



MASTER BUILDERS
A U S T R A L I A INC

**Submission
to the
Minister for Employment and Workplace Relations
on the
Building and Construction Industry Improvement Bill
and the Future of
Workplace Relations**

February 2005

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EXECUTIVE SUMMARY

Master Builders Australia's (Master Builders) submission outlines suggestions for change to make the operation of the *Building and Construction Industry Improvement Bill 2003* (BCII Bill) more efficient and simpler for building and construction industry participants. With anticipated reforms after 1 July 2005 that will lead to a more decentralised workplace relations system, many of the provisions of the BCII Bill run counter to that trend. However, yet more regulation is needed in the building and construction industry to restore the rule of law.

The BCII Bill is required principally to properly establish the boundary between lawful and unlawful industrial activity and to address unlawful conduct which must attract serious consequences. The central component of the BCII Bill is the establishment of an independent monitoring and prosecuting authority to monitor conduct and enforce the rule of law in the building and construction industry. The changes suggested by Master Builders in this submission do not detract from that essential requirement.

Given the anticipated reforms of the general workplace relations system, Master Builders has suggested the deletion of a number of parts of the BCII Bill which will be better dealt with in across-the-board reform. These are:

- Award streamlining
- Union rights of entry
- Increased responsibilities of registered organisations

Master Builders has also outlined a number of suggestions to change the BCII Bill to make its operation simpler and to reduce its complexity.

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1. INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interests of all sectors of the building and construction industry. Master Builders consists of nine State and Territory builders' associations with approximately 28,000 members. The building and construction industry contributes \$81 billion of economic activity annually to the Australian economy.¹
- 1.3 Master Builders is a member of the Australian Chamber of Commerce and Industry (ACCI). We broadly support ACCI's Workplace Relations Blueprint², published by ACCI in November 2002. From the perspective of the building and construction industry, that document sets out reforms that should be implemented in the long-term.

2. PURPOSE OF THIS SUBMISSION

- 2.1 Master Builders has been generally supportive of the *Building and Construction Industry Improvement Bill 2003* (BCII Bill). There are a number of issues where small changes to the BCII Bill could, we believe, make its operation more efficient and clearer for building and construction industry participants. This submission outlines the suggested changes. We were pleased that the Government on 4 November 2004 committed to reintroduce the BCII Bill during 2005.
- 2.2 With the Government's majority in the Senate from 1 July 2005, giving it the ability to advance general workplace relations reform, we believe that there are three areas where the BCII Bill's provisions will not be required and where the Government's general reform agenda should override the provisions of the BCII Bill:
- Award streamlining (Awards, Part 1, Chapter 5);
 - Right of entry (Chapter 9); and
 - Increased responsibilities of registered organisations (Accountability of Organisations, Chapter 10)

¹ ABS catalogue 8755 Construction Work Done November 2004

² 'Modern Workplace: Modern Future – A Blueprint for The Australian Workplace Relations System 2002-2010, November 2002

- 2.3 We would prefer that in the three areas mentioned above, the building and construction reforms were subsumed into highly desirable across the board reform. This advocacy should not be construed in any sense as a rejection of the fundamentals of the BCII Bill or of the need for urgent workplace relations reform in the building and construction industry.
- 2.4 This submission, in section 3, sets out Master Builders' broad vision for workplace reform. We then analyse parts of the BCII Bill where we have identified that change will assist the practical operation of the BCII Bill or assist industry participants and relate that back to our broad policy position. We also highlight why the provisions identified in paragraph 2.2 should be deleted from the BCII Bill. This submission concentrates upon short to medium-term reform.
- 2.5 This submission does not deal with the issue of the protection of the rights of independent contractors which will be dealt with in a separate submission.

