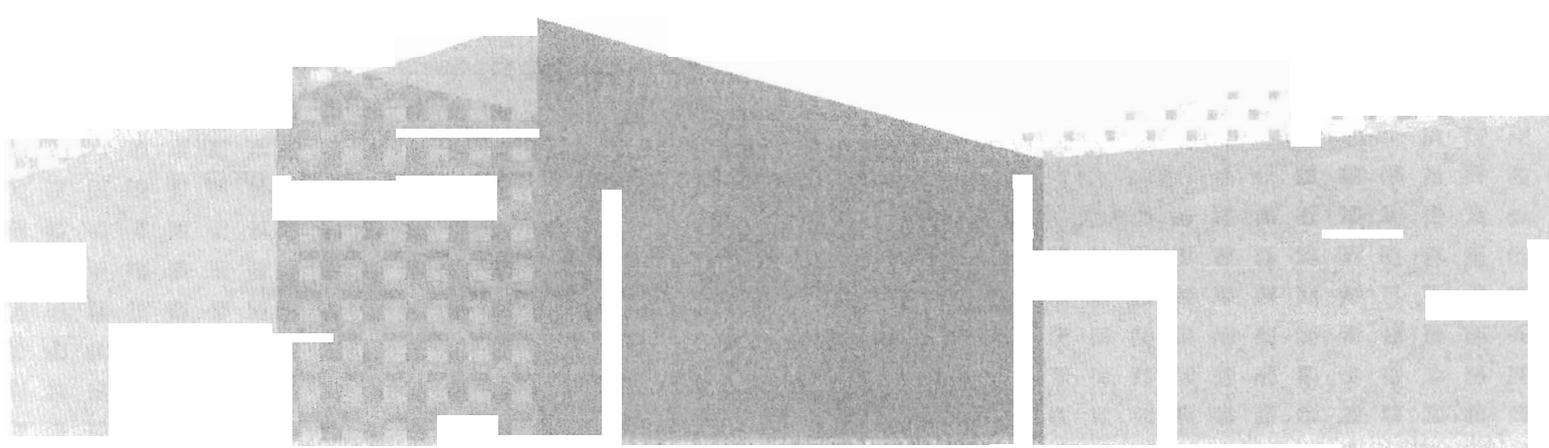




Master Builders Queensland

**Submission to the Australian
Competition and Consumer
Commission Regarding An Application
from the Construction, Forestry, Mining
and Energy Union for authorization for
collective negotiations by owner-drivers
with earthmoving contractors in South-
East Queensland**



1 ABOUT MASTER BUILDERS

Master Builders is Queensland's largest building industry membership organisation representing over 11,000 members including builders, subcontractors, manufacturers, industry consultants and students.

Its main goals are to promote the viewpoints and advance the interests of the building and construction industry, and to provide services to its members in a range of areas, including industrial relations, training, OH&S, legal and contract services, and building codes and technical services.

Master Builders' membership consists of national, international and regional businesses, representing residential, commercial and industrial builders and civil contractors, together with subcontracting firms, suppliers and industry professionals. Membership of Master Builders represents 95 per cent of all sectors of the building and construction industry.

PURPOSE OF THE SUBMISSION

Master Builders has been invited by the Australian Competition and Consumer Commission (ACCC) to make a submission on the likely public benefits and the likely effect on competition, or other public detriment, from the proposed collective bargaining arrangements sought in the Application of the Construction Forestry Mining and Energy Union, Queensland.

Whilst Master Builders does not represent the earthmoving sector or owner drivers as such, the contracting companies in the building construction industry would be directly affected by any change in the contracting arrangements for earthmoving services. Further, Master Builders is concerned that should the CFMEU Application be successful, the authorisation to bargain a collective agreement in the earthmoving sector will create a precedent for future authorisation in respect to independent contracting in the commercial building trades.

The ACCC must be certain that the Application will not be used by the CFMEU to pursue industrial relations type arrangements. In this respect, when determining the Application, the ACCC must take into account the history of the CFMEU industrial relations policy and tactics in organising labour in the construction industry.

