

Master Builders Australia

Supplementary Submission to the Senate
Standing Education and Employment Legislation
Committee

*The Building and Construction Industry (Improving
Productivity) Bill 2013 and the Building and
Construction Industry (Consequential and
Transitional Provisions) Bill 2013*

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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 122 years the movement has grown to 32,000 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 Master Builders lodges this submission as a result of appearing in the hearing of the Senate Standing Education and Employment Legislation Committee (the Committee) on the *Building and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Building and Construction Industry (Consequential and Transitional Provision) Bill 2013* (Transitional Bill) on 26 November 2013.
- 2.2 The Chair of the Committee asked that Master Builders provide a response to the questions asked by no later than close of business 27 November 2013.

3 Question about Judicial Review

Senator Cameron asked that Master Builders comment on the safeguards that Commissioner Cole in the Cole Royal Commission Report¹ indicated should be in place concerning the ABCC's operations, particularly the aspect of judicial review. Master Builders notes the discussion of this issue in Chapter 3 of Volume 11 of the Cole Royal Commission Final Report where after indicating that the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* "ought to apply to the ABCC, according to

¹ http://www.royalcombcj.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf

its terms,”² the Royal Commissioner set out Recommendation 196 and Recommendation 197 which, in our understanding, are effected in the Productivity Bill. The recommendations are as follows:

196 The Australian Building and Construction Commission report annually to the responsible Minister, such report to be tabled in each House of the Parliament. Such report shall include information on the number and types of matters investigated, the amount of employee entitlements recovered from recalcitrant employers, and the aggregate cost of unlawful industrial action in the industry.

*197 The Australian Building and Construction Commission be subject to the jurisdiction of the Commonwealth Ombudsman.*³

4 Independent Economics Report

4.1 Attachment A to Master Builders submission dated 22 November 2013 to the Committee is the report commissioned by Master Builders entitled *Economic Analysis of Building and Construction Industry Productivity: 2013 Update* prepared by Independent Economics (2013 Report).

4.2 At the last page of the Proof Hansard the following is said by the Chair:

A lot of the debate this morning has centred on the reliability and validity of the Independent Economics report used by the Master Builders. Has the department used Independent Economics to provide any advice over the last five years?

4.3 For the record, and completeness, Master Builders believes Independent Economics has undertaken the following:

“Deed of standing offer for the operation, maintenance and further developments of the Independent Economics Computable General Equilibrium Model”, Australian Treasury, ongoing.

Independent Economics provided economy-wide modelling services to the Australian Treasury under a Deed of Standing Offer that was initiated for the 2012/13 year and renewed in 2013/14

“Economic modelling of the business tax system for the Business Tax Working Group”, Australian Treasury, 2012.

Independent Economics worked with Treasury to model options for reforming the company tax system, and our modelling was published as

² Ibid at para 206 of Chapter 3 of Vol 11 p49

³ Ibid at page 50

part of the Final Report of the Australian Government's Business Tax Working Group.

"CGE Analysis of the Current Australian Tax System" Australian Treasury, 2009-2010.

Chris Murphy from Independent Economics led the team which estimated the effects of 19 different taxes on the Australian economy for the Australian Treasury. The analysis formed a key part of the final report of the Henry Tax Review

"CGE Analysis of Part of the Government's AFTSR Response" Australian Treasury, 2010

Chris Murphy and his team were commissioned by the Treasury to estimate the impacts of some of the Government's policy reforms in response to the Henry Tax Review. This included the impact of introducing a resource rent tax on the Mining sector

"Measuring the impact of the Productivity Agenda, Department of Education, Employment and Workplace Relations, 2010

Chris Murphy led the team which estimated the economy-wide benefits of the Government achieving its targets under the participation and productivity reform agenda in education, employment and workplace relations. The report was launched by the Hon. Julia Gillard MP, the then Minister for Education, Employment and Workplace Relations at the National Press Club on 26 May 2010.