3. MASTER BUILDERS' BROAD REFORM AGENDA

- 3.1 Industrial relations plays a critical role in the productivity of the commercial building sector of the building and construction industry. As was illustrated throughout the Final Report of the Royal Commission into the Building and Construction Industry³ (the Report), the current industrial relations framework for the building and construction industry is not well suited to the contemporary demands and needs of the industry, the broader economy, and the community. The current framework works against achieving economic efficiency and higher productivity, it works against optimal labour market participation and against a training system which gives young Australians the opportunity to realise a rewarding career.
- 3.2 Master Builders' workplace relations policy calls for the adoption of workplace agreements that place decisions in the hands of employers and employees so that they can make arrangements that engender employment and greater sectoral and national productivity. Accordingly, as indicated in paragraph 2.1, Master Builders welcomed the announcement by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews, on 4 November 2004 that the BCII Bill would be re-introduced into Parliament in 2005. We believe that passage of the BCII Bill will ensure that the following priority areas for reform may be achieved:

³ <http://www.royalcombci.gov.au/>

- a system of workplace relations underpinned by respect for the rule of law; and
- the introduction of genuine enterprise bargaining.

3.3 The principal short-term aim of building and construction industry workplace reform is to ensure that the industry's participants abide by the same laws that apply in other workplaces. Hence, these two priority reform areas must be addressed as a matter of urgency.

3.4 **Rule of Law**

3.4.1 Master Builders advocates a system of workplace relations underpinned by respect for the rule of law. The Cole Report found that in the building and construction industry, standards of industrial conduct depart from those exhibited in the rest of the Australian economy. The Royal Commissioner found that there was an urgent need for structural and cultural reform.

3.4.2 The irony of the need for this reform in the building and construction industry is that the Australian industrial relations system is the most pervasive and intrusive in the global economy. However, in the building and construction industry, yet more regulation is needed to enforce the rule of law. This necessity runs counter to the overall trend of the Government's foreshadowed reform agenda which is to continue to free-up the workplace relations system. That is also one of the foundations of the ACCI blueprint referred to in paragraph 1.3 of this submission. Hence, the need to better apply the rule of law makes some of the fundamental building and construction industry regulation of a different character to general workplace reform requirements.

3.4.3 Master Builders' workplace relations policy principles accordingly centre upon the need for the rule of law to be restored and applied consistently and fairly in the industry. Master Builders advocates a system where employer and employee parties are empowered to enter into any workplace agreement, above safety net standards, that suits the particular workplace and/or building site. They will only achieve this capacity in a system where the rule of law is restored.

3.4.4 Master Builders' policy positions are underpinned by the following broad principles:

- the boundary between lawful and unlawful industrial activity must be clearly delineated;
- unlawful conduct must attract serious consequences at least in line with the general criminal law;
- those who, by unlawful conduct or practices cause other participants in the industry loss should bear the cost of the losses they cause; and
- there should be an independent monitoring and prosecuting authority in the industry to monitor conduct, and enforce the rule of law.

3.4.5 These are fundamental principles that flow into the BCII Bill and underpin the Cole Report.

3.4.6 Master Builders policy position reflects the strong and ongoing concern of its members with the unlawful industrial practices experienced on work sites around Australia, concerns which are backed by the first report of the (then) Interim Building Industry Taskforce. In its first report⁴ the then Interim Building Industry Taskforce said as follows:

“Approaches for reform which may be appropriate for other industries would simply fail in the building and construction industry because of the poor state of workplace relations and the pervading culture of lawlessness. Most concerning to the Taskforce are reports received about threats and intimidation being used as a means of advancing industrial agendas. Such coercion is indicative of how countless industrial disputes are currently resolved in the industry.”⁵

3.5 While legislation⁶ passed in mid-2004 has increased the powers of the Building Industry Taskforce, it remains an agency that does not have the status of an independent authority. Its new information gathering powers, in addition, are due to sunset after three years. It is required to rely upon highly specific guidelines to exercise its information gathering powers. This is unacceptable. As indicated below, a better resourced and more greatly empowered agency is required to properly deal with the issues set out in its first report.

⁴ Cth of Australia 2003 *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce* Department of Employment and Workplace Relations, March 2004.

⁵ Id at p(iii)

⁶ *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth), with Royal Assent given on 13 July 2004.

