MASTER ELECTRICIANS AUSTRALIA

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Building and Construction Industry (Improving Productivity) Bill 2013

Re-introduction of the Australian Building and Construction Commission

Submission from Master Electricians Australia

About Master Electricians Australia

Master Electricians Australia (MEA) is a national employer association representing the interests of electrical contractors and the broader electrotechnology industry. As one of the longest running organisations of its kind, MEA has established itself as the leading voice of the electrotechnology sector. MEA is recognised by industry, government and the community as the electrical industry's foremost business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

Building and Construction Industry (Improving Productivity) Bill 2013

There are a number of critical issues being raised by our members from within the industry that the *Building and Construction Industry (Improving Productivity) Bill 2013* (the Bill) and the introduction of the Australian Building and Construction Commission (ABCC) will address.

Following the decision by the Gillard Labor government in 2012 to replace the ABCC with the Fair Work Building Commission (FWBC), we have strongly advocated for the return of the ABCC. The subsequent commitment by the Abbott and later Turnbull governments in 2014 to restore the construction industry watchdog was welcomed by MEA. Our organisation has been representing electrical contractors for over 79 years and we understand the critical importance of the ABCC for small business owners in allowing them to perform quality work and continue to create employment opportunities for Australians.

In our 2014 submission to the Senate inquiry into the Government's approach to re-establishing the ABCC, we outlined the positive impact that the ABCC did, and could again, have on the construction industry. These benefits include:

- An enhanced workplace relations framework that will encourage genuine workplace bargaining and a means to investigate and enforce the Act, relevant building laws and the Building Code itself;
- The ABCC's advice and support functions that would be provided to workers and employers alike;
- Employees will reap the benefits of an efficient and equitable industry that attracts more investment and generates long-term secure employment; and
- An assurance that all building industry participants are accountable for unlawful conduct.

Targeting unlawful behaviour

There have been numerous incidences of intimidation and threatening behaviour by union organisers towards both employers and employees that demonstrate the need for a specialist regulator for the construction industry.

Sunshine Coast University Hospital

In May of this year, illegal strike action was undertaken by workers on the site of the $1.6 billion Sunshine Coast University Hospital site, delaying the provision of 738 urgently needed hospital beds for the Sunshine Coast community. The strike by more than 900 CFMEU and ETU

members was in direct contravention of the fifth return to work order made by the Fair Work Commission since the project commenced in 2012. No demands were being made by the workers, with no safety issues identified.

Lady Cilento Children's Hospital

This unlawful union activity at the site of the Sunshine Coast University Hospital followed industrial action undertaken at the site of the Lady Cilento Children's Hospital in Brisbane in 2012. This dispute lasted nine weeks, preventing more than 600 workers from accessing the site. The justification for the nine weeks of stop work was not safety, nor pay rates, but Abigroup's use of contractors on the site. The action cost Queensland tax payers millions of dollars and delayed the admission of the hospital's first young patients to this state-of-the-art children's hospital.

Gold Coast 2018 Commonwealth Games site

Over May and June 2016, dozens of CFMEU members on a 2018 Commonwealth Games site undertook stop-work action for four hours a day, risking the on time completion of the $126 million Carrara Sports and Recreation Project. The reason for the strike action was, again, not safety related. It concerned the Head Contractor's refusal to sign a new four-year Enterprise Bargaining Agreement (EBA) which required a 5 per cent pay increase for workers each year of the agreement and a number of other non-productive costs and conditions that would limit the ability of the employer to compete. The main bargaining matter disputed was the employer's request for the agreement to be compliant with the anticipated Building Code. This was critical to the business as it directly affected its ability to be awarded future work on federally funded projects; a large proportion of work for the business.

In court proceedings, the CFMEU admitted that it deliberately set out to cause maximum disruption on a taxpayer-funded Commonwealth Games site but defiantly stated "so what"[1].

The CFMEU tactic was not considered industrial action as the stop-work meetings are permitted under the terms of the current agreement. The CFMEU submitted that it was legally entitled to hold almost 70 hours of stop-work meetings in May, which put critical deadlines for the Carrara Sports and Recreation project at risk and cost the head contractor $700,000.

Subcontractors had no choice but to pull approximately 70 employees from the project in response to the lack of progress on site. The Courier Mail reported in an article on 6 June 2016 that workers were said to be too scared to speak out against the union for fear of "repercussions" and that the stop-work action had cost at least 20 people their jobs[2].

The Fair Work Building and Construction (FWBC) inspectorate asserted that the union should face hefty penalties as the meetings, held twice daily for two hours each time, were "nothing more than a sham" and a "clumsy and unsophisticated attempt to disguise industrial action as legitimate meetings". However, no substantive action could be taken by the FWBC as it lacked the powers to prevent these types of agreement terms concerning stop-work meetings being allowable.