- 4.4 At page 25 Proof Hansard Master Builders is asked why the period 1995 – 2003 was used as a baseline period in the 2013 Report. The question was put to Independent Economics. Their response is as follows:

The data in the years immediately preceding the taskforce/ABCC era is more relevant than data from the more distant past in establishing the impact of the productivity gains or otherwise. Therefore, the 2013 Update Report compares working days lost immediately before the era (1995-1996 to 2001-2002) to working days lost after the taskforce/ABCC had been in place long enough to have a major impact i.e. 2006-2007 to 2011-2012.

- 4.5 Senator Cameron also then asked whether or not all analysis in the report would be open to academic scrutiny, "independent academic analysis".

- 4.6 Master Builders, at the hearing, advised that the methodology for the Independent CGE model was set out in Appendix A of the 2013 Report. Master Builders also outlined that Independent Economics/Econtech had responded to previous critiques relating to the previous reports. Master Builders noted that Econtech had responded to those critiques and had amended the prior reports. Master Builders notes that the 2013 Update Report is a public document and therefore by its very nature is open to review and critique and there is no attempt to hide its results or its methodology.
- 4.7 Master Builders understands that separate approaches have been made to Independent Economics about the analysis and the underlying methodology in the 2013 Report.
- 4.8 Master Builders would be happy to act as a channel for forwarding any critiques to Independent Economics.

5 Days Lost to Industrial Action

- 5.1 The paragraph which appears at the top of the summary component of the 2013 Report as follows was the subject of some discussion:

ABS data shows that the days lost to industrial action in the building and construction industry averaged 159,000 per year between 1995/96 and 2001/02. This gradually declined during the first five years of the Taskforce/ABCC era, and working days lost then remained at a low level from 2006/07 to 2011/12. However, with the replacement of the ABCC by the FWBC, working days lost jumped from 24,000 in 2011/12 to an estimated 89,000 in 2012/13. Hence, more than one half of the improvement in working days lost in the Taskforce/ABCC era has already been relinquished in the first year of the FWBC era.

- 5.2 Master Builders was asked to estimate what proportion of hours 89,000 working days lost represents to the total number of hours worked in the industry. We were also asked to estimate a cost that 89,000 working days lost represent: see page 24 of the Proof Hansard. Master Builders estimates that around 55 million days are worked by the cohort of workers that are likely to be affected by industrial disputation. The estimate is based on the following assumptions:

Number of tradespeople/labourers 568,000

- less 25 percent working in engineering construction

- less 0.5 FTE for each part time worker
 - less 30 per cent for self-employed or non-unionised industrial residential area.
- 5.3 This amounts to 268,000 people likely to be affected based on a cohort population of 568,000. The number of days worked by this cohort is a simple arithmetic calculation of using 205 standard working days.
- 5.4 Master Builders would contend that to calculate the percentage of days lost due to industrial dispute is meaningless statistical data. The fact is that 89,000 days lost are 89,000 days lost and represents a major cost to the contractor and the industry as a whole. See below.
- 5.5 It is not possible to generalise the cost of each working day lost due to industrial dispute. For instance, each construction project is different e.g. simple warehouse, high rise offices and complex scientific/medical institutions. The cost of construction also differs markedly between the different stages of construction which then also reflects the number and skill range of industry participants affected on the day of the strike. Given the very tight time frame provided by the Committee it is not possible to provide the level of granularity that has been requested, however, other estimates have been provided.
- 5.6 In addition, it is important for the Committee to note that the cost is not simply the labour cost or the loss in labour productivity for that day or days that workers are on strike. For instance, a one day strike can have massive consequential and cost damaging effects if the strike was called (as is often the case) during a critical concrete pour in a high rise building. These wild cat strikes regrettably are “normal” union tactics. The cost to the contractor is not just the loss of one day labour productivity, but weeks of rework as the partially poured concrete floor is demolished and the concrete pour recommenced.
- 5.7 There are other costs and/or damages that can result from a strike particularly where these involve days and weeks. The costs include expensive plant and equipment such as cranes and other major construction equipment lying idle. It is normal practice for this plant and equipment to be leased or hired for the period of the project. Contractors also face the risk of incurring liquidated damages from the client for any delay in completing the project. Liquidated

damages can be as much as \$1 million a day. These industrial relation risks are priced into the tender price.

