

Master Builders Australia

## Submission to the Competition Policy Review

On

### *Secondary Boycotts and Industrial Relations Issues Affecting Competition*

28 May 2014



**MASTER BUILDERS**  
AUSTRALIA



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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 124 years the movement has grown to over 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 will provide the Review with a submission that focuses on the identification of laws and regulations which have the potential to impede competition and reduce productivity. Other specific matters are also the subject of Master Builders' input to the Review and this submission is provided in advance of Master Builders' other work.
- 2.2 This submission responds to one aspect of the Competition Policy Review's [Issues Paper](#). At paragraphs 5.27 and 5.28 of the Issues Paper the subject of secondary boycotts is raised. Questions are posed at page 34 of the Issues Paper as follows:
- Do the provisions of the *Competition and Consumer Act, 2010* (CCA) on secondary boycotts operate effectively; and
  - Do they work to further the objectives of the CCA?
- 2.3 The subject of secondary boycotts and the intersection of the competition laws with industrial relations laws and practices was discussed between representatives of Master Builders and the Review Secretariat on 28 April 2014 and this submission amplifies that discussion. The elements of the submission which extend beyond the answers to the questions posed in the

Issues Paper relate to other impediments to competition that are formulated by the intersection of industrial relations law with competition law.

### 3 Policy Underpinnings for Secondary Boycott Provisions

- 3.1 Bannerman<sup>1</sup> has set out the policy rationale for the introduction of the secondary boycott provisions of the now CCA thus:

*It is, of course, of little use to prohibit a supplier from engaging in resale price maintenance, and thereby supplanting competition, if his employees then combine to do the same thing. That was the genesis of section 45D. It prohibits “secondary boycotts” where, for example, a discounting retailer finds his supplies cut, not by his supplier but by his supplier’s employees.<sup>2</sup>*

- 3.2 In essence the quotation from Bannerman encapsulates the recommendations of the Swanson Committee which in 1976 proposed a prohibition of certain types of boycotts against constitutional corporations. McCrystal<sup>3</sup> analyses this subject as follows:

*The Trade Practices Act amendments were recommended in 1976 by the Swanson Committee, whose terms of reference had included ‘the application of the Act to anti-competitive conduct by employees, and employees or employer organisations’. This was prompted by a series of boycotts undertaken by employees in the transport industry in New South Wales against petrol and retail outlets that had been engaged in fierce price competition affecting petrol and bread. The concern of the transport workers was that the sustained price cutting threatened the profitability of the industry and, in turn, the employment of the workers. While the Swanson Committee acknowledged the concern of the employees that unrestrained price competition could jeopardise their employment, it did not consider that the employees should ‘be entitled to be the judge in [their] own cause’ where conduct interfered with the competitive process between firms.<sup>4</sup>*

- 3.3 Despite the resonance of the quoted extract from the Swanson Committee contained in the above extract viz that employees should not be entitled to be judge in their own cause, the provisions have not, however, been without controversy and have over their history been seen as a threat to working conditions or to employment. That perspective has been adopted into law by

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<sup>1</sup> R M Bannerman “Competition as the Regulator” (1982) Vol 5 UNSW Law Journal 61

<sup>2</sup> Id at p65

<sup>3</sup> S M McCrystal “The Right to Strike in Australia” Federation Press 2010

<sup>4</sup> Id at p64

prior governments. In this context, it is noted that the provisions have been the subject of substantial political debate, particularly as to whether they should be constrained by industrial relations law or be treated as commercial issues. Creighton and Stewart<sup>5</sup> note:

*After several unsuccessful attempts by the Hawke Government, ss45D and 45E were repealed by the Industrial Relations Reform Act 1993 and, as they applied to industrial action were re-enacted in a much-modified form as Division 7 of Part VI of the Industrial Relations Act 1988.*<sup>6</sup>

The major constraint on the re-enacted provision was that as a precursor to relief under the law, the relevant dispute was required to be referred to the then Australian Industrial Relations Commission (AIRC) for resolution, placing such disputes firmly in the industrial relations jurisdiction.

