

Master Builders Australia

Submission to the Competition Policy Review

On

Competition Policy Review Draft Report

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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 This submission responds to a number of the Draft Recommendations contained in the *Competition Policy Review Draft Report* (Draft Report) released for comment on 22 September 2014.
- 2.2 Discussion occurs from section 5 of this submission under the headings used in the Draft Report. The relevant Draft Recommendation is first set out in italics and the Master Builders' response is then set out. Section 4 of this submission contains an overview of Master Builders' response to the Draft Report.
- 2.3 A number of the Draft Recommendations are not addressed as they relate to specific areas that are not relevant to the building and construction industry e.g. the Draft Recommendations in relation to pharmacies, taxis and liner and coastal shipping, parallel imports, extra-territorial reach of the law, and retail trading hours are not dealt with.
- 2.4 In short, this submission focuses on key areas where Master Builders seeks to reinforce an aspect of a Draft Recommendation or where disagreement is proffered. We emphasise that Master Builders believes the Review Panel has produced a Draft Report of enormous value and consequence.

3 Key Reform Priorities

3.1 Master Builders in this analysis and submission in response to the Draft Report has proposed a number of changes. Key amongst the proposed changes are:

- amending Draft Recommendation 1, which deals with Competition Principles, to read, inter alia: *The Panel endorses competition policy that focuses on making markets work in the most efficient manner possible to the benefit of all participants.*
- amending Draft Recommendation 7, dealing with the Intellectual Property Exception, to ensure the proposed review does not result in higher costs for Australian industry;
- amending Draft Recommendation 10, dealing with Planning and Zoning, by including the following text:

To promote effective implementation of these objectives and principles, relevant authorities and sub-State/Territory jurisdictions report annually in consistent and standard form their performance against these principles to their respective State/Territory Governments, who should then publish these reports in an open and transparent manner.

Such reporting should include explanations of the weightings attached to each of the principles in decision-making, and of the reasons for any non-compliance.

- replacing existing Draft Recommendation 13, dealing with Competitive Neutrality Policy, with the following text:

All non-government standards or the like which are imported into, referenced by, or enforced through, legislation or policy be required to fully conform with the “Australian Government Guide to Regulation.

This would require existing and proposed standards or the like to meet rigorous regulatory requirements and impact tests, robust cost-benefit analysis, and demonstrate the superiority of the proposed course of action over a range of alternatives, including no intervention and even deregulation.”

3.2 Master Builders has sought the Panel to reconsider its stance on not recommending a strengthening of secondary boycott provisions. Master Builders has asked the Panel to re-consider more fundamental reform and

that the recommended reform be included in expanded Recommendation 31 and 32. Master Builders argues for the specific building and construction industry industrial relations regulator to be vested with jurisdiction in secondary boycott proceedings.

4 Overview

- 4.1 Master Builders commends the Review Panel for a thorough and relevant Draft Report. The principal concerns that Master Builders has with the Draft Recommendations and the underpinning rationale relate to the issue of employment related matters. Draft Recommendations 31 and 32 do not go far enough in an area crying out for reform. That reform task should not be left to other reviews that do not have as a main focus the deficiencies in the area of law now under consideration. We also do not believe that the commentary at page 241-247 of the Draft Report addresses some of the pressing issues in play in this context.
- 4.2 In addition, Master Builders in one of its original suite of submissions to the Review Panel highlighted the anti-competitive impact of poorly designed and administered regulations and made a number of proposals for remedial action. In the relevant submission, Master Builders emphasised that regulation continues to be an important issue for small business, given its capacity to divert scarce entrepreneurial time and energy away from operating and growing their business, and creating jobs, to filling in forms for particular government agencies, the purpose/need/benefit of which is not always apparent.
- 4.3 We also expressed particular concern at the actual and the potential anti-competitive effects of regulations. These range across:
- raising barriers to entry by potential new competitors;
 - impeding the exit of existing players, whose ongoing presence confounds market signals;
 - limiting the choices of businesses and of consumers on the products and the services available to them;

