land-zoning decisions as it would lead to increased investment, economic growth and employment.

6.2 Planning and zoning regimes in Australia can have a number of anti-competitive features, with even small reforms in this area potentially delivering large economic benefits.

6.3 Amongst the main anti-competitive features of the planning and zoning regimes in operation across the nation are:

- their tendency to be overly-localised in their focus, with little regard for the promotion of competition;
- they operate with arrangements which either explicitly or implicitly favour incumbent operators, and create barriers to entry by new players in the local market; and/or
- they adopt procedures which are complex, time-consuming and which differ across jurisdictions.

6.4 However, an over-arching principle set down in Draft Recommendation 10 (the predecessor provision to the current Recommendation 9, on the same topic which appeared in the Draft Report that was published as a means to garner feedback) appears to have been deleted from the Final Report. Draft Recommendation 10 contained the narrative:

> *All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.*

6.5 Master Builders is disappointed at this deletion, and would like to see the principle reinstated in the Government's response to the final Harper Report.

6.6 In addition, Master Builders would like to see the following sentiment embraced in the Government's response:

> *To promote effective implementation of these objectives and principles, relevant authorities and sub-State/Territory jurisdictions report annually in consistent and standard form their performance against these principles to their respective State/Territory Governments, who should then publish these reports in an open and transparent manner.*
>
> *Such reporting should include explanations of the weightings attached to each of the principles in decision-making, and of the reasons for any non-compliance.*

7 Priorities for Regulation Review – Recommendation 10

Further to Recommendation 8, and in addition to reviewing planning and zoning rules (Recommendation 9), the following should be priority areas for review:

- ***Taxis and ride sharing**: in particular, regulations that restrict numbers of taxi licences and competition in the taxi industry, including from ride sharing and other passenger transport services that compete with taxis.*
- ***Mandatory product standards**: i.e., standards that are directly or indirectly mandated by law, including where international standards can be adopted in Australia.*

7.1 Master Builders Australia welcomes the identification of mandatory product standards as a priority area for review. However, the review process should be expanded, to operate along at least three tracks:

7.1.1 firstly, 'aged regulations/standards' – that is, instruments which have been in existence in their current forms (and/or without prior robust review) for more than 10 years;

7.1.2 secondly, State/Territory and local government variations to supposedly uniform national regulatory frameworks, in particular the fulcrum National Construction Code; and

7.1.3 thirdly, international regulations/standards which have been adopted into relevant Australian instruments.

7.2 Master Builders remains concerned inadequate attention has been given by regulatory agencies – both those responsible for their creation, and their administration – as to the relevance of regulations/standards in the three categories just discussed. Given the breadth and pace of product and practice innovation, and commercial, industrial, legal and technical change, it is a reasonable presumption that a regulation/standard 'older' than 10 years is at best lagging behind contemporary best practice, and more likely quite simply out-of-date.

7.3 Against this background, and reflecting the thrust of the current Government's policy statements and pro-active approach to regulation review and reform, Master Builders would propose:

7.3.1 all federal agencies publish annually registers of each and every regulation/standard falling within their administrative responsibility;

7.3.2 identify the date of its promulgation/ entry into force, and identify any previous robust reviews undertaken of the particular regulation/ standard; and,

7.3.3 where the instrument is 'older' than 10 years, define a process for its rigorous, open and transparent public review process.

7.4 Of particular irritation to the building and construction industry are the sizeable (and growing) number of variations to the (supposedly) uniform National Construction Code (NCC) by State/ Territory, but more significantly, local governments around the nation. Such variations add to uncertainty in regulatory compliance for builders, and add to the costs of construction which are reflected in higher-than-otherwise house prices (and thus further impeding housing affordability), and costs of supply for key economic and social infrastructure (for example, schools, aged care facilities and hospitals).

7.5 Master Builders recommends the federal Department of Industry be charged with compiling and reporting on its website by the end of 2015/16 (with annual updates thereafter) a definitive and exhaustive list of all State, Territory and Local Government variations from the National Construction Code. In the short term, such a listing would promote greater transparency and competitive benchmarking of the incidence and impact, as well as acting as the platform for subsequent program of work in reviewing, rationalising and potentially eliminating, such variations.

