Master Builders Australia

Submission to Royal Commission into Trade Union Governance and Corruption

Discussion Paper: Options for Law Reform

21 August 2015

MASTER BUILDERS AUSTRALIA

Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

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1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 On 19 May 2015, the Royal Commission issued its Discussion Paper entitled 'Options for Law Reform' (Discussion Paper). This submission responds to the Discussion Paper.

2.2 The Discussion Paper contains a series of 'questions for discussion' which are answered in this submission. The questions responded to are shown as numbered headings in the sequence in which they appear in the Discussion Paper. The question number from the Discussion Paper appears in brackets at the end of the question posed which forms the heading of most of the paragraphs in this submission.

2.3 The Discussion Paper is a well-researched and commendable document. Because of that standard, in a number of instances we have merely agreed with the outcome pointed to by the arguments in the Discussion Paper.

2.4 Throughout this submission Master Builders remains cognisant of the principal rationale for reform in workplace relations in the building and construction industry. This was made perfectly plain by Logan J recently where he remarked on the CFMEU's "outrageous disregard in the past and also in the present case

of Australian industrial norms".[1] This statement comes hard on the heels of other judicial comments that are of the same ilk such of those of Justice Tracey as follows:

> *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.*[2]
>
> And
>
> *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.*[3]

2.5 The reform of registered organisations alone will not re-establish the rule of law in the building and construction industry, a matter that requires the passage of the Bills before the Senate which would restore the Australian Building and Construction Commission (ABCC). These are the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013. Associated with the necessity to pass these Bills to restore the ABCC is the introduction of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 that would assist to shape appropriate and non-coercive workplace agreements and on-ground practices. Attachment A is Master Builders' submission to the Senate Standing Education and Employment Legislation Committee on the Bills to restore the ABCC. We reference that submission in a number of places in this submission.

[1] *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 a t para 49

[2] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at para 103

[3] Id at para 106

2.6 There is also the need to re-think the manner in which industrial organisations are structured and who may qualify to hold office in unions. The discussion of fines as set out below (for example at paragraph 50.2) does not take into account the disruption to the building of community infrastructure nor the costs associated with the time and resources devoted to enforcement of clearly deliberate and obdurate breaches of the law. Litigation that has been taken is just the tip of the iceberg that represents the unlawful and anti-social behaviour that the Royal Commission is uncovering.

2.7 As indicated in the Discussion Paper, there is utility in the idea that reform is able to be achieved through changes to the *Fair Work (Registered Organisations) Act,* 2009 (Cth) (RO Act). The need for the laws to change and/or be better enforced so that the culture that is evident within the CFMEU can be altered is highlighted by the fact that, as recently brought out by the Fair Work Building and Construction (FWBC) agency:

The Courts have to date fined the CFMEU and its affiliates more than $6.1 million in cases brought by the FWBC and its predecessor agencies.[4]

2.8 Master Builders has formulated recommendations on those matters we believe should be the reform priorities and these are set out in the text of this submission and collected at its commencement.

3 Master Builders Proposal for Fit and Proper Person Test

3.1 Under cover of a letter dated 23 May 2014, Master Builders provided the Royal Commission with a copy of a submission which outlines in detail our proposal that the Government introduce a new fit and proper person test in the requirements of the workplace relations legislation.

3.2 Master Builders' position in this context is maintained. We note that in paragraph 224 of the Discussion Paper, the view is adopted that "a difficulty with imposing a 'fit and proper person' test as a ground for qualification of persons standing for office in registered organisations is that it would require someone (presumably the General Manager or other regulator) to make an assessment before every election for office in an organisation." This process is labelled as "likely to be time-consuming and expensive."

[4] FWBC media release 5 July 2015 "Court Fines CFMEU and official $24,000 after official racially abuses site rep"

3.3 We disagree. Master Builders believes that most matters expressed in the test for fitness should be the subject of a statutory declaration. The issue of being a person in whom the community would have confidence could be substantiated in any such declaration by at least two independent witnesses and the necessary belief held on that basis. As close as possible to objective criteria should be applied. If subsequently it were found that the declaration was false or the referees not of a required character (eg independent, themselves not disqualifiable) then there should be the ability vested in the regulator to refer the matter to the Director of Public Prosecutions. The capacity to be elected on the basis of the declaration would not preclude subsequent disqualification as proposed in the Discussion Paper and supported by Master Builders.

3.4 In the discussion of questions 41-43 in this submission, we have not raised this difference with the stance taken in the Discussion Paper but have answered the questions in context.

4 Background – Discussion Paper

4.1 As the Royal Commission notes in the Discussion Paper at paragraph 61:

> *proposals for reform arising out of problems in union governance must take into account the fact that unless a division is to be drawn in the RO Act between the regulation of employee organisations on the one hand and employer organisations on the other, changes to the RO Act will also apply to employer organisations.*

4.2 Master Builders' member associations are either registered under the federal system or under State-based workplace relations statutes or both; none of the State based organisations is a branch of a federally registered organisation. Master Builders Australia is not an industrially registered organisation.

4.3 In the context of proposed reform to federally registered organisations, Master Builders' member associations are aware of the consequences of reform proposals on their own corporate governance and regulation. That factor has been assessed by Master Builders in responding to those questions which impinge on the reform of registered organisations. Generally, Master Builders' member associations are prepared to accept the greater disciplines imposed on them in order that the governance of union organisations is remediated.

5 Is it desirable and practicable for the Commonwealth and States to adopt uniform laws in relation to the registration, de-registration and regulation of registered organisations, akin to the *Companies Codes*? (Q1)

5.1 Master Builders notes that the vast majority of employers and employees in Australia are now governed by the *Fair Work Act,* 2009 (Cth) (FW Act). In other words the substantive workplace relations law operates so that it applies to, in the words of the Royal Commission at para 101 of the Discussion Paper, the "vast bulk" of Australian employees.

5.2 Master Builders agrees with the view that it is difficult to see why it should be necessary to have different regulatory regimes regulating registered organisations at the State and Commonwealth level. If employers and employees are in the main governed by the federal system then their representative bodies should be similarly regulated. It is certainly desirable for there to be federal laws that apply to registered organisations in the same manner. However, as is noted at paragraph 102 of the Discussion Paper regulation of industrial associations was explicitly excluded from the legislation effecting the referral of powers on workplace relations.

5.3 The practical considerations appear to Master Builders to be that the political colour of a State or Territory government may mean that the local legislation is conceived of as providing a "safe harbour" for a particular union or union branch. In other words, it seems to Master Builders that, whilst uniformity is highly desirable, the practical reality is that State governments will wish to maintain separate legislative regimes. Any solution based on co-operation and/or referral of powers would appear very difficult to achieve in practice.

6 Is it desirable and practicable for the States to refer legislative power to the Commonwealth in relation to the registration, de-registration and regulation of registered organisations, similarly to what has occurred in relation to companies under the *Corporations Act*? (Q2)

6.1 The same considerations apply as set out in the prior answer.

7 What, if any, other changes to State and Commonwealth laws are desirable and practicable to achieve greater uniformity of laws concerning the registration, de-registration and regulation of registered organisations? (Q3)

7.1 In practical terms, as there is less and less functionality at the State and Territory level because of the centralisation of workplace law in the FW Act, the need for State and Territory based industrial organisations should become less apparent. However, as indicated in paragraph 5.3 above, State and Territory governments may assist to provide "safe harbours" for, especially, union organisations. The political linkages between unions and the Labor Party, for example are set out at pages 77-94 of the Discussion Paper. It would appear that such linkages may mean that any financial rigours that might be applied federally could well be, in part, avoided through having a less stringent regulatory regime at the State and Territory level.

7.2 Whilst Master Builders notes the political likelihood of barriers to reform, the efficiency and utility of having one set of laws for registered organisations located in the federal system is compelling.

7.3 Accordingly Master Builders recommends that by whatever means possible there be Commonwealth laws established as the sole mechanism by which industrially registered organisations are regulated. That proposition is subject to the caveat that the substance should reflect the policy parameters set out in this submission.

Recommendation 1	**By whatever means possible there be Commonwealth laws established as the sole mechanism by which industrially registered organisations are regulated.**

8 Should there be a single statutory regulator of organisations registered under the *RO Act*, separate and independent from the FWC? (Q4)

8.1 Master Builders is in favour of there being one regulator with sole responsibility for the regulation of industrially registered organisations. Master Builders'

longstanding policy is to support initiatives which deliver improved governance and financial transparency in the management and conduct of registered organisations. Registered organisations should be properly accountable to members and should not be operated for particular individuals' interests. Master Builders supported the concept of a single regulator as proposed in the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 Bill) the substance of which is, in its latest emanation, now the Fair Work (Registered Organisations) Amendment Bill 2014 [No 2] introduced to the Senate on 25 June 2015[5] which was defeated in the Senate on 17 August 2015.

