

Master Builders Australia

Submission to the Productivity Commission

on

the Review of the

Workplace Relations Framework

Issues Papers 1-5

11 March 2015



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## RECOMMENDATIONS

<p><b>Recommendation 1</b> (see page 8)</p>	<p>That recommendations 13.1 and 13.2 as follows from the Public Infrastructure report be included in the current report's recommendations to Government.</p> <p>“Australian, State and Territory governments should adopt codes and guidelines with an essentially similar framework to the Victorian Code of Practice for the Building and Construction Industry for their own major infrastructure purchases.</p> <p>The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments.</p> <p>The Australian Government should:</p> <ul style="list-style-type: none"> <li>• increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry; and</li> <li>• ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime.”</li> </ul>
<p><b>Recommendation 2</b> (see page 11)</p>	<p>Delete s3(c) of the FW Act and give greater emphasis to producing productivity.</p>
<p><b>Recommendation 3</b> (see page 14)</p>	<p>That the ABCC Bills be passed by the Parliament and that their content is endorsed by the Productivity Commission as suitable for the building and construction industry.</p>
<p><b>Recommendation 4</b> (see page 16)</p>	<p>That weekly hours under the NES be able to be averaged over up to 52 weeks.</p>
<p><b>Recommendation 5</b> (see page 20)</p>	<p>That payment for public holidays only be available where an employee is providing service as defined under s22 FW Act.</p>
<p><b>Recommendation 6</b> (see page 20)</p>	<p>That sections 66 and 112 of the FW Act be repealed.</p>
<p><b>Recommendation 7</b> (see page 21)</p>	<p>That section 130(2) of the FW Act be repealed.</p>
<p><b>Recommendation 8</b> (see page 25)</p>	<p>That modern awards be further rationalised as to content and that they sunset after a period of 5 years.</p>
<p><b>Recommendation 9</b> (see page 26)</p>	<p>The system should transition over the period where Awards were reduced so that at the time of the sunseting of awards there was one minimum wage rate for juniors and one minimum wage rate for adults in place.</p>
<p><b>Recommendation 10</b> (see page 28)</p>	<p>That there should be more robust measures in workplace law to discourage pattern bargaining, inclusive of a proscription on the grant of a protected action ballot order where pattern bargaining has occurred or is occurring.</p>
<p><b>Recommendation 11</b> (see page 29)</p>	<p>That s176(1)(b) of the FW Act be repealed and that bargaining representatives should be appointed in writing by any employee eligible to be involved in the bargaining process.</p>

<b>Recommendation 12</b> (see page 34)	That employer greenfields agreements be reinstated.
<b>Recommendation 13</b> (see page 36)	That the exception at s412(2) be removed, such that a person cannot be held to be genuinely trying to reach an agreement if they are pattern bargaining.
<b>Recommendation 14</b> (see page 42)	That the workplace relations system permits IFAs to be about any matter pertaining to the employment relationship and that a provision to that effect should be a mandatory term of an enterprise agreement.
<b>Recommendation 15</b> (see page 45)	That an exemption from unfair dismissal should be introduced for businesses employing fewer than 20 people.
<b>Recommendation 16</b> (see page 47)	That an unfair dismissal remedy should not be available where an employer has a valid reason for the dismissal and has provided appropriate written warnings.
<b>Recommendation 17</b> (see page 47)	The phrase “termination of employment”, should be used to describe what is now outlined in Part 3-2 of the FW Act.
<b>Recommendation 18</b> (see page 49)	Laws defining a valid reason for redundancy should be confined to termination for reasons based on the operational requirements of the employer’s business.
<b>Recommendation 19</b> (see page 55)	Section 347(b)(v) of the FW Act should be removed, as it unfairly protects union members from legitimate disciplinary action in relation to their behaviour as employees.
<b>Recommendation 20</b> (see page 55)	The test for whether adverse action has occurred should require a comparison of whether the action taken against the employee concerned would have also been taken against other employees in the same circumstances.
<b>Recommendation 21</b> (see page 55)	Section 360 should be amended so that an employer will be held to have taken action for a particular reason only if it is the sole or dominant reason.
<b>Recommendation 22</b> (see page 55)	Adverse action applicants must show reasonable grounds for their application during conciliation conferences before the FWC.
<b>Recommendation 23</b> (see page 55)	Access to an interim injunction prior to proceeding to conciliation should be abolished.
<b>Recommendation 24</b> (see page 55)	The reverse onus of proof provision required in adverse action cases should be amended to provide an exemption for small business employers.
<b>Recommendation 25</b> (see page 56)	Consideration be given to repealing the anti-bullying laws and focussing resources on this subject on to WHS regulations.
<b>Recommendation 26</b> (see page 60)	That the ABCC be vested with concurrent jurisdiction to combat secondary boycott activity in the building and construction industry.

