Master Builders Australia

Submission to the Senate Education and Employment Legislation Committee

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

8 September 2017

MASTER BUILDERS AUSTRALIA

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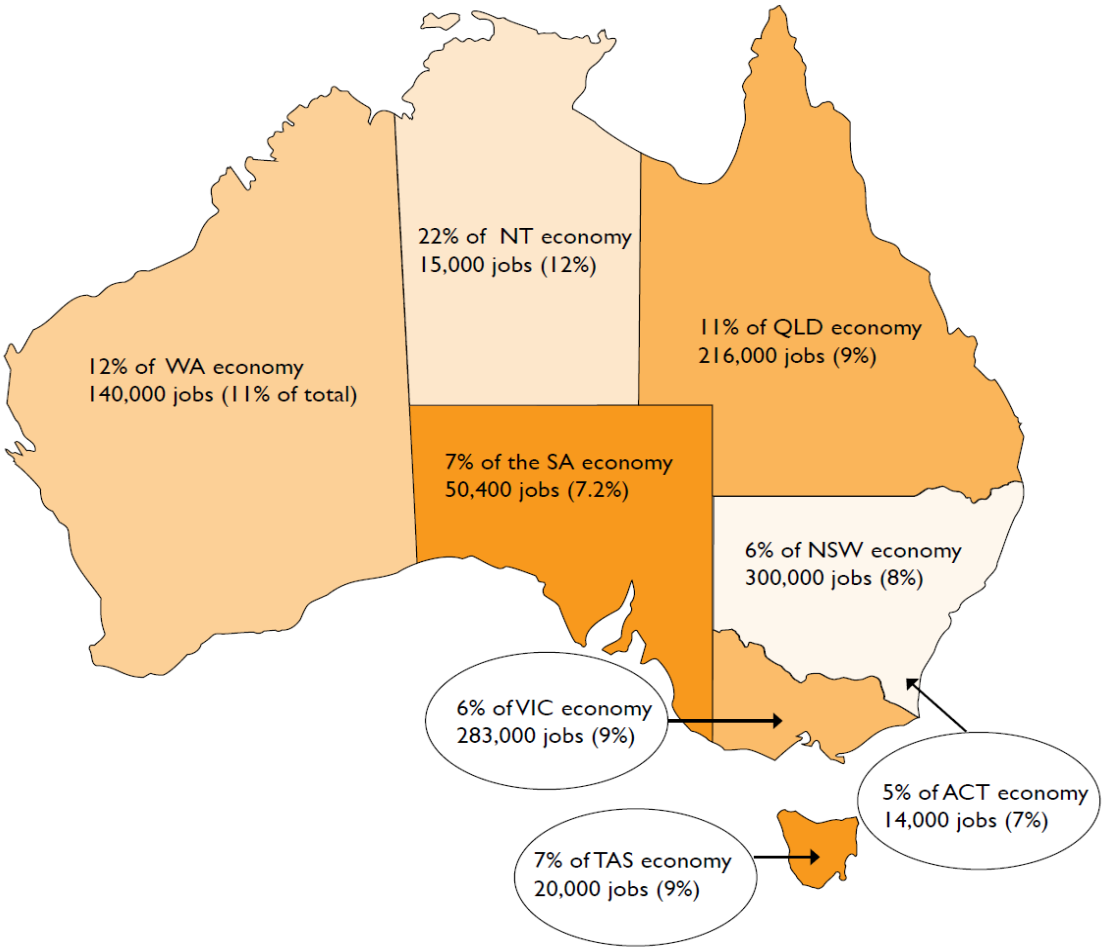
Introduction

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 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.

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.

Summary of Submission

5. This submission is made to the Senate Standing Education and Employment Legislation Committee ('the Committee') to assist in its inquiry into the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* ('the Bill').

6. Master Builders Australia **supports** the passage of the Bill.

7. The basis for this support is, in summary, is that the Bill:

   - will implement several recommendations contained in the Final Report of the *Royal Commission into Trade Union Governance and Corruption* ('Heydon Royal Commission') that arose from circumstances and various case studies that (on the whole) arose from within the building and construction industry;
   - will see the Government discharge an election promise to introduce a form of test to ensure that any amalgamation between registered organisations ('ROs') is in the public interest;
   - ensures that any additional powers will be given to third party entities (including Courts and Tribunals) to be used upon application thereby ensuring an appropriate level of oversight, scrutiny and protection for those involved in those proceedings;
   - aligns with Master Builders view that there ought to be consequences for those who regularly break the law, or regard themselves as being above the law, by creating an additional incentive to ensure conduct is lawful;
   - will improve the standard of industrial conduct displayed by some ROs, particularly those employee associations in the building and construction industry whom are renowned for unlawful and illegal conduct;
   - would ensure appropriate scrutiny is given to RO amalgamations and allows more scope for concerns/views heard and considered by FWC by adopting legislative concepts already commonly featured throughout the Fair Work laws;
   - will better align the obligations of ROs and their officials to those which exist for companies and their directors, ensuring greater consistency and uniformity; and
   - will ensure that ROs of all types are more transparent and accountable to their membership, improving the level of internal democratic process and ensure members do not experience a repeat of circumstances akin to those experienced by members of the Health Services Union ('HSU').

8. While this submission recommends that the Committee consider some minor alterations to provisions to improve the operation of the Bill, Master Builders would remain in support of the Bill, were it to pass as introduced.

9. This submission notes some key aspects of the Bill that are important for the Committees consideration and provides a summary of matters relevant to the measures within the Bill from a building and construction industry context. The remainder deals with the four broad items of change set out within the Bill to amend the *Fair Work (Registered Organisations Act) 2009* (the Act).

10. It should be noted that where quotations include words underlined, these are at the author's initiative for emphasis.

Key/Important **elements** of the Bill

11. It is important to note some key aspects of the Bill that Master Builders submit should be important to the considerations of the Committee.

- No impact on those who comply with the law: None of the new provisions will be of any consequence to those persons that comply with existing laws and embrace lawful industrial conduct. Only those who break the law, or intend to break the law, should have concerns as to the intended operation of the Bill.
- New powers to be administered by Tribunals and Courts: The Bill will vest powers in, and allow new processes to be undertaken by, independent tribunals and courts. This will ensure a fair, transparent and due process is followed if proceedings commence that enliven any new provisions sought by the Bill.
- Addresses deficiencies in existing law: The Bill addresses deficiencies in the existing law which have been identified by earlier reports and reviews. It is nonsensical, for example, that the current law might prevent an industry specific employer association being allowed to make submissions to FWC when the related industry union seeks to amalgamate with another union, just as it is unfair that industry unions would not be able to be heard about the consequences of amalgamations between related industry employer associations.
- Utilises familiar legislative concepts: The Bill adopts legislative concepts that are used throughout the Fair Work regime of laws and are familiar to practitioners and those working with ROs. For example, provisions expanding the range of those who would be able to make submissions to assist the FWC consider the public interest are akin to existing provisions regarding suspension or termination of industrial action of the Fair Work Act[1] and the approach adopted by the FWC insofar as parties involvement in Modern Award review processes. In addition, powers proposed for the Federal Court adopt existing provisions with respect to consideration of penalties and taking account of prior conduct.
- Applies equally to employer and employee associations: The Bill affects all ROs, including employer and employee associations. This means employer associations, officers thereof and their members will be covered by the same provisions as unions, officers thereof and their members.

[1] *See Ch 3 – Pt 3-3 – Division 4*

Registered Organisations in the Building and Construction Industry

12. There are a large number of sources that describe the conduct and history of registered employee organisations in the building and construction industry.

13. One of the most recent was the Final Report of the Heydon Royal Commission[2] which devoted some 1160 pages to the building and construction sector alone. Of the five volumes in the Final Report, almost one and a half volumes were specific to the building and construction sector and the conduct of the CFMEU.

14. In respect of this conduct, the Royal Commissioner summarised:

> *"The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."*[3]

Then further observed:

> *"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."* [4]

And later:

> *"The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry."*[5]

15. These comments followed from earlier commentary in the Interim Report[6] which made the following observations about the CFMEU:

> *"The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:*
>
> *(a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
>
> *(b) officials prefer to lie rather than reveal the truth and betray the union;*
>
> *(c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*

16. Noting that additional case studies were undertaken by the Commission subsequent to the Interim Report, it was found that:

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[2] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015,*
[3] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1*
[4] *Ibid at para 2*
[5] *Ibid at para 3*
[6] *Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.*

> *"The case studies considered in this Report only reinforce those conclusions"*[7]

And:

> *"The evidence has revealed possible criminal offences by the CFMEU or its officers against numerous provisions of numerous statutes including the Criminal Code (Cth), the Crimes Act 1900 (NSW), the Crimes Act 1958 (Vic), the Criminal Code 1899 (Qld), the Criminal Law Consolidation Act 1935 (SA), the Corporations Act 2001 (Cth), the Charitable Fundraising Act 1991 (NSW) and the Competition Policy Reform (Victoria) Act 1995 (Vic)"*[8]

Further:

> *"The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia."*[9]

And:

> *"Nor is the conduct revealed in the Commission's hearing unrepresentative"*[10]

17. Of the seventy-nine recommendations made for law reform in the Final Report, seven were specific to the building and construction sector. These recommendations largely went to addressing the conduct displayed by building unions.