7.6 Master Builders' supports-in-principle greater integration of accepted and recognised international standards into Australia's regulatory regime, where they are consistent with Australian conditions, practice and requirements.

7.6.1 In this context, we are particularly pleased to see the Government, under the auspices of its "Cutting Red Tape" initiative, working with key stakeholders, and most importantly industry, to examine which international regulations/standards could be imported into the Australian regulatory regime.

7.6.2 In the building and construction industry, such work should be pursued through the Australian Building Codes Board (ABCB), with ongoing contributions from Standards Australia.

8 Standards Review – Recommendation 11

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, Australian Standards that are not mandated by government should be subject to periodic review against the public interest test (see Recommendation 8) by Standards Australia.

8.1 Master Builders recognises Standards (whatever their nomenclature) can be anti-competitive.

8.2 While Standards are able to deliver benefits by, inter alia, providing greater information to consumers, and so enhance consumer confidence in the goods and services they acquire, they can also be anti-competitive by acting as barriers to market entry by new competitors, deterring innovation by entrepreneurial firms and mandating particular technologies or processes rather than performance outcomes.

8.3 Master Builders welcomes the Final Report's recognition of the important role played by Standards Australia in the regulatory process. While its publications are badged as "standards" they are widely regarded as (and act as de facto) "regulations" by consumers and industry. This is in addition to where they are in fact mandated as part of the regulatory regime and therefore become, albeit not suited to that form, regulatory instruments. This is the case with a number of regulations and Codes of Practice under the harmonised work health and safety (WHS) laws.

8.4 One example of the use of Australian Standards in the WHS context will suffice – that is with respect to the Code of Practice regarding tilt-up construction which has not been updated since 2008 and which contains a heavy reliance on AS 3850 and AS 3600.[3] In this context Master Builders is aware that Safe Work Australia is examining the role of Australian Standards in WHS law.

8.5 Master Builders in response has reissued its policy stance on this matter. In applying nationally consistent WHS standards, which need to be different and separate from Australian Standards, employers use differing approaches. Performance-based standards can be used to develop corporate plans and in-

3 http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/cp200802precasttiltupandconcreteelements

house safety systems to comply with legislation. In the case of small and medium sized companies, approaches will differ. Some businesses will be able to develop in-house safety systems whilst smaller, under-resourced enterprises will use industry guidance. These guides can be more detailed and provide information on 'what to do' and 'how to do it' in order to comply with relevant legislation. All of these standards and related guidance should be self-contained (ie should limit or have no external references), accessible and free of charge. Without these elements present, the primacy of safety may be detracted from because of the difficulty with accessing the law and related materials.

8.6 If Australian Standards are called up in legislation, it is clear that they have legislative force. That is a misconceived form of regulation because Australian Standards are not designed as documents of regulation. If they are called up in WHS Codes of Practice which assist with how to follow a reasonably practicable means of complying with a WHS obligation, those bound by the Code must meet the requirements of the Standard. If Australian Standards are used in guidance material, and, for example, the guide indicates a means of complying with WHS obligations, then again that insertion, depending on context, will mean that compliance with the Australian Standard is necessary in order to show the authorities that the person conducting a business or undertaking (PCBU) has turned its mind to a method of compliance. Master Builders' position is wherever possible WHS standards should be independently drafted and self-contained and should not rely on Australian Standards.

8.7 At a more general level (although applicable to Australian Standards called up in WHS law), Master Builders regards the approach proposed in Recommendation 11 for the review of Australian Standards as inadequate, an approach which has the capacity to leave consumers and industry with a two tier approach to regulation review especially at the national level.

8.8 While Master Builders sees merit-in-principle in the privatisation of the regulatory process, through organisations such as Standards Australia, this must not come at the expense of analytical rigor in the development and evaluation of the instruments thus created.

8.9 Subject to its comprehensive and effective implementation across all agencies, departments et al of the Australian Government, the *Australian Government Guide to Regulation* (the Guide) has the potential to dramatically overhaul the processes by which regulations/standards are created and reviewed, and administered. In time the application of the substance of the Guide will make a significant contribution to reducing the burden of regulatory compliance carried by business, especially small business.