- acting as a disincentive to entrepreneurship, and to new research and development, and
 - providing usually invisible cross-subsidies from non-preferred to favoured businesses and consumers.
- 4.4 All of these effects are ultimately reflected in lower-than-otherwise levels of productivity and rates of productivity growth, and through these channels lower employment, investment and broader economic growth. Further, we stressed our regulation review and reform agenda should not be misrepresented to mean we are opposed to all and any regulation. Rather, we recognise the need for efficient, well-designed and administered regulations, with appropriate and transparent compliance burdens.
- 4.5 Master Builders also signalled our support for regulation ‘in the right place’:
- for the building and construction industry, this generally means a single, national and uniform National Construction Code, thus making compliance easier and more cost-effective.
 - building regulation should not be pursued through diverse planning schemes, or distributed across a plethora of State/Territory/local governments and their agencies.
- 4.6 Against this background, Master Builders welcomes the constructive proposals made in the Draft Report focusing on regulation review and reform. However, while broadly ‘headed in the right direction’, several of the Draft Recommendations could be strengthened to deliver greater and more durable outcomes, discussed under the specific Draft Recommendation, bearing in mind the preceding discussion.

5 Competition Principles – Draft Recommendation 1

The Panel endorses competition policy that focuses on making markets work in the long term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy:

- *legislative frameworks and government policies binding the public or private sectors should not restrict competition;*

- *governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;*
- *the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;*
- *governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities;*
- *government business activities that compete with private provision, whether for profit or not for profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;*
- *a right to third party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and*
- *independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.*

Applying these principles should be subject to a ‘public interest’ test, so that:

- *the principle should apply unless the costs outweigh the benefits; and*
- *any legislation or government policy restricting competition must demonstrate that:*
 - *it is in the public interest; and*
 - *the objectives of the legislation or government policy can only be achieved by restricting competition.*

5.1 The Draft Report usefully sets down (at page 4) what it sees as the main purposes and objectives for competition policy, including ensuring:

- Australia has the capacity to meet current economic challenges, and realise future economic opportunities;
- markets work properly to meet the needs and preferences of Australians, and through this contribute to their economic welfare;
- competition laws, policies and institutions serve our national interest; and,
- markets work in the long-term interests of consumers.

5.2 Master Builders broadly endorses these purposes and objectives.

- 5.3 Master Builders supports Draft Recommendation 1 save the first sentence which we suggest should read: “The Panel endorses competition policy that focuses on making markets work in the most efficient manner possible to the benefit of all participants.”
- 5.4 We also support the Panel’s view, expressed on page 180 of the Draft Report, that competition principles should be incorporated into Government procurement policies.

6 Human Services – Draft Recommendation 2

Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

The guiding principles should include:

- *user choice should be placed at the heart of service delivery;*
- *funding, regulation and service delivery should be separate;*
- *a diversity of providers should be encouraged, while not crowding out community and voluntary services; and*
- *innovation in service provision should be stimulated, while ensuring access to high quality human services.*

Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

- 6.1 Master Builders has an active interest and direct participation in the provision of education services.
- 6.2 Master Builders does not believe that education services should be treated in the same qualitative sense as the provision, for example, of health care. The Panel calls on innovation in service provision to be stimulated *while ensuring access to high quality human services*. Requirements of the nature and extent of ‘quality’ and how it would manifest itself should be disaggregated and applied differently to the type of service identified. In other words, we would suggest adding to the fourth dot point the words *tailored to the type of service provided*.
- 6.3 Any indication that current Commonwealth or State and Territory government policy would support this proposal would assist to determine the likelihood of this measure being made tangible.

7 Road Transport – Draft Recommendation 3

Governments should introduce cost reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, there should be a cross jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.

7.1 Master Builders supports this Draft Recommendation as its practical application will contribute to building Australia's infrastructure.

8 Intellectual Property Review – Draft Recommendation 7

The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.

The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.

8.1 See commentary under Draft Recommendation 8.

9 Intellectual Property Exception – Draft Recommendation 8

The Panel recommends that subsection 51(3) of the CCA be repealed.

Intellectual Property (IP) is becoming an increasingly important component of commerce. We agree with the Panel that IP is able to be applied in a manner that harms competition. Commercial transactions including IP rights should be subject to the *Competition and Consumer Act, 2010 (Cth) (CCA)*. However, the review contemplated by Draft Recommendation 7 should be careful in not subjecting Australia to higher costs. Observations such as those made at page 87 of the Draft Report should be considered when establishing the terms of reference for the IP review.

10 Planning and Zoning – Draft Recommendation 10

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision making.

The principles should include:

- *a focus on the long term interests of consumers generally (beyond purely local concerns);*
- *ensuring arrangements do not explicitly or implicitly favour incumbent operators;*
- *internal review processes that can be triggered by new entrants to a local market; and*
- *reducing the cost, complexity and time taken to challenge existing regulations.*

10.1 Master Builders supports the Draft Recommendation to introduce competition principles in planning and land-zoning decisions as it would lead to increased investment, economic growth and employment. The Draft Report (at Section 2.7) notes planning and zoning regimes in Australia can have a number of anti-competitive features, with even small reforms in this area potentially delivering large economic benefits.