- 5.8 The extent of the direct costs of a protracted strike can be gleaned from the Myer Emporium strike where Grollo incurred, according to the public record, losses of millions of dollars as a consequence.
- 5.9 Similarly, strikes have consequential effects throughout the supply chain, affecting offsite manufacturers and building material suppliers who work to very close time frames to meet the industry's practice of just-in-time delivery of products and services. The rescheduling and delay in the delivery of products and the delay in the various specialist labour based services means that the schedule of not only the immediate construction project involved is affected but also other non-related construction projects which products and subcontracting services. In other words, the non-affected parties also suffer from the strike action.
- 5.10 While it is not possible to accurately calculate the construction cost of a day lost, Master Builders can confidently say that the economic damage is not in the hundreds of dollars but tens of thousands for the less critical projects, to hundreds of thousands for complex or critical phases of construction. These would be the direct costs; as mentioned elsewhere there are indirect costs that flow through the supply chain that would also be affected by the industrial action. The other costs that need to also be taken into account as mentioned elsewhere are liquidated damages imposed by the client for not completing the project on time.
- 5.11 If it is assumed that the direct cost of a strike is \$100,000 per day then 89,000 days lost to industrial action would equate to \$8.9 billion.
- 5.12 It should be noted that building unions also use the industrial tactic of calling for a strike then at the last moment calling it off. These are not formally recorded in the ABS statistics but they have an equally damaging impact on the construction process. For instance, once a union advises the contractor that it is intending to strike, the contractor then makes arrangements for halting all work which affects not only the workers involved but also the other suppliers that may be scheduled for that day. This means that the contractor arranges for the site to be non-operational that day and is unable at short

notice to recommence work even though the union has reversed its decision to strike. These situations are equally damaging and not recorded in the ABS statistics.

6 Productivity and Technology

- 6.1 Master Builders was asked whether or not an increase in non-labour factors could explain an increase in productivity during the period of the ABCC: page 27 of the Proof Hansard.
- 6.2 It is generally accepted that the labour component in construction represents in the order of 40-60% of the total cost of construction. Labour and labour productivity therefore represents a major cost component during the construction phase.
- 6.3 The other major components that could influence productivity during the construction phase include:
1. Building design innovation, either architecturally or engineering.
 2. Construction techniques.
 3. Use and installation of building materials.
 4. Project management.
- 6.4 During the period of the ABCC that is 2005 – 2012 which was the period of analysis in the 2013 Report, there was no substantial or major step-change advance industry-wide in innovation on technology that could credibly be advanced as having significant improvement in raising productivity that could have contributed to the 9.4 per cent increase calculated in the 2013 Report. This proposition was tested with two major construction firms in Australia. It is accepted that at an individual enterprise level some innovation or improved construction techniques may have been employed but none of which would have contributed to an industry-wide productivity increase.

7 Industrial Disputes

- 7.1 Master Builders was asked to comment on the small number of industrial disputes which were alleged to have occurred as expressed in the evidence of the ACTU and “spikes and peaks” in the numbers.

- 7.2 Master Builders notes that in the industry there are now fewer strikes but more disruptive tactics and where the official ABS statistics do not reflect the disruption to work. This is in part facilitated by clauses which permit stoppages which are at the boundary of what may or may not be lawful. These clauses are in agreements where “sign up or else” tactics are used. The following clause for example is in the pattern CFMEU Queensland agreement:

Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities.

- 7.3 As the standard clause is vague in respect of the frequency and type of union activity the unions have been using the clause to gain unprecedented power over employers. In 2012, in Queensland, the CFMEU/BLF demonstrated that it was willing to use the 2 hour clause to pressure employers to concede to claims outside of protected industrial action rather than following formal bargaining processes. If the contractor refused a particular claim, the project was subjected to rolling 2 hour stoppages invoking the entitlement under the standard clause. None of these activities would have registered in the working days lost statistics. Hence, larger disputes result in more “spikes” in the statistics.