- 3.4 Also, as cited by Creighton and Stewart, the Howard Government in 1996 “was intent on restoring s45D to its ‘rightful’ place in the Trade Practices Act”.<sup>7</sup> No change was made to the provisions which were at that time reinstated by the then Government when the CCA displaced the prior legislation. In other words, since that ‘restoration’ of the secondary boycott provisions, they have remained unchanged.

## 4 The Detailed Provisions

- 4.1 The provisions of s45D and, in particular, s45E are complex. In essence, boycotts engaged in for the purpose, or which are likely to have the effect of, causing substantial loss or damage to the business targeted, would be in breach of the Act if the detailed requirements of s45D are met. The boycotts have the nomenclature ‘secondary boycotts’. In the building and construction industry, for example, unions impose a boycott on a contractor so that it is forced not to accept materials or products from a third party in order to damage the business of that third party, noting that s45DC specifically deals with how unions are caught by the substantive provisions. A recent high profile example of the kind of conduct in question is where the Construction, Forestry, Mining and Energy Union has threatened contractors so that they do

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<sup>5</sup> B Creighton and A Stewart “Labour Law” 5<sup>th</sup> Edition, Federation Press

<sup>6</sup> Id p808

<sup>7</sup> Ibid

not order or seek supplies from Boral, because Boral supplied or supplies materials to Grocon.<sup>8</sup>

4.2 Miller<sup>9</sup> says of the particulars of s45D:

*Section 45D is the first of a number of provisions which deal with such boycotts. Essentially, the section bans two or more people engaging in conduct together which hinders or prevents a third person supplying goods or services to a corporation or acquiring goods or services from a corporation if one of the purposes for doing so is to cause substantial loss or damage to the business of the corporation, and the conduct is likely to have that effect.*<sup>10</sup>

4.3 The provision does not, however, stand alone. As was discussed with Review officials, a provision which causes ambiguity in the industrial relations context when secondary boycotts are invoked is s45DD. Boycotts which would otherwise be in breach of s45D to s45DB are not the subject of a contravention if the conduct engaged in has the dominant purpose, or is substantially related to “the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by the employer of that person.”

4.4 Section 45DD(3) provides a further carve-out from contravention of s45D to s45DB. That section says that no breach will occur where the dominant purpose of the conduct relates to environmental protection or consumer protection and the conduct is not industrial action. Industrial action is defined in s45DD(4) and s45DD(5).

4.5 As indicated earlier s45E is a complex provision. It deals with conduct which indirectly leads to a secondary boycott but which is not covered by s45D to s45DB. Miller explains that it covers two situations:

*In the first situation – the supply situation – the section prohibits the supplier entering an arrangement with a union for the purpose of hindering or preventing the supplier supplying goods or services to a customer whom the supplier is under an obligation to, or is accustomed to supply: s45E(2). A typical situation covered by this provision is where industrial action is threatened against a supplier unless that supplier agrees not to supply a customer who is the real target of the union threatening the industrial action.*

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<sup>8</sup> M Dunckley and J Kehoe *Straight Shooter*, Boss Financial Review Volume 15 May 2014 26 at p27

<sup>9</sup> R V Miller “Miller’s Australian Competition and Consumer Law Annotated”, 36<sup>th</sup> edition

<sup>10</sup> Id at p535

*The second situation – the acquisition situation – is the reverse of the first. The section prohibits a person who customarily acquires goods or services from a supplier from entering an arrangement with a union for the purpose of hindering or preventing that person continuing to deal with a supplier from whom the person is accustomed or under some obligation to acquire goods or services: s45E(3).<sup>11</sup>*

## 5 The Cole Royal Commission and Recommendations about Secondary Boycotts

5.1 The Cole Royal Commission in relation to secondary boycotts found that:

*There is no reason, in principle, why secondary boycotts should be treated as protected industrial action. Such action should be subject to penalty. Losses thereby occasioned should be recoverable.<sup>12</sup>*