10.2 Amongst the main anti-competitive features of the planning and zoning regimes in operation across the nation are:

- their tendency to be overly-localised in their focus, with little regard for the promotion of competition;
- they operate with arrangements which either explicitly or implicitly favour incumbent operators, and create barriers to entry by new players in the local market; and/or
- they have procedures which are complex, time-consuming and which differ across jurisdictions.

10.3 The Draft Report usefully proposes a number of reforms to planning and zoning regimes in Australia. An over-arching principle is contained in Draft Recommendation 10 set out above. That is:

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

- 10.4 Master Builders welcomes this proposal, but would insert after the word “legislation” the following: *and commit to their effective implementation.*
- 10.5 The Draft Report, at Draft Recommendation 10, also sets down the “competition principles” which should be included in the objectives of State/Territory planning and zoning laws.
- 10.6 The Draft Report (at page 95) notes planning and zoning regimes can have anti-competitive effects in the retail sector in particular (by constraining which retailers can operate in a specific geographic area), with attendant implications for building firms servicing the commercial construction sector. As such, planning and zoning arrangements which distort investment and locational decision-making by retailers (both individually, such as a major supermarket chain, or collectively such as through a shopping centre provider) can diminish the business opportunities open to builders in the commercial construction sector.
- 10.7 Consistent with our proposal for additional narrative (*and commit to their effective implementation*), Master Builders would recommend that the following text be included within Draft Recommendation 10:

To promote effective implementation of these objectives and principles, relevant authorities and sub-State/Territory jurisdictions report annually in consistent and standard form their performance against these principles to their respective State/Territory Governments, who should then publish these reports in an open and transparent manner.

Such reporting should include explanations of the weightings attached to each of the principles in decision-making, and of the reasons for any non-compliance.

- 10.8 Such reporting should be used by the Australian Council for Competition Policy (ACCP) in determining the appropriateness, and the quantum, of any competition payments.

11 Regulation Review – Draft Recommendation 11

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- *they are in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

Factors to consider in assessing the public interest should be determined on a case by case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

- 11.1 See discussion at Draft Recommendation 12 Standards Review, for Master Builders' response to this Draft Recommendation.

12 Standards Review – Draft Recommendation 12

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, the Australian Government's Memorandum of Understanding with Standards Australia should require that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.

- 12.1 The Draft Report (at page 34) notes standards (whatever their nomenclature) can be anti-competitive. We note that standards are able to deliver benefits by, inter alia, providing greater information to consumers, and so enhance consumer confidence in the goods and services they acquire. Yet, as stated, standards can be anti-competitive by acting as barriers to market entry by new competitors, deterring innovation by entrepreneurial firms and mandating particular technologies or processes rather than performance outcomes.
- 12.2 The Review Panel proposes the Australian Government's Memorandum of Understanding with Standards Australia require non-governmental standards (such as those created by Standards Australia) be reviewed according to the processes contained in Draft Recommendation 11 of the Draft Report, which deals with regulation review.

- 12.3 Master Builders welcomes the Draft Report’s recognition of the important role played by Standards Australia in the regulatory process. While its publications are badged as “standards” they are widely regarded as (and act as de facto) “regulations” by consumers and industry. However, Master Builders regards the approach proposed in Draft Recommendation 11 for the review of Australian Standards as inadequate, an approach which has the capacity to leave consumers and industry with a two tier approach to regulation review especially at the national level.
- 12.4 The better approach, which Master Builders would prefer to see in a revised Draft Recommendation 12, would be as follows (the rationale for the revision being expressed in the substance of the second proposed paragraph):

All non-government standards or the like which are imported into, referenced by, or enforced through, legislation or policy be required to fully conform with the “Australian Government Guide to Regulation.”

This would require existing and proposed standards or the like to meet rigorous regulatory requirements and impact tests, robust cost-benefit analysis, and demonstrate the superiority of the proposed course of action over a range of alternatives, including no intervention and even deregulation.

13 Competitive Neutrality Policy – Draft Recommendation 13

All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

- 13.1 Master Builders supports this Draft Recommendation as a basis for action based on the principles established in Draft Recommendation 1.
- 13.2 The Review Panel should recommend a timeframe for the achievement of this review, say by mid-2016.