18. With respect to the CFMEU, the Heydon Royal Commission found that it is home to *"longstanding malignancy or disease"*[11] within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.

19. In the 2015–16 financial year for example, the courts issued $1.826 million in penalties in ABCC related cases. The vast majority were fines against the CFMEU ($1.732 million). The CFMEU have been penalised over $10 million in cases brought by the ABCC[12], the FWBC and their predecessors and building unions generally have been penalised over $12 million in total. Despite this, the conduct continues.

20. Recent ABS data showed the construction industry as dropping to having the second highest number of days lost to industrial action (12,300)[13]. However, this drop is rare given that the sector consistently held the most days lost of all sectors for numerous quarters of the same data measure.

21. The ABCC has approximately 67[14] current proceedings against building unions and industry participants for breaches of the law involving Adverse Action, Unlawful Industrial Action, Coercive Behaviour, and Right of Entry breaches.

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[7] *Heydon Report, Chapter 5, page 396*
[8] *Ibid*
[9] *Ibid*
[10] *Ibid*
[11] *Heydon Royal Commission, Volume 5, p401*
[12] *"Latest penalty takes CFMEU fines past $10m mark" Courier Mail, August 4, 2017*
[13] *6321.0.55.001 - Industrial Disputes, Australia, June 2017,*
[14] *https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases*

22. Federal Court proceedings were launched on 9 August 2017[15] against the CFMEU and two of its representatives for allegedly preventing non-financial union members from working at a Melbourne construction site. The ABCC has alleged that:

    - Threats were made by a CFMEU delegate to *"shut the whole site down"* at the University College project unless a worker became a member of the union in March 2016.
    - The delegate had allowed one union member to start work but prevented two other non-financial members from working at the site.
    - The delegate approached a worker and said words to the effect: *"You can't do any work until you join up with the union"* and grabbed a worker's laptop and attempted to pull it from his grasp during a short struggle.
    - In May 2016, a CFMEU official threatened a contractor on the project that unless it paid *"union rates"* it could not continue its contract on the site.

23. On 8 August 2017, the ABCC launched legal action against the CFMEU and one of its officials for allegedly undertaking coercive and adverse action on a site by threatening to set up a picket line.[16] In the Statement of Claim, the ABCC has alleged that:

    - A CFMEU organiser threatened to set up a picket line at the construction site in August 2016 if a subcontractor's workers were sent back to work after a work meeting.
    - The organiser addressed a meeting of around 500 workers after which approximately 30 to 50 per cent of the workers left the site.
    - The action is alleged to contravene the coercion and adverse action provisions of the *Fair Work Act 2009 (Cth)* ('FW Act').

24. In May 2017, the CFMEU and one of its officials were penalised $86,000 after attempting to force two Brisbane construction workers to join their union or be turned away from the site.

25. The Federal Circuit Court found that the two workers had been told they could not work on an apartment project in January 2016 unless they paid fees to the CFMEU.

26. The court found that a CFMEU delegate had demanded each worker pay $1,290 in union fees. However both workers left after refusing to hand over the money. When a site manager reminded the delegate that workers had a right to not be in a union, the CFMEU official had replied: *"everybody's got to be in the union, this is an EBA site".*

27. In handing down his penalty decision, Judge Jarrett found that the delegate had breached workplace laws by attempting to force the workers to join the union. The CFMEU was penalised $80,000 while the delegate was ordered to pay a total of $6,000

28. Judge Jarrett said the penalties reflected: *"the CFMEU's deplorable history of compliance with industrial laws".*[17]

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[15] *https://www.abcc.gov.au/news-and-media/industry-update/latest-industry-update/court-summary-new-matters*
[16] *Ibid*
[17] *Australian Building and Construction Commissioner v Barker & Anor [2017] FCCA 1143 (30 May 2017)*

29. On 5 September 2017, a Brisbane landscaping firm was penalised more than $40,000 after it terminated the contract of another company which did not have a CFMEU EBA because it did not want "*trouble*" with the union.[18]

30. The situation giving rise to the penalty occurred in 2014 when a CFMEU official told workers at the waterproofing company they were not allowed to work on a site because their employer did not have a CFMEU EBA. The waterproofing company's contract was then terminated by the company.

31. In the Federal Circuit Court, Judge Vasta said the decision by the Company to terminate the contract was because it "*did not want to have trouble"* with the CFMEU.[19]

32. Judge Vasta said the waterproofing company had been unlawfully discriminated against because it did not have a CFMEU EBA. The company had a valid EBA and a right to work at the site. The Judge[20] said:

> *"It beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site."*

33. The court imposed penalties totalling $101,745 for the breaches of the FW Act. The company was penalised $40,800 and its project manager $6,120. The CFMEU was penalised $47,175 and CFMEU site delegate Kurt Pauls $7,650.[21]

34. Judge Vasta[22] went on to say:

> *"This was a very clear and deliberate action to illustrate to [the waterproofing company] that it was the CFMEU who alone decided who worked on that particular site."*
>
> *"It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society."*

35. In May this year, a Senior CFMEU official was ordered to pay the maximum penalty of $10,200 for his conduct on a construction site at Fortitude Valley in 2015.[23]

36. The official admitted in the Federal Circuit Court that when he was asked for his right of entry permit he raised his middle finger and said he didn't need one. When a site manager attempted to record the incident, the Official admitted saying:

> *"Take that phone away or I'll f***ing bury it down your throat."*

37. He then squirted water at the person which struck him in the face, shirt and mobile phone. When another site manager asked the official words to the effect:

> *"What are you doing here, you are here illegally, why didn't you go through the right channels?"*

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[18] *Australian Building and Construction Commissioner v Dig It Landscapes Pty Ltd & Ors [2017] FCCA 2128 (5 September 2017)*
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*
[22] *Ibid*
[23] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/judge-orders-maximum-penalty-against-former-queensland-cfmeu-boss*

38. The official replied: *"I can do what I like."*

39. Also in May this year, the CFMEU and seven of its officials were penalised $277,000 for unlawful conduct which halted work at the $1.2 billion Perth Children's Hospital project.[24]

40. The penalties arose in circumstances where the site was blockaded, one occasion where 400 people prevented a large concrete pour involving 45 trucks. The Court determined that CFMEU officials had organised, incited, and controlled the protest because the head contractor did not agree to a demand for an EBA.

41. Other incidents included a union organised a blockade which prevented 200 workers from entering the site, and a separate blockade where a CFMEU official admitted to attempting to prevent workers from entering the site by physical restraint.

42. In issuing the penalties, the Judge said that senior officials *"clearly provided endorsements to the unlawful action and gave it what might be called a misplaced legitimacy in the minds of the CFMEU members".* Justice Barker also took into account the "*prior extensive history of contraventions on the part of the CFMEU"* in determining the penalties imposed.

43. In April 2017, the Federal Court issued fines of $101,500 against the AMWU, CFMEU and AWU and three of their officials for their involvement in unlawful industrial action at a construction project in Victoria's Latrobe Valley.[25]

44. The unlawful action stopped work at the project for three days in March 2014, continuing on the third day in defiance of orders from the FWC that industrial action stop. Whilst the officials contended the stoppages related to safety and therefore did not constitute unlawful industrial action, the Court found that *"[t]hat view was a mistaken one".*

45. The Court found instead that by involving themselves in the action, the officials *"took advantage of the employees' unlawful conduct to strengthen their hands in their negotiations with the companies*".

46. In the judgment, Justice Jessup singled out the CFMEU for what he described as its *"appalling"* prior record of non-compliance with industrial laws.

47. Justice Jessup noted the *"normalisation of contraventions"* by the CFMEU "*has been the subject of comment by Judges on so many previous occasions that any further observation on my part here would amount to little more than stating the obvious*".

48. His Honour continued:

> *"…if there is any union in the industrial universe which should be acutely aware of the importance of understanding the boundaries of lawful conduct in the prosecution of disputes, it is this one. Self-evidently, it does not care to do so."*

49. The CFMEU was penalised $45,000, the AMWU $25,000 and the AWU $20,000. Officials were penalised a total of $11,500.

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[24] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/court-penalises-cfmeu-leaders-277000-perth-children%E2%80%99s-hospital-decision*

[25] *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2) [2017] FCA 367 (11 April 2017)*

50. Also in April 2017, the CFMEU and ten officials were penalised $590,800 for co-ordinated unlawful industrial action across multiple construction projects worth nearly half a billion dollars.[26]

51. The coordinated unlawful action saw workers walk off the job at nine projects, including four hospitals and an aged care centre across Melbourne and Geelong in 2014.