8.2 Master Builders supports, in principle, the establishment of an independent Registered Organisations Commission (the Commission) to be headed by a Registered Organisations Commissioner (the Commissioner). The enhanced investigation and information gathering powers of the Commission modelled on those of the Australian Securities and Investments Commission (ASIC) are commended. The current system whereby the Fair Work Commission (FWC) is the responsible agency for the RO Act is not working. This matter is evident from the 'laboured and protracted investigation of Health Services Union officials'[6] which has not yet played out to completion in the courts.[7] Master Builders agrees with the reasons for the relevant change set out in paragraphs 109-111 of the Discussion Paper.

8.3 The 2013 Bill and the successor Bills establish the Commissioner as an independent statutory office holder within the Office of the Fair Work Ombudsman and the Commission would not be a separate agency for the purposes of the *Public Service Act 1999* or the *Financial Management and Accountability Act 1997*. Therefore the staff assisting the Commissioner would be assigned by the Fair Work Ombudsman and be staff of the Office of the Fair Work Ombudsman. These arrangements may present challenges in practice. Accordingly, a separate well empowered, independent regulator is preferred. That regulator should possess all of the powers relating to industrially registered organisations that are now vested in the FWC.

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[5] http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/bills/r5422_first-senate/0000%22

[6] 'Clear need for union regulator', *The Australian Financial Review* (Sydney), 18 November 2013, 50.

[7] See for example http://www.sbs.com.au/news/article/2015/06/29/kathy-jacksons-legal-ups-and-downs

Recommendation 2	**A separate well empowered, independent regulator for industrially registered organisations should be formed.**

9 If the answer to Question 4 is yes, should a separate regulator be established, or should ASIC or some other existing body be the regulator? (Q5)

9.1 A separate regulator should be established and part of the remit of that regulator would be to change the unacceptable culture that is now manifest in some unions, particularly the CFMEU, so that law-abiding conduct is enforced as a normative value.

9.2 There would be too many dangers of the work of the independent regulator being subsumed into the other aspects of regulation currently undertaken by existing regulators, the "low-priority" argument set out at paragraph 109 of the Discussion Paper. This is part of the problem alluded to in paragraph 8.3 of this submission.

10 What, if any, additional information gathering and investigatory powers should be conferred on the General Manager (or other regulator of organisations registered under the *RO Act* as the case may be)? (Q6)

10.1 Under the 2013 Bill and the successor Bills the proposed Commissioner would have functions which include: "to promote the efficient management of organisations and high standards of accountability of organisations and their office holders to their members and to promote compliance with financial reporting and accountability requirements of the RO Act, including by providing education, assistance and advice to organisations and their members."[8] In addition the Commissioner would also have "the function of monitoring acts and

[8] Paragraph 47 EM to the 2014 No 2 Bill
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/bills/r5422_first-senate/0000%22

practices of registered organisations and their office holders to ensure they comply with the provisions of the RO Act, including as amended by this Bill."[9]

10.2 Given these functions, the 2013 Bill and successor Bills confer powers on the Commissioner which exceed those currently held by the General Manager of the FWC. For example, Part 4 of Chapter 11 would enable the Commissioner to conduct inquiries and investigations, commence legal proceedings in respect of contraventions of civil penalty provisions and refer possible criminal offences to the Director of Public Prosecutions or law enforcement agencies.

10.3 As noted at paragraph 117 of the Discussion Paper, the proposal to vest the Commissioner with powers equivalent to those held by ASIC has merit given the functions conferred on the Commissioner by the proposed law. Master Builders supports the proposed change to the law and the increased information gathering and investigatory powers that would be conferred on the Commissioner.

Recommendation 3	**Increased information gathering and investigatory powers should be conferred on the independent regulator.**

11 Should provision be made in the *RO Act* with respect to the obligations of registered organisations to make and keep minutes of committee of management meetings? If so, what form should any amendments take? (Q7)

11.1 Master Builders supports the change proposed in the 2013 Bill and the successor Bills.

11.2 As the Discussion Paper notes in paragraph 120 and as expanded at footnote 48, the proposed legislation would have mandated record keeping in respect of minutes of proceedings and resolutions of meetings of committees of management. The requirements should not in any way be able to inhibit the necessarily robust and democratic debate that occurs at such meetings.

[9] Id at para 48

12 What amendments, if any, should be made to the scope of disclosures required by s 237 of the *RO Act*? In particular, should an organisation and its branches be required to lodge information with the General Manager disclosing payments over a specified threshold (eg $1,000) made to organisation or branch? (Q8)

12.1 Master Builders supports greater transparency and disclosure being applied to the affairs of registered organisations. We support increased disclosure requirements under s237 or a similar provision in any new regime.

12.2 Master Builders supports the financial disclosure provisions of the *Industrial Relations Act, 1999 (Qld)* (Queensland Act) particularly sections 557J-557Z. Queensland Master Builders Association (QMBA) reports that this disclosure regime is manageable, inclusive of the requirement that any person is able to obtain a copy of the relevant financial disclosure report. In this regard, the report is made available via the QMBA web site.[10] This recommendation is subject to the reservations expressed about the breadth of the definition of "political purpose" expressed in section 24 of this submission.

12.3 We would commend the Queensland system of disclosure and the keeping of various registers as a way to overcome the problems which are mentioned in the Discussion Paper.

Recommendation 4	**The Commonwealth should adopt the Queensland Act's financial disclosure regime.**

13 Should s 237 statements be made available to the public? (Q9)

13.1 If the Queensland regime is adopted, the public would be able to inspect the relevant registers (see section 557I, Queensland Act) and the financial disclosure statements (s 557Z).

[10] See http://www.masterbuilders.asn.au/about-us/mandatory-reporting

14 What changes, if any, should be made to the reporting requirements of reporting units under the *RO Act*? (Q10)

14.1 A reporting unit is defined currently under section 242 of the RO Act as, in effect, the whole of the organisation or its branches. The increased disciplines required by, for example, adoption of the greater levels of transparency arising from reform based on similar provisions to those under the Queensland Act should apply to all entities.

14.2 If there are branches which are required to report, those same levels of disclosure and transparency should equally apply as to the whole of the organisation.

15 What changes, if any, should be made to the audit requirements of organisations? Should auditors be required to be registered with ASIC under the *Corporations Act*? Should additional auditor independence requirements be introduced analogous to those under the *Corporations Act*? Should some or all registered organisations be subject to auditor rotation requirements? (Q11)

15.1 The prima facie Master Builders' position is that no change in the qualifications of auditors is required. Currently, a number of Master Builders' member associations use ASIC qualified auditors. Master Builders' position is that reform should concentrate on the financial and other disclosures that should be put in place.

15.2 Master Builders does not believe that there is merit in placing different audit qualifications based on size measured by turnover or some other financial indicator. Auditors of the kind used by Master Builders' member associations provide a more-than-adequate service and appropriate investigative skills to ensure bona fide compliance. Currently, we understand that, even within smaller member associations, there are ASIC qualified auditors which undertake the audit task.

16 What changes, if any, should be made concerning the penalties for contraventions of the accounting and record keeping provisions of the *RO Act*? (Q12)

16.1 Part of the problematic issue in relation to the current civil penalty regime under the RO Act is that it does not distinguish between offences which involve false representations or statements and matters like simply failing to lodge an agreement under s151(2) through, say, inadvertence.

16.2 Master Builders recommends increased penalties which apply where there are false statements or representations made as opposed to inadvertence or negligence being at play. This recommendation derives from the notion that greater levels of culpability should garner increased penalties, in this instance a doubling compared with where there has been administrative error or inadvertence, given the nature of the organisations regulated. They are often small and comparatively unsophisticated.

Recommendation 5	**Increased penalties should apply where there are false statements or representations made as opposed to inadvertence or negligence being at play.**

17 Should contraventions of the requirements in ss 148A and 148C of the RO Act be made civil penalty provisions, rather than simply being contained in the rules of an organisation? (Q13)

17.1 Master Builders supports the changes proposed in the 2013 Bill and successor Bills that would impose a direct statutory disclosure obligation on officers and organisations similar to those under s148A and 148C.