5.2 The Cole Royal Commission also remarked on the role of the Australian Competition and Consumer Commission (ACCC) relating to secondary boycotts as follows:

*The ACCC presently undertakes enquires into allegations that secondary boycotts have been imposed in support of industrial demands in the industry. It has not been active in the industry in these matters. The victims of such unlawful conduct have rarely sought to pursue their remedies through the courts. The result has been that few of the many instances of secondary boycotts which have occurred in the building and construction industry and which have come to the Commission's attention have been referred to or pursued by the ACCC.<sup>13</sup>*

5.3 Master Builders notes that in a March 2014 speech<sup>14</sup> in the Senate Senator McKenzie reinforced that the Cole Royal Commission's finding in the last paragraph remains true today:

*Mr Sims has reportedly said that the investigation of these types of allegations – presumably, allegations of secondary boycotts – is 'a priority for the ACCC'. Senators will have to forgive me for being slightly sceptical. According to its quarterly activity reports, the last time the ACCC commenced and concluded secondary boycott proceedings was in August 2006 – almost eight years ago.*

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<sup>11</sup> Id p550

<sup>12</sup> Final Report of the Royal Commission into the Building and Construction Industry Cth of Australia Vol 5 Chapter 17 at p129.

<sup>13</sup> Id Vol 11 para 152.

<sup>14</sup> "The Senate Hansard Adjournment Industrial Relations Speech", 24 March 2014



- 5.4 Master Builders supported Recommendations 16, 181 and 182 of the Cole Royal Commission. Those recommendations are as follows:

*Recommendation 16*

*The Building and Construction Industry Improvement Act:*

*(a) proscribe secondary boycotts being imposed in support of claims being made in respect of a proposed agreement;*

*(b) provide that any breach of the proscription attract a civil penalty up to a maximum of \$100 000 for a corporation and \$20 000 for individuals;*

*(c) provide that, on application of an interested person or the Australian Building and Construction Commission, the Federal Court may grant an injunction (interim, interlocutory or permanent) restraining any person from engaging in the proscribed conduct; and*

*(d) provide for the payment, by any person who contravenes the proscription, of compensation to any person who suffers loss as a result of the contravention.*

*Recommendation 181*

*The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss45D–45E of the Trade Practices Act 1974 (C'wth), but limited in operation to the building and construction industry.*

*Recommendation 182*

*The Australian Building and Construction Commission share jurisdiction with the Australian Competition and Consumer Commission in investigating and taking legal action concerning secondary boycotts in the building and construction industry.*

- 5.5 In relation to Recommendation 16 Master Builders, at the time, and currently believes that **a provision in the specific building and construction industry legislation should operate as an additional legal remedy rather than displace the secondary boycott provisions. The specific building and construction industry provision should contain a mechanism by which the ABCC is required to act within a disciplined framework on receipt of any complaints, particularly from small businesses, concerning alleged secondary boycotts.**

- 5.6 Conduct in the current legislative environment vesting the appropriate jurisdiction in the ABCC would be facilitated by the provision contained in the

advance release of the *Fair and Lawful Building Site Codes 2014* (Code). Section 16(4) requires the entities bound by the Code to report to the ABCC any request or demand by a union that the Code covered entity engage in conduct “that appears to be for the purposes of a secondary boycott within the meaning of the CCA”. The same provision requires that the report must be made as soon as practicable but not later than 24 hours after the relevant request or demand is made.