52. The Federal Court decision highlighted that of the various stoppages "*in no instance was there any suggestion of an issue or grievance, specific to the site or workers on it that justified, or even explained, the organisation of the industrial action"*. Instead, the Court found the "*arrogant*" and "*high-handed*" approach of the CFMEU and its officials led to the irresistible inference that the unlawful conduct *"had the explicit object of inflicting commercial harm on* [the contractor]*".*

53. The Court also made comment about the "*transparently groundless invocation*" of workplace safety as a pretext for one of the unlawful stoppages. One official was penalised $7,600 for an "*unjustified and gratuitous*" disruption of work that had *"nothing to do with any issue or grievance which the workers [on site] had".*

54. In March 2017, the CFMEU and ten of its officials were given penalties totalling $242,000 after they blocked construction work on the $80 million Perth International Airport Arrivals Expansion Project. [27]

55. In a majority decision, Justices Rares and Dowsett described the officials' conduct as *"a clear instance of them taking the law into their own hands",* further noting:

> *"The conduct of the CFMEU in this case brings the trade union movement into disrepute and cannot be tolerated".*

56. Recently, during national protest action, a senior union official made the following comments in front of a rally causing public outrage[28] with respect to ABCC inspectors:

> *"Let me give a dire warning to them ABCC inspectors, be careful what you do. You're out there to destroy our lives."*
>
> *"We will lobby their neighbourhoods, we will tell them who lives in that house and what he does for a living, or she, and we will go to their local footy club, we will go to their local shopping centre, they will not be able to show their faces anywhere."*
>
> *"Their kids will be ashamed of who their parents are when we expose all these ABCC inspectors."*

57. In August 2017, the Federal Court handed down penalties totalling $430,000 for unlawful industrial action taken at the Lady Cilento Children's Hospital and two other Brisbane construction sites.[29]

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[26] *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368 (11 April 2017)*
[27] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53, NORTH, DOWSETT AND RARES JJ*
[28] *"CFMEU boss John Setka threatened to expose personal details of ABCC inspectors" Genevieve Alison, Tom Minear and Matthew Johnston, Herald Sun, June 21, 2017*
[29] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/federal-court-penalises-cfmeu-cepu-430000-unlawful-brisbane-action*

58. The Court found the actions of CFMEU officials was part of a *"highly coordinated and deliberately orchestrated campaign"* and that the CFMEU had a prior history that "*reveal a lamentable, if not disgraceful, record of deliberately flouting industrial laws*" (and was) "*a recidivist when it comes to contravening industrial laws."*

59. In awarding the penalties, the Court noted that *"it (the CFMEU) continues to thumb its nose at the industrial laws"* and "*the CFMEU's record of past transgressions means that there is no reason to afford it any particular leniency based on its past behaviour."*

60. In 2016, senior building industry union officials reportedly used the words *'We've got to get our hands dirty'* and '*You've got to break a few eggs to make an omelette*' at a union rally where it is alleged a non-union worker suffering a terminal disease was subsequently assaulted by a union official. [30]

61. In March 2016, a case in Queensland found building union officials entered a lunch shed, removed workers food from a fridge, then padlocked the door to the shed saying it was "*only for the use of union members."* [31]

62. In August 2016, the CFMEU in Melbourne was found to have not followed proper right of entry rules and refused to leave when asked. The Judge found this a *"demoralising lack of respect either for the law or their roles as officials". [32]*

63. In April 2016, the CFMEU and 15 union officials in Adelaide were fined for breaching entry laws, coercive conduct, and related breaches. These included unauthorised entry, accessing unsafe areas, becoming physical to force site entry, and coercion to force the flying of a union flag. [33]

64. Building unions are by far the most penalised category of union in Australia and courts have observed, on a more than regular basis, a predisposition for them to break the law. Building unions are more than willing to take advantage of the considerable rights and benefits associated with being a RO, however they demonstrate a serial reluctance to do so in a manner where rights are evenly balanced against associated relevant obligations.

65. This is important to note given trade unions in other sectors seem able to operate within existing rules and do not need to engage in illegal behaviour to represent members.

66. Against this backdrop, the following sections deal with each separate schedule and its relevance to the building and construction industry.

Schedule 1 – Disqualification

67. Schedule 1 amends the Act by introducing new provisions that empower the Federal Court to disqualify a RO official from standing for, or holding, office within an RO.

68. Such power would be available to the Court were it to be found that an official had:

- Deliberately flouted the law;
- Failed to act in the interests of their members;

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[30] CUB Dispute: CFMEU boss John Setka urged workers to get 'hands dirty' at rally" Galloway A, Herald Sun, 16 September 2016
[31] [2016] FCCA 488 (9 March 2016)
[32] [2016} FCA 817
[33] [2016] FCA 415 (22 April 2016), [2016] FCA 414 (22 April 2016), [2016] FCA 413 (22 April 2015)

- Breached their duties;
- Stood for office while already disqualified; or
- Otherwise found to be not a fit and proper person to act or hold office as an official.

69. In addition, the proposed change will enable the Court to disqualify an official automatically where that official has been found guilty of an offence punishable by five or more years' imprisonment.

70. Master Builders supports this measure and notes it is consistent with recommendations of the Heydon Royal Commission.

71. The Heydon Royal Commission[34] made a number of observations about the Act and its existing provisions relevant to officer disqualification, noting areas where it contained defects.

72. These included:

- The existing list of prescribed offences relevant to disqualification is narrow and could see individuals who have committed significant criminal offences free to hold office in a RO;
- The definition of prescribed offence is largely redundant;
- Officials not eligible to hold right of entry permits remain eligible to run ROs;
- There is no mechanism to disqualify officials who repeatedly breach the FW Act; and
- The existing laws only provide for 'automatic' disqualification.

73. The genesis behind these recommendations was overwhelmingly found with reference to evidence from the building and construction industry. The Commission found that:

> *"The Commission's inquiries have revealed a worrying and recurring phenomenon, particularly within the CFMEU, of union officials deliberately disobeying court orders or causing the union to disobey court orders. Officials who deliberately flout the law should not be in charge of registered organisations".*[35]

74. One of the many examples leading to the finding above was in evidence given by a CFMEU senior official during Commission proceedings as follows:

> *Q: You have no issue, do you, as the Divisional Branch Secretary, with officials of the CFMEU engaging in activities in the kind which I saw on that footage, despite orders having been made injuncting that sort of activity?*
>
> *A. At the end of the day, I don't have a problem with that, no. If the decision had been made of the workforce not to return to work, if they wanted to send a protest, if they wanted to send a message back to the company that they're not happy, I don't think that – I think that people have a right, whether it's the official or the workers that he is with, to send a message back to the company. These disputes are very robust in the construction industry and there is always a little bit of emotion and passion in it, but you've got to look*

[34] *Vol 5, 225-236.*
[35] *Heydon Vol 5 p226*

> *at the circumstances of how this all came about. It was certainly set up by the company.*[36]

75. While noting that the last sentence of the statement above was eventually determined to be untrue, the Commission went on to find that the comments were *"entirely antithetical to the rule of law"*[37] as referenced against commentary of Merkel J:

> *"The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes … it also requires that parties comply with the orders made by the courts in determining those disputes."*[38]

76. The findings of the Heydon Royal Commission about the CFMEU continued the pattern of findings arising from earlier similar Royal Commissions. The Final Report of the Cole Royal Commission observed:

> *"Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions."*[39]

77. The Heydon Royal Commission[40] went on to then find:

> *"There is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law. What can be done to cut out the malignancy and cure the disease?"*

78. In considering various options to answer the above question, numerous options were canvassed including that special laws be established to prohibit officials of ROs from holding office in any such organisation or branch for a particular period of time.

79. The Report noted[41] that such a law would "*recognise that an organisation can only act by its officers and that the culture within an organisation is created in large part by its officers*" and provide better protection for members of ROs.

80. With specific reference to the CFMEU, the report noted[42] such a law would:

> *"protect the members of the CFMEU and the public more generally by disqualifying persons whom the Parliament determined were not fit and*

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[36] *Michael Ravbar, 6/8/14, T: 347.25-39. Referenced Heydon Report, Volume 5, page 400.*
[37] *Heydon Report Volume 5, p401*
[38] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2000] FCA 629 at [79].*
[39] *Royal Commission into the Building and Construction Industry, Final Report (2003), Vol 1, p 11, para 22.*
[40] *Heydon Royal Commission, Volume 5, p401*
[41] *Heydon Royal Commission, Volume 5, p402*
[42] *Heydon Royal Commission, Volume 5, p407*

> *proper persons to be running organisations that have the range of statutory privileges conferred upon registered organisations"*

And

> *"in particular, seek to protect the members of the CFMEU and the public from the consequences of the culture of disregard for the law within the CFMEU by focusing on those in control of the CFMEU rather than on the membership of the union."*

81. The Committee should be clear that the above comments were made while considering the benefit of legislation that allowed the Parliament to disqualify CFMEU officials. The Report noted a potential adverse consequence of taking such an approach was that it may be constitutionally invalid if seen to be an exercise in judicial power.

82. While Master Builders has no view on the above constitutional question, we do note that the Bill under consideration avoids the need to consider it by vesting the same power in the Federal Court.

83. It is also appropriate to note, in addition to the above history and context, that the conduct of CFMEU officials continues and there is no evidence that this would be likely to change in the near future.

84. Master Builders understands that there are approximately 50 ABCC matters before the courts, with around 95% of these involving matters against the CFMEU. These matters involve around 1962 separate charges against 97 individual CFMEU officials for alleged breaches of workplace laws.

85. Since the ABCC laws originally commenced, courts have handed down over $13.5 million in penalties against building unions with the CFMEU alone being penalised in excess of $10 million.

86. Were the provisions in Schedule 1 to become law, the changes would be likely to improve the extent to which officers within building and construction industry ROs comply with law and boost the standard of overall industrial conduct. This would be of significant benefit to members of ROs within this sector and the public more broadly who would, as the Heydon report noted, be protected from the consequences of a culture that has little or no regard for the law.