3 WHO IS THE APPLICANT?

There is some doubt as to who the Applicant in this matter is. The covering letter to the Application, from Hall Payne Lawyers, of 3 October 2008, states that "*We act on behalf of the Construction Forestry Mining and Energy Union, Construction and General Division Queensland.*" The named union is a Federally registered Industrial Organisation, under the Workplace Relations Act 1996, whereas paragraph 1.2 of the submission in support of the Application, refers to the Constitution of the Construction Forestry Mining and Energy, Industrial Union of Employees, Queensland. This entity is registered under the *Industrial Relations Act 1999* (Qld). Throughout the submission, reference to "the union" is reference to the Queensland registered entity.

Submission to the ACCC Re Application from CFMEU for Authorization for Collective Negotiations by owner-drivers with earthmoving contractors in SEQ

The rules of the respective federal and Queensland registered CFMEU are not the same. The membership eligibility rules of the two unions are not the same.

In respect to owner drivers, the federal CFMEU Rules at Paragraph 2E(a), exclude from eligibility for membership " *motor truck drivers wherever employed*". The Rules of the Queensland CFMEU, which are registered with the Queensland Industrial Registry, are not immediately clear in respect to truck drivers. The scope of these Rules appears to grant discretion to the union executive as to which persons may be admitted as members. Paragraph 1.2 of the Application seems to rely upon this Rule, although no details are provided.

The issue of the union coverage of the owner drivers is a matter for consideration for any prospective authorisation to enable collective bargaining. This is recommended when considering the public interest aspect of the Application, both for the obvious fact that the Transport Workers Union stands out as the most representative union for the transport sector, and also for the uncertainty as to which CFMEU entity is the applicant union.

It is Master Builders understanding that the applicant federal CFMEU (Qld) and the state CFMEU operate for all intents and purposes as one organisation. This is not uncommon in many similarly structured industrial organisations. Despite this dual interest, the Application is seriously flawed. The federal CFMEU (Qld) is claiming to be the Applicant for persons who are not members, nor eligible to be so, yet throughout the Application the union is made out to be the Queensland CFMEU. This is an important distinction that should have been made clear in the Application and for it to not have been, does not bring confidence in the declared purpose of the Application.

4 FREEDOM OF ASSOCIATION

The Application is misleading in declaring that the participation in the proposed Collective Bargaining Agreement will be voluntary. Should the Application be successful and future negotiations with earthmoving contractors result in a collective agreement, it is totally unacceptable that the CFMEU require the owner driver parties to collective agreement to be members of the union.

If this Application was made in the industrial relations jurisdiction it may be found to be in breach of the Freedom of Association laws (FOA) , as set out in the *Workplace Relations Act 1996*. It concerns Master Builders that the CFMEU is required to comply with the FOA laws in the industrial relations jurisdiction but seem at ease in proposing a members only collective agreement when bargaining under the *Trade Practices Act 1974*

The CFMEU aim to benefit from such an agreement even though the union cannot be a party. The CFMEU, like all unions, exists to organise and influence workers behaviour. With a union member only agreement in place the CFMEU will be the gatekeeper to the proposed fixed contracting rates. The CFMEU will obtain benefits, with revenue from membership, without the distraction of the industrial relations laws.

Section 779 of the *Workplace Relations Act 1996* casts a wide net and extends FOA protections for independent contractors. Discriminatory action would include the circumstances where a owner driver, who is eligible to be a member of the union, is threatened or refused the supply services and goods. The Application may create the

circumstance where such actions could occur. For example, if an owner driver, not party to the collective agreement on cartage rates, is refused a contract for that reason. To access the agreement the owner-driver would have to become a union member. Alternatively, an owner driver may resign as a union member and consequently be removed from the list of parties. This is a penalty.

As submitted above, the dual registration or character of the union requires careful consideration when assessing the accountability of the union under the *Workplace Relations Act 1996*. Whether by design or chance, the federal CFMEU is proposing a collective agreement using the State CFMEU's membership rules which may in the future create problems with the interpretation and enforcement of FOA. Section 799 is enforceable only if the person [the owner driver] is eligible to become a member of the relevant union. The federal CFMEU (Qld) may not therefore be subject to this special FOA protection for owner drivers.

To avoid doubt we strongly submit that should the ACCC reject the Application on the ground it seeks a union member only agreement.

