

Master Builders Australia

SUBMISSION TO TREASURY
*MODERNISING BUSINESS REGISTERS AND
DIRECTOR IDENTIFICATION*
EXPOSURE DRAFT LEGISLATION

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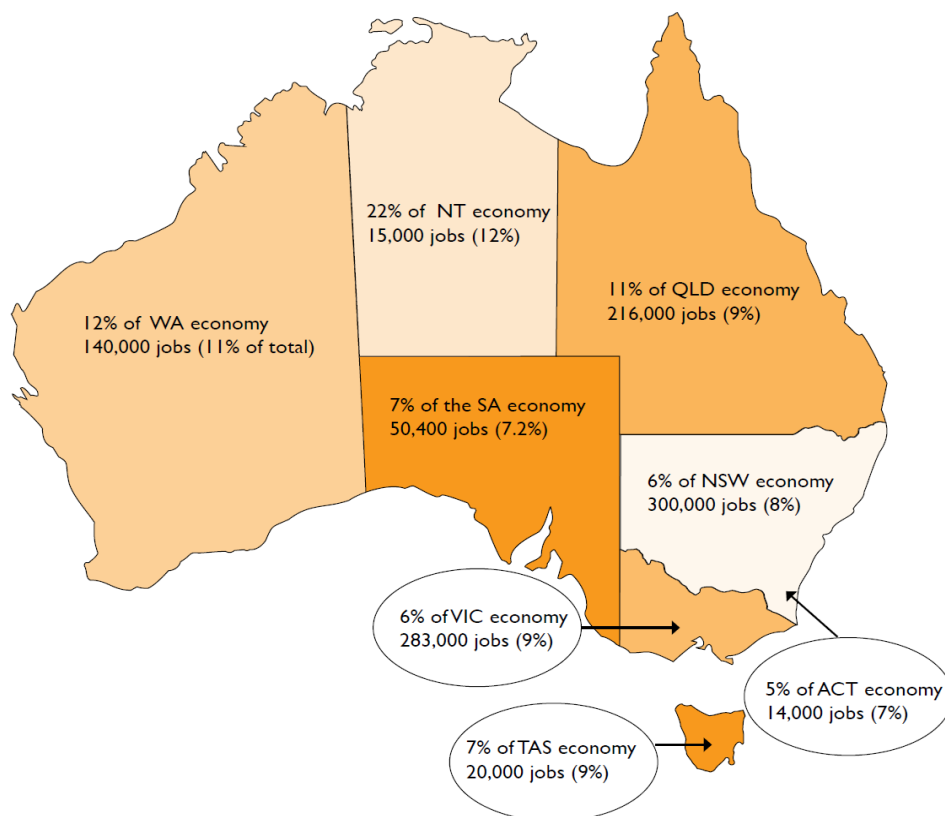
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Introduction

1. This submission is made on behalf of Master Builders Australia Ltd.
2. Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 127 years the movement has grown to over 34,000 businesses nationwide, including the top 100 construction companies and over 33,000 small businesses. Master Builders is the only industry association that represents all four sectors; residential, commercial, civil, and engineering construction.
3. The building and construction industry is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and around 9 per cent of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of \$2.6 trillion and for the number of people employed in the industry to rise by 300,000 to 1.3 million.



Picture 1: Representation of the state by state breakdown of the economic and employment contributions attributable to the building and construction industry (MBA – 2016)

4. The building and construction industry:
 - Consists of over 340,000 business entities, of which approximately 97% are considered small businesses (fewer than 20 employees);

- Employs over 1 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
- Represents over 8% of GDP, the second largest sector within the economy;
- Trains more than half of the total number of trades-based apprentices every year, being well over 50,000 apprentices; and
- Performs building work each year to a value that exceeds \$200 billion.