3.6 Unlawful conduct must attract serious consequences at least in line with the common law.

Violence, intimidation and thuggery are unacceptable wherever these practices occur. Building sites are no different from any other part of society and criminal conduct on a building site should be the subject of the same sanctions as are imposed generally. Master Builders advocates that all criminal offences set out in the *Workplace Relations Act 1996 (Cth)* (WRA) should attract the same penalties as under the Criminal Code⁷. This should **not** be a reform confined to the building and construction industry and, in particular, passage of Division 1 of Chapter 12 of the BCII Bill (as well as the enhanced civil penalty regime) dealing with enforcement should not be the Government's sole response to this concern. As part of its general reform agenda, the Commonwealth should change the offence regime within the WRA so that it emulates the offences established under the Criminal Code.

3.7 Those who, by unlawful conduct or practices cause other participants in the industry loss should bear the cost of the losses they cause.

Unlawful strikes and stoppages can financially cripple building industry employers, especially small businesses. Master Builders advocates that where dispute resolution mechanisms are flouted, those disregarding their industrial obligations should meet the financial consequences of their actions. Until such time as there are meaningful deterrents to unlawful behaviour, there will continue to be inappropriate and unlawful behaviour by those who choose to take advantage of the system.

3.8 There should be an independent monitoring and prosecuting authority in the industry to monitor conduct and enforce the rule of law.

3.8.1 Master Builders advocates the establishment of a central independent agency with the responsibility for the investigation of all forms of unlawful and inappropriate conduct which occurs in the building and construction industry as well as being tasked with gathering **all** complaints about the building and construction industry. The agency should be charged with investigating and prosecuting that conduct. The agency, ideally the Australian Building and Construction Commission (ABCC) is envisaged by the BCII Bill, bolstered by the additional functions we articulate in this submission, should, so far as

⁷ Master Builders Australia's Submission to the Shadow Minister For Workplace Relations on Increasing Criminal Penalties Under The Workplace Relations Act, June 2004

possible, be a one-stop shop to which anyone complaining of misconduct in the industry may make a complaint and seek assistance.

3.8.2 While this does not mean that every complaint which is received would be dealt with by the ABCC, it would be a function of the agency to report to the complainant about how the agency to which the matter was referred had dealt with the matter and to keep the complainant informed of the complaint process and the outcome of the complaint.

3.8.3 Wherever possible the new Commission should stand in the shoes of small business, because the resources of that small business are generally inadequate to properly enforce their rights against those who had caused loss by their unlawful conduct or practices. This will also mean that small business is more likely to provide the necessary evidence to enable the Commission to succeed in a prosecution.

3.8.4 Master Builders supports the current Building Industry Taskforce, but believes it requires increased powers to better fulfil its functions. It is imperative that the new independent authority receive adequate and ongoing funding and that it be given a permanent status. The current Taskforce's operations would, in Master Builders' view, be able to be efficiently merged with the ABCC.

3.9 **Genuine Enterprise Bargaining – Broad Considerations**

3.9.1 Master Builders supports genuine enterprise bargaining where workplace changes to enhance productivity are able to be introduced into the workplace for the benefit of employers and employees. Genuine enterprise bargaining underpinned by an appropriately set safety net is the mainstay of the Australian industrial relations system and must be a concept that extends to the building and construction industry. Agreements should be formed which genuinely suit an enterprise or site. Bargaining should be reached without the interference of external parties, save when there is a request that unions or other third parties should be involved in representing the interests of employees or employers.

- 3.9.2 Unacceptable pattern bargaining where pro forma non-negotiable union agreements are imposed upon employers and employees is a practice that currently subverts the proper conduct of industrial relations in some parts of the building and construction industry and should be proscribed. Industrial action taken in pursuit of an illegitimate pattern agreement should be unlawful and dealt with harshly.
- 3.9.3 Where proper enterprise bargaining agreements are in place, they should be respected and no disputes of interest should be permitted during the term of the agreement. Disputes of rights should be settled through dispute resolution mechanisms that are adhered to by all parties. Industrial action during the term of an enterprise bargaining agreement should be unlawful.
- 3.9.4 Master Builders advocates that enterprise bargaining agreements should be permitted to have a term of up to five years in order to create great certainty about labour cost issues, especially on large infrastructure projects. The Government recognised this policy requirement in its election platform. This is a reform which should be introduced across-the-board.