17.2 As noted at paragraph 136 of the Discussion Paper, the relevant provision is at cl166 of Schedule 2 of the 2013 Bill.

17.3 Contravention of the provisions just discussed would give rise to a civil penalty and hence that step is similarly supported.

17.4 The questions raised in this part of the Discussion Paper raise an issue that is of concern to Master Builders. The term 'officer' is defined in the RO Act as, 'in relation to an organisation, or a branch of an organisation, means a person who holds an office in the organisation or branch'.[11] 'Office' is defined by section 9 of the RO Act which reads:

> *(1) In this Act, office, in relation to an organisation or a branch of an organisation means:*
>
> *(a) an office of president, vice president, secretary or assistant secretary of the organisation or branch; or*
>
> *(b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions:*
>
> *(i) the management of the affairs of the organisation or branch;*
>
> *(ii) the determination of policy for the organisation or branch;*
>
> *(iii) the making, alteration or rescission of rules of the organisation or branch;*
>
> *(iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules; or*
>
> *(c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:*
>
> *(i) existing policy of the organisation or branch; or*
>
> *(ii) decisions concerning the organisation or branch; or*
>
> *(d) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or*
>
> *(e) the office of a person holding (whether as trustee or otherwise) property:*
>
> *(i) of the organisation or branch; or*
>
> *(ii) in which the organisation or branch has a beneficial interest.*
>
> *(2) In this Act, a reference to an office in an association or organisation includes a reference to an office in a branch of the association or organisation.*[12]

[11] *Fair Work (Registered Organisations) Act 2009* (Cth), s 6.

[12] *Fair Work (Registered Organisations) Act 2009* (Cth), s 9.

17.5 The current meaning of 'office' in the RO Act creates a situation where employees of registered organisations may, in some circumstances and dependent on the terms of the relevant organisation's rules, be considered to be officers of the organisation. For example, persons who are employed by employer associations that would ordinarily be considered employees, are often captured as office holders under section 9(1)(c) or 9(1)(d) of the RO Act. This is because under the relevant rules these employees are entitled to participate directly in the determination of policy for the organisation. However, these employees are not elected to hold an office by members of the organisation.

17.6 The proposed new subsection 293BC(2) to be inserted into the RO Act per item 166 of Schedule 2 of the 2013 Bill will require that the branch of an organisation must disclose the remuneration of the five highest remunerated officers of the branch each financial year (similar to the requirement in current s148A(4)). As highlighted above, persons who would ordinarily be considered as employees of an organisation will be considered an officer of the organisation if the relevant rules of the organisation authorises that person to determine policy for the organisation. As such, the organisation will be required to publically disclose their remuneration if they are among the five highest remunerated persons within the organisation. Where elected office bearers are paid a salary, this should be reported. However, where personnel are engaged under a normal employer and employee relationship, consideration should be given for the salary not to be reported. If there is a proposal for disclosure of employee salaries then Master Builders recommends that these be disclosed as an aggregate figure in respect of the top 5 highest paid executives.

17.7 It is recommended that proposed subsection 293BC(2) of the 2013 Bill be amended so that only the remuneration of elected office bearers be reported and not that of appointed office bearers who operate under an employment contract. However, this latter proposition should not protect those who would seek to control policy of registered organisations under this exception. Those found to be equivalent to shadow directors should be subject to the duty of disclosure as well as all duties vested in elected office holders.

Recommendation 6	**Proposed subsection 293BC(s) of the 2013 Bill be amended so that only the remuneration of elected office bearers be reported and not that of appointed office bearers who operate under an employment contract.**

18 What changes, if any should be made to the scope of disclosures required by ss 148A and 148C (or equivalent civil penalty provisions)? In particular, should s 148C be expanded to payments made *by* related parties to an organisation? (Q14)

18.1 For the reasons set out at paragraph 137 of the Discussion Paper, we agree that payments made by related parties should be part of the relevant disclosure requirements.

19 What changes, if any, should be made to the definition of 'related party' in s 9A of the *RO Act*? (Q15)

19.1 The question contains a mis-reference. As set out at paragraph 138 of the Discussion Paper, the definition of "related party" is at section 9B.

19.2 If the concept of a related party transaction were to be replaced by a test of where a "material interest" is held by the registered organisation in an entity or vice versa (as implied in paragraph 138 of the Discussion Paper) then the concept should be defined clearly.

19.3 The definition of "material interest" is context specific. For example in the *Canberra Institute of Technology Act,* 1987 (ACT) it shapes the disclosures that the director must make, akin to the disclosure of directors who are company directors. Hence, in the current context, the requirement for disclosure of the relevant material interests should be a precursor to payments to entities where that material interest exists.

19.4 The rationale for any change to the law and the tailoring of the relevant definition must be the full and proper disclosure of all material circumstances surrounding the conflict transaction and which, thereby, achieves effective and efficient organisational accountability.

Recommendation 7	**Emphasis should be placed on full and proper disclosure of all material circumstances surrounding any potential conflict transaction.**

20 Is s 148D, or a similar provision, necessary and appropriate? (Q16)

20.1 S148D permits an application to be made for exemption from the disclosure requirements in s148C in respect of related party transactions. In the interests of full and appropriate disclosure that exemption should not be available.

21 Should an organisation be required to lodge with the General Manager of the FWC (or other regulator as the case may be) information disclosed pursuant to requirements of the kind in ss 148A and 148C? If so, should the information be publically available? (Q17)

21.1 Master Builders would not object to the relevant information being made available to the regulator or to the public.

22 Should s 190 of the *RO Act* be amended to read as follows:

An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part (in respect of any organisation or branch) for an office or position. (Q18)

22.1 Yes, the mischief against which s 190 is directed would be better addressed by applying the interpretation labelled as the "broad interpretation" in paragraph 140 of the Discussion Paper and encapsulated in the proposed wording.

23 Should there be restrictions on the use of an organisation's funds for the purpose of making political donations or incurring political expenditure? If so, what form should those restrictions take? (Q19)

23.1 The workplace relations system reflects a change away from notions of collectivism which characterised the rise and strength of the early union movement to a system that is based on individual rights. This approach to, for example, freedom of association emphasises individual interests and choices of the worker, particularly the choice not to join a trade union.

23.2 This change has been characterised by some commentators as weakening the voice of workers, for example, thus:

> *When workers group together, voice acquires a different quality of expression. This voice has greater impact and power and is more able to face other powerful voices such as capital and the State. From this, we can see the relevance and effect of restricting the locus of voice to individual rather than collective mechanisms as a means of controlling labour power.*[13]

23.3 This perspective places trade unions as separate actors, as more than their members, acting as principals in providing "balance" to the system. Master Builders prefers the characterisation of the need for democratic processes and controls within unions to be motivated by and based on what Tracey found thus:

> *The new breed of professional union managers were seen by the members as the providers of a specialist service. The right to control the officials remained in theory but in practice it was not meaningful because members were unwilling and/or unable to exercise their rights. This phenomenon may be described as 'passive representative democracy'. In its extreme form it may come perilously close to the border with enlightened despotism.*[14]

23.4 The same author goes on to say:

> *The essential elements of a system of representative democracy were said by the Court to include the enfranchisement of electors, an electoral system which gives effect to the electors' choice of*

[13] Victoria Lambropoulos and Michael Wynn *Unfair Labour Practices, Trade Union Victimisation and Voice: A Comparison of Australia and the United Kingdom* (2013) 34 Adelaide Law Review 43 at p45

[14] R.R.S. Tracey *The Legal Approach to Democratic Control of Trade Unions*, (1985) 15(2) Melbourne University Law Review 177 at 179 (original footnotes deleted)

> *representatives and the conferral of decision-making powers on those representatives' To these may be added a requirement that representatives, once elected, 'are unable to prevent opposition factions distributing propaganda and mobilizing electoral support.*[15]

23.5 Master Builders advocates that a system similar to that which applies in the UK should be put in place. We recommend that the restrictions on the use of political funds are adopted, noting that where a vote is required this must be conducted via an independently supervised secret ballot. We note that the following at paragraph 144 of the Discussion Paper fits with appropriate democratic constraints on those who may be viewed as "enlightened despots":

> *First, the furtherance of political objects needed to be approved as an object of the union at a ballot by a majority vote of members. Secondly, payments in furtherance of the political objects were to be made out of a separate fund, no member could be forced to contribute to the separate fund and contributions to the funds could not be made a condition of admission to the union.*

23.6 We endorse these matters forming the basis of the law in this country. In addition, if these democratic controls were not present then income tax exemption of the relevant entity should be withdrawn. This would be the case because monies were not being spent for the purposes of the advancing members' interests but in order to advance political interests. Members' interests do not necessarily fit with one political set of beliefs.