8.10 Master Builders welcomes in particular the presumption in the Guide against regulation, the need for regulators to consider alternatives to regulatory interventions, greater use and rigor in preparing high-quality cost/benefit and regulatory impact analyses, and increased transparency in the regulation development/ review processes.

8.11 Of specific importance to the building and construction industry is the obligation for Government agencies, departments et al using standards created by third parties, such as Standards Australia, to ensure these instruments meet the Regulatory Impact Statement (RIS) requirements set down in the Guide.

8.12 This new threshold for the inclusion of third party standards or performance requirements into federal regulations is significant for the building and construction industry, given the expansive practice of the Australian Building Codes Board (ABCB) of importing Australian Standards into the National Construction Code.

8.13 At the very least, this must include rigorous and transparent Preliminary Impact Analyses, Cost/Benefit Analyses and Regulatory Impact Statements for each and every third party instrument adopted or imported into federal legislation or regulation.

8.14 To ensure third party instruments remain relevant to current practices, and do not unnecessarily impede innovation and change in future practices, such instruments where adopted or imported into federal legislation or regulation should be subject to mandatory, defined (preferably not more than five year) sunset provisions.

8.15 Master Builders recommends the Australian Building Codes Board be directed by the relevant Minister(s) that standards or the like promoted or developed

by third parties imported into federal government regulation be required to meet, as minimum, the performance thresholds set down in the Guide.

8.16 The better approach to that proposed by Recommendation 11 then is as follows. We note that Master Builders submitted this proposal in our response to the Draft Report, would be as follows (the rationale for the revision being expressed in the substance of the second proposed paragraph):

> *All non-government standards or the like which are imported into, referenced by, or enforced through, legislation or policy be required to fully conform with the "Australian Government Guide to Regulation."*
>
> *This would require existing and proposed standards or the like to meet rigorous regulatory requirements and impact tests, robust cost-benefit analysis, and demonstrate the superiority of the proposed course of action over a range of alternatives, including no intervention and even deregulation.*

9 Government Procurement – Recommendation 18

All Australian governments should review their policies governing commercial arrangements with the private sector and non government organisations, including procurement policies, commissioning, public private partnerships and privatisation guidelines and processes.

Procurement and privatisation policies and practices should not restrict competition unless:

- *the benefits of the restrictions to the community as a whole outweigh the costs; and*
- *the objectives of the policy can only be achieved by restricting competition.*

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with reporting on progress in reviewing government commercial policies and ensuring privatisation and other commercial processes incorporate competition principles.

9.1 The substance of Recommendation 18 is endorsed. Master Builders does, however, emphasise the specific issues about construction procurement set out in section 3 of this submission.

9.2 To the extent that the 2014 Code might be labelled a restriction on competition (particularly a barrier to entry) the policy benefits of workplace reform that the 2014 Code would engender should be viewed from the outset of the implementation of this Recommendation as outweighing any negative competitive issues. That proposition is made having regard to the intensive

scrutiny given to these issues by the Productivity Commission in the Public Infrastructure Report.

10 Application of the Law to Government Activities – Recommendation 24

Sections 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

This recommendation is reflected in the model legislative provisions in Appendix A.

10.1 Master Builders commends this recommendation. Often governments create uniform contract terms in tenders or seek to place undue risks on contractors. This risk shifting is especially evident in Department of Defence contracts.

10.2 Master Builders submits that where governments legislate to provide a shield of 'fairness' to consumers and others as epitomised in unfair contract terms law, they should in turn exhibit in their dealings those same notions of fairness. This philosophy is certainly reflected in the way, for example, the Commonwealth conducts litigation.[4] This is not the case with Commonwealth Departments' and some agency contracts, however, and Master Builders, as stated, has evidence in particular of Department of Defence contracts which contain one-sided or unfair risk allocation.

10.3 Not only does the risk loading experienced in Government contracts offend against ideas of fairness in practice, loading of risks by governments onto builders leads to poor outcomes. The Interim Report of the Building the Education Revolution (BER) Taskforce[5] provides a discussion of the reality of an outcome influenced by increased prices where risk is loaded onto specific industry participants. The Interim Report made the preliminary finding that the Managing Contractor model identified as one of three delivery mechanisms for BER projects charged higher management fees than the other models, but that this 'prima facie reflect[ed] a higher assumption of risk.'[6]

[4] See Appendix B Legal Services Directions 2005 which sets out *The Commonwealth's Obligation to act as a model litigant.*

[5] See *Building the Education Revolution Implementation Taskforce Interim Report* (Cth of Aust, 6 August 2010); http://www.bertaskforce.gov.au/pages/publications.aspx.