87. Overall, given that Schedule 1:

    - Implements a Heydon recommendation in a way that addresses constitutional questions with appropriate independent oversight;
    - Would assist in changing a culture of disregard for the law by officers of employee ROs in an industry which is renowned for being a hotspot of such culture;
    - Would better protect the public and members of ROs; and
    - Would create an additional scheme of deterrent for those seeking to break the law;

    it is **supported** by Master Builders and we recommend that the Committee find accordingly.

Schedule 2 – Cancellation of Registration

88. Schedule 2 amends the Act by introducing new provisions that empower the Federal Court to cancel the registration of an RO, or take action regarding a part thereof, when that organisation or its officers:

- Repeatedly break the law;
- Breached duties to members; or
- Failed to act in the interests of members.

89. The Schedule also provides the Court with flexibility and discretion to make appropriate orders limited to a particular branch, division, or part of a RO in circumstances where it is found that the conduct described above emanates from a specific part of a wider RO.

90. As noted in earlier sections of this submission, the history and current activity of some ROs within the building and construction industry is infamous. A significant concern to Master Builders is that there appears to be no indication that this ingrained culture will change.

91. The Heydon Royal Commission considered this history and noted[43] that:

> *"It points to both repeated unlawful conduct in the building and construction industry, and by the CFMEU in particular."*

92. Views akin to the above finding are regularly canvassed during court proceedings and have been the subject of much judicial commentary. A selection of this commentary follows:

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."*
>
> (Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)
>
> *"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."*
>
> (Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407)
>
> *"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act."*

[43] *Heydon Report Chapter 5, p397*

(Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845)

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties."

(Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436)

"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct."

(White J, 22 April 2016, Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415)

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised."

(Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173)

"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct."

(Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145)

"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..."

(Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548; (2009) 182 IR 327)

"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts."

(Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429)

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."*
>
> (Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)

> *"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means."*
>
> (Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

> *"The CFMEU is to be regarded as a recidivist rather than as a first offender."*
>
> (Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

> *"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry."*
>
> (White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432)

> *"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."*
>
> (Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134)

93. A list of additional commentary is **attached** to this submission.

94. The issue of RO deregistration was also canvassed by the Heydon Royal Commission in a similar vein to its consideration of officer disqualification.[44]

95. Once again, the Final Report noted the history of the CFMEU and its consideration of deregistration was in the context of specific reference to that organisation. The report canvassed a number of options by which this could occur with specific reference to the CFMEU.[45]

96. Like the Cole Royal Commission, the Heydon Royal Commission did not recommend that the CFMEU be deregistered. The basis for this view included[46]:

- That there would be a disproportionate effect on union members who may not have been involved in illegal activity if moves to cancel the registration of the union as a whole were taken;
- Deregistration under the provisions of the Act is a costly and lengthy process;

[44] *Heydon Report Chapter 5, p402-406*
[45] *Ibid*
[46] *Ibid*

- Previous moves to deregister building unions (via enactment of the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 [Cth] and the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act* 1986 [Cth]) which had the effect of cancelling the registration of the Australian Building Construction Employees' and Builders Labourers' Federation, gave rise the birth of the CFMEU; and
- Any merger between the MUA and CFMEU (expressed at that time to be merely "*a real possibility*") meant it was likely that the deregistration mechanism under the Act would prove ineffective.

97. Master Builders notes that Schedule 2 of the Bill (along with measures elsewhere therein) accommodates and addresses the above factors which weighed against a recommendation to deregister the CFMEU.

98. These include:

- First, Schedule 2 allows for action to be taken against a RO or a part thereof, creating flexibility that is not otherwise available. The result allows for the Federal Court to make orders applicable to part of an organisation, not necessarily the entire organisation, therefore removing the potential for adverse consequences on those members whom were part of a RO that acted in a manner that complies with the law.
- Second, other provisions of the Bill (e.g. Schedule 3) are designed to reduce the cost and complexity associated with the proceedings under the Act, addressing the second point.
- Third, Schedule 1 (officer disqualification) will alleviate any concern about individuals simply starting a new organisation when considered conjunctively with Schedule 2.
- Fourth, since the delivery of the Final Heydon Report, moves of the CFMEU to amalgamate with the MUA have crystallised and this information, considered in combination with Schedule 4 (Public Interest Test) and the Bill as a whole, would pre-empt those concerns as held at that time.

99. Notwithstanding the barriers identified by the Royal Commission in deciding to not recommend CFMEU deregistration no longer exist and/or are addressed by other parts of the Bill, it is Master Builders' view that there are a range of other positive outcomes that would flow from the passage of this measure.

100. The most significant of these are:

- That a further incentive is created for ROs and their officials to comply with the law;
- It would provide greater protections for members of a RO, and ensure (where relevant) that any consequence for breaking the law is targeted at the part of an RO so involved; and
- It would improve the standard of industrial conduct while protecting RO members and the public more generally.

101. For these reasons, the Schedule is **supported** by Master Builders and we recommend that the Committee find accordingly.

Schedule 3 - Administration

102. Schedule 3 amends the Act by introducing clarity to existing provisions as to how the Federal Court should approach the administration process of a RO, where it, or a part thereof, or its officers have:

- Repeatedly break the law;
- Breached duties to members;
- Failed to act in the interests of members; or
- Is otherwise dysfunctional.

103. Master Builders supports this clarification as it improves the Act by addressing gaps as identified in proceedings associated with the HSU case.

104. Historically, circumstances involving a RO in administration are rare and/or mostly occur in the context of proceedings or events that are either without controversy or involving parties between which agreement or situational commonality exists.

105. The HSU matter, however, did identify the absence of clarity within existing provisions and demonstrated the cost and complexity it generates, or has the potential to generate. As the associated EM notes, but for the eventual agreement between the then relevant parties, the time, complexity and expense associated when enlivening the existing provisions could be significant.

106. In such circumstances where financial resources are likely to be limited or otherwise cause significant strain, the interests of those members of a RO in administration are not served if forced to expend additional resources on legal proceedings that could otherwise have been avoided.

107. Neither, more importantly, are members' industrial interests best met if there is uncertainty as to the status of their organisation or a delay in the identification of those responsible for representation.

108. It follows that addressing the uncertainty within existing legislation so as to minimise circumstances with potential for unnecessary expenditure, delay or uncertainty, will better suit the financial and industrial interests of relevant members.

109. Such an outcome is not only desirable as a standalone policy proposition, it is also entirely consistent with the objects of the Act.

110. For these reasons, the Schedule is **supported** by Master Builders and we recommend that the Committee find accordingly.

Schedule 4 – Public Interest Test

111. Schedule 4 amends the Act by giving the FWC greater power to ensure that amalgamations of ROs are in the public interest. This occurs via the introduction of a test that ensures applications for amalgamation receive a greater level of third party scrutiny prior to approval.

112. The test will require the FWC to be satisfied that any amalgamation is in the public interest prior to its approval. This gives the FWC greater discretion to consider a broader range of matters as part of this test, and allows a broader range of entities to make submissions or be heard in relation to its consideration of the test.

113. Importantly, the test will also require FWC to consider the historical conduct of the applicant organisations, parts or officers thereof, in terms of complying with the law and otherwise discharging their obligations to members.

114. The consideration of this public interest test, and satisfaction thereof, are to occur at any point after an application to amalgamate is received and prior to the setting of an amalgamation date at section 73 of the Act.

115. This **proposal as a whole is strongly supported** by Master Builders Australia for numerous reasons including those outlined below.

116. The provisions of the existing Act are deficient and, as the EM observes, are in practice a 'rubber stamp' for any amalgamation so proposed.

117. There is little, if indeed any, opportunity for organisations, entities, parties or persons to be heard or materially assist the FWC in its considerations, with the exception of a small cohort narrowly defined. This prevents the FWC from being availed of all relevant circumstances, material and context that should otherwise be available in order for it to make an order that is appropriate and consistent with the objects of the Act more broadly.

118. Schedule 4 will address this deficiency and ensure that the FWC is better able to inform itself ensuring more comprehensive regard is had to all impacts of an amalgamation order sought. This would include consideration of matters about which the existing provisions are unable to encompass.

119. The requirement for the FWC to have regard to the prior conduct of ROs before amalgamation is also welcome. There are numerous benefits that would flow from the introduction of such a measure.

120. For example, it would have the effect of creating a new regime of consequence for those ROs that repeatedly break the law. This means that not only would a penalty be considered for particular individual instances of breach at the time they are found to have occurred, but that there would be a further additional consequence in the longer term. This incentive to comply with the law would have a positive impact upon the conduct of some ROs that are known to repeatedly break it without contrition or remorse.

121. In addition, the measure would ensure that ROs who repeatedly break the law are unable to grow larger in size and asset base. This would mean that those ROs that comply with the law and act in the interests of members would remain an attractive proposition for potential amalgamation while those that repeatedly break it would become less so. This outcome, combined with that in the preceding paragraph, would prevent those ROs who break the law from becoming larger and vice versa. This would cause an improved standard of industrial conduct and ensure member interests were better served.

122. Further, those ROs who regularly flout the law often consider any financial penalty associated with doing so as simply 'a cost of doing business.' The lack of deterrent associated with financial penalties available under the Fair Work regime is often linked to the asset size of a particular RO. i.e financial penalties have less impact on those that are easily capable of absorbing the cost compared to those that are less capable.