Recommendation 8	**Restrictions on the use of funds for political purposes be adopted.**

24 Should funds to be used by an organisation for the purpose of making political donations or incurring political expenditure be made from a separate fund containing voluntary contributions raised specifically for political purposes? (Q20)

24.1 This question is answered in the affirmative having regard to what is proposed in Recommendation 8 above. We would not recommend adoption of section 552A of the *Industrial Relations Act* 1999 (Qld) in relation the definition of a political purpose. That definition is too vague in setting boundaries. Legitimate

[15] Id at 180

lobbying processes including advertising for a policy stance expressed only by one party should be permissible. But that should be distinguished from actual support for a political party. Direct or indirect support should be proscribed. Indirect support could include the provision of staff or campaign resources. Re-examination of sections 552A and 551 of the *Industrial Relations Act, 1999* (Qld) in the context of obtaining certainty about the required boundaries in this context should occur in any proposal for the adoption of the substance of the Queensland scheme as recommended in section 12 of this submission.

24.2 The regulator should take a highly proactive stance in relation to contributions to any fund established for political purposes. The building and construction industry specific regulator, be that the ABCC or the current FWBC, has shown that coercion is unfortunately a quotidian matter in the industry. Accordingly, special attention to any campaign to solicit donations to any such fund should be audited regularly especially whilst the current unacceptable culture in the industry inures. In the alternative, consideration should be given to a period where no such fund is permitted to be established given the toxic industry culture.

25 Should ss 182(2), 183 and 186 (and consequently ss 184 and 185) of the *RO Act* be repealed? (Q21)

25.1 Master Builders maintains the view that is expressed at paragraph 151 of the Discussion Paper, a position reflected in Master Builders' response to the Royal Commission's Issues Paper on funding of trade union entities,[16] set out below. The position is presaged on other reforms relating to transparency and accountability being in place, along the lines of the reforms proposed in the 2013 Bill.

25.2 In Master Builders 11 July 2014 submission on the Issues Paper concerning funding of trade union entities we said:

> *The current exemption could continue so long as the registered organisation could show that each candidate was in full compliance with the transparency and accountability requirements set out in this submission.*

[16] http://www.tradeunionroyalcommission.gov.au/Submissions/Documents/issues-paper-3-funding-of-trade-union-elections.pdf

However, the current exemption should not be available to a registered organisation which has, since its last election, been found guilty of breaching any of the provisions of the law relating to registered organisations.

26 If the answer to the previous question is "No", should there be a requirement for an organisation with an exemption under s 186 to lodge a report with the General Manager (or other regulator of organisations as the case may be) setting out how the election was conducted? (Q22)

26.1 The additional discipline proposed that is a report being prepared relating to the conduct of the election which must be provided to the regulator is supported.

27 Should s 186 be amended to include a requirement that the General Manager (or other regulator of organisations as the case may be) is satisfied that the organisation is not in breach of other requirements of the Act such as disclosure, reporting and auditing requirements? (Q23)

27.1 Having regard to Master Builders' position as re-articulated in paragraph 25.2, we would support the proposal. The granting of such an important exemption should not be available to a non-compliant organisation.

28 What, if any, amendments should be made to the class of persons who can make a protected disclosure specified in s 337A(a) of the RO Act? In particular, should s 337A(a) of the RO Act be amended to include:

(a) a former officer of an organisation, or of a branch of an organisation;

(b) a former employee of an organisation, or of a branch of an organisation;

(c) a former member of an organisation, or of a branch of an organisation;

(d) a person contracting for the supply of services or goods, or otherwise dealing with an organisation or a branch of an organisation, or an employee or officer of such a person;

(e) any member of the public, at least where the disclosure involves a suspected criminal offence? (Q24)

28.1 S337A RO Act sets out the classes of person who are currently protected as a whistleblower under Part4A of the RO Act. As set out at paragraph 155 of the Discussion Paper, the effect of this provision is that only existing officers, employees or members of a registered organisation, or branch of an organisation, can make a protected disclosure.

28.2 Master Builders recommends that the law be changed so that at least the same class of persons are protected as provided for in the *Corporations Act.*[17] Accordingly, all of the suggested expansions at (a)-(d) of the question are endorsed. However, extending the protection to any member of the public is not supported.

[17] S1317AA(1) establishes the relevant classes

28.3 Master Builders has had experience of members of the public relying on spurious grounds to pursue direct members through the channels of Master Builders' dispute resolution/code of ethics complaints procedure. Whilst we understand that the Royal Commission seeks to alter a culture that is reinforced by lack of transparency combined with fear of reprisals if disclosure of offences or unethical conduct is disclosed, the extension to any member of the public even in relation to criminal matters is not justified. The extension is not justified because the costs of dealing with vexatious litigators would outweigh the benefits of the proposal given that a large number of registered organisations operate within the law, paying regard to its disciplines. The law should not protect those who promote false information motivated by personal grievances. This argument, with a further rationale, is taken up in section 32 below.

Recommendation 9	**The law be changed so that at least the same class of persons are given whistleblower protection as provided for in the *Corporations Act*.**

29 What, if any, changes should be made to the class of person entitled to receive a protected disclosure under s 337A(b)? In particular, should current and former officers or employees of an organisation or branch of an organisation be entitled to receive a protected disclosure? Should State and Federal police be authorised to receive protected disclosures under the *RO Act* involving suspected criminal offences? (Q25)

29.1 Master Builders continues to advocate comparable provisions to those in the Corporations law. S1317AA(2) of the *Corporations Act* permits ASIC, a company's auditor, a director, secretary or senior manager of the company, or a person authorised by the company to receive a protected disclosure. In the latter regard, a person authorised by the registered organisation should be entitled to receive the relevant disclosure.

29.2 We believe that the single regulator for registered organisations should receive the relevant disclosures. If those disclosures reveal criminal conduct then the regulator should refer those matters to the police and that communication should be similarly protected.

30 Should the penalties in s 337C(6) be increased? If so, what is an appropriate penalty for victimisation? (Q26)

30.1 Item 338 of Schedule 3 to the Corporations Act sets the penalty for breach of s 1317AC(1), (2) and (3) at 25 penalty units or 6 months imprisonment, the same penalty as for breach of s337C mentioned at paragraph 160 of the Discussion Paper.

30.2 Master Builders believes that this penalty is adequate if the measures discussed in the next section of this submission are adopted.

31 Should a person who contravenes s 337 be disqualified from holding office or otherwise being involved in the management of an organisation or branch of an organisation? (Q27)

31.1 The current remedy is considered adequate so long as the additional deterrent of disqualification becomes part of the law. As proposed in paragraph 162 of the Discussion Paper, a person convicted of an offence against s 337C should be disqualified from holding office or being involved in the management of a registered organisation.

Recommendation 10	**A person convicted of an offence against s 337C should be disqualified from holding office or being involved in the management of a registered organisation.**

32 Should a victim be entitled to seek reinstatement of employment, an injunction to restrain adverse conduct and an apology? (Q28)

32.1 It is important that victims who are punished merely for speaking the truth are given the law's protection. Master Builders notes the observations of Latimer and Brown[18] when considering the protection of whistleblowers in this country,

[18] P Latimer and AJ Brown *Whistleblower Laws: International Best Practice* (2008) 31(3) University of New South Wales Law Journal 766

words which we believe have currency in the context of those who speak up against unions:

> *There are lingering fears that reprisals remain the norm and that legal protection can only ever be symbolic, and that a whistleblower or witness protection scheme is still a poor substitute for effective disclosure laws.* [19]

32.2 Latimer and Brown also reinforce the position put by Master Builders at paragraph 28.3 of this submission, arguing that there should be a connection via employment or institutionally for whistleblower protection to be afforded, because:

> *whistleblowers' internal position renders them vulnerable and they thus require special legal and management protection as well as encouragement to come forward. Members of the public do not usually need legislative protection to report wrongdoing, especially concerning services or matters that affect them personally, because they are not normally subject to the same organisational loyalties and risks of reprisal that affect an organisation's own employees.*[20]

32.3 Master Builders supports all of the suggested additional protections for those with the vital connections just discussed. Rather than mere reinstatement (which could involve an element of ongoing victimisation) compensation should be available, as it would be in the unfair dismissal context.

