**MASTER BUILDERS AUSTRALIA**

**RESPONSE TO QUESTIONS ON NOTICE**

**Senator Cameron asked:**

> *Mr Harnisch, on this issue of unprotected action do you have figures on the disputes in the building and construction industry for what are protected and what are unprotected—that is, illegal industrial action or illegal industrial action—or are you just putting them all together to get a figure?*

**Answer from Master Builders:**

Master Builders expanded upon this question during proceedings (our emphasis):

> ***Mr Schmitke:*** *The answer to that question is: we are going off the Australian Bureau of Statistics data in relation to days lost through industrial disputation. Regarding how they measure it and whether they distinguish between—using your terminology, Senator—lawful disputes or protective (sic) action and unprotected action, we simply look at those figures holus-bolus as an amount, because that is the measure that is used consistently.*
>
> ***Senator CAMERON****: That is quite disingenuous, because you come here and talk about unlawful activity and yet when you talk about industrial action you put legal industrial action and protected industrial action in with illegal industrial action—and I am not sure if there is any illegal industrial action. You come here and you argue all these points; you argue that is why you want an ABCC. Yet you come and say, 'We don't really know.'*
>
> ***Mr Schmitke:*** *Again, all I can say is that this is the consistent data measure. Again, if you want to compare it to other sectors, they are measured exactly the same way. This is a time series measure. We can see that the level of disputation increases and decreases over time with the measure, which is consistently used by a government agency.*

The ABS data measure "*6321.0.55.001 - Industrial Disputes, Australia*" does not identify whether or not industrial action measured was lawful or unlawful.

The measure contains a glossary that deals with the categories of disputes to which it measures.[1] In short, the measure splits disputes into two broad categories being 'Enterprise Bargaining related' or 'Non-Enterprise Bargaining related'. There are subsequent further sub-categories that provide other detail however none of these explain or indicate whether the disputation was lawful or unlawful. While one category of reasons for return to work includes the operation of a Federal Law (that includes an FWC order) it does not identify which law or how the law operated.

[1] *http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6321.0.55.001Glossary1June%202016?opendocument&tabname=Notes&prodno=6321.0.55.001&issue=June%202016&num=&view=*

However, in this respect Master Builders notes (by way of example) that during the period February 2013 to March 2016 there were some 86 applications[2] made to the Fair Work Commission across Australia for return to work orders pursuant to s.418 of the *Fair Work Act 2009*. Section 418 orders are only available when industrial action is taking place that is not protected – that is, unlawful or illegal. Of the 86 applications, almost one third were sought against building unions and related to the building and construction industry.

In addition, Master Builders notes that:

- The ABS data measure "*6321.0.55.001 - Industrial Disputes, Australia*" includes measures of the total number of working days lost to industrial disputation. It has been, and remains, the most commonly referenced data set as it measures the effects of industrial disputation in a manner that is quantifiable and consistently measured. This enables a clear comparison over time (e.g. quarter to quarter, year to year etc), between sectors (construction versus mining) and between sectors over time.
- While this measure is the most commonly used, Master Builders wishes to note that the above measure only includes disputes where the equivalent number of days lost is 10 or more. That is, disputes that cause the loss of less than 10 days are not included in the measure. It is Master Builders experience that disputes causing a loss of 10 days or less this would not capture a large proportion of disputes in the construction sector and therefore the actual or true loss of days is far higher.
- Further, the definition of dispute is defined by the ABS as "*a state of disagreement over an issue or group of issues between an employer and its employees, which results in employees ceasing work.*"[3] Arguably, this definition does not capture disputes between an employer and a trade union which is a common feature of the disputation within the construction industry.
- The ABS itself notes that "*Due to the imputation procedures and the limitations on identification of disputes, the statistics should not be regarded as an exact measure of the extent of industrial disputation.*"[4]
- Notwithstanding the deficiencies noted herein, we remain of the view that the measure remains the most consistent comparator between sectors and over time.
- This same measure also records the total number of disputes as a total quantity on a per quarter basis over time. The Committee should note that there are again collection deficiencies that affect the accuracy of the total number of disputes in terms in real terms. For example, where a dispute involves multiple stoppages and returns to work within a two-month period, it is counted as one single dispute rather than multiple disputes. Further, disputes affecting several locations is counted as a single dispute if it is organised or directed by the same organisation (e.g. a trade union).