123. The proposed measure would ensure that those ROs which adopt the 'cost of doing business' attitude would be unable to grow larger and/or expand their asset base and financial pool. Not only would this preserve the integrity and intent of the existing Fair Work penalty regime, but it would render a RO unable to share any penalty imposed on it across any financial base arising from the amalgamation with another entity.

124. The building and construction industry is renowned for being home to numerous employee ROs that appear unfazed by financial penalty. [47] The Heydon Report noted that this was because some ROs are becoming more business-like, stating:

> *"Large national unions, such as the CFMEU, MUA and the AWU, have substantial assets. They have many thousands of members. They operate branches across different jurisdictions. They employ large numbers of employees. They generate tens of millions in membership dues annually. They generate millions in commercial enterprise and agreements with third parties. They are trading corporations in the constitutional sense. They are big businesses."*[48]

125. A further notable feature of Schedule 4 is the adoption of a positively expressed test of public interest i.e any amalgamation must be **in** the public interest and not merely contrary to it.

126. The benefit of this approach is to ensure that any RO amalgamation will only be allowed when it is determined to be of benefit to the broader interest of the community and public generally. This is an important consideration as the interests of a RO will not always be the same as those held by the public and could in some circumstances be contrary to them.

127. In addition, the potential ramifications of an amalgamated RO for the public interest may not be discernible on their face and therefore it is appropriate for the FWC to have broader discretion to consider all relevant matters.

128. It is also appropriate that the FWC have discretion as to when it ought to consider the public interest test so as to ensure it is capable of assessing the public interest at any point. For example, there may be a relevant circumstance arise that is within the public interest which occurs during the conduct of a ballot.

129. There are parts of Schedule 4 in which Master Builders recommends the Committee consider making a number of minor alterations to improve its operation and understanding. These include:

- Section 72A – this provision should include additional flexibility so as to not limit the FWC's discretion in determining a public interest consideration when and if it deems it appropriate. For example, as noted above, a ballot taking place under current Division 5 may by its conduct raise matters relevant to the public interest that might not have existed prior to the ballot being ordered. An option to achieve this would be via the insertion of a provision that makes it clear that if the FWC makes a determination relevant to the public interest at an early stage of a proceeding, relevant circumstances arising subsequent to that determination must also be considered, where a person making submissions about the public interest requests that it be so.
- Section 72C – this provision should make it clear that persons may make submissions about the public interest *and/or provide evidence* supporting those submissions.
- Section 72D – this provision should clarify the determination of items in parts 72D(1) and (2) can require matters under parts 72D(3) and (4) to be heard if necessary and vice versa. This would allow matters to be raised that

[47] *See, for example, Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[48] *Heydon Report Volume 5, p.194.*

provide context to items (1) and (2). Further, additional certainty would be generated if section 72D was altered to clarify that the relevant 'compliance record events' include both those set at Section 72E(1) (events involving organisational compliance) and Section 72E(2) (events involving compliance of officers).

130. Notwithstanding the above improvements, and having regard to paragraph 8 herein, Master Builders would also support the passage of the Bill as drafted and introduced.

Conclusion

131. Master Builders appreciates the opportunity to make a submission to the Committee regarding the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017.*

132. We recommend the Committee finds that the Bill should be supported and pass Parliament as soon as practicable.

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JUDICIAL COMMENTS RE: CFMEU

DATE	CASE	JUDGE(S)	OBSERVATION
9 May 2002	*Hamberger v Construction, Forestry, Mining and Energy Union* [2002] FCA 585	Cooper J	At [20]-[21]: If an industrial organisation turns a blind eye, or does not concern itself as to the manner and methods employed by officers, servants or agents of the industrial organisation to achieve what they see as the organisation's ends, the organisation is at risk of being heavily penalised where the means adopted are prohibited and exhibit the worst features of the proscribed conduct. In the present case, the first and second respondents have chosen to give no evidence as to what those in authority knew of the conduct of the third and fourth respondents at and prior to the matters complained of. Nor is there any evidence as to what, if any, action was taken by the organisation to counsel, or moderate the behaviour of, the officers for the future.
"If an industrial organisation turns a blind eye, or does not concern itself as to the manner and methods employed by officers, servants or agents of the industrial organisation to achieve what they see as the organisation's ends, the organisation is at risk of being heavily penalised where the means adopted are prohibited and exhibit the worst features of the proscribed conduct." **Cooper J, 9 May 2002, *Hamberger v Construction, Forestry, Mining and Energy Union* [2002] FCA 585**			
11 April 2008	*A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466.	Gyles J	At [13]-[14]: A number of findings involving unlawful behaviour by officials related to the CFMEU have been made in recent years...[His Honour then cited 12 cases] ... ...These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law. I note that there is no evidence of offending officials… suffering any serious disciplinary penalties. In my opinion, notwithstanding the purely vicarious nature of the liability of the CFMEU, the penalty in this case, when compared with the maximum penalty, should adequately reflect the systematic nature of the failure of the CFMEU to deter or prevent actions of the kind involved in

DATE	CASE	JUDGE(S)	OBSERVATION
			this case and act as a spur towards effective action by the CFMEU and the State entities connected with it.[49]
"...These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law. I note that there is no evidence of offending officials… suffering any serious disciplinary penalties." **Gyles J, 11 April 2008, *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466**			
19 September 2008	*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426; (2008) 177 IR 61 at [44].	Tracey J	At [41]: In my view the conduct was serious and was designed to coerce Hooker Cockram (or, through it, one of its sub-contractors) to meet the Employment Requirement. The ban was imposed in preference to alternative, lawful, actions such as negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members. At [44]: ...Similar previous conduct demonstrates that the respondent has a history of engaging in the particular conduct in question, that the penalties previously imposed were insufficient to deter the respondent from re-engaging in that conduct and that the respondent has failed to take adequate steps to prevent further contraventions…
"The ban was imposed in preference to alternative, lawful, actions such as negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members." **Tracey J, 19 September 2008, *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426**			
29 May 2009	*Williams v Construction, Forestry, Mining and Energy Union (No 2)*	Jessup J	At [29]:

[49] The maximum penalty applicable was $11,000 (see [6]).

DATE	CASE	JUDGE(S)	OBSERVATION
	[2009] FCA 548; (2009) 182 IR 327 at [29]. NB: This penalty decision was overturned on appeal but not this observation.		...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'...
"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..." **Jessup J, 29 May 2009, *Williams v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 548; (2009) 182 IR 327**			
10 September 2009	*Draffin v CFMEU & Ors* [2009] FCAFC 120; (2009) 189 IR 145 at [70, [79], [92].	Goldberg, Jacobson and Tracey JJ	At [70], [79], [92]: …the litany of contraventions [and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct.
"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct." **Goldberg, Jacobson and Tracey JJ, 10 September 2009, *Draffin v CFMEU & Ors* [2009] FCAFC 120; (2009) 189 IR 145**			
7 April 2011	*Cozadinos v CFMEU & Ors* [2011] FMCA 284.	Riethmuller FM	At [18]: Deterrence is clearly an important factor in this case as the applicant submits because the union is a repeat offender and, indeed, it seems it has quite an unenviable history of breaches as set out in the various cases. At [23]: Whilst the particular losses caused by the conduct imposed greater losses, it seems, on the members than anyone else it was nonetheless a breach in circumstances where there were real alternatives available and where the union has an unenviable history of past breaches.

DATE	CASE	JUDGE(S)	OBSERVATION
"Whilst the particular losses caused by the conduct imposed greater losses, it seems, on the members than anyone else it was nonetheless a breach in circumstances where there were real alternatives available and where the union has an unenviable history of past breaches. **Riethmuller FM, 7 April 2011, *Cozadinos v CFMEU & Ors [2011] FMCA 284.***			
7 February 2012	*Hogan v Jarvis* [2012] FMCA 189.	Burnett FM	At [20]: …I have had referred to me, particularly in Schedule A to the submissions prepared by the applicant, material which identifies at least 38 occasions where the fourth respondent [CFMEU] has been adversely noted as a party to proceedings seeking imposition of penalties. It is fair to infer from that Schedule that, as was submitted, the fourth respondent does have a history of engaging in conduct that brings it adversely to the attention of the courts and, notwithstanding the imposition of significant or at least not insignificant penalties, it does not appear that the penalties imposed have, to date at least, been sufficient to deter it from re-engaging in that conduct. As I have noted in the course of debate with counsel, perhaps the union needs to review its enterprise risk management processes in order to do more to bring attention to this form of behaviour to those who manage the union.
"It is fair to infer from that Schedule that…the fourth respondent does have a history of engaging in conduct that brings it adversely to the attention of the courts and, notwithstanding the imposition of significant or at least not insignificant penalties, it does not appear that the penalties imposed have, to date at least, been sufficient to deter it from re-engaging in that conduct." **Burnett FM, 7 February 2012, *Hogan v Jarvis* [2012] FMCA 189.**			
20 August 2013	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846.	Collier J	At [34]-[35]: On the material before the Court the CFMEU appears a worse offender than the CEPU, in that the CFMEU has been penalised approximately $1.2 million of members' money (in addition to penalties personally imposed on individual union officials) in respect of more than 40 contraventions of laws relating specifically to coercive conduct…the facts demonstrate the need to impose penalties which meet the objective of specific deterrence, particularly in relation to the CFMEU whose organisers appear to have shown a somewhat cavalier disregard both of the need