Background

5. Master Builders Australia (MBA) welcomes the opportunity to provide this submission in respect to the exposure draft *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018* ('the Bill') and is limited to provisions that deal with the Director Identification Number ('DIN') initiative.
6. At the outset, we reiterate our support for reform that targets unfair commercial conduct. Unfair commercial conduct damages the Building and Construction Industry by increasing the costs of doing business for those who do the right thing.
7. MBA has historically condemned this practice, and continues to do so. For many reasons it has disadvantaged bona fide industry participants by damaging competition, the economy, and consumer faith - amongst other things.
8. Master Builders supports the DIN and welcomes moves to implement this initiative for which Master Builders has long advocated and supported as a concept.
9. The genesis of the DIN concept was the *2001 Royal Commission into the Building and Construction Industry* ('Cole Royal Commission'), where measures to increase the effectiveness of the existing legal frameworks to better protect the BCI from fraudulent commercial conduct were recommended. The Cole Royal Commission recommendations were nuanced in subsequent reports, culminating in recommendations by the Productivity Commission's Report into Insolvency in the Australian construction industry to establish the DIN framework and register in 2015.
10. The DIN concept and its implementation remains a key policy priority for Master Builders. Master Builders is pleased to see it adopted by both major political parties as a core policy and look forward to its implementation as soon as possible, subject to the improvements recommended in this document.

DIN Benefits

11. While there are several major benefits Master Builders has identified associated with a DIN, the most significant is that it allows better use of existing laws and facilitates agency and regulator enforcement processes. This addresses what Master Builders believe is a clear deficiency within the current legislative framework more generally - the need for regulators and relevant government agencies to better store, share and communicate pertinent data, in order to better discharge their obligations and functions under the law.
12. In other words, making it easier for regulators and agencies to ensure compliance with (and where required enforce) a range of existing legal frameworks is a positive outcome. It follows that the current law will therefore be more effective and as such

reduces the temptation for policy makers to make a new or additional layer of law or regulation.

13. The magnitude of progress the proposal represents in combatting fraudulent or illegal business activity cannot be overstated. Master Builders and our members have frequently observed that many proposed or actual changes to the law associated with corporations and directors arise not because the law itself is deficient, but because there are deficiencies in the way the law is actually enforced. The DIN proposal provides the groundwork for government to address and solve many of the issues currently faced by industry absent unnecessary red tape.

The Bill – Improvements Proposed

14. Whilst Master Builders welcome the DIN initiative, there are some areas in which Master Builders believes the Bill can be improved to better meet its stated policy intent and objective.

(a) Registration Process

15. Master Builders submits that the Government should reconsider the proposed approach to ensuring directors obtain a DIN and adopt an alternative course that is less punitive in nature.

16. As drafted, the proposal requires directors to actively obtain a DIN for themselves in particular defined circumstances, within a set time-frame. These are:

- Where an officer is appointed to a directors role, they must apply for a DIN within 28 days of undertaking the appointment; and
- Where the Registrar (an official role appointed under the legislation) directs an eligible company officer to apply for a DIN, they must do so within 28 days of the direction being issued.

17. Further, the proposal prohibits persons from:

- Knowingly applying for multiple DINs; and
- Misrepresenting a DIN to a government body or registered body.

18. There are penalties proposed in the draft which would become enlivened in the event the registration action is not carried out consistent with the above circumstances, or a person commits a prohibited act. These penalties include:

- Failing to apply for a DIN within 28 days of assuming a director's role or being directed to apply for a DIN by the Registrar – 25 penalty units (currently \$5,250).
- Knowingly applying for multiple DINs or misrepresents a DIN to a government or authorised body – 100 penalty units (currently \$21,000), and/or imprisonment for 12 months.

19. Master Builders believe this is an incorrect approach for Government to adopt. We consider it is not appropriate to impose civil and/or criminal penalties on directors in circumstances where they are obliged to familiarise themselves with an entirely new form of registration, without proposing a safeguard to first educate potential company

directors on their registration obligations (and providing other assistance as appropriate to allow directors to meet their obligations).

20. We recommend that Government consider alternatives approaches. These include, in our order of preference:

Reconsider the process to obtain a DIN:

21. The process to have a Director entered into the registry should, in the first instance, be at the initiative of the government. We consider that the Government would be able to create a DIN for each new and existing company director, whilst undertaking to notify directors of the new identifier.
22. The Government should establish a system that identifies when new director details are provided to ASIC, which triggers an internal process to create, allocate and issue a new DIN. This would streamline the process for directors, removal burden on law enforcement and the legal system, and removal the possibility of unconscious or inadvertent non-compliance.