- 5.7 Given the aforementioned complexity of the secondary boycott provisions, this will be a difficult issue for small business and a matter where the Cole Royal Commission provision is preferred to a mere reporting requirement as currently encapsulated in the advance copy of the Code.
- 5.8 Recommendations 181 and 182 deal with the manner in which secondary boycott provisions were to be inserted in the envisaged legislation. At the time Master Builders believed that Recommendation 182 was ambiguous. We commented in our 2003 submission on the Cole Royal Commission recommendations that the notion of sharing jurisdiction between the ABCC and the ACCC should not be an issue. At the time we indicated that the Royal Commissioner was of the view that there should be parallel avenues for investigation and enforcement by both agencies. **The ABCC, in the Royal Commissioner’s view, should have the same authority as the ACCC possesses to investigate breaches of the secondary boycott provisions and to undertake enforcement action wherever those secondary boycotts occur in the building and construction industry. Master Builders is of the view that this would be an ideal situation.**
- 5.9 We note that **under the current Bills before Parliament<sup>15</sup> the ABCC is not vested with the jurisdiction to cover secondary boycotts, but an amendment to vest them with the appropriate function would be appropriate.** In our view that amendment should make it clear that the ACCC does not in fact possess complete jurisdictional authority but its jurisdiction would be constrained by the definition of ‘building work’ in the principal statute reinstating the ABCC. This would bring the statute under which the new ABCC will operate more in line with the original Cole Royal Commission envisaged remedies and specific recommendations referred to above. It

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<sup>15</sup> *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*

would also stop secondary boycott conduct which is used as an everyday tool by unions in the industry from being the potent weapon it is: a weapon that has the capacity to send Master Builders' members to the wall or inflict sufficient damage to warrant complicity.

- 5.10 Based on Master Builders' experience, there is also a practical dimension worthy of consideration in this context. Secondary boycotts are invariably accompanied by, and therefore intertwined with, conduct which is unlawful. This includes conduct such as collusion, adverse action and other behaviour which offends principles of freedom of association contrary to the *Fair Work Act 2009* (Cth). As a consequence, when an allegation of certain unlawful behaviour is made, and the enquiries of either the former ABCC or currently the FWBC, get underway, it is usually particularly difficult to distinguish between what should be investigated by that agency and what should be referred to the ACCC for investigation. Accordingly, not only at the level of transforming into law the Cole Royal Commission recommendations does Master Builders' proposal make sense but it would assist to provide the ABCC with the ability to investigate and prosecute secondary boycotts as a matter of cogent practice.
- 5.11 Former Royal Commissioner, Mr Gyles is reported<sup>16</sup> as saying the former ABCC's ambit to cover industrial law matters meant it had an inadequate architecture, stating a renewed ABCC needed a broader remit:

*"For that body to be effective it needs to combine the ability to intervene in industrial matters, with civil remedies, injunctions, and the like, and claims of damages, and the criminal jurisdiction".*

*He continued that there is a "disconnect" between investigative bodies and prosecuting ones, and until there is "some coordination, there won't be any real action".*

*Re-establishing the ABCC "would help with law and order, but in my view it doesn't solve the problem".*

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<sup>16</sup> Former Royal Commissioner Gyles calls for CFMEU's Deregistration Workplace Express 19 May 2014

## 6 Exemption of Employment Conditions

- 6.1 In the context of the industrial relations system having effects which are anti-competitive and which reach into the commercial sector, Master Builders has traversed with the Review the terms of s51(2)(a) of the CCA. This provision exempts from the terms of the legislation:

*any act done in relation to, or to the making of a contract or arrangement or the entering of an understanding, or to any provision for contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees.*

- 6.2 The boundaries of this provision have not been properly explored judicially although there is judicial authority for the proposition that: “the section is directed at an act done in contracts, arrangements or understandings in relation to employment contracts only to the extent that they relate to employment conditions.”<sup>17</sup> The exemption does not apply to resale price maintenance provisions or the secondary boycott provisions per the introductory words in s51(2).
- 6.3 As expressed to the Review, one of Master Builders’ key priorities is the reversal of laws that permit independent contractors to be regulated via enterprise agreements. This battle has continued for a number of years. Clauses which restrict the engagement of independent contractors unless they have agreements which mirror employee conditions are anti-competitive and have little to do with the purported aim of ‘job security’ for employees, which qualifies them under s172 FW Act as matters that pertain to the employment relationship. In practice, these clauses permit unions to be gatekeepers for who may or may not be engaged on site and permit unions to monitor those subcontractors who have not signed up to a union pattern agreement. This practice inflates costs and hampers competition.
- 6.4 Master Builders took litigation to a then Fair Work Australia (FWA) Full Bench to seek to have this area of the law clarified – see *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union*<sup>18</sup> (Asurco). In the Asurco case the Full Bench did not provide detailed reasons but said that a clause in

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<sup>17</sup> See Miller supra note 9 at p647 citing *Adamson v New South Wales Rugby League Ltd* (1991) 27 FCR 535.