4. THE BCII BILL – GENERAL CONSIDERATIONS

- 4.1 As is evident from a number of the comments made under the broad policy position set out in section 3 of this submission, Master Builders would support urgent short-term reform of the building and construction industry principally to facilitate the restoration of the rule of law. The building and construction industry is unique in the sense that in a country such as Australia (where the rule of law is a fundamental tenet of our way of life), the rule of law demonstrably has not been reliably applied or observed on many commercial building sites. This is a national problem that deserves particular solutions. It is this problem that marks the industry as unique rather than its operational or sectoral characteristics. Hence, the BCII Bill should be primarily directed to establishing mechanisms to restore the rule of law in the building and construction industry. The ABC Commissioner's role and the establishment of an independent agency wielding appropriate coercive powers must be the central plank of the BCII Bill. Both the general and specific comments on the Bill which follow do not disturb this central proposition.

4.2 From the outset, Master Builders has determined a number of criteria against which any new system of workplace relations for the industry should be assessed. The criteria are ten-fold as follows:

1. It provides a legal framework which is simple, readily accessible and easily understood.
2. It avoids excessive legalism as well as delays in and associated costs of the legal process.
3. It covers the field to the extent of Federal constitutional power and eliminates union jurisdiction swapping.
4. It provides effective sanctions to eliminate coercion as well as illegal and inappropriate behaviour by all industry participants.
5. It provides rapid (24-48 hour) access to effective enforcement and compliance measures of industrial instruments, legislation and orders of relevant tribunals.
6. It establishes a one-stop-shop for all government agencies, avoiding overlaying bureaucracies, an agency that can stand in the shoes of employers and employees who are unable to fund litigation.
7. It establishes adequate and timely remedies for damages arising from industrial action taken outside a bargaining period or in breach of dispute settlement provisions.
8. It promotes the effective operation of competitive market forces (change the culture of expediency) and fair competition.
9. It promotes the Federal Government as a major investor in the industry to lead by example in a consistent application of legislative codes and policies which exemplify best practice in the industry.
10. It promotes uniform contract conditions to be applied by the Federal Government and its agencies for all works where the Federal Government is a principal or contributor of funding.

4.3 We commend these criteria as applying appropriate measures against which reform proposals should be compared. Our remaining comments are generally directed to criteria 1, 2 and 5. The BCII Bill meets most of the criteria listed, but is deficient in respect of the criteria mentioned in points 1, 2 and 5. The biggest negative issue arising from the terms of the BCII Bill is one of complexity. The comments which follow are largely concerned with that issue. In the main, we have, in the body of this submission, sought to rely upon points of principle. As indicated in paragraph 8.5 of this submission, some technical details are set out in Attachment B. Where we have dealt with matters in this submission also covered in Attachment B, this submission contains our most recent policy position.