5 PATTERN BARGAINING

The Application proposes to set a level playing field of rates and conditions to be pursued with earthmoving companies and marketed to potential union members. It comes as no surprise that the Application is consistent with the policy of the CFMEU to seek pattern workplace agreements with employers in the building and construction industry. The CFMEU in Queensland is currently pursuing its new "Industry Agreement" for 2009-2011 and will seek to make the same Agreement many times over with employers.

The following extract from the November 2008 CFMEU Queensland news journal is highlighted for this purpose.

The new EBA campaign for 2009 is under way with the new log of claims being endorsed on the sites with the collecting of member's mobile phone numbers to notify them of their EBA meetings.....

This round of EBAs we need all workers to stand as one united force for a better deal, it was encouraging to see several companies represented at the mass scaffolders workers meeting where they voted unanimously to support QBSA licensing; agreed industry rates of pay and the scaffolders EBA log of claims;.....

By David Hanna - Assistant Secretary

Prior to the enforcement of anti pattern bargaining laws in 2005 through the introduction of the *Building Construction Industry Improvement Act 2005*, over 400 Queensland companies in the commercial building industry were faced with the option of signing the 2003/ 2005 union agreement or face a variety of union retributions, including bans, limitations and strikes. Many of these actions were not lawful.

Master Builders is determined to stop the return of these behaviours, both through the industrial strategy of its members and in lobbying the federal government to retain strong prohibitions on pattern bargaining behaviour and related practices, such as closed shops.

Master Builders advocates a system where employer and employee parties are empowered to enter directly into an appropriate workplace agreement, that suits the particular workplace and employees. The process permits individual or workplace agreements to be made that reflect the employer's situation and accounts for employee performance and circumstances. Pattern bargaining is a practice which subverts and inhibits the capacity of the parties at the workplace to identify efficient work practices.

6 INDEPENDENT CONTRACTING IN THE BUILDING INDUSTRY

The use of contractors throughout the building and construction industry is one of the most positive features of the Australian Labour Market. Some trades in the commercial building sector have a high proportion of independent contractors working alongside employees. For example, tiling tradespersons are used extensively in the construction of high rise and many of these are independent contractors. The residential housing sector, which predominantly uses contractors, is noted for its labour efficiencies relative to large employing contractors. In both commercial and residential, case the market determines the relative competitiveness of the contractors and self regulates. Competition is driven by price and performance, where the contractor is bound to the contract he enters into in respect to the work to be performed and has incentive to get on with the job.

The CFMEU does not embrace self employed contractors and is not a suitable agent to promote collective bargaining under the Trade Practices Act 1974, in any industry sector.

The CFMEU is an industrial organisation first and foremost with a policy of limiting the number of independent contractors working in the industry.

Prior to 2006, before the restrictive terms were prohibited in workplace agreements under the *Workplace Relations Act 1996*, the CFMEU required employers to limit the use of independent contractors by inserting into agreements clauses which limited the ratio of contractors to employees, clauses which required contractors to be paid employee benefits such as superannuation and redundancy, and banning "pyramid subcontracting". The following extracts from the CFMEU industry *Certified Agreement 2003-2005* , demonstrate the union policy in action.

Use Of Supplementary Labour Sourced Through Labour Hire Companies

The company agrees to utilise the services of a labour hire company in order to supplement its own directly employed labour force only in circumstances where:

- *peak work loads or unusual operational requirements make it impractical to further supplement the company's existing workforce via direct employment offers; and*

the labour hire agency supplying personnel to the company, is required to pay all such persons the hourly wage rate and any penalty payments otherwise applicable under this agreement, together with any superannuation and pro-rata redundancy and income protection entitlements which would otherwise have applicable to the company's own employees in the same circumstances.

Pyramid Sub-Contracting

Pyramid sub-contracting will not be undertaken in any form since the parties to this agreement accept that such arrangements are detrimental to both the building industry and its employees. Pyramid subcontracting is defined as sub-contracting out parcels of work already contracted to the company that could reasonably have been expected to have been undertaken by the company and is within the normal scope of work undertaken by the company. This clause shall not apply to prevent the company sub-letting specialised work outside of the normal scope of work which the company performs.