DATE	CASE	JUDGE(S)	OBSERVATION
			to comply with the law and of penalties which have been previously imposed on the union for similar conduct.
"…the facts demonstrate the need to impose penalties which meet the objective of specific deterrence, particularly in relation to the CFMEU whose organisers appear to have shown a somewhat cavalier disregard both of the need to comply with the law and of penalties which have been previously imposed on the union for similar conduct." **Collier J, 20 August 2013, *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846.**			
7 October 2013	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014.	Gordon J	At [46]: The CFMEU has engaged in a significant number of prior contraventions of similar legislation.
"The CFMEU has engaged in a significant number of prior contraventions of similar legislation." **Gordon J, 7 October 2013, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014. .**			
21 November 2013	*Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243.	Tracey J	At [43]: There is also a need for any penalty to have a specific deterrent effect on the CFMEU. It has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct. As a result this consideration must weigh heavily when determining an appropriate penalty.
"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct." **Tracey J, 21 November 2013, *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243**			

DATE	CASE	JUDGE(S)	OBSERVATION
20 December 2013	*Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431.	Barker J	At [73]: It was mentioned above that there are a number of prior incidents involving unlawful industrial action that have resulted in the imposition of penalties against the respondents. It is generally accepted by the parties that the penalties imposed for the conduct described in the cases listed in Sch B of the respondents' outline of submissions on penalty are relevant in this case, and I take them into account generally when setting penalty. Among other things, they confirm that the respondents are not "cleanskins" when it comes to compliance with industrial laws such as the BCII Act and know that repeated, calculated contraventions will be met with monetary penalties of some significance.
"…the respondents are not "cleanskins" when it comes to compliance with industrial laws such as the BCII Act and know that repeated, calculated contraventions will be met with monetary penalties of some significance." **Barker J, 20 December 2013, *Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431.**			
28 February 2014	*Director, Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429.	Burnett J	At [45]-[46]: There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts. My views on that matter are reinforced by my inquiries of the corporate respondents concerning measures of corrective action. This would appropriately involve the development of policy dealing with union entry to work sites, coupled with the training of employees in how to use that policy and undertake their duties responsibly. The unions would be required to supervise the implementation of those policies and provide for sanctions, possibly by way of re-training, for employees who failed to comply with those policies. This would also necessitate internal audit process to check that policies are being applied, are working and are modified if necessary. There is no evidence that any of this, or indeed any corrective action at all, takes place.

DATE	CASE	JUDGE(S)	OBSERVATION
"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts." **Burnett J, 28 February 2014, *Director, Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429**			
5 March 2014	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2014) 140 ALD 337.	White J	At [46]: … even if regard is had only to the CFMEU's contraventions of s 43 of the former BCII Act, its antecedent history must be regarded as significant." At [56]: The CFMEU's history and the nature of its present contravention indicate that deterrence, both general and specific, should be a significant consideration in the fixation of an appropriate penalty. The CFMEU is not, of course, to be punished again for its previous contraventions but its history does mean that it is not entitled to any leniency by reason of a previous good record, or by reason of a history of attempting to comply with provisions such as s 355. The penalty is to be fixed in the context of the CFMEU's previous record.
"The CFMEU is not, of course, to be punished again for its previous contraventions but its history does mean that it is not entitled to any leniency by reason of a previous good record". **White J, 5 March 2014, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (2014) 140 ALD 337.***			
31 March 2014	*Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134	Cavanough J	At [201]: …the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling. Specific deterrence must loom large in this case. I accept that a respondent is not to be punished a second time for prior conduct. And, as the CFMEU submitted, the concept of deterrence cannot be permitted to hijack the process…The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.
"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."			

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Cavanough J, 31 March 2014, *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134			
2 October 2014	*Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047.	Mansfield J	At [93]: I consider that the CFMEU's record of contraventions also demonstrates that a particularly persuasive form of personal deterrence against similar conduct in the future is appropriate.
"I consider that the CFMEU's record of contraventions also demonstrates that a particularly persuasive form of personal deterrence against similar conduct in the future is appropriate.' **Mansfield J, 2 October 2014, *Director of the Fair Work Building Industry Inspectorate v Cartledge [2014] FCA 1047.***			
23 December 2014	*Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432	White J	At [76]-[77]: The Director provided a schedule of the occasions on which the CFMEU has been dealt with by Courts for contraventions of industrial legislation. It is fair to describe the CFMEU record as dismal. Since 1999, the CFMEU has had penalties imposed on it by a Court on numerous occasions. Many of the Court decisions involved multiple contraventions. Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Industry Inspectorate v Cartledge*…imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.
"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry." **White J, 23 December 2014, *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432**			
17 March 2015	*Director of the Fair Work Building Industry Inspectorate v*	Tracey J	Contempt of court judgment. At [34]:

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	Construction, Forestry, Mining and Energy Union [2015] FCA 226		In doing so it [the CFMEU] opted for a show of industrial force in preference to engagement in lawful dispute settling procedures. The CFMEU has failed to explain why it chose this course of action despite having undertaken to the Court that it would not so act less than a fortnight before these events occurred. The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means. At [47]: In doing so it [the CFMEU] displayed, at best for it, a cavalier attitude which could only serve to undermine respect for Court processes. At [59]: [The relevant priors] do, however, expose a propensity, on the part of the CFMEU, to continue to commit contempts notwithstanding the imposition of significant sanctions. At [63]: The CFMEU is to be regarded as a recidivist rather than as a first offender.
"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means." *"The CFMEU is to be regarded as a recidivist rather than as a first offender."* **Tracey J, 17 March 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226**			
20 April 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353	Tracey J	At [96]-[98]: The present conduct of one of its officials adds to this depressing litany of misbehaviour. It evidences an ongoing disregard for the rule of law and highlights the need for the imposition of meaningful penalties within the limits imposed by the Act. The CFMEU … has not, however, deprecated Mr Berardi's conduct or expressed any contrition for failing to prevent his contraventions. Nor has it indicated any willingness to take steps to ensure that its officials in future comply with their legal obligations.
"The present conduct of one of its officials adds to this depressing litany of misbehaviour. *It evidences an ongoing disregard for the rule of law and highlights the need for the imposition of meaningful penalties within the limits imposed by the Act.*			

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The CFMEU … has not, however, deprecated Mr Berardi's conduct or expressed any contrition for failing to prevent his contraventions. Nor has it indicated any willingness to take steps to ensure that its officials in future comply with their legal obligations." ***Tracey J, 20 April 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353**			
1 May 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407	Tracey J	At [103]: In seeking to achieve its desired outcomes the CFMEU had available to it lawful processes which it could have pursued. It chose, instead, to prosecute its objectives by means which it must have known or, at least, should have known, were unlawful. Not for the first time the CFMEU sought to impose its will by means of threats and coercion against employers. Its approach was one of entitlement: it was free, despite legal constraint, to deploy its considerable resources in order to achieve its industrial objectives. The concept of the rule of law was anathema to it. At [106]: The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account. At [107]: Its continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, have not had a deterrent effect.
"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account." **Tracey J, 1 May 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407**			
12 June 2015	*Director, Fair Work Building Industry Inspectorate v Cradden [2015] FCA 614*	Logan J	At [9]: With the representational role of industrial organisations comes particular privileges, as well as particular responsibilities. One cannot have one without the other. An industrial organisation, be it an

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			employer organisation or an employee organisation, which persistently abuses the privilege by engaging in unlawful conduct cannot expect to remain registered. At [106]: The circumstances of these cases were not identical to those in the present case. They, nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account. At [49]: As to the CFMEU, I am firmly of the view, having regard to its outrageous disregard in the past and also in the present case of Australian industrial norms, as set out materially for this case in s 44 of the BCII Act, that anything less than a penalty of the individual amounts for particular days and the total amount would not serve the main purpose of the Act and the particular public interest, described in the Royal Commission report, which this Act was designed to promote. Had there been evidence of particular economic loss at the site, or worse conduct, and had there not been at least something of the mitigation entailed in an acknowledgement of the contraventions, the penalties in respect of the CFMEU would have been much greater.
"An industrial organisation, be it an employer organisation or an employee organisation, which persistently abuses the privilege by engaging in unlawful conduct cannot expect to remain registered." *"They,* [circumstances of the case under consideration] *nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."* **Logan J, 12 June 2015, *Director, Fair Work Building Industry Inspectorate v Cradden [2015] FCA 614***			
3 July 2015	*Director of the Fair Work Building Industry Inspectorate v Upton [2015] FCA 672*	Gilmour J	At [61]: Whilst the CFMEU's record does not mean that a disproportionate penalty can or should be imposed, it is nonetheless relevant to the assessment of the level of penalty that is necessary for deterrence (see *Temple* at [64]). The CFMEU's long history of its officials conducting themselves unlawfully involving