- 4.4 Reducing complexity may be achieved by relying upon the Government's published reforms in at least the three areas sought to be omitted from the BCII Bill, mentioned in paragraph 2.2 of this submission and as discussed below. In this way, the complexity of testing the BCII Bill side-by-side with complementary, but different, laws under the WRA, will be reduced.
- 4.5 We note that the Government has committed to re-introducing the substance of legislation defeated in the Senate in prior Parliamentary sessions. We also note that the Government has committed to reforming right of entry laws across-the-board. We support that stance. We have made a submission to the Senate Employment, Workplace Relations and Education Committee on the *Workplace Relations Amendment (Right of Entry) Bill 2004 - Attachment A*. Passage of that Bill, especially with the changes sought, will eliminate the need for Chapter 9 of the BCII Bill.
- 4.6 The issue of Award streamlining dealt with in Clause 51 of the BCII Bill should be dropped in the face of the substance of the *Workplace Relations Amendment (Award Simplification) Bill 2003* containing an acceptable industry-wide approach. Similarly, the components of *Workplace Relations (Registered Organisations) Bill 2001* which were not subsequently enacted adequately cover the subject of reform of registered organisations. These latter two reforms need not be specific to the building and construction industry as they do not impinge upon the central role of the BCII Bill, that of extending the rule of law to the industry.
- 4.7 Master Builders has also, from the outset, sought greater levels of accountability and transparency in the outworkings of the BCII Bill, notions that match with criterion 1 in 4.2 above. For example, the Annual Report of the ABCC (see clause 16 of the BCII Bill) should be far more comprehensive than required by the current provision. In line with our view that the ABCC should be a 'one-stop' shop for all complaints about any aspect of the building and construction industry, Master Builders would like to see a requirement placed on the ABCC to report comprehensively about the range of complaints received and the broad outcome associated with each complaint, even upon referral to another agency.

- 4.7 In the same vein, we believe that where a delegation is made by the ABC Commissioner under clause 15 of the BCII Bill, those arrangements should be a matter of public record. Delegations should be published in the Gazette as a formal record and posted on the Commissioner's website. It should be an obligation for the Commissioner to so publish all delegations. There should be absolute clarity in the administrative arrangements between agencies so that where potential conflict exists, for example, an action that might be in breach of Chapter 6 of the BCII Bill as well as in breach of the *Trade Practices Act*, the individual agencies' responsibilities are known to building industry participants and the outcome that is to be expected from an agency in taking action is clear and certain.
- 4.8 We also note that the Federal Safety Commissioner is to be established as a separate office. We believe that the Federal Safety Commissioner could be appointed as part of the ABCC. Criteria 6 of the 10 governing criteria mentioned in paragraph 4.2 stipulates the avoidance of overlapping bureaucracies. Making the Federal Safety Commissioner part of the ABCC will avoid the duplication of bureaucratic structures, separate annual reports and the like. It will also mean most of the activities of the Federal Safety Commissioner would be dealt with under the report of the ABCC rather than under clause 36 of the BCII Bill. In addition, we believe that rather than have ministerial directions governing the role of the Federal Safety Commissioner, as proposed by clause 33 of the BCII Bill, the functions of the Federal Safety Commissioner should be properly outlined in delegated legislation and the role of the Federal Safety Commissioner integrated with the ABCC.

5. BCII BILL SPECIFIC PROVISION – PATTERN BARGAINING

- 5.1 As is evident from paragraph 3.9 of this submission, Master Builders supports provisions regulating pattern bargaining. However, Master Builders has consistently argued that the BCII Bill's provisions relating to pattern bargaining should be modified. This is not to say that Master Builders wishes to extend the current manner in which pattern bargaining operates in the industry which has essentially nullified the scope for genuine enterprise level bargaining. We note that the existence of a pattern agreement under the BCII Bill stands as prima facie evidence that a bargain was not genuinely reached. The BCII Bill effectively outlaws pattern bargaining.