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[1] http://www.theaustralian.com.au/national-affairs/industrial-relations/contractors-deserted-games-site-over-cfmeus-fourhour-meetings/news-story/ecb19cdc986ea2c595b83c87c64eea62

[2] http://www.couriermail.com.au/news/queensland/queensland-government/peter-beattie-urges-resolution-to-gold-coast-commonwealth-games-construction-delays/news-story/bf70dbc76b8e61d16ecfa38a0bf138ac

The ABCC would have greater scope under the *Building and Construction Industry Code (Fair and Lawful Building Sites) Code 2014* to refuse works to companies tendering for government projects with these types of terms in their agreements. This would have protected the employer's bargaining claim, namely, that the EBA must comply with Building Code 2014, in this situation, as it did under the ABCC previously. Ensuring efficient and industrially harmonious construction sites through appropriate industrial instruments is as important a feature of the legislation as actions in curtailing the on-site practices of building industry participants.

In the case of the Commonwealth Games site, it took Federal Court action to get an order to limit meetings to one each week until a decision could be made on whether these meetings were able to be held for an illegitimate purpose. If this was found to be the case, it would be a patently unacceptable outcome, contrary to the expectations that those employees engaged on a site to work, should be allowed to do so.

It is also clear through this example that construction unions, like the CFMEU and ETU, will not alter their bargaining agenda from inflexible, unproductive and disruptive terms without an unequivocal regulation requiring it. They have shown that, regardless of the importance of the employer's position and the fundamental ability for the business to continue to operate and employ the union's members, they will not accept anything other than their own agenda.

Employers in the construction industry who seek to challenge the union in order to maintain the livelihood of their business under the current system have to wear significant legal costs, on top of a massive 'stop work' campaign and its financial impact just to be able to go to work.

Cost to small business

Earlier this year, MEA was informed by three of our members about union organiser's using intimidating tactics towards employers, including:

- Requests that specific union members be employed as union delegates;
- Declarations that the union organiser can influence a building contractor's decisions about the awarding of contracts if an employer does not sign a Union EBA; and
- Insistence that unions be informed as to the operation of an employer's business.

Unfortunately, due to the reputation of unions and the intimidation tactics they employ, MEA members are reluctant to volunteer such information to the FWBC for fear of retribution and limited protection. As a representative for electrical contractors, MEA makes efforts to meet with the FWBC to raise these issues and continues to encourage those members to report such incidences and have them addressed. However, without the protection of the proposed legislation, the industry will continue to suffer from an undercurrent of threats to person and business viability.

What has been lost in the argument over this issue is that to run a successful business in construction, deadlines are critical. In theory, an employer could simply refuse a union's demands. However, the reality of the building and construction industry means that a subcontractor faced with these issues and a principal contractor threatening liquidated damages of many hundreds of thousands of dollars for not meeting deadlines, may have no choice but to accept the union's demands, however unreasonable they may be.

Based on the growing incidences of unlawful behaviour on the part of trade unions, we are concerned that the FWBC neither has the resources nor the powers to deal with issues. For example, pattern bargaining occurs when a union representative seeks to make identical agreements with two or more employers. The intended outcome being that when the union gains a new and superior entitlement from one employer, they can then use that agreement as a precedent to demand the same entitlement from another employer. In Queensland, over 100 identical agreements have been completed in the CFMEU area of coverage since November 2015. This must raise serious doubts as to whether real consultation took place. Pattern bargaining of this kind is illegal and contrary to the provisions of the *Fair Work Act*. In fact, the Cole Royal Commission into the Building and Construction Industry recommended that pattern bargaining in the construction industry be prohibited entirely and this has not been altered by any government of any persuasion since.

The reality is that participants are fearful of taking a stand and of being placed on a black list by the Unions, even affecting a contractor's approach to tendering. Instead of the most appropriate subcontractor obtaining the work, the decision to award a contract is based on keeping the industrial peace. Productivity and efficiency are secondary considerations as the cost of disputation is too great should the Union not approve of a contractor's choice.

There have been incidences in which businesses have taken action against the system and won. In August his year, Judge Salvatore Vasta fined two contractors from J Hutchinson Pty Ltd for their refusal to hire a subcontractor whose enterprise agreement wasn't endorsed by the CFMEU. In his decision, Judge Vasta stated that:

"For subcontractors, such as C & K, a major pathway to growing their business is to be awarded contracts from large construction companies like [Hutchinson].

"If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate."

FWBC director Nigel Hadgkiss observed that the case was an example of the "concerning" industry practice in which contractors refuse to engage subcontractors that don't have union enterprise agreements.

Boral has also won an out of court settlement for a secondary boycott in Victoria.

However, the majority of contractors in the electrical and construction industry do not have the resources, time or expertise to fight such battles.