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			the very kind of conduct in which Upton engaged on 8 October 2012 calls for a significant component of specific deterrence.
"The CFMEU's long history of its officials conducting themselves unlawfully involving the very kind of conduct in which Upton engaged on 8 October 2012 calls for a significant component of specific deterrence." **Gilmour J, 3 July 2015, *Director of the Fair Work Building Industry Inspectorate v Upton [2015] FCA 672***			
14 August 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union(No 3) [2015] FCA 845*	Mansfield J	At [24]: As with Pearson and Olsen, there is no suggestion of penitence, corrective action, or cooperation in the investigation by the Director. There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act. At [25]: There is clearly an ongoing need for an order to be made for a pecuniary penalty which has a deterrent effect upon the Union and signals to others who may consider engaging in such conduct or like conduct that it is inappropriate to do so. In my view, in the circumstances, the appropriate pecuniary penalty to impose on the Union is $35,000.
"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act." ***Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union(No 3) [2015] FCA 845***			
10 September 2015	*Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2) [2015] FCA 998*	Flick J	At [21]: In the circumstances of the present case it is respectfully concluded that the latter of the two courses should be pursued. But for the past history of contraventions on the part of the CFMEU, a penalty would have been imposed of $175,000; when that past history is taken into account it is considered that the penalty should be $225,000. Approached in this manner, the reasoning at least has the advantage of transparency. The penalty of $225,000 is proportionate to the contraventions that have been found to have occurred. Rather than the penalty of $225,000 being seen as an increase in the

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			penalty "*because of prior convictions*", it is more correctly characterised as a penalty that may better serve the objective of deterrence. To employ the language of Buchanan J in *Cahill*, a penalty in the sum of $225,000 is not "*to increase a sentence beyond what is considered to be appropriate having regard to the seriousness of the offence because of prior convictions*". A penalty in that amount, it is concluded, is appropriate having regard to all of the facts and circumstances relevant to the present case – including the past history of contraventions.
4 November 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173*	Jessup J	At [29]: As has become customary in cases such as this, the applicant has placed before the court a schedule of the Union's previous contraventions of civil penalty provisions in the FW Act, and of corresponding provisions in the *Building and Construction Industry Improvement Act 2005* (Cth). The pattern of contravention which emerges from material such as this has been the subject of comment by the court on a number of occasions. The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised. In this context, the following words of Tracey J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [99] have more than in-principle relevance in a case in which the Union is involved:
"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised." **Jessup J, 4 November 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173***			
22 December 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 1462*	Jessup J	At [10]: The case is devoid of any mitigating circumstances. The Union has shown no contrition, and has not cooperated with the regulator. I accept the submission made on behalf of the respondents that neither of these circumstances should be regarded as an aggravating one. On the other hand, on the facts of the case, and on the way it has been conducted, there is no circumstance to which counsel could point as tending to exert a moderating influence upon the level of the penalty which the court would otherwise impose.
"The Union has shown no contrition, and has not cooperated with the regulator." **Jessup J, 22 December 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 1462***			

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9 March 2016	*Director of the Fair Work Building Industry Inspectorate v Vink & Anor FCCA [2016] 488*	Vasta	At [1]: This is an application for the imposition of pecuniary penalties upon the First Respondent, Scott Vink, and the Third Respondent, Construction, Forestry, Mining and Energy Union (CFMEU). The First Respondent is an official of the Third Respondent as that term is defined by s.12 and s.793(1)(a) of the *Fair Work Act 2009* (Cth) ("FW Act"). The Third Respondent is "*an industrial association*" within the meaning given to that term by s.12 of the FW Act and "*an employee organisation*" within the meaning given to that term by the same section of the FW Act. At [40]: There was never any legitimate reason for the First Respondent to enter that shed. The only reason he did so was to intimidate the employees and to reinforce to others at the building site, the notion that non-union membership is not going to be tolerated. At [41]: It is hard to imagine a more blatant single breach. The need for condign punishment is obvious. The maximum penalty for the First Respondent is $10,200.00 and the maximum penalty for the Third respondent is $51,000.00. At [43]: There is a great need for general deterrence and specific deterrence in this case. It would be apt to describe the behaviour of the First Respondent as "sheer thuggery". Such thuggery has no place in the Australian workplace. Contraventions of the FW Act that involve such thuggery cannot be tolerated. At [44]: The Third Respondent does have an unenviable history of breaching the FW Act. It seems to treat being caught conducting such breaches or as the present one simply as occupational hazards in the way in which they conduct their business. There has been no apology for such appalling behaviour.

"*It would be apt to describe the behaviour of the First Respondent as "sheer thuggery". Such thuggery has no place in the Australian workplace. Contraventions of the FW Act that involve such thuggery cannot be tolerated."*

Vasta, 9 March 2016, *Director of the Fair Work Building Industry Inspectorate v Vink & Anor FCCA [2016] 488*

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"It seems to treat being caught conducting such breaches or as the present one simply as occupational hazards in the way in which they conduct their business. There has been no apology for such appalling behaviour." **Vasta, 9 March 2016, *Director of the Fair Work Building Industry Inspectorate v Vink & Anor FCCA [2016] 488***			
8 April 2016	*Director of the Fair Work Building Industry Inspectorate v Myles & Anor [2016] FCCA 772*	Jarrett	At [42]: In previous applications, judges of the Federal Court have described that the CFMEU has a '...depressing litany of misbehaviour' (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353 at para [96]), a 'propensity to deliberately flout industrial legislation which proscribe coercive conduct' (*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at para [61]), 'a deplorable attitude, ... to its legal obligations and the statutory processes which govern relations between unions and employers in this country' (*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at para [62]), 'an attitude of indifference ... to compliance with the requirements of the legislation ...' (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at para [105]) and 'an organisational culture in which contraventions of the law have become normalised' (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 at para [29]. At [59]: The CFMEU's history of unlawful industrial activity demands that the penalty imposed carries a very significant deterrent effect. I am conscious that I cannot and should not punish the CFMEU for its prior contravening conduct, but its woeful prior history demands that some attempt be made to deter future contraventions.
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413*	White J	At [18]: A number of the authorities in this Court have emphasised that deterrence has both personal and general aspects: *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65, (2007) 158 FCR 543 at [93]; *Leighton Contractors Pty Ltd v CFMEU* [2006] WASC 317, (2006) 164 IR 375 at [74]; *Draffin v CFMEU* [2009] FCAFC 120, (2009) 189 IR 145 at [89]; and *Alfred v CFMEU* [2011] FCA 556 at [89]-[91]. Deterrence is particularly important in the present case because of the CFMEU's record of non-compliance with industrial legislation. At [33]:

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			I have previously described the CFMEU record of contraventions of industrial legislation as dismal: *DFWBII v Stephenson* [2014] FCA 1432 at [76]. That description is just as apt now as it was then. At [35]: The CFMEU's compliance with industrial legislation generally has been poor. The Director's summary shows that in the period from December 2000 to October 2013, the CFMEU and its officials were dealt with by courts on 80 separate occasions for contraventions of industrial legislation. On any reasonable measure that is an appalling record. It bespeaks an attitude by the CFMEU of ignoring, if not defying, the law and a willingness to contravene it as and when it chooses. This means that specific deterrence in particular must be a prominent consideration in the penalties imposed on the CFMEU in the present case. At [38]: Substantial penalties have been imposed on the CFMEU in the past. They have not been sufficient to deter the CFMEU from further contraventions. This suggests that the penalties to be imposed on it now must be even more severe.
"On any reasonable measure that is an appalling record. It bespeaks an attitude by the CFMEU of ignoring, if not defying, the law and a willingness to contravene it as and when it chooses." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413***			
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414*	White J	At [50] I accept the Director's submission that the CFMEU is a large, prominent and influential national union, that there is no evidence that it has an incapacity to pay penalties of the kind he has proposed, that it has not made any expressions of contrition or regret or even of a determination to ensure that both it and its officials comply with Pt 3-4 in the future, and that it has not provided any evidence of instructions or training to its officials with respect to the need to comply with the requirements of Pt 3-4. The CFMEU's dismal record means that deterrence must be a particularly important consideration in the penalties imposed on it. At [51] The contravention of s 500 by the CFMEU constituted by Mr Stephenson's conduct is particularly serious. That seriousness arises from the circumstance that a senior official of the CFMEU had

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			directed one of the employees for whom he was responsible to engage in unlawful conduct and that the employee committed the contravention by giving effect to that direction.
"The CFMEU's dismal record means that deterrence must be a particularly important consideration in the penalties imposed on it." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414***			
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415*	White J	At [153]: The dismal record of contraventions of industrial legislation by the CFMEU to which I referred in the Lend Lease Sites Penalty Judgement had deteriorated still further by the time of the subject contraventions between late March and early May 2014. At [154]: In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct. At [155]: All in all, the CFMEU itself or through its officials had in the period between 1 January 1999 and 31 March 2014 been dealt with by courts on 42 separate occasions for some 211 contraventions of industrial legislation. This is a regrettable record of indifference to, or defiance of, the law. Substantial penalties have been imposed on the CFMEU in the past without deterring it from unlawful conduct. That suggests that even more severe penalties should be imposed now.
"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415***			

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13 May 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436*	Mortimer J	At [104]: Given the history of contraventions of s 348 by both the CFMEU and Mr Myles, I am prepared to infer that both respondents (and the CFMEU's other responsible officers) well knew the conduct was unlawful, and did not care. At [140]: The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties.
"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." **Mortimer J, 13 May 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436***			
1 July 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case) [2016] FCA 772*	Jessup J	At [48]: The CFMEU's record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement. It has been the subject of comment by this court so frequently in recent times as to make any further recitation quite unnecessary. At the level of specifics, my attention has been drawn to the fact that, before 17 February 2011, the CFMEU (acting through the Victorian Branch of its Construction and General Division) had been found to have contravened s 38 of the BCII Act, and penalised therefor, on 16 occasions. The BCII Act was substantially amended, and re-named, in 2012, but the CFMEU continued thereafter to contravene other relevant legislation. The schedule of contraventions handed up on behalf of the applicant is extensive, and runs well beyond those 16 occasions. In a submission from which counsel for the respondents was not heard to demur, it was said for the applicant that "at least 80 of the [Union's] previous contraventions were either dealt with (in court) before the events the subject of these proceedings, or involved contravening conduct which had occurred before the events the subject of these proceedings, but were finalised after." Quite obviously, over the years the CFMEU has shown a strong disinclination to modify its business model in order to comply with the law.
"The CFMEU's record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement."			