- 5.2 The Federal Court on the application of an interested person or the ABCC is empowered to grant an injunction restraining any person engaging in pattern bargaining (clause 67) and is a ground for deregistration of an employer organisation or a union. The AIRC is tasked to ensure that any certified agreement it reviews is not a pattern agreement (clause 56). Where it is not satisfied in that regard, the AIRC must refuse certification. Hence, conduct that comprises pattern bargaining is dealt with harshly under the BCII Bill. Because of the harshness with which the conduct is treated, it is vital that the definition of pattern bargaining is clear and that the normal operations of employer associations or, for that matter, unions operating legitimately, are not adversely affected by the BCII Bill's provisions.
- 5.3 The definition of pattern bargaining is set out in clause 8(1) of the BCII Bill. That subclause makes it clear that a 'course of conduct' or even 'the making of claims' that involve seeking wages or other common conditions of employment (other than via an Award or State Award) which extend beyond a single business is of the nature of a pattern bargain. Subsection 8(2) then ameliorates this very broad test by saying that conduct by a person is not a pattern bargain to the extent to which the person is genuinely trying to reach agreement on the matters that are subject of the conduct. In other words, the overriding criterion to be brought to bear is the genuineness of the bargain.
- 5.4 Master Builders is of the view that this criterion, that of genuineness, is exactly the policy that we wish to promote. Genuineness is, under the BCII Bill, then referenced to the range of procedural matters that are set out in clause 62. Master Builders is concerned to ensure that genuineness is not expressed solely by reason of conduct that appears to require highly processed-based matters to be satisfied. Master Builders believes that some substantive indication of genuineness is required as the process orientation vindicated by clause 62 of the BCII Bill will not lead to a significant substantive change. Rather, unions will be encouraged to use procedures that could delay the bargaining process or employers could be forced to deal with unions as a means to comply with the processes set out in clause 62 whilst the notion of engendering productivity and exploring mutual benefit that is at the essence of enterprise bargaining were not required by the statute to be given attention. Accordingly, we have, since October 2003 in our submission on the exposure draft of the BCII Bill (Attachment B), called for the deletion of clause 62.

5.5 We now have an alternative position if the Government is committed to the processes set out in clause 62. Clause 8 could specifically contain a subsection along the following lines:

“Conduct by a person is not pattern bargaining where an employer and the relevant employees agree on an outcome which is the same as another separately negotiated agreement extending beyond a single business provided section 62 is satisfied.”

5.6 This is an alternative suggestion to our primary position that clause 62 should be deleted and substantive criteria inserted in its place. This alternative clause, combined with the effect of clause 63 of the BCII Bill (which requires employers to take reasonable steps to ensure that all affected employees have an opportunity to make representations about the proposed agreement), would bring a new era into the building and construction industry where abuse of power (the ‘sign-up or else’ position) was not possible. The involvement of the employer and employees in bargaining would mean that compulsory imposition of a pattern bargain by a union would be constrained.

5.7 Master Builders’ view is that pattern bargaining, without the existence of genuineness, is damaging for the industry and must be addressed. The only caveat to that concern is if a pattern agreement is freely entered into by the parties as expressed in the proposed change to the definition of pattern bargaining that we have put forward, then that should be permitted by the legislation. This change does not in any way detract from Master Builders’ fundamental policy as outlined earlier in this submission. This position merely recognises that, at present, the BCII Bill would prohibit pattern bargaining which is freely and genuinely entered into, with genuineness the central concern, as we have outlined.

6. BCII BILL SPECIFIC PROVISION – THE BUILDING CODE

6.1 Clause 26 of the BCII Bill empowers the Minister to issue a building code that is to be complied with by all building contractors which are constitutional corporations per clause 26(3)(a).

6.2 The Code will be a very important document for the building and construction industry. We would prefer that the code was published as regulations attaching to the BCII Bill rather than published as a Ministerial code of practice. Earlier we referred to the need for the BCII Bill and related legislation to be transparent in their outworkings. This is particularly the case

so far as the building code is concerned. This concern is underlined by the fact that, pursuant to clause 30(3), failure to give a report to the ABC Commissioner concerning compliance with the building code attracts a Grade B civil penalty under the BCII Bill.

6.3 As we have indicated in earlier submissions on the BCII Bill including in Attachment B, clauses 26 to 30 really comprise a skeleton. If the building code is to emulate the National Code and Guidelines, then we would appreciate an early announcement by the Government that it is its intention to so proceed. In addition, as stated, we believe that the statutory code should be established by delegated legislation and the code should contain an internal dispute resolution mechanism that is quick and inexpensive for those who believe that an interpretation of the code by the ABC Commissioner which is wrong is able to be challenged without undue difficulty or expense.

6.4 If the code is introduced early on in the application of the BCII Bill, there are likely to be a large number of current certified agreements and State enterprise agreements that will offend against the new code. We believe that either a provision of the code itself or a recognition in the BCII Bill should be made for existing certified agreements. Where the nominal expiry date on an existing certified agreement has not been reached and its content is such that a building contractor will be in breach of the published code, transitional or facilitative arrangements should be put in place. We would be happy to have discussions about how this concern might otherwise be accommodated within the legal processes envisaged.