14 Competitive Neutrality Complaints – Draft Recommendation 14

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- *assigning responsibility for investigation of complaints to a body independent of government;*
- *a requirement for the government to respond publicly to the findings of complaint investigations; and*
- *annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.*

14.1 Master Builders supports this Draft Recommendation as a basis for action based on the principles established in Draft Recommendation 1.

15 Competitive Neutrality Reporting – Draft Recommendation 15

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

15.1 Master Builders supports this Draft Recommendation.

15.2 We suggest a pro forma statement of the kind envisaged be set out in the Review's final report.

16 Competition Law Concepts – Draft Recommendation 17

The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.

16.1 This Draft Recommendation is supported.

16.2 On the whole the substance of the law is working albeit that it is overly complex.

17 Competition Law Simplification – Draft Recommendation 18

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions.

The Panel recommends that there be public consultation on achieving simplification.

Some of the provisions that should be removed include:

- *subsection 45(1) concerning contracts made before 1977;*
- *sections 45B and 45C concerning covenants; and*
- *sections 46A and 46B concerning misuse of market power in a trans-Tasman market.*

This task should be undertaken in conjunction with implementation of the other recommendations of this Review.

17.1 Master Builders agrees with this Draft Recommendation and would be happy to be involved with the public consultation suggested.

18 Application of the Law to Government Activities – Draft Recommendation 19

The CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

18.1 Master Builders endorses Draft Recommendation 19, proposing the CCA should apply to the Crown in right of the Commonwealth, State and Territories insofar as they undertake activity in trade or commerce.

18.2 Draft Recommendation 19 correctly recognises the substantial, and often significant, footprint of governments at all levels in trade and commerce in Australia, for example in the provision of utilities, in transport and in building related services, which impact on the building and construction industry.

18.3 The result of implementing Draft Recommendation 19 would be consistent with, and would be a wider application of, the established principle of competitive neutrality. Indeed, against this background, the better question is not whether Draft Recommendation 19 should be enacted, but what sufficient justification is there for it not to be enacted.

19 Cartel Conduct Prohibition – Draft Recommendation 22

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- *the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;*
- *the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;*
- *a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition;*
- *an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.*

19.1 Master Builders fully supports this Draft Recommendation.

20 Secondary Boycotts Enforcement – Draft Recommendation 31

The ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved each year.

20.1 See commentary under Draft Recommendation 32, Secondary boycotts proceedings, for the Master Builders' response to this Draft Recommendation.

21 Secondary Boycotts Proceedings – Draft Recommendation 32

Jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA should be extended to the state and territory Supreme Courts.

21.1 Whilst supported, Draft Recommendations 31 and 32 do not go far enough to effect necessary reform. The rationale for the limited terms of these Draft Recommendations appears to derive from the comment at page 245 of the Draft Report thus:

A sufficient case has not been made for changes to the secondary boycott provisions of the CCA.

- 21.2 We submit that this in part derives from a misunderstanding of Master Builders' position as outlined in detail in our submission dated 28 May 2014 to the Review Panel upon which we continue to rely. The following comment which also appears at page 245 of the Draft Report underlines this concern:

Where legislation confers a comparable enforcement jurisdiction on a specialist regulator in respect of secondary boycott laws, such as has occurred in the building and construction industry, it would be appropriate for the ACCC to establish protocols for enforcement and investigation.

- 21.3 We note that the step mentioned in the extracted paragraph has not occurred. In other words despite a recommendation to that effect by the Cole Royal Commission that is encapsulated in Recommendation 181 extracted at page 243 of the Draft Report, the legislative step was not taken. Master Builders is urging that it does occur. The terms of the above quoted extract, which is incorrect, can only lead to the conclusion that the Panel believes that this Cole Royal Commission Recommendation has been effected. We reiterate that this is not the case. As indicated at paragraph 5.9 of the submission dated 28 May 2014 (footnotes omitted):

*We note that **under the current Bills before Parliament 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 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.*

- 21.4 The Cole Royal Commission and the recent Boral evidence to the Royal Commission into Trade Union Governance and Corruption illustrates that militant unions use secondary boycott conduct as a frequent industrial weapon. It is this concern that motivates both the need for there to be a specific jurisdiction for the building and construction industry and for there to be greater reform to these provisions or at least strengthening of the information gathering powers of the ACCC in this context, discussed below. As reported in Boral Annual Report 2014:

Since February 2013, the Construction division of the Construction, Forestry, Mining and Energy Union (CFMEU) has run an orchestrated campaign against Boral because we refused to give in to demands by the union that we stop doing business with a long-standing client, the Grocon group, in Melbourne.