The need for a specialist regulator

Arguments have been made that it is unnecessary for a specialist construction industry body to be reinstated and that a generalist anti-corruption body would be more appropriate. However, the need for a specialist industrial regulator in the building and construction industry was confirmed by the findings of the Cole Royal Commission into the Australian building and construction industry as far back as 2001. A key finding of the Royal Commission was the destructive culture of industrial lawlessness present in this industry that only a dedicated regulator could properly address.

We note further that many other industries such as aged care, road transport, medical professions, financial and banking services have regulators with unique powers. The construction unions' regular call is for 'one rule for all' but this already far from the case; with

good reason. Specific regulation of industries and/or occupations is required to ensure that safety, professional standards and due care/diligence align with community expectations. This is in acknowledgement that each of these industries have specific risks that demand the involvement of a specialist regulator. Notably, there is no evidence that these specialist regulators have in any way compromised employees' right to lawfully engage in industrial action or freedom of association. Nor have these industries suffered any lowering of safety standards, as has been suggested by some stakeholders. The community expects that projects are delivered on time, on budget and that they are constructed safely and the ABCC supports this objective.

Powers of the ABCC

There have also been suggestions that the proposed powers of the ABCC are excessive. However, we would argue that, while the enforcement powers outlined in the Bill are comprehensive, they are necessary measures in light of the secretive and ultimately destructive culture of the building and construction industry. They are also powers designed to protect parties from known tactics of intimidation and coercion from third parties seeking to avoid compliance with established laws. The proposed enforcement powers of the ABCC are in clear proportion to the unlawful actions that would trigger the ABCC into action. The only trigger for ABCC intervention will be unlawful actions by the parties involved. Those abiding by the law will only stand to benefit from the ABCC being restored as a regulator.

The priority of the ABCC has always been to ensure lawful behaviour, workplace equality and freedom of association for all concerned, which will continue to include the right for trade unions to represent their members in workplace matters.

It is also important to note that, as an added layer of protection, the Commonwealth Ombudsman will have power to oversee the examination notice process.

The right to silence

Much has been made of the proposed Bill's removal of the "right to silence". This claim is made in reference to section 60 of the Bill which notes that:

"The ABC Commissioner may require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of this Act or a designated building law by a building industry participant."

However, despite claims to the contrary by union groups, neither the information provided, nor information derived from what is provided, can be used against the person in court, unless they are being prosecuted for:

- failing to comply with the notice;
- knowingly providing false or misleading information, answers or documents; and/or
- obstructing, hindering, intimidating or resisting an official in the performance of the official's functions.

In particular, the CFMEU has sought to claim that a construction worker will have less rights than an ice dealer[3]. The CFMEU's assertion has conflated two very different concepts. Professor Andrew Goldsmith of Flinders University Law School told the ABC that:

[3] http://www.abc.net.au/news/2016-04-27/will-building-workers-have-less-rights-than-ice-dealers-abcc/7340868

"The comparison is flawed because it equates two different processes with distinct purposes. ABCC examinations are used to gather information from witnesses in relation to construction workplace activities whereas an interview with a criminal suspect is concerned with collecting evidence for criminal prosecution."

Information provided to the ABCC by a witness cannot be used against them in other proceedings (section 102 of the Bill), nor will they face civil or criminal liability as a result of complying with a notice (section 103).

The fact is that the 'right to silence' remains untouched by the introduction of the Bill. Assistant Professor Joel Butler of Bond University Law School identified to the ABC[4] that:

"The difference is significant: even if a person giving evidence to the ABCC admits that they committed some wrongdoing, that 'confession', as far as the law is concerned, never happened. The person's 'right to silence' is therefore preserved."

These powers are necessary in order to overcome the 'code of silence' that has operated in the construction industry; cultivated through a culture of fear and intimidation of workers and employers alike. This culture severely hinders the effectiveness of investigations, leading to a marked increase in lawless and disruptive behaviour as witnesses fear reprisals from the union.

Does it target workers?

The construction unions have sought to link the return of this legislation to an attack on workers' rights.

The Bill does not single out workers for the purposes of investigations into breaches of the code. The Bill proposes that anyone who has information or documents or is capable of giving evidence relevant to an investigation into "a suspected contravention, by building industry participant" of the bill or "a designated building law" may receive an examination notice.

It is true that someone suspected of wrongdoing may be examined. However, those issued an examination notice may also be victims, workers, management and even bystanders.

Recommendation

MEA continues to strongly support the *Building and Construction Industry (Improving Productivity) Bill 2013* and the re-introduction of the ABCC as a priority to bring an end to the culture of lawlessness, intimidation and fear in the construction industry. The end result will boost employment and foster growth in the construction industry.

Yours sincerely,

Jason O'Dwyer
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[4] http://www.abc.net.au/news/2016-04-27/will-building-workers-have-less-rights-than-ice-dealers-abcc/7340868