<sup>18</sup> (2010) 197 IR 365; [2010] FWAFB 6180.

an enterprise agreement that provided pay and conditions parity between employees and independent contractors was clearly permitted and did not offend against provisions of the FW Act that do not permit unlawful terms to be placed in enterprise agreements.<sup>19</sup> This was despite comprehensive submissions that traced the history of such clauses and concluded that the law on which the Full Bench relied without question had no legal bedrock and should be re-examined. The Full Bench's decision was dismissive.

6.5 The decision at first instance in *ADJ Contracting Pty Ltd re ADJ Contracting Pty Ltd Enterprise Agreement (ADJ Contracting)*<sup>20</sup> brought the validity of clauses restricting engagement of contractors and labour hire employees into sharper focus. It is a decision that relied on the Asurco case to find against those who argued, amongst other things, for the agreement not to be approved because of clauses which regulate independent contractors.

6.6 In the decision at first instance, Senior Deputy President Acton was asked to examine a provision similar to the provision in the Asurco case, that is a subclause in an enterprise agreement in the following terms:

*The Employer shall only engage contractors and employees of contractors to do work that would be covered by the Agreement if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement. This will not apply where the Employer is contractually obliged by the head contractor/client to engage a specific nominated contractor to do specialist work.*

6.7 In addition, the clauses which were under scrutiny contained provisions which required the employer to provide details to the employees and the relevant union, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU) of contractors and labour hire companies which the employer proposed to engage, clearly signalling to the union which companies may or may not have entered into its pattern agreement.

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<sup>19</sup> Section 194 defines an unlawful term that includes an objectionable term, the latter which is defined in section 12 FW Act. Section 186(4) states that FWA must be satisfied in approving an agreement that it does not include any unlawful terms.

<sup>20</sup> [2011] FWA 2380.(unreported, Acton SDP, 28 April 2011).

6.8 The clauses under scrutiny were part of a pattern deal that had been agreed between the ETU and the Victorian branch of the National Electrical and Communications Association. The ABCC together with the AiG intervened in the proceedings to challenge the validity of the independent contractor clauses and some other clauses, not dealt with in this submission. The analysis which follows links these concerns with issues of competition.

## 7 ADJ Contracting in detail

7.1 The ABCC contended that the relevant clause and the union notification provision were what are known as 'objectionable terms'. Pursuant to section 194 of the FW Act an objectionable term is an unlawful term for the purposes of the FW Act and will prevent agreement approval.<sup>21</sup> Further, to the extent that a term of an enterprise agreement is an objectionable term it has no effect: section 356 FW Act.

7.2 In effect the ABCC and the AiG argued that the relevant clauses were objectionable terms and hence unlawful terms. This is because if the employer or the union were to take adverse action against a contractor or a labour hire company because the contractor applied the terms of its own enterprise agreement then Part 3-1 of the FW Act would be breached. Part 3-1 of the FW Act is concerned with setting out the 'general protections' which extend to independent contractors as well as employees. These general protections in broad terms constrain a person from taking 'adverse action' against another person because that person has a workplace right. Under s341(1)(a) of the FW Act, the benefit of a workplace instrument is a workplace right. Hence, the terms of enterprise agreements constitute a workplace right.

7.3 The ABCC and AiG particularised this argument by indicating that the practical industrial reality was that section 354(1)(a)(iii) and/or section 354(1)(b)(ii) FW Act would be breached by the on-ground application of the clauses regulating independent contractors. Those statutory provisions set out that a person must not discriminate against an employer because:

- employees of the employer are covered, or are not covered, by an enterprise agreement that does, or does not, cover an employee

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<sup>21</sup> FW Act, sub-section 186(4A).

organisation, or a particular employee organisation (section 354(1)(a)(iii));  
or

- it is proposed that such employees be covered, or not be covered, by an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation(section 354(1)(b)(ii)).