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Jessup J, 1 July 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case)* [2016] FCA 772			
19 July 2016	*Director, Fair Work Building Industry Inspectorate v Bolton (No 2) [2016] FCA 817*	Collier J	At [42]: There is also extensive material before the Court indicating a significant record of non-compliance with the provisions of the industrial legislation by the CFMEU. Penalties imposed on the CFMEU appear to have no impact – indeed the obvious inference to be drawn is that the CFMEU has ignored such penalties as inconsequential. At [46]: The CFMEU submits, in summary, that there is no material to support a finding that it was in any way an accessory to the contraventions by the individual respondents. In my view this is a nonsensical submission. At material times the individual respondents were all officials of the CFMEU. I am satisfied that they were acting with apparent, if not actual, authority of the CFMEU in respect of their conduct. At [57]: That the individual respondents no longer have entry permits does not mean that there is no role for specific deterrence, or that the principle of general deterrence has been satisfied. The individual respondents were officials of the union, and as such can be expected to be role models for other union members, not only in representing the CFMEU but in compliance with the law and fulfilment of their legal obligations. The conduct of the individual respondents, while at the lower end of the spectrum, demonstrates a demoralising lack of respect for either the law or their roles as officials. That a number of the individual respondents may no longer hold management positions in the CFMEU, or be union officials with the CFMEU, is irrelevant. The penalties proposed by the Director are a proper deterrent for such conduct.
"There is also extensive material before the Court indicating a significant record of non-compliance with the provisions of the industrial legislation by the CFMEU. Penalties imposed on the CFMEU appear to have no impact – indeed the obvious inference to be drawn is that the CFMEU has ignored such penalties as inconsequential." **Collier J, 19 July 2016, *Director, Fair Work Building Industry Inspectorate v Bolton (No 2) [2016] FCA 817***			
9 August 2016	*Director, Fair Work Building Inspectorate v J*	Vasta J	At [16]: What the First Respondent did was to either terminate the contract or, depending on that view of the facts, refuse to engage C & K. The First Respondent, in terminating the contract, has done so because

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	Hutchinson Pty Ltd & Ors [2016] FCCA 2175		C & K had a workplace right; that is, to enjoy the benefit of their agreement and they had not exercised a workplace right, being the right to make an enterprise agreement, because it already had in place an enterprise agreement that did not cover the CFMEU. At [17]: The three respondents admitted that they have breached s.340 At [25]: In this case, it seems to me that there is a blatant case of discrimination against C & K because they did not have an EBA that included the CFMEU. It is clear on the way that the facts have been presented by both parties that if C & K did have an agreement with the CFMEU, then they would have completed the contract for the tiling at Circa One. At [26]: Such conduct strikes at the heart of freedom of association. For subcontractors, such as C & K, a major pathway to growing their business is to be awarded contracts from large construction companies like the first respondent. If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate
"Such conduct strikes at the heart of freedom of association. For subcontractors, such as C & K, a major pathway to growing their business is to be awarded contracts from large construction companies like the first respondent. If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate." **Vasta J,9 August 2016, *Director, Fair Work Building Inspectorate v J Hutchinson Pty Ltd & Ors [2016] FCCA 2175***			
19 January 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3) [2017] FCA 10*	Besanko J	At [46]: General deterrence is clearly a relevant consideration and, in light of the CFMEU's poor record, specific deterrence is an important consideration.
"General deterrence is clearly a relevant consideration and, in light of the CFMEU's poor record, specific deterrence is an important consideration."			

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Besanko J, 19 January 2017, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3) [2017] FCA 10*			
8 February 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62*	Jessup J	At [65]: It is now well-established that deterrence, both specific and general, is the predominant purpose of civil penalties in a statutory regime such as that of the FW Act. The CFMEU is a registered organisation of substantial size, resources and influence. Any suggestion that it did not fully understand the operation of the provisions of the Act under which the Director proceeded could not be taken seriously. Indeed, its past record of encounters with these, or similar, provisions speaks loudly of its familiarity with them. That record, to which I refer further below, justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour. The CFMEU and its members may be grateful that the staff of the banks and other financial institutions to whom it has, I presume, entrusted its considerable assets do not take the same approach to compliance with the law. At [66]: The CFMEU's record of contravention has become so extensive that it presents a challenge to convey, both accurately and comprehensively, the substance of the findings made in particular cases.
"That record, to which I refer further below, justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour." ***Jessup J, 8 February 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62***			
29 March 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53*	North, Dowsett and Rares JJ	At [99]: The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated. At [100]:

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			In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. At [102]: The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. It is not entitled to any leniency in the circumstances of the conduct complained of.
"The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated. *"In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition."* ***North, Dowsett and Rares JJ, 29 March 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53***			
11 April 2017	*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368*	Jessup J	At [12]: In the case of the CFMEU, I have based my assessment upon the fact of the contravention, upon the seriousness of the impact of the contravention, upon the behaviour of the individual respondent whose conduct was attributed to the CFMEU and upon the CFMEU's own record of past contraventions of similar or analogous industrial laws. At [17] …I also take into account the CFMEU's own record of lawlessness in the industrial context.
"I have based my assessment upon the fact of the contravention, upon the seriousness of the impact of the contravention, upon the behaviour of the individual respondent whose conduct was attributed to the CFMEU and upon the CFMEU's own record of past contraventions of similar or analogous industrial laws."			

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Jessup J, 11 April 2017, Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368			
11 May 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens' Hospital Contraventions Case) [2017] FCA 491*	Barker J	At [82] *As to the CFMEU*, the Contraventions Table (Annexure 3 to the Commissioner's submissions) discloses the CFMEU's extensive history of prior contraventions of industrial laws. This table lists 107 separate legal proceedings where the CFMEU was found to have contravened industrial legislation, or committed a civil or criminal contempt. At: [176]: This is a case where the prior extensive history of contraventions on the part of the CFMEU, in particular, and some of its key officials, must be regarded.
"This… lists 107 separate legal proceedings where the CFMEU was found to have contravened industrial legislation, or committed a civil or criminal contempt. ***Barker J, 11 May 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens' Hospital Contraventions Case) [2017] FCA 491***			
17 May 2017	*Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2017] FCAFC 77*	North, Besanko, Flick JJ	At [36]: The CFMEU was asserting that it could enter building sites simply because – given its position as a prominent Union – it could. At [37]: Such a submission, if properly understood, is astounding. There could be no contravention of s 500 of the Fair Work Act, so the submission ran, because no "right" was being exercised but rather the exercise of industrial power and might and the exercise of industrial muscle.
"…no "right" was being exercised but rather the exercise of industrial power and might and the exercise of industrial muscle." ***North, Besanko, Flick JJ, 17 May 2017, Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2017] FCAFC 77***			

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28 July 2017	*AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER V KURT PAULS & ORS [2017] FCA 843*	RANGIAH J	At [62]: …acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. At [68]: The CFMEU has a very extensive history of contraventions of industrial laws, including ss 355 and 417 of the FWA. The Commissioner provided the Court with a schedule demonstrating that there have been 123 separate cases in which this Court or the Federal Circuit Court of Australia (or its predecessor) have imposed civil penalties upon the CFMEU for contraventions of the FWA, the BCIIA or the Workplace Relations Act 1996 (Cth). Of those cases, 52 have involved contraventions of s 417 of the FWA or equivalent provisions and 17 have involved contraventions of s 355 of the FWA. At {69}: There is no evidence of contrition by Pauls, Steele, Bland or the CFMEU. At: [62] The respondents' attempts to coerce Watpac into acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. It is also a very serious infraction of the law to organise employees to engage in industrial action during the currency of enterprise agreements. At: [68]: The CFMEU has a very extensive history of contraventions of industrial laws, including ss 355 and 417 of the FWA. At [74]: In particular, declarations are an appropriate vehicle to record the Court's disapproval of the contravening conduct, serve to vindicate the Commissioner's claim that the respondents contravened the FWA and may deter others from contravening the FWA: see Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2007] ATPR 42-140; [2006] FCA 1730 at [6].

"The respondents' attempts to coerce Watpac into acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. It is also a very serious infraction of the law to organise employees to engage in industrial action during the currency of enterprise agreements."

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			Rangiah J, 28 July 2017, Australian Building and Construction Commissioner v Kurt Pauls & Ors [2017] FCA 843