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[2] *Source: Australasian Legal Information Institute 2016, Australasian Legal Information Institute - University of Technology Sydney, Ultimo, New South Wales, viewed 15 June 2016 http://www.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;meta=%2Fau;mask_path=%2Bau%2Fcases%2Fcth%2FFWC;mask_world=;query=s418%20-%20application%20for%20an%20order%20that%20industrial%20action;results=50;submit=Search;rank=on;callback=off;legisopt=;view=date&offset=100*

[3] *http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6321.0.55.001Glossary1June%202016?opendocument&tabname=Notes&prodno=6321.0.55.001&issue=June%202016&num=&view=*

[4] *http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6321.0.55.001Explanatory%20Notes1June%202016?OpenDocument*

**QUESTIONS FROM SENATOR CAMERON REGARDING THE BUILDING CODE**

Master Builders note that the questions from Senator Cameron were referenced in a manner that did not clearly distinguish between the *Building Code 2013* ('2013 Code') and the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* ('2014 Code').

The 2013 Code is currently operative. As it is proposed that the 2014 Code will become operative upon passage of the Bills that are subject to the current Committee deliberations, Master Builders provides the information hereunder on the understanding that the questions from Senator Cameron are intended to refer to the 2014 Code.

The above understanding is supported with reference to a document published by the Electrical Trades Union in Victoria titled *"Key Facts - Building and Construction Industry (Fair and Lawful Building Sites) Code 2014"*[5] from which the following extract is drawn:

> *"The Building Code does not only prohibit 'union friendly' clauses. The Code prohibits 76 Clauses in a construction ETU Agreement, including clauses:*
>
> - *That prevent unlimited ordinary hours worked per day*
> - *That guarantee the employee's ability to have a day off on Christmas Day and Easter Sunday, Public holidays etc.*
> - *That encourage employment of apprentices*
> - *That discourage discrimination against mature workers*
> - *That include agreed stable and secure shift arrangements or rosters*
> - *That ensures construction workers conditions and entitlements cannot be eroded*
> - *That provide for equality and fairness onsite for construction workers*
> - *That impact on the rights of construction workers to have a safe workplace."*[6]

The Committee should note that the above extract makes assertions referencing specific clauses in a proposed agreement that has been deemed by the Department of Employment to be not compliant with the 2014 Code. In the time available, Master Builders has been unable to source the proposed agreement so referenced nor the related advice from the Department of Employment setting out the basis or reasoning for the non-compliance.

That said, the ETU document then asserts that if a particular proposition is not compliant, then it must follow that the reverse proposition must be compliant. This is illogical, misleading and untrue.

For example, if the proposition:

> *"illegal gambling must not take place on a building site"*

was deemed non-compliant, then using the ETU logic, the reverse proposition of:

> *"illegal gambling <u>can</u> take place on a building site"*

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[5] *https://www.etuvic.com.au/Documents/Campaigns/Building_Code_Facts.pdf*

[6] *Master Builders notes that our inclusion of the extract in this answer does not represent an acceptance or endorsement of its content. As noted herein, Master Builders contests the assertions for the reasons noted hereunder in specific response to questions from Senator Cameron.*

must be true and therefore cause the assertion of:

> *"there is nothing in the 2014 Code that can restrict illegal gambling on a building site"*

This would be an illogical outcome that ignores the existence of other laws or regulation.

Master Builders notes that questions from Senator Cameron may be drawn from materials in the public domain (such as the ETU publication noted above) and therefore could have unintentionally adopted and/or been premised upon the inaccurate propositions noted above.

Master Builders answers hereunder should therefore be read in the above context.

In addition, it is important that the Committee also note that:

- There are other laws and regulations that apply to all workplaces, including those in the building and construction industry, such as discrimination, safety, and industrial laws. These other laws operate irrespective of the 2014 Code and cannot be over-ridden.
- The 2014 Code will apply to the content of enterprise agreements and the related conduct on building sites covered by those agreements. All enterprise agreements made (irrespective of whether the 2014 Code applies to them or not) must be subsequently considered and approved by the Fair Work Commission.
- The Fair Work Commission must, when considering the agreement, ensure that it provides conditions that leave workers better off overall. This is done by applying a "Better Off Overall Test" commonly known as the BOOT.
- If it is found that employees to be covered by an enterprise agreement will not be better off overall under its proposed terms, it will not be approved by the Fair Work Commission. This applies across the board and includes agreements made in the building and construction industry.
- In addition, the Fair Work Commission will not approve an agreement that is inconsistent with other applications laws and regulations, including the National Employment Standards set out in the *Fair Work Act 2009*.