[6] Ibid at 42.

10.4 In its final report[7] this issue was even more cogently expressed:

> *Business as usual arrangements, with managing architects in the equivalent superintendent's representative role, would have been more suitable for BER school projects given their relatively small size, complexity and risk profile. This approach would have maintained a more traditional relationship with building contractors than has been the case of the more complex outsourced, multi-site procurement models used by the Victorian and NSW governments. These education authorities have had the vast majority of complaints, value for money concerns and quality issues.*
>
> *NSW elected to engage seven managing contractors across nine NSW regions. Managing contractors are responsible to arrange for the scoping, budget and quality delivery of projects through the engagement of their own design and sub-contractors to perform the projects in accordance with a modified GC21 contract form which* ***transfers design, procurement, construction and commercial risk. NSW has paid relatively high fees (documented in our previous report) to managing contractors in order to transfer considerable performance and commercial risk away from the NSW Government.***[8]

10.5 This phenomenon seems to reflect what has been identified by Ulbrick[9] as follows:

> *During the contracting phase little consideration is given to how the risks associated with construction ought to be allocated. Rather, the focus during the contracting phase is dedicated to how risks will be allocated where each party to the contract acts on a self-preservation basis.*[10]

10.6 In the case of the BER projects in New South Wales and Victoria, this perspective was damaging. In this context, Charrett and Shnookal[11] have drawn on a Japanese publication to list the consequences of self-preservation risk loading:

- higher bid price;
- bid failure and disruption of project implementation;
- non-participation in the bid of conscientious and capable contractors;

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[7] See *Building the Education Revolution Implementation Taskforce Final Report* (Cth of Aust, July 2011); http://www.bertaskforce.gov.au/pages/publications.aspx.

[8] Ibid at 63 (Master Builders' emphasis).

[9] D Ulbrick, 'No Dispute? Testing the Wisdom of Abrahamson' (2010) 21 Insurance LJ 96.

[10] Ibid at 100.

[11] D Charrett and T Shnookal, 'Standard Form Contracting – The Role for FIDIC Contracts Domestically and Internationally', ACLN 138, May/June 2011 at 6.

- contract awarded to a bidder who fails or was not capable of estimating the risks properly;
- poor construction quality and delay to the progress of the work due to lack of risk contingency;
- undermining the relationship of mutual trust and respect between the employer and the contractor;
- repetition of groundless claims from the contractor;
- frequent disputes between the employer and the contractor; and
- in an extreme case eventual termination of the contract.[12]

10.7 Master Builders, in particular, opposes the use by governments of termination for convenience clauses. These permit the principal to exit the contract at will. If governed by the terms of the unfair contracts provisions of the Competition and Consumer Act, it is likely that these provisions would be set aside by a court.

10.8 The Australian Consumer Law binds each government in so far as it "carries on a business"[13]. In *McMillan v Commonwealth*[14] the Federal Court held that the Commonwealth was not liable for misleading conduct in the course of a tender because it could not be said that the Commonwealth was carrying on a business when selling AGPS assets. The judge's reasoning equally applies to procurement for purely governmental purposes.[15] These and other similar cases mean that all governments are in large part not bound by the Australian Consumer Law in respect of their most important commercial activity, namely, procurement. This omission will stand starkly against the Government's current reform proposals relating to the extension of unfair contract terms to small business[16] and hence this Recommendation should be given priority in implementation.

[12] Ibid at 9.

[13] *Competition and Consumer Act 2010* (Cth) s 2A

[14] (1997)147 ALR 419

[15] *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152

[16] http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms

11 Secondary Boycotts – Recommendation 36

The prohibitions on secondary boycotts in sections 45D 45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

11.1 In the extensive commentary that Master Builders provided to the Review Panel on the Draft Report in Master Builders' submission dated 24 November 2014, (November Submission) the area of reform of secondary boycott law was given a high priority.