33 Should the officers of trade unions be subject to statutory regulation at all? (Q29)

33.1 Master Builders supports the regulation of industrial organisations. We do so on the basis that there is asymmetrical trust in the relations between registered organisations and their members. This notion has been identified by Freiberg[21] as follows:

> *Asymmetrical trust arises from an inequality of knowledge, power or expertise of the parties or from their status. In this context, 'trust' refers to an expectation that the person with the knowledge or power in an interaction will place the interests of the weaker party before their own; that is, that they will carry out their fiduciary*

[19] Id at 767

[20] Id at 775

[21] A Freiberg *The Tools of Regulation* The Federation Press 2010

> *obligation to the weaker party or will use their expertise in a technically competent manner.*[22]

33.2 Essentially the extract in the previous paragraph reinforces the notion of a fiduciary relationship mentioned at paragraph 175 of the Discussion Paper. Whilst Master Builders also supports the arguments which are also articulated at pages 44-46 of the Discussion Paper, the argument for the need to regulate where asymmetrical trust is at issue seems most compelling. This matter has recently been put in plain language thus:

> *because unions purport to represent the voiceless and vulnerable, this implies a certain purity: rightly or wrongly, more is expected of union leaders.*[23]

34 Should the officers of registered organisations be subject to a regulatory regime which is substantially different from that which applies to company directors? If so, what form should that regime take? (Q30)

34.1 As is evident from the discussion in answer to the prior question, Master Builders' position is that the fiduciary element of the relationship between officers of a registered organisation and members should be given prominence in the rationale for applying greater levels of transparency and disclosure on registered organisations than is currently reflected in the law. This point is made in paragraph 183 of the Discussion Paper.

34.2 Those who find themselves in a position close to that of "enlightened despots", as indicated in paragraph 23.3 of this submission should be required to exercise high standards of behaviour. This point, with which we agree, is made at paragraph 183 of the Discussion Paper thus:

> *Senior trade union officials are also capable of directly wielding substantial political power. Misconduct by a trade union official may therefore have the potential of affecting not only many workers, but also third parties and indeed the broader political process. There is therefore, arguably a substantial public interest in keeping union officers to at least as high a standard of honesty, diligence and accountability as company directors.*

[22] Id at 14

[23] S Young *Unions Need Makeover to Suit Modern Times* The Age 8 July 2015

Recommendation 11	**Officers of registered organisations should be subject to a regulatory regime which requires greater levels of transparency and disclosure.**

35 Should s 283 of the *RO Act* be repealed? Alternatively, should the meaning of the phrase 'related to the financial management of the organisation or branch' be clarified or expanded? (Q31)

35.1 The legislation which saw the introduction of s283 was part of a tortuous history of proposed change to regulation of registered organisations.[24]

35.2 Master Builders supports enactment of the common law fiduciary duties in statutory form, partly because they are then able to be enforced by the dedicated regulator and are more likely to both be adhered to and enforced because of that requirement. We would support repeal of s283 so long as the statute which reformed this area of the law contained the statutory exemplification of the common law fiduciary duties.

36 Should s 286 of *RO Act* be amended by deleting the words 'what he or she believes to be'? (Q32)

36.1 Fiduciaries should not obtain an unauthorised benefit from the relationship which confers that duty and should not be in a position of conflict with those towards whom the duty is owed.[25]

36.2 Master Builders is of the view that the test of acting in the best interests of the company is not translatable to registered organisations. We agree with the propositions set out at paragraph 192 of the Discussion Paper that:

> *the members of registered organisations, particularly trade unions, have a range of different and possibly competing interests and that it would not be possible for officers to act so as to promote the interests of all of the members. Accordingly, it would often not be possible to make any assessment of what was objectively in the best interests of the organisation, and so inappropriate to impose a*

[24] Bills Digest 171 2001-2002 sets out that history http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0102/02bd171#Concluding

[25] *Breen v Williams* (1996) 186 CLR 71 at 113.

duty on the officers of registered organisations to act in objectively the best interests of the organisation.

36.3 We note that the Discussion Paper dismisses these arguments albeit saying that they have some force. We do not believe that the matter is resolved by the reference in the Discussion Paper to the requirement in the duty vested in directors of companies where there is a conflict in objectives to act fairly between different classes of members.[26] We do not believe that the proposition is sufficient to resolve issues associated with the application of the test as amended per the terms of the question.

36.4 The point in the last paragraph is made because there is also an element of subjectivity in the terms of the test in the context of registered organisations when compared with the relevant notions as applied in company law. We refer to the highly pertinent discussion in an article by Klein and Du Plessis.[27] In that article the authors argue that the legality of corporate donations is questionable unless the primary motivation is the advancement of the interests of the corporation and secondly donations must be made in a transparent, accountable way.

36.5 The article by Klein and Du Plessis bears on the considerations raised in section 23 of this submission. But it also has utility in reinforcing that the company law test is able to be boiled down to the fact that for directors "everything they do must be motivated by commercial interests."[28] That concept cannot be applied to the activities of industrial organisations. Master Builders is of the view that repeal of s286 and reliance in a statutory context on a statutory rendering of a fiduciary's duties together with greater transparency and disclosure obligations is a better route to reform than amending s286.

[26] The discussion paper cites two English authorities

[27] E Klein and J J Du Plessis *Corporate Donations, the Best Interests of the Company and the Proper Person test* (2005) 28(1) University of New South Wales Law Journal 69

[28] Id at 96

37 What changes, if any, should be made to the penalties for contravention of ss 285–288 of the *RO Act*? In particular, should the penalties be increased? Further, or alternatively, should the maximum penalty depend on the seriousness of a breach or the size or nature of the organisation in question? (Q33)

37.1 In the context of Master Builders' support for the main elements of the 2013 Bill we have already expressed support for the approach taken in that Bill.

37.2 The relevant approach is described as the third option in the Discussion Paper at paragraph 199. This means that the law would draw a distinction between serious and non-serious breaches of duty, with different maximum penalties for the two classes of breach. This is a distinction already drawn by s 1317G of the Corporations Act. It is an approach which seeks to alleviate concerns that officers of organisations would be unduly deterred from standing for office by the potential for heavy penalties being imposed for honest or trivial breaches of duty. We support this way of reforming the law.

38 Should the *RO Act* be amended by introducing a new section modelled on s 184 of the *Corporations Act* which makes an officer of an organisation or branch criminally liable for an intentionally dishonest or reckless breach of the fiduciary duties and duty of honesty in ss 286–288 of the *RO Act*? (Q34)

38.1 Master Builders supports the 2013 Bill changes in this context. The following comments are subject to the cautions raised in section 36 of this submission.

38.2 The proposed section 290A to be inserted into the RO Act per item 163 of Schedule 2 of the Bill will create a number of new prescribed offences in the RO Act. These offences relate to failing to exercise powers or discharge duties in good faith and for a proper purpose; using their position to gain an advantage for themselves or someone else, and using information obtained while an officer or employee to gain an advantage for themselves or someone else. These new offences align with Master Builders' policy and are supported.

38.3 As these offences will be prescribed offences pursuant to section 212(b) of the RO Act, any person who has been convicted of these offences would not be eligible to be a candidate for an election, or to be elected or appointed to an office in an organisation. Where a person already holds an office in an organisation, that person will cease to hold office after 28 days unless that person makes an application to the Federal Court under section 216 or 217 of the RO Act[29] for leave to hold office.

39 Should the *RO Act* be amended to include provisions prohibiting an organisation or branch indemnifying an officer of the organisation for fines or penalties imposed on the officer for conduct in connection with the organisation or branch? If so, what penalties should be imposed for contravening such a prohibition? (Q35)

39.1 This question has currency. In the context of recent contemptible behaviour by CFMEU officials, this issue has been addressed by his Hon Justice Flick. A report[30] on the particular case indicates:

> *Justice Flick said he would consider at a further hearing whether the court has the power to ensure any penalties against Bragdon and Kong "are to be paid personally, and in a manner which ensures that neither can be re-imbursed (sic) by (for example) one or other of the [CFMEU's state and federal entities].*
>
> *"If a primary purpose of imposing a penalty is deterrence, there may be little deterrence if a penalty imposed upon a union official is simply re-imbursed (sic) by his union".*

39.2 These comments were echoed in a recent Fair Work Commission decision[31] as follows:

> *There is no evidence before me of constructive efforts by the CFMEU and the CFMEUQ to ensure that its officials comply with the requirements of industrial laws. I am not aware of any legitimate explanation for the large number of contraventions. I am not aware of the extent to which, for example, the CFMEU has required its officials to pay fines imposed on its officials personally. I am not*

[29] *Fair Work (Registered Organisations) Act 2009* (Cth), s 215.