7.4 Quite simply, if the employer treated a contractor less favourably than other contractors in accepting, for example a tender to perform work, and one of the reasons it did so was because the subcontractor did not have an enterprise agreement in the form of the ETU pattern agreement, then these provisions would be breached. Coverage by the pattern agreement would have the effect of delivering mirror conditions with those signed up to by the employer ADJ Contracting Pty Ltd. Hence, it is highly likely in practice that if an agreement has been reached outside of the pattern or template process, there will be lesser conditions, a matter that categorically affects competition. This is the practical industrial reality. This is the productivity damaging reality. It was the same argument advanced in the Asurco case which Master Builders took but which was not addressed by the Full Bench in that case.

7.5 However, in the decision at first instance, the Senior Deputy President did not accept a link between coverage of the pattern agreement and wages and conditions parity. At paragraph 18 of ADJ Contracting,<sup>22</sup> Acton SDP said as follows:

*I consider the AIG's concern that clause 4.3(b)(v) requires ADJ to contravene s.340(1) of the FW Act is unfounded. Clause 4.3(b)(v) requires ADJ to only engage contractors who apply wages and conditions no less favourable than those provided for in the ADJ Agreement. The clause is not concerned with whether or not an enterprise agreement or other workplace agreement covers the contractor.*

7.6 SDP Acton in reaching the conclusion just set out relied on the Asurco case. In particular she relied on the following paragraphs from Asurco:

*Asurco also argues that the clauses in question contain unlawful content. It contends that the clause requires or permits the employer to refuse to engage an independent contractor because the independent contractor is entitled to the benefit of a workplace law or workplace instrument. We reject this argument. First the*

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<sup>22</sup> Above note 19

*terms of an agreement cannot override the terms of the Act. Any objectionable term has no effect:*

*‘356      Objectionable terms*

*A term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term.’*

*In any event, the obligation sought to be imposed on the employer is to require contractors to be paid, as a minimum, the amounts in the agreement applicable to employees. The existence of another enterprise agreement with higher or lower terms does not preclude any such obligation being observed, nor does it follow, as was submitted by Asurco, that such a provision would lead to a breach of the general protections provisions of the Act.<sup>23</sup>*

- 7.7 It is the latter proposition in paragraph 13 from the Asurco case which denies the industrial reality. It favours form over substance. As a matter of such reality, an enterprise agreement that covers the ETU will axiomatically provide for conditions that are no less favourable than those contained in an agreement which has been reached on good faith bargaining principles. The union was given greater rights to interfere in what should be commercial decisions. That is acknowledged by the Victorian ETU Secretary which was reported in Workplace Express on 24 March 2011 as follows:

*Mighell said that there was ‘no doubt’ that what the ETU had secured on union rights was leading edge, but ‘why shouldn’t it be?’<sup>24</sup>*

- 7.8 With the higher terms and conditions and with the gate-keeping process in place, the ADJ Contracting provision reinforces the fact that independent contracting is under threat by those who would force contractors to be treated as if they were employees. The FW Act’s “backdoor” method of regulation of contractors is a highly unsatisfactory position and wrongly provides legality to a provision that, if sought in general commercial arrangements, would fall foul of the CCA. It creates a situation where contractors’ remuneration is treated as on all fours with employee remuneration and eliminates the labour cost component of market-place competition.

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<sup>23</sup> Asurco, at paras 12 & 13 (see above note 17) as cited in *ADJ Contracting* at para 19.

<sup>24</sup> ‘AiG challenges Victorian electrical contracting deal’ *Workplace Express* (24 March 2011).



7.9 The union clause clearly restricts the operation of the free market. Indeed, if clauses along the lines of those in question are acted upon by employers it may be that companies will be exposed to breaches of the CCA. This was also a consideration in ADJ Contracting, with the interveners arguing that compliance with sub-clause 4.3(b) would result in the employer breaching section 45E of the CCA.