7. BCII BILL SPECIFIC PROVISION – OCCUPATIONAL HEALTH AND SAFETY

7.1 Master Builders is committed to improving the occupational health and safety (OH&S) record of the building and construction industry. Indeed, Master Builders has endorsed the National Occupational Health and Safety Commission (NOHSC) National OH&S Strategy 2002-2012. That is, we have committed to achieving the NOHSC national targets to sustain a significant and continual reduction in the incidence of work-related fatalities with a reduction of at least 20% by 30 June 2012 and to reduce the incidence of workplace injury by at least 40% by 30 June 2012. The strategy calls for a reduction of 10% of work-related fatalities by 30 June 2007 and a reduction of 20% in workplace injury being achieved by 30 June 2007. As stated, Master Builders has endorsed these targets.

- 7.2 We commend the establishment of the Office of the Federal Safety Commissioner as a component of achieving the targets established by the strategy. However, as stated in section 4 of this submission, we believe that the Office of the Federal Safety Commissioner should not be separate from the ABCC. Having the Federal Safety Commissioner as part of the same structure will reduce the infrastructure requirements associated with the establishment of such an office, but will not affect the office's integrity.
- 7.3 Clause 50 provides for an accreditation scheme. The details of this scheme are to be properly contained in regulations. The BCII Bill provides that the Commonwealth or a Commonwealth authority must not enter into a building contract with a person who is not accredited at the time of entering into the contract. Accordingly, there will need to be a transitional period and we would urgently ask the Government to determine the basis upon which there will be an opportunity to understand the terms of the accreditation scheme prior to the commencement of any regulations made under this provision and the expected time for builders to qualify with the content of such a scheme.
- 7.4 We would also express concern about the overlapping bureaucracy inherent in the exercise of the functions of the Federal Safety Commissioner pursuant to clause 32 of the BCII Bill. Under Division 3 of Chapter 12 of the BCII Bill relating to enforcement, the Federal Safety Officers will have wide ranging powers. These powers are similar to those possessed by inspectors under various OH&S statutes of the States and Territories. Accordingly, we urge consideration of the role of Federal Safety Officers and whether or not their functions should be integrated with the role currently held by State and Territory inspectors. If this is not the case (say, for political reasons), there is the potential that the process of OH&S in the industry could be further overregulated at the point of the imposition of the new Commonwealth rules and their enforcement. With the extent of national work on OH&S, including the imminent publication of the National Standard on Construction, there may be merit in the Commonwealth Government considering taking responsibility for the regulation of building and construction OH&S Australia-wide. At this point, Master Builders believes that this is a concept which should be pursued having regard to the various costs and benefits for the Commonwealth and building and construction industry participants, rather than proffered as a fixed policy. This is an issue which we would like to discuss further with the Commonwealth, particularly in the context of NOHSC being abolished and its functions being transferred to the Australian Safety and Compensation Council.