The purpose of the CFMEU to require these conditions in industry agreements was to inhibit employers in engaging contractors and to maximise the number of employees covered by union workplace agreements. By limiting subcontractors, the union is able to generate more influence, membership and revenue.

The prospect of the CFMEU pursuing similar Applications under the *Trade Practices Act 1974*, to collectively bargain with building sector contractors, should not be overlooked when assessing the current Application in respect to owner drivers. Any activity which may lend itself to the future diminution of independent contracting in any industry is against the public interest.

7 PUBLIC BENEFIT NOT ESTABLISHED

The Application falls well short of establishing the proposed collective bargaining and agreement for owner drivers will provide a net public benefit. The Application relies on three areas to support its claims of public benefit.

Fairness In Negotiation

The Application appears to deny the nature of commercial contracting, which is about competition, demand and supply. Persons considering becoming owner drivers should make a business case for themselves, before entering the field. The ease of entry should be tempered by the supply/demand reality. The cost of set up and overheads is quantifiable and if the market is in over supply then the competition will self regulate. The question of bargaining power in these circumstances is a given. In other words, the nature of the service and state of the market in that service, determines the relative bargaining power of the parties

Master Builders points to the *Independent Contractors Act 2007* for recognising and regulating the subcontract system . The *Independent Contracting Act 2007* provides uniform laws, a national unfair contracts jurisdiction and draws the line on sham contracting arrangements.

The imposition of a form of safety net for cartage rates, across a wide range of different businesses, would be artificial and of no public benefit.

Safety

The owner drivers whom the CFMEU claim to represent, do not operate in a vacuum. There are significant road safety programs in place in Queensland that go to the heart of the concerns expressed in the Application. It is in the public interest that the Federal and State Governments take responsibility to review and regulate these matters. The State Government has worked closely with the transport industry in recent years and has taken important steps in improving driver and public safety. With respect, these are genuine concerns of the CFMEU. However, there is no record of CFMEU activity in this area and we submit this aspect of the proposal would duplicate much more effective arrangements already in place.

Efficient Business Viability

The application is not forthcoming on the details of how the public interest is enhanced through “providing greater certainty” regarding terms and conditions of work. For owner drivers, certainty in terms and conditions of work is only meaningful if the work is actually performed. The proposed collective agreement will not, in itself, deliver this certainty, nor make the industry more viable. Moreover, such an agreement may cause a diminution of efficiency across the earthmoving industry.

The CFMEU proposal is to create business viability through such devices as fixing a minimum daily rate and regional/city rates. This is inconsistent with commercial wisdom. In the building and construction industry builders use independent contracting arrangements to deliver efficiencies including:

- An opportunity for skilled tradespersons with necessary motivation to significantly increase their earnings with their income directly related to their efficiency in the actual time they work
- To simplify administration and reduce supervision and the principal contractor does not incur the administrative overheads of employing staff
- Provides incentives to solve problems which develop on site quickly and effectively as contractors do not get paid for delays while employees on the other hand, have little incentive to solve such problems
- Results based contracts are generally more efficient than time costed labour working towards the same ends

- Due to fluctuations in demand in Building and Construction, there is much competition between firms and there can be much uncertainty about demand, so many firms prefer to use contract labour
- Regional variations in prices paid to contractors encourage mobility of those contractors which helps to achieve and improve balance within regional markets.

There is no evidence provided, only generalisation, that the collective process will improve allocation of resources in the earthmoving sector. The Application does not specify who or what is to be provided to achieve the improvements. If the CFMEU wish to provide services to its members in respect to business viability, it can do so now. Business training, negotiation skills, financial services etc. are widely available throughout South East Queensland. The CFMEU can enhance its current services by establishing alliances with professionals and training providers to deliver to its members the type of business services proposed in its Application.

8 CONCLUSION

Master Builders objects to the Application for the reasons provided above. The CFMEU has not established the grounds for the ACCC to grant the Application. In particular, the union has not provided any substance, merit or evidence that the Application would be of public benefit. To the contrary, the approval of Application will likely disturb legitimate commercial arrangements and competition, and have implications far greater than presented in the Application. In these circumstances the Application should be rejected by the ACCC.