11.2 In that submission we pointed out that the Cole Royal Commission and the recent Boral evidence to the Royal Commission into Trade Union Governance and Corruption illustrates that militant unions use secondary boycott conduct as a frequent industrial weapon. It is this concern that motivates both the need for there to be a specific jurisdiction for the building and construction industry and for there to be greater reform to the provisions.

11.3 Master Builders believes that the Review Panel's recommendation that increased vigour be applied in the pursuit of secondary boycott cases should stand as an interim measure. We submit that following a 12 month period, informed by the increased availability of data about actions taken in this area compared with complaints made, Government will be able to assess whether the required increase in vigour has become manifest. If not, further reform should be immediately contemplated, reform of the kind proposed in the November Submission.

12 Trading Restrictions in Industrial Agreements – Recommendation 37

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

12.1 Master Builders fully supports this Recommendation. There is a need to stop anti-competitive conduct that would otherwise be proscribed by these provisions. The current law is that s 45E does not operate to impede the scope of enterprise agreement making under the *Fair Work Act 2009* (Cth) (FW Act). This is first because a single-enterprise agreement under the FW Act is not recognised as being made with an organisation of employees; secondly, an enterprise agreement is not considered to be a qualifying 'contract, arrangement or understanding' for the purposes of the provision.[17]

12.2 The lack of penetration of these provisions to enterprise agreements has led to some very confusing but highly constraining laws relating to regulation of independent contractors via enterprise agreements. In short, the law has constrained the engagement of contractors at market rates – instead they must be provided with the same terms and conditions as employees even though that might be inappropriate for the length or nature of engagement of those contractors.

12.3 Independent contractors in the building and construction industry may be viewed as providing supplementary and specialist labour in a way which makes construction projects viable, thereby supporting jobs, rather than threatening them which is the rationale for those who support the current law. Clauses which restrict the engagement of contractors raise costs and undermine this necessary function of contract labour. They also deny the usual flexibility that is required to respond to the dynamic issues associated with the use of contractors in the building and construction industry, additional labour that is often called on to meet time deadlines so that, for example, liquidated damages are not applied by the principal. These are factors that

[17] *Australian Industry Group v Fair Work Australia [2012] FCAFC 108*

we have pressed in all of our arguments and submissions over a number of years.

12.4 There are a number of opponents to the proposed reforms. Their arguments are along the lines set out in the quotation which follows. Clearly, there would not be, as asserted, an increase in red tape by the proposed reform of contractor regulation. It would have the opposite effect:

> *There have been suggestions that s 45E should be expanded to cover single-enterprise agreements and limit the capacity of employers and their employees freely to agree to protect the employment security of relevant workers by requiring independent contractors or labour hire workers to be paid equivalent rates to directly employed workers. This approach would undermine the degree of latitude permitted to employers and their employees with respect to the matters over which they wish to bargain and, not coincidentally, it would have the flow-on effect of artificially strengthening the position of employers at the bargaining table. Such an approach would increase red tape and complexity within the system and decrease the extent to which parties are able to strike the best bargain for the particular circumstances of that enterprise. It would also strengthen the employer's ability to circumvent an agreed enterprise bargain by utilising labour hire and contractor labour at a cost below that agreed with their employees.*[18]

12.5 As well as the necessity to combat arguments of the kind made by those opposing the change to the law discussed in the prior paragraph, the Government should produce material that clearly shows where, for example, unions are creating monopolies or exclusive arrangements to the detriment of competition and stress that these are matters that relate to the commercial market. This argument certainly applies to the ability of building and construction firms to freely engage independent contractors. That is a central consideration in the way that our members use specialist labour and a practice which is inappropriately undermined by the workplace laws. It is further anticipated that these reforms will be labelled as relating to workplace relations and, therefore, wrongly labelled as requiring the Productivity Commission report on workplace relations to be finalised before the implementation stage may occur.