7.10 The arguments in this context are set out at paragraph 21 of the ADJ Contracting decision thus:

*(i) clause 4.3(b)(v) amounts to an arrangement or understanding between ADJ and the CEPU and at least one purpose of that arrangement or understanding is to prevent or hinder ADJ from acquiring services from existing contractors or labour hire companies who do not provide their employees with at least the wages and conditions in the ADJ agreement; and/or*

*(ii) ADJ's compliance with clause 4.3(b)(v) is likely to lead ADJ to not engage contractors or labour hire companies who do not have industrial instruments acceptable to the CEPU.*

7.11 Senior Deputy President Acton dismissed these arguments. She said that compliance with the contractor clause would not offend against s45E because compliance is not an offence but that the making of a relevant contract, arrangement or understanding would be an offence. Again Master Builders respectfully argues that this denies the real effect of the clause. In essence, the terms of Clause 4.3(b) deliver to the union the same outcome as in *ACCC v. IPM Operation and Maintenance Loy Yang P/L*.<sup>25</sup> The respondent in that case admitted entering an agreement with the union in breach of section 45EA of the CCA which prohibits a person from giving effect to the terms of a relevant contract, arrangement or understanding. In that case it was an agreement that it would not employ electrical contractors at a power station unless the contractors entered into a certified agreement with the union. This is in fact what must be done to achieve the pay and conditions parity required in the ADJ Contracting Pty Ltd Enterprise Agreement.

7.12 The AiG appealed the decision of SDP Acton to a Full Bench. The ABCC did not. On 13 October 2011 a Full Bench of FWA via a split decision<sup>26</sup> handed down its appeal judgment. The Full Bench said that AiG was a person

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<sup>25</sup> (2006) 157 FCR 162.

<sup>26</sup> *The Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWAFB 6684 (unreported, Harrison, Richards SDPP, Roe C, 13 October 2011)

aggrieved and had standing to bring the appeal.<sup>27</sup> AiG lost. In its decision, the Full Bench upheld the decision of SDP Acton and held that the agreement did not require or permit a contravention of the general protections provisions of the FW Act and questioned whether an employer could have a workplace right for the purposes of enlivening the general protections. The Full Bench also held that the agreement was not an arrangement or understanding contemplated by sections 45E and 45EA of the CCA.

7.13 The Full Bench did not consider how the clauses in dispute affected job security. Indeed, very rarely is there a consideration by the Fair Work Commission (FWC) of how the facts of a case indicate that use of contract labour is likely to affect job security, despite the project/industry-specific implications of such a proposition. However, as Munro J noted in *Re Australian Liquor, Hospitality and Miscellaneous Workers' Union*<sup>28</sup> 'only in limited circumstances could [pay parity between employers and contractors] be said to pertain to the relations of employers and employees'. That is certainly Master Builders' position. The circumstances in which contract labour is used differs widely across industries and very rarely will contract labour in the construction industry affect the job security of employees.<sup>29</sup>

7.14 In Master Builders' submission, it is possible to view independent contractors as providing supplementary and specialist labour in a way which generates competition in the labour market, and makes construction projects viable, thereby supporting jobs, rather than threatening them. Clauses which restrict the engagement of independent contractors raise costs and undermine this necessary function of contract labour and diminish competition in the labour market. They also deny the usual flexibility that is required to respond to the dynamic issues associated with the use of contractors in the building and construction industry, additional labour that is often called on to meet time deadlines so that, for example, liquidated damages are not applied by the principal under a commercial building contract.