**Senator Cameron asked:**

> *Why should the code prevent unlimited ordinary hours being worked in any day on a construction site?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

In the event such a provision provided for in enterprise agreement, it would not be approved by the Fair Work Commission.

Notwithstanding our comments earlier in this document regarding the ETU publication and that document so referenced, we note that it is common in the construction industry for building unions to bargain for clauses that:

- Require union approval about when and where work is performed, rather than the agreement of the workers to whom the agreement applies; and/or

- Clauses that are referred to as "one in, all in" where, if one person is offered overtime, all the other workers must be offered overtime whether or not there is enough work.

Such provisions would offend the 2014 Code provision deems agreement clauses to be non-compliant if they "*limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed*". This does not mean that an employer can force workers to work unlimited ordinary hours in any one day.

In addition, section 9 of the 2014 Code requires building industry participants to comply with all designated building laws and this includes Commonwealth industrial instruments such as enterprise agreements. The Code therefore actually prohibits unlimited hours from being worked on a building site – as this would be a breach of the industrial instrument.

We also note that:

- The 2014 Code does not contain the word "unlimited".
- The word "ordinary" is used only in the context of the 2014 Code prohibiting restrictions on a loaded rate of pay that incorporates payment for ordinary time and other matters such as overtime and allowances in one loaded rate.
- The word "hours" is mentioned only three times in the context of establishing a 24-hour period in which entities covered by the 2014 Code must "report or notify" notify the ABCC of threatened or actual industrial action (whether protected or otherwise) or when "any request or demand by a building association, whether made directly or indirectly, that the code covered entity engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the Competition and Consumer Act 2010…"

**Senator Cameron asked:**

> *Why should the code deny an employee's ability to have a day off on Christmas Day, Easter Sunday and public holidays?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

It is important to remember that the 2014 Code applies to content of enterprise agreements that operate in conjunction with underpinning laws, including the National Employment Standards ('NES').

As the Fair Work Ombudsman notes, the NES:

> *"provide an entitlement for employees to be absent from work on a day or part-day that is a public holiday. The NES protect an employee's workplace right to reasonably refuse to work on a public holiday, and will guarantee payment where an employee is absent from work because of a public holiday. Employees are protected from adverse*

*action for having, using, or seeking to use their workplace right to reasonably refuse to work on a public holiday."*[7]

And also:

*"Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and those that do will have no effect."*[8]

**Senator Cameron asked:**

*Why should the code restrict the encouragement of apprentices on a building and construction site?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

The 2014 Code will operate to the extent that it prohibits enterprise agreements containing clauses that prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time. It appears that this question may be related to this particular or similar provisions.

In that respect, it should be noted that the Explanatory Memorandum[9] ('EM') associated with the 2014 Code notes that it will not operate to prohibit any "*initiatives to promote the take-up and completion of apprenticeships, such as mentoring programs*" and later that "*engaging apprentices is highly desirable and encouraged*".

Initiatives to encourage more apprentices into the industry are not prohibited by the 2014 Code and this is made explicitly clear in the EM.

**Senator Cameron asked:**

*Why should the code discourage discrimination against mature workers?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

The 2014 Code will not prevent initiatives to promote the employment of mature age workers in the building and construction sector and specifically bans clauses that are discriminatory.

The 2014 Code contains a provision that requires building industry participants to ensure an enterprise agreement does not contain terms that:

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[7] *Fair Work Ombudsman information sheet "Public holidays and the National Employment Standards"*
[8] *Ibid*
[9] *EXPLANATORY STATEMENT Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 Issued by the authority of the Minister for Employment 28 November 2014*

*"discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors"*

In addition, the associated EM notes that the 2014 Code is not intended to operate to prohibit:

*"initiatives to promote the employment of women, Indigenous, mature age or other groups of workers disadvantaged in the labour market; or…."*[10]

**Senator Cameron asked:**

*Why should the code include agreed stable and secure shift arrangements or rosters being outlawed?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

The 2014 Code does not outlaw "agreed stable and secure shift arrangements rosters" but does prevent clauses in agreements that place unreasonable restrictions on the capacity to amend such arrangements as required or require union approval before changes can be made.