[30] "Croc hunter" might be personally liable for entry-breach fines Workplace Express 7 July 2015

[31] [2015] FWC 4544

aware of any disciplinary action taken against officials who have been found to contravene industrial laws.[32]

39.3 The deterrent effect of a fine is substantially reduced where the official is indemnified by the union. If such a prohibition were to be made law, the prohibition should be further reinforced by the union's officials who wrongfully endorsed such an indemnity in turn being personally liable for a substantial fine and/or disqualification from office.

Recommendation 12	**a) A registered organisation should be prohibited from indemnifying an officer of the organisation for fines and penalties imposed on the officer for conduct in connection with that organisation.** **b) Those officers who, in breach, authorised an indemnity in any event should be liable for a personal fine or disqualification from office.**

40 Should s 148B of the *RO Act* be replaced with a provision similar to s 191 of the *Corporations Act*? If so, who should be required to make disclosure? What, if any, exceptions should apply? (Q36)

40.1 Master Builders supports the reforms that are proposed in the 2013 Bill and successor Bills. These reforms are summarised at paragraph 209 of the Discussion Paper.

41 Should a provision similar to s 195 of the *Corporations Act* be introduced to the *RO Act*, either in respect of all or a subset of registered organisations? If so, what, if any, exceptions should apply? (Q37)

41.1 Master Builders supports this reform.

[32] Id at para 30

42 Should provisions equivalent to ss 236 and 237 of the *Corporations Act* be introduced in respect of organisations registered under the *RO Act*? (Q38)

42.1 Master Builders would support the introduction of provisions that would enable a member of an organisation to apply to the Supreme Court or Federal Court for leave to bring proceedings on behalf of an organisation. Under those provisions the Court must grant leave if satisfied that certain conditions, which are intended to operate as safeguards to frivolous or vexatious claims, are established.

42.2 The Discussion Paper at paragraph 212 indicates that "a sufficiently interested person" would also be given the ability to apply. Despite the safeguards articulated, Master Builders submits that the person must be a member or a former member in order to be vested with the right. This will be an additional safeguard on top of those envisaged. The Discussion Paper indicates that these safeguards mean a Court would only grant leave if satisfied of certain conditions eg that it is probable that the organisation would not bring the proceeding itself, that the member is acting in good faith and that there is a serious question to be tried. If leave were granted, then the proceedings would be brought and continued in the name of the organisation. Master Builders supports the right being granted so long as these safeguards are implemented.

43 If so, should specific provision be made with respect to the costs of any derivative action brought? (Q39)

43.1 Master Builders agrees with the proposition that individual union members are unlikely to have the financial capacity to bring an action on behalf of the organisation if the members had to fund the proceeding themselves.

43.2 Accordingly, the court should be given the ability to order costs be paid by the organisation or a party to the proceedings. We reiterate that this capability must be subject to the safeguards mentioned in paragraph 42.2 of this submission.

44 What amendments, if any, should be made to the definition of 'office' in s 9 of the *RO Act*? In particular, should the definition include any person who is involved in the management and control of an organisation or branch, or in accordance with whose instructions or wishes the officers of the organisation or branch are accustomed to act? (Q40)

44.1 Master Builders notes that this question arises as a result of matters put before the Royal Commission by this organisation. Accordingly we thoroughly endorse the proposal to adopt the expansion of the definition of "officer" set out at paragraph 218 of the Discussion Paper.

44.2 We refer also to the text at section 17 of this submission.

45 What changes, if any, should be made to the definition of 'prescribed offence' in s 212 of the RO Act? (Q41)

45.1 Master Builders notes the comments made in section 3 of this submission.

45.2 Master Builders answers this question on the basis that the Discussion Paper rightly points out that the scope of prescribed offences for which a person will be disqualified is relatively narrow. The scope is inappropriate when, as the Discussion Paper notes at paragraph 222 an officer of an organisation who has been convicted of criminal contempt on numerous occasions would still be entitled to be elected as an officer. Criminal trespass is not included within the list of prescribed offences.

45.3 At the least, the definition of prescribed offence should include any conviction for criminal contempt. Criminal trespass should also be included as such an offence on the basis that right of entry is a privilege which should be exercised in a lawful manner. Further the responsibilities vested in union officials require the exercise of right of entry at a level where a great deal of trust and confidence is given to those officials. In the *Victorian Association of Forest Industries* case[33], the then AIRC found that when a union official who holds a relevant

[33] PR939097 Victorian Association of Forest Industries v Construction, Forestry, Mining and Energy Union, 9 October 2003, Full Bench, Vice-President Lawler, Senior Deputy President Lacy, Commissioner Richards

permit exercises the right of entry for the purposes of investigating suspected breaches, the relevant official is discharging a function akin to that exercised by a public official. At the least these offences should be considered as equivalent to invoke the disqualification from office of an official of a registered organisation akin to the power under s 206C(1) of the Corporations Act. In other words, conviction for these offences should give the Commissioner or another person the right to apply to a court for the exclusion from office of the official. Given the toxic culture in the industry, consideration should be given to enacting automatic disqualification in this context.

45.4 The current tests about criminal conduct don't work because they are conditioned by very narrow criteria: in s212(a) an offence involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more. In section 212(d) the intentional use of violence, intentional causing of death or injury or the intentional damaging or destruction of property again is too narrow a consideration.

45.5 Given the disclosure of circumstances akin to or actual blackmail that have arisen as part of the evidence provided to the Royal Commission that matter should be capable of invoking disqualification.

46 What, if any, additional grounds of *automatic* disqualification should be added to s 215? For example, should it be a ground of automatic disqualification that a civil penalty is imposed against an officer of a registered organisation for a breach of ss 285–288 of the *RO Act*? (Q42)

46.1 Master Builders notes the comments in section 3 of this submission.

46.2 In addition to the matters discussed at paragraph 45.3 we reinforce the Commission's conclusion that repeated flouting of the law should lead to automatic disqualification. The regulator should be given the power to apply to a court to establish a pattern of conduct that would then be applied to all of those who participated in the relevant breaches of the law.

Recommendation 13	**In addition to adding criminal contempt and criminal trespass to the list of convictions where automatic disqualification from office arises, the independent regulator should be given the power to apply to a court to establish a pattern of conduct to exclude all those who participated in the relevant breaches of the law.**

47 Should provisions be introduced making it a criminal offence for a disqualified person to be involved in the management or control of a registered organisation? (Q43)

47.1 Master Builders notes the comments in section 3 of this submission.

47.2 Master Builders answers this question in the affirmative. It should also be noted that a criminal offence would arise in the context of a person falsely swearing the recommended statutory declaration discussed in section 3 of this submission.

48 Should the General Manager (or other regulator of organisations as the case may be) have the ability to apply to a court (eg State Supreme Court) for an order disqualifying a person from holding office in an organisation for a specified period? If so, in what circumstances should the court be empowered to make such banning orders (eg if the Court is satisfied that the person is not a fit and proper person to be in control of a registered organisation)? (Q44)

48.1 We have already answered this question when dealing with the regulator's power to show a court that a pattern of unlawful conduct has been exhibited which should lead to disqualification – see Recommendation 13.

48.2 The period of disqualification should be linked with the severity of the conduct. This should in part be at the discretion of the court. Where there are serious offences that discretion should not be available. Thus if a conviction for fraud or blackmail has been recorded then the period of exclusion should be the same as for spent convictions (10 years). Any reinstatement should be subject to the

same criteria on application as Master Builders has set out in section 3 of this submission ie proof that they are at that point a fit and proper person.

Recommendation 14	**Reinstatement of a person to qualify for office should be subject to the fit and proper person test proposed by Master Builders.**

49 Further, or in the alternative, should the General Manager (or other regulator of organisations as the case may be) have the power to issue a banning notice, the effect of which is to disqualify a person from holding office in a registered organisation for a period specified in the notice? If so, in what circumstances should the regulator be entitled to issue a banning notice? (Q45)

49.1 The regulator should not be vested with the power to issue a banning notice save where the conditions for automatic disqualification are proven to be in existence eg by an order or orders of the court being in evidence or a conviction being recorded.

49.2 In the circumstances indicated in paragraph 46.2 above, the court finding about repeated breaches of the law could trigger a regulator banning order.