- 7.4 Master Builders notes that unlawful industrial action occurs almost daily in some States and Territories. The following is a list of matters where s418 orders were sought in Queensland and the Northern Territory from July 2013:

Laing O'Rourke Australia Construction Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another [PR538778](#) 09/07/2013 -Alleged industrial action at the Northern Water Treatment Plant project

Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union [PR540450](#) 19/08/2013 - Alleged industrial action at Laing O'Rourke Australia Construction Pty Ltd, Condabri Gas Construction project

Fluor Construction Services Pty Ltd v Construction, Forestry, Mining and Energy Union and another [PR541318](#) 04/09/2013- Alleged industrial action at Fluor Construction Services Pty Ltd

Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] [FWC 7868](#) 08/10/2013- Summary: s.418 order -

demand to employee union delegate - CFMEU rules - divisional branches

Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union [PR543009](#) 08/10/2013 -Alleged industrial action at Skyview Project, 63 Blamey Street, Kelvin Grove Brisbane

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another [PR543476](#) 17/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project - interim order Lend Lease Project Management & Construction (Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union and another [PR538822](#) 10/07/2013 -Alleged industrial action at Lend Lease Project Management & Construction at the Oral Health Centre, Herston

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [PR543477](#) 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [PR543490](#) 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order extended.

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another [PR543489](#) 18/10/2013 - Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project interim order extended

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [PR543520](#) 21/10/2013- Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another [PR543519](#) 21/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project

Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union [PR543610](#) 22/10/2013 - Alleged industrial action at Ichthys Accommodation Village Project, Darwin

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 -Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project - corrected by 2013 FWC 8274 - [PR543830](#) re preamble

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 - Correction to preamble re Alleged industrial action at two Lend Lease sites

John Holland Group Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWC 8552 30/10/2013- Alleged industrial action at the Gallipoli Barracks, Enoggera - Enhanced Land Force Stage 2 - industrial action is happening - CFMEU's actual conduct was to organise industrial action. See [PR544002](#)

John Holland Queensland Pty Limited v Construction, Forestry, Mining and Energy Union [2013] FWC 8554 30/10/2013- Alleged industrial action at the Queensland University of Technology Creative Industries Precinct Project site - purpose for being on site concealed - identity of organiser concealed - deliberate obfuscation - finding that union was organising industrial action - order for six months - correction order see [PR544003](#)

8 Discrimination

- 8.1 Master Builders was asked to address the claims of discrimination set out by the ACTU and the CFMEU.
- 8.2 The legislation does not discriminate against building workers. Instead, it provides a regime recommended by the Cole Royal Commission which deals with the industry in a singular way to meet singular problems. The legislation covers building industry participants. Insofar as there are allegations that fundamental principles have been breached by the terms of the legislation, Master Builders notes the extensive human rights implications discussed in the statement of compatibility with human rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* which appears on page 50 and following of the Explanatory Memorandum for the Productivity Bill.

9 Focus on the Grocon Dispute

- 9.1 Master Builders was asked to comment on the ACTU allegation that the evidence was focussed overly on the Grocon dispute: page 27 of the Proof Hansard.
- 9.2 As is evident from paragraph 7.4 of this submission and table 1 below, Master Builders does not rely solely on the Grocon dispute to substantiate its position or the position of the Government as expressed in the Bills.

Table 1 Other Disputes

PARAGRAPH NUMBER FROM SUBMISSION DATED 22 NOVEMBER 2013	DISPUTE SUBJECT
4.5	Melbourne Markets
4.8	39 cases before the court since 1999
4.10	Assault by Derek Christopher
4.12	Three right of entry abuses
8.2	<i>Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union</i>
9.9	<i>Laing O'Rourke Australia Pty Ltd v CFMEU</i>
16.5	<i>Cape (CHS)P/L v CFMEU</i>
16.8	Tedra/City West Water and the AMWU
16.12 and following	Royal Children's Hospital South Brisbane