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<sup>27</sup> Id at para 8 of majority judgment

<sup>28</sup> (unreported, Munro J, Watson DP, Redmond C, AIRCFB, 30 January 1996) (at pg 11)

<sup>29</sup> Clause 672 of the Explanatory Memorandum to the Fair Work Bill indicates that it is intended that the following terms would be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

- terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement;

- 7.15 The AiG took action in the Full Federal Court to challenge the Full Bench's decision. The Full Federal Court did not accept arguments linking the operation of the relevant clause to a breach of the CCA.
- 7.16 The court said that there was no breach of s45E on five grounds:
- First, the Agreement itself is not with a union in the s45E sense;
  - Secondly, the Agreement has statutory force – it is not the consensual type of agreement, arrangement or understanding to which the CCA is directed;
  - Thirdly, s192 of the FW Act is concerned with agreements not arrangements or understandings;
  - Fourthly, the Agreement is not an arrangement or understanding with CEPU;
  - Fifthly, there was no evidence of CEPU's involvement in the antecedent conduct which could suffice to establish the elements of s45E of the CCA.<sup>30</sup>
- 7.17 The court expanded on its argument that an enterprise agreement cannot constitute an agreement with a union for the purposes of s45E as follows:

*Further, not only is the Agreement not an agreement with a union for the purpose of s45E of the CCA (which AiG concedes), but it cannot operate in itself as an arrangement or understanding. The Agreement has statutory force. It is neither a contract, arrangement or understanding within the meaning of the CCA, but a creature of statute. The anterior process of negotiation is not the reaching of an agreement or understanding for the purpose of s45E of the CCA.*

*The AiG argument that the statutory instrument is less binding and less formal than a formal contract (and therefore an agreement or understanding) must also be rejected. The statutory instrument has more formality and greater consequence than any contract arrangement or understanding could have. Sanctions for its breach are greater and apply to persons whether they voted for it or not, whether they were in the relevant employment at the time*

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<sup>30</sup> *Australian Industry Group v Fair work Australia* [2012] FCAFC108 at para 69

*when it was approved and even if they were completely unaware of its existence.*<sup>31</sup>

- 7.18 Whilst these arguments are obviously based on a strict approach to the law which elevates clauses in enterprise agreements as beyond the reach of s45E, they do not accommodate the industrial reality previously referred to. Whilst there are other arguments that may be raised by employers in challenging clauses of the kind sought to be impugned in the litigation,<sup>32</sup> the Review should, in Master Builders' submission, recommend that **there be a clear separation of commercial and workplace law and that the regulation of contracts for services should be covered by the CCA and excluded from the ambit of the FW Act especially in regulation through enterprise agreements.**
- 7.19 On the logic of the Full Federal Court, if a provision of an agreement does not pertain to the employer/employee relationship (or to the employer/union relationship now contemplated by s172(1)(b) FW Act), then such an arrangement could breach the CCA. In other words, where a provision does not sit lawfully within an enterprise agreement because it does not sufficiently pertain to the relationships vindicated by s172, that clause could potentially stand as an arrangement or understanding affecting supply or acquisition of goods and services or a covenant affecting competition under s45 or s45B of the CCA. That would in turn make it unlawful and s194 would operate to make the enterprise agreement unable to be approved. This line of argument has not yet been run with the FWC but Master Builders believes that is the logical step when the characteristics of the law just discussed are applied in practice. However, this argument is highly technical and would require more complex and costly litigation in order to be advanced. Hence, Master Builders' recommendation stands that **there should be a clear separation of commercial and workplace law that the regulation of contracts for services should be covered by the CCA and regulation of independent contractors should be excluded from the terms of the FW Act.**

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<sup>31</sup> Id para 72 and 73.

<sup>32</sup> Touched on in *CFMEU v Brookfield Multiplex Australia P/L* [2012] FWA4051.

## 8 Conclusion

8.1 Unions apply secondary boycotts as a matter of everyday pressure on Master Builders' members. Whilst the application of the laws surrounding the use of a s45D and s45E are an especially emotive subject, with a chequered legislative history, it is important to go back to the basics of the Swanson Committee's words that, "employees should not be able to stand as judge in their own cause."

8.2 **Master Builders recommends that the secondary boycott jurisdiction be strengthened, inclusive of vesting contemporaneous jurisdiction in the ABCC (once it is established by legislation currently before Parliament) to ensure more effective competition in labour and product markets in Australia.**

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