[18] Submission to the Productivity Commission workplace relations reference by Stewart et al entitled "Labour Regulation: Is There a Case for Major Reform?" http://www.pc.gov.au/__data/assets/pdf_file/0006/187917/sub0118-workplace-relations.pdf at p22

12.6 We reiterate the point about unnecessary and anti-competitive intrusion into product markets. Master Builders has, for example, previously provided Government with information about the requirement set out in the CFMEU pattern agreement promoted in the Australian Capital Territory. It requires monies to be placed with a company, ABN 69 009 098 864,[19] which uses a Built-Plus policy relating to income protection. We understand that the CFMEU receives a commission for moneys paid in respect of Built-Plus policies: the "promoter" Creative Safety Initiatives (sic) Trust (which we understand is controlled by the CFMEU) receives from 8.89% to 13.34% of all contributions made to Built Plus. Clause 37 of the ACT pattern agreement dealing with this matter is as follows:

> *Income Protection Insurance*
>
> *At a cost of no more than $20 per week, per Employee (see Clause 1.7 of this Agreement) the Company will provide the income protection insurance offered by Jardine Lloyd Thompson Pty Limited under its Built-Plus policy, to those Employees who are able to be insured under the terms and conditions of that policy.*
>
> *Income Protection will be paid for all periods of Employees (sic) authorised absence.*
>
> *The cost of BUILT-PLUS policy will not exceed $20 per week per Employee during the nominal term of this Agreement.*
>
> *It is agreed Income Protection Insurance will be paid quarterly.*
>
> *It is agreed that if the Company has not made a valid or current insurance payment the Company shall be liable for any loss of earnings or benefits that would have otherwise been given to the Employee.*

12.7 The importance of this recommendation cannot be underestimated. Its implementation would have a very useful and overdue effect on practices which are anti-competitive but which are currently unassailable because of the provisions of workplace law.

[19] ABN for Jardine Lloyd Thompson P/L

13 Competition Payments – Recommendation 48

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort should be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

13.1 The implicit message contained in Recommendation 48 is State/Territory and local governments are unlikely to pursue necessary, although potentially politically difficult, reforms of themselves in the public interest, but require financial 'incentives' to deliver net public benefit outcomes.

13.2 Nevertheless, Master Builders recognises the utility of a rigorous and transparent process of competition policy payments for realising meaningful competition and regulation reform by providing financial motivation for otherwise reluctant State/Territory governments to take difficult political decisions in the national interest.

13.3 However, such competition payments should only be paid:

- for 'additionality' – that is, not just for doing what is necessary, but for doing 'more than is required';
- based on competition between the States/Territories for a given pool of funds, with disbursements based on agreed targeted areas of reform, promptness and boldness of action against transparent benchmarks; and
- only on an ex post basis against proven outcomes and enforceable commitments against recidivist or countervailing behaviour elsewhere.

13.4 Master Builders endorses an active role for the proposed Australian Council for Competition Policy in assessing reform outcomes (as distinct to reform efforts), and through this channel the quantum and distribution of any competition payments.

14 Economic Modelling – Recommendation 56

The Productivity Commission should be tasked with modelling the recommendations of this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue.

14.1 Master Builders believes that this process should occur at the stage of drafting of the Regulatory Impact Statement for the proposed legislation. We would not support the delaying of the vital reforms that the implementation of the Final Report would deliver.

14.2 There would be no need to specifically consult with jurisdictions other than exposing the legislation in draft and the draft resulting RIS which would contain the results of the modelling.

15 Conclusion

15.1 Master Builders reiterates that the Final Report is a work of great benefit to the community. The benefits of the implementation of the Recommendations discussed in this submission, where necessary with a different emphases, will have a positive impact on the economy.

15.2 There are a number of issues that are distinct to the building and construction industry which have been highlighted in this submission, most notably the utility of the 2014 Code and the need to carve out the application of that Code from the relevant competition policies more broadly proposed. The Productivity Commission's detailed analysis of the reforms required in the building and construction industry relating to workplace relations underline Master Builders' submission in that regard. Master Builders also highlights reforms at the local government level and the targeted use of national competition payments to accelerate long lasting structural reforms.

15.3 The issues associated with Australian Standards and local government as well as the application of competition laws to governments generally emphasise that greater regulatory disciplines should be applied at all levels of government when issues of competition arise. Master Builders would welcome the opportunity of further discussions with Treasury to further explain the rationale of these increased disciplines, a matter central to the success of the implementation of the Final Report.