<p><b>Recommendation 27</b> (see page 60)</p>	<p>Master Builders recommends that the law should be changed to ensure that an enterprise agreement which prevents, hinders or restricts a business in acquiring goods or services from, or supplying goods or services to another business does not fall within the exemption in section 51(2)(a) of the Competition and Consumer Act.</p>
<p><b>Recommendation 28</b> (see page 62)</p>	<p>Master Builders recommends no change to the sham contracting laws.</p>
<p><b>Recommendation 29</b> (see page 67)</p>	<p>In summary Master Builders' recommendations are that:</p> <ul style="list-style-type: none"> <li>• commercial law should categorically govern independent contractors with provisions which regulate their contract via workplace agreements made unlawful;</li> <li>• a voluntary negative licensing registration system should be introduced;</li> <li>• individuals may seek registration as a contractor;</li> <li>• the system could be underpinned by requiring applicants to provide evidence from a legal practitioner or other suitably qualified professional that the circumstances of the worker have been assessed as those of a contractor;</li> <li>• provide registration only in relation to the contractor's circumstances as assessed by the relevant professional;</li> <li>• provides registration that is time limited; and</li> <li>• has the consequence of individuals being precluded from registration, where misuse of the system occurs.</li> </ul>
<p><b>Recommendation 30</b> (see page 70)</p>	<p>Simpler transfer of business rules be introduced.</p>
<p><b>Recommendation 31</b> (see page 74)</p>	<p>That the Queensland model of 24 hours' notice for investigative entry under model work health and safety laws is adopted nationally.</p>
<p><b>Recommendation 32</b> (see page 76)</p>	<p>That the law relating to right of entry better reflect the fact that union officials are exercising functions akin to those exercised by public officials.</p>
<p><b>Recommendation 33</b> (see page 76)</p>	<p>That the name of the principal statute be changed to better reflect its functions.</p>

## 1 Introduction

- 1.1 This submission is made on behalf of Master Builders Australia Ltd.
- 1.2 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 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.3 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 December 2014, the Government released the Terms of Reference for the inquiry into Australia's workplace relations framework being conducted by the Productivity Commission. On 22 January 2015, five Issues Papers were released by the Commission for feedback. The closing date for submissions to the first stage of the Commission's inquiry is 13 March 2015 and the inquiry report is expected to be handed to the Government in November 2015. This inquiry represents the opportunity for a major review of Australia's workplace relations system by an agency that operates through transparent and independent processes. The inquiry is commended.
- 2.2 This submission provides Master Builders' perspective on the matters raised in all Issues Papers. The matters dealt with are addressed in the sequence raised via the Issues Papers. Not all topics are addressed. Before discussion of the matters dealt with in the Issues Papers, we set out Master Builders' fundamental principles that guide our assessment of the workplace relations system. We also discuss some of Master Builders' fundamental concerns about the issues associated with industrial relations in the building and construction industry. That discussion is sparked by the exclusions from the



inquiry noted in Issues Paper 1. Changes proposed to the broader workplace relations framework would, we submit, be contemporaneous with the required building and construction industry workplace reform. The reforms proposed more broadly, it is emphasised, would not obviate the need for specific industry reform. The detailed recommendations that would underpin the industry specific reform are not set out in this document. They are in large part the recommendations made by the Cole Royal Commission, a matter only touched on in this submission.

### **3 Fundamental Principles**

3.1 There are five essential principles that underpin Master Builders' policies on workplace relations:

1. Respect for and adherence to the rule of law must guide workplace relations in the building and construction industry.
2. Independent contractors' legislation that preserves and enhances the subcontracting system must be maintained and strengthened.
3. A workplace bargaining system in which employers and employees may freely enter into appropriate and lawful workplace agreements underpinned by a simple safety net of conditions must be adopted.
4. There should be only one industry Award that is not overly prescriptive, an Award that permits necessary divergence from the National Employment Standards on demonstrated evidence; the need for a dual safety net of statutory conditions as well as 122 modern awards is questioned. One fair safety net of minimum conditions should suffice.
5. The workplace relations system should focus on cooperative relations between employees and employers. It should emphasise the resolution of any disputes at the workplace level without the need for external party involvement.

3.2 The last point needs clarification in the context of Master Builders' call, re-articulated in this submission, for a separate, well empowered independent watchdog to be established for the building and construction industry. To the fullest extent possible the workplace relations system must provide structures

where employers and employees obtain solutions to issues that arise from conflict via negotiation at the workplace rather than through the involvement of third parties. This is a different proposition from, and should not be confused with, third party intervention to create the system by which the rule of law operates. The third party envisaged as the industry's watchdog was devised as an entity which is not subject to the same pressures as participants in the industry, a matter discussed further below. It is this latter point which is one of the four platforms for reform in the building and construction industry that was posited by the Cole Royal Commission and which Master Builders fully supports as necessary planks of reform for the building and construction industry.