Removal of the criminal penalty sanction associated with initial registration:

23. Whilst we consider the reforms appropriate to tackle issues of fraudulent commercial conduct across all industries, imposing criminal sanctions for the initial registration process is akin to using a sledgehammer to crack a nut. The majority of directors want to do the right thing – and facing civil and/or criminal consequences for an inadvertent breach or uncontrollable delay (or the time and financial costs associated with defending an inadvertent action in a Court) would likely have unintended consequences, including to dissuade directors' from wanting such roles.
24. Any exception of these penalties for initial registration could include an exception for circumstances where a director has not obtained a DIN pursuant to the appropriate parameters and is subsequently found to have breached their duties as a director.

Reverse Onus:

25. The Explanatory Memorandum at Section 2.36-2.39 notes that the onus is placed on the defendant to rebut any claim of wrongdoing (for example failure to register). The basis for this provision is stated to be:

"The evidential burden in these defences has been reversed because the subject of the defences is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defence to establish".

26. It therefore appears to Master Builders that the reasoning for this position is purely cost associated, and not about the appropriate administration of justice or increasing the efficacy of the framework. We do not see these as grounds for reversing or reforming legal convention, and as such recommend the onus in this provision be reversed.

Establish a moratorium on all penalties for non-compliance:

27. A moratorium on non-registration penalties should be incorporated into the implementation of the DIN framework. This moratorium should be for not less than 12 months. This will allow directors appropriate time to seek advice with respect to their obligations and rights and take appropriate actions – including establishing a DIN.

(b) Agency and Department Access

28. It is appropriate that Government ensure relevant agencies and regulators responsible for enforcing compliance ought to have access to the DIN register. Master Builders understands that this subject is captured within the Bill at Division 1, Subdivisions B and C.
29. Section 62H proposes that the Registrar is to make a legislative instrument that deals with data standards. Likewise, s.62L allows the making of an instrument that deals with the disclosure of information maintained on a DIN register.
30. While it is important to allow appropriate regulator and agency access, this should not be without limitation. The determination of what agency or regulator is 'relevant' should be had with reference to the director obligations set out within the relevant legislative framework for which the agency or regulator holds compliance or enforcement responsibility. Agencies that do not have such responsibility should not otherwise be able to access information stored by the DIN, unless exceptional circumstances exist.
31. We recommend that the relevant subdivisions include a reference to the above limitation so as to make it an express requirement of any instruments so made.
32. The capacity for regulators, departments and agencies to access the DIN register and the terms of that access should also be communicated clearly and simply to Directors as part of any process Government adopts to educate this cohort.
33. Relatedly, Master Builders is concerned that proposed s.62G effectively absolves the Commonwealth from all damages liability that may arise in discharging the functions in that part of the Bill. This provision is too broad and should be narrowed. The benefits of doing so would be:
 - (a) to increase confidence amongst Directors that information within the DIN will be secure and used only in appropriate circumstances, thereby encouraging greater participation; and
 - (b) to ensure register information is disclosed consistent with the terms of the relevant instrument.

(c) Review Existing Laws to Remove Redundant Provisions

34. Government should, immediately upon the passage of the DIN legislation, commence a thorough review of all existing measures in place implemented or proposed to achieve the same or similar policy outcome as stated to be achieved by the DIN.
35. Master Builders makes this recommendation most emphatically after having observed a growing trend towards the adoption and implementation of various measures in what could be described as an 'ill-considered' or 'disjointed' manner. We use those descriptors not as a means to undermine or question Government policy, but to replicate and emphasise the degree of frustration that Master Builders and our members regularly experience when navigating the long list of obligations which apply to Directors and Corporations within the building and construction industry.
36. The frustrations that members report stem from the actions and initiatives of Governments at all levels (not just Commonwealth) and can be summarised as follows:

There is often little or no evidence to justify that a measure will deliver practical or meaningful solutions or achieve the relevant stated policy objective:

37. This is described by members as making policy based on 'good intentions' rather than 'good evidence'.

Once implemented, they are very rarely removed:

38. While willing to comply with new obligations or measures, members often complain that related measures remain in place and must be discharged in addition to those proposed or new. There is significant merit in thoroughly examining all measures related to a new measure to ensure that they remain relevant and necessary. Where they are not, old or redundant measures should be removed.