50 Should the penalties for misuse of a right of entry permit be increased? (Q46)

50.1 Master Builders reiterates that there should be a ground of disqualification from office based on repeated flouting of the law which should include where misuse of right of entry occurs.

50.2 There should consideration to having the level of penalties reflect the now repealed *Building and Construction Industry Improvement Act, 2005 (Cth)* where the penalty levels were approximately three times greater than under the general workplace law. That level of penalty has a greater deterrent effect. This would especially be the case where individuals were required to personally

pay the relevant fine attributable to their behaviour: see also the discussion at paragraphs 3.6, 4.4, 4.5, 4.7 and 19.3 of Attachment A.

50.3 Registered organisations should be more accountable for the breaches of the law by their officials and where a pattern of conduct emerges which clearly shows the deliberate flouting of the law, the organisation should be made culpable. The organisation should be liable to pay into the court monies which must then be expended on remediating the behaviour on threat of a further substantial fine or loss of the money so attributed. This process should be repeated until remediation has occurred.

51 What, if any, other changes should be made to the *Fair Work Act* concerning right of entry permits to ensure permits are not misused? (Q47)

51.1 The Master Builders' conception of the fit and proper person test revisited in section 3 of this submission should be applied to the issue of right of entry permits. In addition, the organisation's history should be considered a relevant factor when assessing the individual's right to hold a permit. The organisation should show that it is aware of the obligations placed on its individual officers and that they have received appropriate training about those obligations which has translated to behaviour. That cannot be the case where there is a history of flouting the law.

51.2 Consideration should be given to changing the general law so that where a permit might otherwise be required for entry there is no right of invitation as if the person was a lawfully authorised visitor unless the person holds an entry permit. Where a person holds a right of entry permit all entries should be in accordance with the rights provided by that permit. At the least enterprise agreements should not be permitted to contain a "standing" right of invitation for right of entry even where there is a purported exercise of other lawful rights: see section 14 of the 2014 Building Code for an equivalent obligation.

51.3 We note that the clause against which this recommendation is framed currently appears in the CFMEU pattern agreement published in Queensland as follows:

> *33.4 A standing invitation exists for any representative of the Union covered by this agreement to enter any place where company employees or representatives are for purposes including,*

but not limited to, dispute resolution or consultation meetings but not for purposes for which a Right of Entry exists under Part 3-4 of the Fair Work Act.

41 SEVERABILITY

It is the intention of those covered by this agreement that the agreement contains only permitted matters under the Fair Work Act 2009. The severance of any term of this agreement that is, in whole, or in part, of no effect by virtue of the operation of s 253 of the FW Act shall not be taken to affect the binding force and effect of the remainder of the agreement. To the extent it is possible, all terms should be interpreted in a manner that would make them permitted matters. The right provided for in subclause 32.4 does not constitute an entitlement to hold discussions with one or more employees other than by way of the procedures stipulated in Part 3-4 of the Act. The company will comply with the requirements of the Privacy Act 1988 (Cth) in respect to any requests made under the subclause 32.7 to which the Act applies. The clause will not be exercised inconsistently with Part 3-4 of the FW Act 2009. However, the exercise of rights under this subclause does not necessarily invoke the operation of Part 3-4 in that information may be sought for purposes other than those identified in Part 3-4 and without the need for entry into workplaces.[34]

52 What, if any, changes should be made to ss 512–515 of the *Fair Work Act*? (Q48)

52.1 The *Fair Work Act* should be changed so as to facilitate adoption of the Master Builders' fit and proper person test.

52.2 Changes necessary to make an organisation accountable in accordance with paragraph 51.1 above should be introduced.

53 Should ss 512 and 513 of the *Fair Work Act* be amended to require the FWC to consider an employee organisation's past compliance with the right of entry regime when considering whether or not to grant a right of entry permit? (Q49)

53.1 The organisation's history should be considered a relevant factor when assessing the individual's right to hold a permit along the lines set out in paragraph 51.1 of this submission.

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54 Should s 513 be amended to require the FWC to take into account additional matters when assessing whether a person is a fit and proper person? (Q50)

54.1 Yes and Master Builders' test should be adopted.

55 Should s 514 be amended to prevent persons with certain criminal convictions being entitled to obtain a right of entry permit? (Q51)

55.1 Yes and this is connected to a revamped fit and proper person test as proposed by Master Builders.

56 Should s 515 be amended to prevent 'conditional' permits being granted to persons who fail the 'fit and proper person' test? (Q52)

56.1 Conditionality is not supported. If the test is failed then no permit should be issued.

57 What, if any, changes should be made to the application process by which persons may apply to hold a right of entry permit under the *Fair Work Act*? (Q53)

57.1 There should be evidence sufficient to satisfy the test proposed by Master Builders.

57.2 If the amended test is not introduced, then a permit should not be issued where there is evidence that the organisation has not applied the law or deliberately flouted the law in this context.

Recommendation 15	**The Master Builders fit and proper person test should be applied to those seeking right of entry permits.**

58 What, if any, amendments should be made to the *RO Act* concerning the general governance and regulation of 'relevant entities'? (Q54)

58.1 We support the suggestion made at paragraph 250 (c) of the Discussion Paper.

59 Should the *RO Act* be amended to impose minimum governance standards on all, or a sub-class, of relevant entities? If so, what standards should be imposed? (Q55)

59.1 The answer for the previous question is repeated.

60 Should the *RO Act* be amended to impose certain disclosure requirements on all, or a sub-class, of relevant entities? If so, what disclosure requirements should be imposed? (Q56)

60.1 This matter is dealt with as the classes of entity are next discussed.

61 Should a new section 190A be introduced to the *RO Act* making it unlawful for:

(a) any person to agree to receive or deduct from another person's salary or wage a regular payment; and/or

(b) any employment contract between a person and an organisation, or branch of an organisation, to contain a term requiring the person to make a regular payment;

to be used, directly or indirectly, for the purposes of campaigning in connection with an election for an office in an organisation, or branch of an organisation registered under the *RO Act*? (Q57)

61.1 This proposed reform is fully supported. The proposal would reinforce the individual choice that must be possessed by those who are employed by registered organisations to make their own decisions on political matters.

62 What, if any, amendments should be made to the *RO Act* concerning the funding of elections for office in organisations registered under the *RO Act*? In particular, should provisions similar to those set out above be introduced to the *RO Act*? If so, what form should those provisions take? (Q58)

62.1 We agree with the proposal set out at paragraph 271 of the Discussion Paper.

63 Should ASIC Class Order CO 02/314 be revoked or amended? (Q59)

63.1 Yes

64 Should ASIC Class Order CO 08/1 be revoked or amended? (Q60)

64.1 Yes

65 Should amendments be made to the definition of 'insurance business' and/or 'life insurance business' in the *Insurance Act* 1973 (Cth) and the *Life Insurance Act* 1995 (Cth) respectively so as bring employee benefits funds providing or purchasing insurance cover within APRA's regulatory oversight? (Q61)

65.1 Yes

66 Should amendments be made to the conditions of exemption in s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth)? (Q62)

66.1 No because the costs associated with removal of the exemption would outweigh the benefits. The costs would be borne by employers and that cost would not do other than place an inequitable burden on employers who were seeking to exercise their rights under the *Building and Construction General On-Site Award 2010* - see clause 17.4. The basis of some of the criticisms of the redundancy funds fails to understand the nature and extent of the modern award obligations which in turn have been transposed to pattern union agreements that are common in the industry. For example, there is a definition of redundancy in the modern award at clause 17.2 which includes resignation as a basis of payment.

66.2 Master Builders does not support the award definition but the Royal Commission should note that a number of the industry arrangements have arisen because of the unique characteristics of redundancy in the industry associated with the reinforcement since 2010 ie the date of operation of the modern award. An industry specific redundancy scheme is part of the safety net. The redundancy funds have a part in the safety net through the award clause referred to earlier. The modern award would need to be changed if there

was to be a payment for "genuine" redundancy only – a matter referred to in the Discussion Paper at 293 and 294.

67 Should specific legislation be introduced which subjects some or all employee benefit funds to independent governance, supervision and reporting requirements overseen either by ASIC, APRA or another regulator? If so, what requirements should be imposed? (Q63)

67.1 Given that Master Builders supports the revocation of the Orders referred to above, the issue of the application of the legislation then deals with the related duties established by that legislation.