Over that time, our trucks have been stopped, our people intimidated and many of our customers in Victoria have had a “friendly visit” from union officials warning them, essentially, not to do business with us. Many clients have refused to toe the union’s line, for which we are grateful, but it’s difficult for small operators.

So far, this unlawful secondary boycott has cost you – our shareholders – around \$10m in lost EBIT, including legal fees.

We have gone to the Australian Competition and Consumer Commission (ACCC) and to Fair Work Australia. We have taken the union to court – and won our case. We have asked the Federal and State Governments for help. And we have presented our case to the Royal Commission into Trade Union Governance and Corruption, detailing the campaign against Boral.

Boral is not anti-union. In fact, we work closely with our employees and the various unions that represent them. We should be allowed to continue to carry out our business without this unlawful campaign.¹

- 21.5 In the context of the building and construction industry, the federal Government has already indicated that the issue of secondary boycott conduct warrants closer attention. In that regard, on 17 April 2014, the Minister for Employment, Senator Eric Abetz published an advance release of the [Building and Construction Industry \(Fair and Lawful Building Sites\) Code 2014](#) (Building Code). Master Builders notes that section 16(4) of that document is as follows:

A code covered entity must, in relation to building work, report any request or demand by a building association, whether made directly or indirectly, that the code covered entity engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the Competition and Consumer Act 2010 to the ABCC as soon as practicable, but no later than 24 hours, after the request or demand is made.

- 21.6 When the Building Code is fully operative, the ABCC will be provided with a great deal of information relating to the issue of secondary boycotts. Master Builders urges the Panel to recommend to Government that the ABCC be given the capacity to act quickly within its jurisdiction to act on that

¹ Boral Limited Annual Report 2014 at p5. See also J Mather and S Patten, *Corrupt culture in super fund*, Australian Financial Review p1, 3 November 2014

information. Otherwise, there could be difficulties with acting to stop the reported conduct where there was a requirement for all matters to be referred to the ACCC which has a plethora of other priorities.

21.7 One of the issues which arise in the context of secondary boycott activity appears to be the difficulty of gathering of sufficient evidence by the ACCC, as, for example, expressed in media coverage of this issue² and as outlined in its submission to the Review Panel dated 15 August 2014.³

21.8 In its 15 August 2014 submission to the Competition Policy Review, the ACCC commented on the relationship between the CCA and industrial relations legislation:

The ACCC takes non-compliance with these prohibitions extremely seriously and seeks to enforce them whenever it can where the conduct is not otherwise being addressed by other regulators. However, at times there are challenges obtaining evidence, which in part may be due to limitations on the ACCC's enforcement powers. It is notable, though, that the ACCC receives relatively few complaints about potential breaches of the secondary boycott prohibitions involving employee organisations. All are investigated - there is no lack of commitment by the ACCC to enforce the law.⁴

21.9 The statement about “challenges obtaining evidence” is made in the face of powers to compulsorily obtain evidence. Master Builders would, in this context, urge the strengthening of the section 155(6A) financial penalties, noting that the term of imprisonment of 12 months does appear at first blush a sufficient deterrent for willful non-compliance. Section 155(5) makes it an offence to:

- fail to comply with a section 155 notice, to the extent that the person who receives the notice is capable of complying with it;
- knowingly furnish false or misleading information or give false or misleading evidence in response to a section 155 notice;

² Nassim Khadem and Tom Cowie *ACCC Probe of Construction Union Boycott* Sydney Morning Herald 5 June 2014 <http://www.smh.com.au/business/accc-probe-of-construction-union-boycott-20140604-39jdt.html>

³ *ACCC Supplementary submission to the Competition Policy Review Further matters* 15 August 2014 http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf

⁴ *ACCC Supplementary submission to the Competition Policy Review Further matters* 15 August 2014 at p5 http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf

- obstruct an authorised ACCC officer who enters premises in accordance with s 155(2) to take possession of documents.

Any person found guilty of one of the above offences is liable to a fine of up to 20 penalty units or as noted above imprisonment for up to 12 months per s155(6A). The difficulty of gathering evidence in the context of the availability of these remedies should be better explained by the ACCC. We note the discussion at pages 259-261 of the Draft Report on the s155 powers and Draft Recommendation 36 set out below. We would not want the difficulties with the application of the s155 powers in the current context further undermined by the framing of s155 issues in “the narrowest form” as proposed; nor compromised by the notion of a “reasonable search”.