Once implemented, they are not assessed, or industry isn't told if they were effective:

39. Members often inquire as to if Government will provide industry with an indication of the extent to which new measures are actually effective and are achieving the desired policy outcome. It is common to receive comments to the effect of "*we are told new laws will achieve X, but Government never comes back to us to explain if X is actually achieved and how effective/efficient the measure actually was. Sometimes it feels like new rules are there to keep public servants in jobs, not to do anything positive for industry.*"
40. Master Builders agree with the above sentiment and would strongly encourage Government to contemplate and implement arrangements where industry (even through associations like Master Builders) can receive information about how effective new measures have been and whether a measure remains efficient and practical.

A strategic approach is needed:

41. Governments appear to be constantly implementing a wide range of diverse measures which often address the same or similar policy mischief, without a strategic or focussed approach. For example, Master Builders is aware that the Government has introduced the following measures on the basis that they would ostensibly achieve the same policy outcome achieved by the DIN, which is stated to "*not only deter and disrupt illegal phoenixing, but more harshly punish those who engage in and facilitate this illegal activity.*"¹
42. Some notable examples of these include:
- the 'Improving the Integrity of GST on property transactions' reforms to the Taxation Administration Act 1953, passed in March 2018 – the purpose of which, as stated by the relevant Minister as "*This measure targets illegal phoenix activity in the property development sector...*"²

¹ <http://kmo.ministers.treasury.gov.au/media-release/100-2018/>

² <http://kmo.ministers.treasury.gov.au/media-release/032-2018/>

- Changes to Corporations Act relating to 'Receivers, and other controllers, or property of corporations' also passed in March 2018 – designed *"to safeguard against the potential risks of misconduct such as illegal phoenix activity"*³

Changes to the Superannuation Guarantee Act which increases employer obligations relating to the remittance of superannuation and redundancy payments – stated to be *"a package of measures aimed at countering illegal phoenix activity"*⁴;

- The multi-faceted proposed 'Reforms to strengthen penalties for corporate and financial sector misconduct', proposed by the Treasury and to be administered by ASIC with the purpose of *"to target those who engage in and facilitate illegal phoenix transactions"*⁵;
- New Phoenix 'Hotline' – established to *"combat the phoenixing activity of dishonest directors and their companies, and protect Australian workers and businesses that comply with our nation's laws."*⁶
- Taxable payments annual report (TPAR) – originally applying only to the BCI and designed *"to identify contractors who haven't met their tax obligations"*⁷;
- The requirement to report 'Delayed and Disputed' subcontractor payments to the Australian Building and Construction Commission pursuant to the *Building Code 2016* designed to address *"illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant...."*⁸
- Reforms to the Fair Entitlements Guarantee – designed in part to address *"illegal phoenix company activity, and subsequent costs to the FEG scheme...."*⁹

43. Master Builders does not suggest that there is no utility in the retention of those provisions we have noted above. To the contrary, we list them to demonstrate just some of the recent array of measures which were expressed by Government as seeking to address the same or similar policy mischief as the DIN.

44. We simply request that Government review these items in light of the DIN proposal to determine if there is utility in retaining or pursuing measures such as those above.

45. In the event it cannot be clearly demonstrated such measures are not obsolete, redundant or unreasonably burdensome, the legislative source or amendment proposal should be repealed or appropriately modified so as to reduce the associated compliance burden.

³ Australian Securities and Investments Commission, submission to Economic References Committee on Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 [Provisions]

⁴ From [draft EM](#)

⁵ <http://kmo.ministers.treasury.gov.au/media-release/097-2018/>

⁶ <http://kmo.ministers.treasury.gov.au/media-release/084-2018/>

⁷ <https://www.ato.gov.au/Business/Reports-and-returns/Taxable-payments-annual-report/>

⁸ <https://www.legislation.gov.au/Details/F2017C00668>

⁹ Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme Consultation paper May 2017

Conclusion

46. Master Builders appreciates the opportunity to make a submission to the Department with respect to the Reforms.
47. The contact officer for this submission is Mr Shaun Schmitke – Deputy CEO – (02) 6202 8888.