Notwithstanding our comments earlier in this document regarding the ETU publication and that document so referenced, we note that it is common in the construction industry for building unions to bargain for clauses that predetermine a schedule for when rostered days off will take place and prevent those days being changed irrespective of operational requirements or the wishes of workers.

Such provisions would offend the 2014 Code provision deems agreement clauses to be non-compliant if they "*limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed*" or if they "*agree to set a schedule for rostered days off that does not allow for flexibility around operational requirements*."

This does not mean that shift arrangements cannot be agreed, regularly observed, or are outlawed. Rather, it means that clauses placing restrictions on the capacity of an employer to change or alter shift arrangements, or employees to request a change or alteration to their shift arrangements, would not compliant with the 2014 Code. For example, a clause requiring workers to seek agreement of a union before they change their hours would not be compliant.

**Senator Cameron asked:**

*Why should the code provide that construction workers' conditions and entitlements cannot be eroded?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

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[10] *EXPLANATORY STATEMENT Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 Issued by the authority of the Minister for Employment 28 November 2014*

The 2014 Code will apply to the content of enterprise agreements and the related conduct on building sites covered by those agreements. All enterprise agreements made (irrespective of whether the 2014 Code applies to them or not) must be subsequently considered and approved by the Fair Work Commission. The Fair Work Commission must, when considering the agreement, ensure that it provides conditions that leave workers better off overall. This is done by applying a "*Better Off Overall Test*" commonly known as the BOOT.

If it is found that employees to be covered by an enterprise agreement will not be better off overall under its proposed terms, it will not be approved by the Fair Work Commission. This applies across the board and includes agreements made in the building and construction industry.

In addition, the Fair Work Commission will not approve an agreement that is inconsistent with other applications laws and regulations, including the National Employment Standards set out in the *Fair Work Act 2009*.

**Senator Cameron asked:**

> *Why should the code provide that equality and fairness on-site for construction workers is illegal?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

Master Builders notes that the 2014 Code explicitly notes its purpose as being to promote:

> *"..an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants."*

The related EM also makes it clear that the 2014 Code requires:

> *"…a WRMP to detail the systems, processes and procedures that the code covered entity has in place (or will have in place) including to promote fair, efficient and productive workplaces."*

And later that:

> *"…code covered entity would have to demonstrate in a WRMP for a particular project how the requirement to promote a fair, lawful, productive and efficient workplace can be met.."*

**Senator Cameron asked:**

> *Why should the code impact on the right of construction workers to have a safe workplace?*

**Answer from Master Builders:**

The question is not an accurate reflection of the 2014 Code or its intended operative effect.

Neither the 2014 Code, nor the Bills, require or limit any matter that would restrict the capacity for workers or their representatives to raise legitimate concerns about workplace health and safety with either their employer or relevant regulators.

Master Builders notes that Subsection 9(3) of the 2014 Code is explicit in ensuring workplace health and safety laws are observed. The EM notes that this subsection:

> *"requires code covered entities to comply with work health and safety laws to the extent they apply to building work, including strict compliance with processes for electing health and safety representatives and right of entry for officials of registered organisations. This does not place new obligations on code covered entities, but rather, reinforces that code covered entities are required to strictly comply with existing obligations. These obligations may arise under Commonwealth, state or territory laws."*

**Senator Cameron asked:**

> *In terms of this 30 per cent IR premium, are you saying that there should be a 30 per cent reduction in construction workers' wages and conditions?*

**Answer from Master Builders:**

This question was dealt with in part during Committee proceedings. We refer to the following extract from Proof Hansard (our emphasis):

> ***Senator Cameron:****….. In terms of this 30 per cent IR premium, are you saying that there should be a 30 per cent reduction in construction workers' wages and conditions?*
> ***Mr Harnisch:*** *Certainly not, Senator.*
> ***CHAIR:*** *Can you flesh out the 30 per cent IR premium, Mr Harnisch?*
> ***Mr Harnisch:*** *That certainly has nothing to do with wages. It is about practices that lead to an additional cost to building, really. It is not about seeking a cut of 30 per cent in wages. I want to put that on the record.*

Master Builders also notes that a related issue was considered in an earlier report regarding industrial relations and construction. It noted that the productivity benefits to the community and economy arising from the existence of the ABCC were did not come at the expense of workers conditions or entitlements finding:

> *"It would seem that the reduction in industrial disputes as well as the improvement in productivity in the construction industry did not occur at the expense of wages paid in the construction industry."* [11]

In addition, Master Builders refers the Committee to the following commentary regarding the ABCC and its impact on construction costs:

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[11] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*

*"Previous reviews have found that there was a reduction in construction costs for major infrastructure projects associated with the introduction and operation of the (now closed) ABCC. They focused on comparing costs that prevailed in the late 1990s and early 2000s to the performance of the construction costs in infrastructure up to around 2007. These studies found that the change helped the industry to avoid costs with a value of between 2 and 11 per cent of the overall project cost.* "[12]

*"Disruption of construction sites can take many forms, with formal stoppages and strike actions being only the most visible examples. During this inquiry, the Commission found various cases of less visible, but still highly costly, delays. These included:*
*• blocking access to work sites through a range of means, including the dumping of debris or materials at work gates, or parking of machinery or trucks for the same purpose*
*• delaying the delivery or use of materials (including concrete pours), by either preventing access to sites or preventing the further handling of materials once on site*
*• stopping the removal of waste from sites*
*• placing 'bans' on the use of critical equipment, such as cranes.*
*While some instances involved relatively short disruption, others were lengthy, involving multiple days or even weeks. The estimated costs incurred from such delays vary considerably, but can be substantial and borne by a range of parties (including principal contractors, but also a range of subcontractors)."* [13]

*"IR problems may affect aggregate economic outcomes in several ways. In some instances, they may increase the labour and capital required in the industry above efficient levels, lowering productivity and raising construction costs. In other instances, IR problems may raise labour costs without corresponding productivity improvements. Prima facie, the previous section strongly suggests that poor IR environments on major project sites will have adverse effects on their productivity and costs (as well as other effects on subcontractors and employees)."*[14]

*"The creation of the Building Industry Taskforce (BIT) and the Australian Building and Construction Commission (ABCC) mitigated some of the problematic practices in the construction sector in the early 2000s (as described by the Cole Royal Commission). The changes reduced the capacity for unions to use certain stratagems and tactics to gain unreasonable bargaining leverage for higher wages and conditions, manning ratios, membership numbers and union dues. For example, changes that reduce industrial disputes and interruptions to work arising from contrived workplace health and safety issues (among other tactics) must be beneficial for productivity. Surveys and case studies provide evidence of a positive impact."*[15]

*"Cases in the Federal Court and Federal Circuit Court have revealed industrial tactics designed to secure common and generous conditions across project sites and to unduly pressure employees to join unions. The nature of construction projects provides unions with significant leverage, which they sometimes abuse. Businesses are exposed to large delay penalties, and high costs if construction work is interrupted (such as during a concrete pour). Bargaining pressures have increased some project costs, particularly*

[12] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*
[13] *(Productivity Commission Inquiry into Public Infrastructure Costs Final Report 2014)*
[14] *(Productivity Commission Inquiry into Public Infrastructure Costs Final Report 2014)*
[15] *(Productivity Commission Inquiry into Public Infrastructure Costs Final Report 2014)*

*in the building construction segment of the industry (as revealed by the excessive pay and conditions in some projects)."*

*"During the period August — October 2012, the Construction Forestry Mining Energy Union (CFMEU), Communications Electrical & Plumbing Union (CEPU), and the Builders Labourers Federation Queensland picketed outside the Brisbane Children's Hospital construction site of contractor Abigroup Ltd. The financial impact of the eight week loss of work on this project, together with time lost due to ramping up of the workforce on the site, has been estimated by the Queensland Department of Housing and Public Works to have caused direct costs which will be payable by the Queensland Government in the order of $7,400,000."*[16]

*"While there are no 'official' estimates of the costs of the dispute, the following figures published in the media give an indication of the possible costs.*

- *This dispute is estimated to have cost Grocon more than $370,000 a day just in the site in Melbourne's Lonsdale Street. Grocon seeking $10.5 million in lost revenue to be recovered from Victorian CFMEU.*
- *The cost to the tax payer, incurred primarily by the hefty police presence, is estimated at $500,000 each day of the dispute."*[17]

[16] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*
[17] *(Allens – Economic Impact of Construction Industrial Relations in NSW 2013)*