21.10 Finally, we note that the ACCC appears to acknowledge that other regulators may be included in dealing with “conduct the subject of a complaint to the ACCC” in this context. In isolating this overlap in the following terms, we submit that the ACCC is vindicating the Master Builders’ proposal for the newly formed ABCC to be vested with the jurisdiction concurrently:

In the ACCC's experience, conduct the subject of a complaint to the ACCC under the secondary boycott prohibitions can also be the subject of other complaints relating to breaches of industrial relations or other legislation. Accordingly, from time to time, other regulators such as Fair Work Australia and Fair Work Building and Construction may be concurrently investigating potential breaches of legislation that they administer. In addition, a party aggrieved by a secondary boycott may also have a cause of action under common law.

In determining what enforcement action to take, the ACCC will consider whether litigation under the CCA is the most appropriate way to achieve its enforcement and compliance objectives, including whether alternative causes of action that are being pursued are likely to be sufficient to deter future offending conduct.⁵

⁵ ACCC Supplementary submission to the Competition Policy Review Further matters 15 August 2014 at p7 http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf

22 Restricting Supply or Acquisition – Draft Recommendation 33

The present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer ‘has been accustomed, or is under an obligation’ to deal with, should be removed.

The Panel invites further submissions on possible solutions to the apparent conflict between the CCA and the Fair Work Act including:

- *a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and to intervene and make submissions;*
- *amending sections 45E and 45EA so that they expressly include awards and enterprise agreements; and*
- *amending sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act.*

22.1 Master Builders commends the Panel on identifying the problem for competition of the current structure of the law. The issues of matters being incorporated into enterprise agreements that are not capable of being agreements, arrangements or understandings to which the CCA is directed was discussed in Master Builders 28 May 2014 submission. The discussion in that submission focussed in particular on the distorting effects on independent contractor regulation that the law currently permits. This should not be the case.

22.2 We prefer the option proposed that awards and agreements should come within the ambit of s45E and 45EA. Where they impinge on matters of general competition, the fact that the provision is in an agreement that otherwise deals with employee relations should not be a barrier to confronting the anti-competitive ramifications that are otherwise permitted.⁶

23 Authorisation and Notification – Draft Recommendation 34

The authorisation and notification provisions in the CCA should be simplified:

- *to ensure that only a single authorisation application is required for a single business transaction or arrangement; and*
- *to empower the ACCC to grant an exemption (including for per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially*

⁶ See in particular arguments made in C Wilkinson, Unions are running a shadow economy, Australian Financial Review, 4 November 2014, p47

lessen competition or that the proposed conduct is likely to result in a net public benefit.

23.1 Master Builders fully supports this Draft Recommendation.

24 Section 155 Notices – Draft Recommendation 36

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age.

Either by law or guideline, the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

24.1 This Draft Recommendation is canvassed when dealing with Draft Recommendation 32 above.

25 Competition Payments – Draft Recommendation 44

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

25.1 The Draft Report expresses (at page 6) support for the use of explicit competition policy payments to State and Territory Governments:

Where competition reforms result in disproportionate effects across jurisdictions, competition policy payments should be made to ensure that revenue gains flowing from reform accrue to the jurisdiction undertaking the reform.

The (Australian Council for Competition Policy) would be responsible for administering payments, based on actual implementation of reforms.

25.2 Against this background, the Review Panel proposed Draft Recommendation 44.

25.3 The implicit message contained in Draft Recommendation 44 is State/Territory and local governments are unlikely to pursue necessary,

although potentially politically difficult, reforms of themselves in the public interest, but require financial ‘incentives’ to deliver net public benefit outcomes.

25.4 Nevertheless, Master Builders recognises the utility of a rigorous and transparent process of competition policy payments for realising meaningful competition and regulation reform by providing financial motivation for otherwise reluctant State/Territory governments to take difficult political decisions in the national interest.

25.5 However, such competition payments should only be paid:

- for ‘additionality’ – that is, not just for doing what is necessary, but for doing ‘more than is required’;
- based on competition between the States/Territories for a given pool of funds, with disbursements based on promptness and boldness of action against transparent benchmarks; and
- only on an ex post basis against proven outcomes and enforceable commitments against recidivist or countervailing behaviour elsewhere.

26 Conclusion

26.1 As stated at the outset, Master Builders welcomes the constructive and detailed Draft Recommendations for reform contained in the Draft Report.

26.2 Master Builders would be happy to discuss this submission with the Panel.