8. BCII BILL SPECIFIC PROVISION – OTHER CONCERNS

- 8.1 As with all industries where small businesses predominate, the building and construction industry is very concerned that formal workplace relations agreement-making is simplified and the associated transaction costs reduced. The *Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2002* contained appropriate avenues to reduce the cost and formality of having an agreement certified and to address a number of systemic issues related to Australian Workplace Agreements (AWAs). The *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* also contained provisions relating to the making and registering of certified agreements in a simpler way. Elements of the *More Jobs, Better Pay Bill* have great merit for small business, including the capacity to lodge agreements and have them approved without the necessity of a formal hearing. The, then, proposed Division 2A which allows for certification of agreements by a Workplace Relations Registrar is both sensible and an initiative that will reduce costs, but, at the same time, maintain the protection of the parties' interests. We note that the Bill provided for the referral of agreements to the AIRC by the Registrar in certain circumstances and as a protective mechanism – see proposed Section 170LMG.
- 8.2 Division 2 of Chapter 5 of the BCII Bill runs counter to this direction of reform. It requires a hearing before certification of each building industry agreement. We refer to earlier comments where we emphasise that some of the building and construction industry reforms run counter to the general direction of workplace relations reform that we anticipate will occur post 1 July 2005. This is a primary example. Accordingly, consideration should be given to a provision where, if a Workplace Relations Registrar is satisfied that matters expressed in the BCII Bill or regulations, particularly relating to pattern bargaining and objectionable provisions, are not present in an agreement sought to be certified, then a discretion to certify an agreement could be considered. A matter in the BCII Bill or the regulations could, for example, be covered by a certificate from a registered industrial organisation such as one of Master Builders' members. In the *More Jobs, Better Pay Bill*, proposed section 170LMD sought the Workplace Relations Registrar to obtain a declaration from the applicant about certain matters. The penalties for providing a false declaration at law are harsh. Such a mechanism would seem to provide a more flexible and less complex path than the current BCII Bill provisions and we ask the Commonwealth to consider making appropriate changes.

- 8.3 We note that the extraneous matters provision, that is clause 54 of the BCII Bill, is no longer required having regard to the manner in which the High Court's *Electrolux* decision is being administered in the AIRC and by the Courts.
- 8.4 The BCII Bill provides an increased role for the AIRC. Again, this runs counter to the general thrust of anticipated decentralising reform which is to place decisions and greater responsibility for workplace conduct in the hands of the industrial parties. The BCII Bill provides an increased role for the AIRC. This is particularly the case in relation to clause 134 of the BCII Bill. This clause is intended to supplant Section 127 of the WRA where "building industrial action" is happening, threatened, impending or probable. We support the changes to be introduced by Section 134. However, we believe that the AIRC's discretion should be reduced. In that regard, we suggest that the word 'may' be deleted in proposed Section 134(4) and the word 'must' be inserted so that the AIRC must act to issue an interim order. This will ensure that damage which unlawful industrial action can inflict at critical points during the construction process is better able to be controlled.
- 8.5 A number of other matters relating to the BCII Bill were raised in our submission on the exposure draft of October 2003. That submission is attached as Attachment B. Whilst some clause numbers have changed, the substance of the matters raised in that submission in many instances have not altered. We have not articulated or related them again in this submission as they are mostly matters of technical detail rather than the points of principle that we have set down in this submission.

9. CONCLUSION

- 9.1 The benefits that have flowed from reforms of the workplace relations system have been enjoyed by the wider community, but have, in the main, not been implemented in the building and construction industry. The process of change in the economic system has been supported by changes in the industrial relations system that have assisted economic welfare. The process of further foreshadowed reform⁸ will engender further productivity. An essentially centralised system of wage and conditions negotiation and setting has been transferred to a system of enterprise bargaining with a small, but beneficial, element of individual-based bargaining.

⁸ L Taylor "PM Gets Tough on Workplace Reform" *Australian Financial Review* 7 February 2005 p 1
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9.2 The building and construction industry has not fully embraced these reforms. The passage of the BCII Bill will enable the industry to establish better systems for bargaining and to better resolve disputes so that bargains are respected and upheld within the law. The small number of changes proposed for the BCII Bill in this submission will enhance that process. Further, building and construction employers are prepared to accept the additional regulatory burden represented by the BCII Bill as a means of ensuring that the required reform occurs and as a necessary step along the path of better workplace relations for the future.

9.3 Finally, having said that building and construction industry employers are prepared to accept the additional regulatory burden, there will be a need to ensure that compliance with those obligations is made as simple as is possible. We suggest that the Department of Employment and Workplace Relations arrange with Master Builders a comprehensive training package that is able to be delivered to members and other industry participants speedily Australia wide. It is therefore imperative that the final shape of the Bill is disclosed to Master Builders well ahead of its introduction in order that planning for this training may proceed smoothly. We would be happy to submit to any confidentiality requirements to facilitate this course.