68 Should amendments be made to ss 172 and/or 194 of the *Fair Work Act* prohibiting an enterprise agreement from containing terms requiring employers to make payments:

(a) to any employee benefit fund;

(b) to a specific employee benefit fund, or to a fund or scheme with reference to a specific employee benefit fund;

(c) to a specific employee benefit fund other than as a default;

(d) to an employee benefit fund in which an employee organisation or official of an employee organisation negotiating an enterprise agreement has an interest or from which the employee organisation or its officials derives a benefit; or

(e) to any employee benefit fund which is not an approved employee benefit fund? (Q64)

68.1 Master Builders supports disclosure rather than prohibition. Having increased governance arrangements in place would then be followed by reform that

focussed on disclosure where a bargaining agent for an enterprise agreement benefitted either directly or indirectly through the organisation with which that agent is associated.

68.2 There should remain the ability for any approved employee benefit fund to be nominated as a default fund in an enterprise agreement. This would assist administration.

68.3 Having said that Master Builders' policy is that section 172 of the FW Act should be remediated. The test in s172(1)(b) of the FW Act which talks about matters being permitted if pertaining to the relationship between an employer and a union covered by the agreement should be abolished. This is an inappropriate test to govern the breadth of agreement content especially as there is no formal relationship between an employer and a union representing the employees. Unions have a representative role rather than a direct relationship with employers. The test is hence misconceived.

Recommendation 16	**Increased disclosure should be required where a bargaining agent for an enterprise agreement benefits directly or indirectly through the organisation with which that agent is associated.**

69 Should an employee organisation bargaining for an enterprise agreement be required to disclose financial benefits, whether direct or indirect, that would be derived by the employee organisation from the terms of a proposed enterprise agreement? If so, what should the consequences be if an employee organisation breaches the disclosure requirements? (Q65)

69.1 As indicated in the prior answer disclosure is the key to reform in this area.

69.2 The consequences should be linked with culpability. An inadvertent non-disclosure should attract lesser consequences than deliberate avoidance of the obligation to disclose. The latter abuse should be linked to the criteria as a fit and proper person ie where deliberate failure to disclose is made out the person

or persons who perpetrated the abuse should be disqualified from holding office.

70 Why should ss 32C(6), (6A), (6B), (7) and (8) of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) not be repealed? (Q66)

70.1 Master Builders supports freedom of choice.

70.2 For administrative convenience, default funds should continue to be permissible in industrial instruments.

71 What, if any, amendments should be made to ss 172 and/or 194 of the *Fair Work Act* concerning the permissible terms in an enterprise agreement in relation to superannuation funds? (Q67)

71.1 We refer to the prior answer.

72 Should registered organisations, and any relevant entities, be required to disclose publicly information in respect of all payments made to them exceeding a monetary threshold? (Q68)

72.1 The requirement to disclose should be in respect of donations, as was indicated by the Cole Royal Commission per the extract at paragraph 326 of the Discussion Paper.

72.2 We supported Recommendation 147 at the time of the release of the Cole Royal Commission report but noted that the recommendation should be explicit about it covering a donation request from an entity related to the union. We continue to support that recommendation as set out:

> *The Building and Construction Industry Improvement Act require clients, head contractors and subcontractors to notify promptly the Australian Building and Construction Commission of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation.*

73 Should specific legislation be introduced making it a criminal offence for a person to give or receive a corrupting benefit payment to an organisation, an officer of such an organisation, or a related party of such an organisation? If so, should the legislation take the form of the draft provisions set out? (Q69)

73.1 Master Builders supports laws which change entrenched corrupt behaviour. The proposal would be of that kind and is supported.

74 Should specific legislation be introduced allowing a person who has suffered loss as a result of the giving or taking of a corrupting benefit to recover damages for the loss caused? (Q70)

74.1 We agree that this proposal is an appropriate corollary to the offence proposed in the prior question.

75 Should there be a regulatory body, separate from the Office of the Fair Work Ombudsman, tasked with the role of investigating and enforcing the *Fair Work Act* and other relevant laws in connection with the building industry participants? If so, what should that body be called? (Q71)

75.1 Master Builders supports the reintroduction of the ABCC and industry specific legislation as detailed in Attachment A. We do so on the basis set out at paragraph 357 and 358 of the Discussion Paper as well as for the range of reasons isolated by the Cole Royal Commission.

75.2 As stated, Attachment A is Master Builders submission to the Senate Committee investigating the terms of the Bills required to re-establish the ABCC.

76 What investigatory and information gathering powers should be possessed by the body with the role of investigating and enforcing the *Fair Work Act* (and possibly other relevant laws) in connection with building industry participants? (Q72)

76.1 We refer to our answer to question 71 in section 75 above.

77 Should there be specific industrial laws that apply only in respect of building industry participants (eg laws prohibiting unlawful pickets)? (Q73)

77.1 Yes as per the arguments set out in Attachment A.

77.2 Section 16 of Attachment A deals with this issue.

78 Should the penalties for contravention of industrial laws by building industry participants (eg coercion, unlawful industrial action) be greater than those which currently apply under the *Fair Work Act*? (Q74)

78.1 Yes for the reasons set out in Attachment A.

78.2 If the industry specific legislation is not passed, then the penalties under the FW Act should be increased as a matter of urgency.

79 Should Commonwealth legislation be introduced for the more effective enforcement of injunctions and other court orders granted to restrain unlawful conduct by building industry participants? If so, what form should that legislation take? (Q75)

79.1 Master Builders supports the reforms outlined at paragraphs 361 and 362 of the Discussion Paper.

80 Should the penalties for breaches of ss 45D and 45E of the *Competition and Consumer Act* be brought into line with the penalties for other contraventions of Pt IV of that Act? (Q76)

80.1 Master Builders has expressed support for the Harper Review recommendation that would see the penalties for breach of s45D and 45E equalised with other Part IV offences. We support the proposal in the current context.

81 In principle, should secondary boycott conduct engaged in for a market sharing purpose be proscribed cartel conduct for the purposes of the *Competition and Consumer Act*? (Q77)

81.1 In principle, we agree but the design of the particular law should not bring with it a risk for those who might unknowingly be in breach.

82 Should the *Competition and Consumer Act* be amended to prohibit a person (A) in competition with the target of a secondary boycott (C) supplying a product or service to another person (B) in substitution for a supply by C where A knows (or reasonably suspects) that B's decision to substitute is part of a secondary boycott against C (knowing supply)? Alternatively, should persons in competition with the target of a secondary boycott be prevented from knowing supply unless they have first notified the ACCC (or appropriate regulator) of their knowledge of the secondary boycott? (Q78)

82.1 The second option is preferable given that this will cause the least operational disruption but would provide the ACCC with information on which it may take action.

83 Which regulatory authority should investigate and prosecute secondary boycott contraventions? What information gathering and investigatory powers are needed by the regulator to achieve those functions? (Q79)

83.1 Master Builders' policy is that for the building and construction industry the ABCC with all of the powers proposed in the current Bills should have concurrent jurisdiction with the ACCC. This will assist with timely enforcement and also enable information gathered as part of a building industry investigation to be used in a range of causes of action.

83.2 We note that the Bills before Parliament do not vest the ABCC with jurisdiction as proposed in the prior paragraph. As stated, the current Bills before Parliament the ABCC is not vested with the jurisdiction to cover secondary boycotts, but an amendment to vest them with the appropriate function would be appropriate. In our view that amendment should make it clear that the ACCC does not in fact possess complete jurisdictional authority but its jurisdiction would be constrained by the definition of 'building work' in the principal statute reinstating the ABCC. This would bring the statute under which the new ABCC will operate more in line with the original Cole Royal Commission envisaged remedies. It would also stop secondary boycott conduct which is used as an everyday tool by unions in the industry from being the potent weapon it is: a weapon that has the capacity to send Master Builders' members to the wall or inflict sufficient damage to warrant complicity.

Recommendation 17	**That the Bills currently before Parliament be amended so that the ABCC is vested with the jurisdiction to cover secondary boycotts.**

84 Is there a need for Australia to adopt RICO-style laws to combat unlawful activities in the building and construction industry, or more generally? If so, what form should those laws take? (Q80)

84.1 Whilst Master Builders understands the basis of the reform proposal, more detail on the effect of the application and greater research on the potential

effects in this country beyond the activities of the unions under scrutiny via the current inquiry should be undertaken.

84.2 The relevant research could be undertaken by, for example, the Department of Employment and issued as a Discussion Paper for stakeholder comment.

85 Conclusion

85.1 Master Builders commends the Royal Commission for its detailed and well researched Discussion Paper.

85.2 Master Builders' recommendations, together with the additional requirements for transparency and disclosure are reforms that require urgent attention.

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