- 3.3 After an extensive investigation into the building and construction industry the Cole Royal Commission derived four fundamental principles for the reform of workplace law in the building and construction industry. Master Builders remains steadfast to these principles. As stated in the Cole Royal Commission Report:

*There are four tenets that should drive reform and cultural change.*

*First, there should be as clear a definition as possible of that industrial activity which is permitted, and that which is not.*

*Second, the rule of law should be re-established so that conduct which is not permitted attracts serious consequences. Penalties for breaches must be increased substantially.*

*Third, those who engage in unlawful conduct or practices should bear the loss suffered by other participants in the industry. A quick, cheap and effective method of establishing and imposing liability for that loss must be established.*

*Fourth, it should become widely known and accepted within the industry that there is an independent body, not subject to the pressures applicable to participants in the industry, which will, with vigour, uphold the law and prosecute any participant in the industry who breaches.<sup>1</sup>*

- 3.4 If these propositions are not able to be made law for the building and construction industry specifically, consideration should be given to their adoption more broadly. The technical considerations which are set out in this submission are made in order to contend for changes in the workplace

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<sup>1</sup> Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry February 2003*, [www.royalcombcgi.gov.au](http://www.royalcombcgi.gov.au) Volume 11, page 11, paragraphs 34 – 39 and 42. Accessed 12 February 2015

relations system that would mean the system better reflected the five over-riding policy principles articulated in paragraph 3.1 of this submission. The four tenets that underline the necessary cultural change in the building and construction industry relate in particular to the need for measures so that adherence to the rule of law is better achieved.

## 4 Issues Paper 1 – *Workplace Relations Framework: The Inquiry in Context*

### 4.1 Scope of the Inquiry – Rule of Law Issue Raised

4.1.1 At page 6 of Issues Paper number 1, two exclusions relevant to this submission are noted. The first is:

*governance arrangements of individual unions (and concerns about specific instances of corruption and other criminally unlawful conduct by employers, employees and unions in the WR system).*

4.1.2 Whilst Master Builders will be renewing engagement with the Royal Commission into Trade Union Corruption and Governance (Heydon Royal Commission) in 2015, where the excluded issues will be further examined, some of the issues raised in the context of corruption and criminality are relevant to the current inquiry. This is highly relevant in the context of the CFMEU eschewing adherence to the rule of law as established in the workplace relations context. This has led the Heydon Royal Commission to find the overall legal system inadequate:

*The defects reveal a huge problem for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years (by the CFMEU)... will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice.<sup>2</sup>*

4.1.3 In the building and construction industry adherence to the rule of law is a factor that directly affects labour market risk and hence productivity; this is why it is Master Builders' main policy priority to have re-established the Australian Building and Construction

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<sup>2</sup> <http://www.tradeunionroyalcommission.gov.au/reports/Pages/default.aspx> at para 260 p1114

Commission (ABCC), as a watchdog that assists in the independent application of the rule of law in the building and construction industry. The rule of law must be observed, and the finding of the Heydon Royal Commission referred to in the previous paragraph links to a more generalised but relevant proposition.

4.1.4 As Singleton from the Cato Institute has said:

*(L)aw in our society serves an essential practical function - that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.<sup>3</sup>*

4.1.5 Lack of certainty caused by unlawful industrial action, and the other manifestations of the defiance of the rule of law seen in the conduct of the CFMEU, drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and effective net present values of projects lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system that seeks and extracts an unjustified economic rent, then governments are obliged to act. This action protects the community by ensuring that the cost of infrastructure including schools and hospitals is not inflated by this factor. Industrial relations law should not only provide fairness but assist to ensure that legal certainty is not undermined by unlawful industrial action and other conduct of the kind evidenced in the findings of the Cole Royal Commission and again in the interim report of the Heydon Royal Commission. The Productivity Commission has called for evidence based submissions. Master Builders can offer no better evidence than that provided by two Royal Commissions.

4.1.6 The second exclusion relevant to this submission is:

*Institutional arrangements in the construction industry, which were addressed in the Commission's inquiry into Public Infrastructure.*

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<sup>3</sup> S Singleton, *Capital Markets: The Rule of Law and Regulatory Reform* 13 September 1999  
<http://www.cato.org/pubs/wtpapers/990913catorule.html> Accessed 12 February 2015

4.1.7 Master Builders understands that the Productivity Commission seeks to exclude the discussion of institutional arrangements that affect the building and construction industry after the intense analysis that is incorporated in the findings of the report entitled Public Infrastructure.<sup>4</sup> The findings of that report, however, especially Recommendations 13.1 and 13.2, reinforce Master Builders' policy positions as set out in the prior discussion in this submission. They vindicate Master Builders' primary policy position of calling for the re-introduction of the ABCC and the underpinning laws that were in place during the currency of the *Building and Construction Industry Improvement Act, 2005 (Cth) (BCIIA)*. In short the two most critical recommendations from the Public Infrastructure inquiry that we fully support are:

*RECOMMENDATION 13.1*

*Australian, State and Territory governments should adopt codes and guidelines with an essentially similar framework to the Victorian Code of Practice for the Building and Construction Industry for their own major infrastructure purchases.*

*The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments.*

*RECOMMENDATION 13.2*

*The Australian Government should:*

- *increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry.*
- *ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime.*

4.1.8 As Master Builders submitted to the Productivity Commission in the context of its inquiry into infrastructure, builder concerns about the constraining influence of industrial relations on business activity fell markedly with the introduction of the BCIIA and establishment of the ABCC. The Productivity Commission reproduced material from Master Builders' national quarterly survey data in its report into Public Infrastructure, stating:

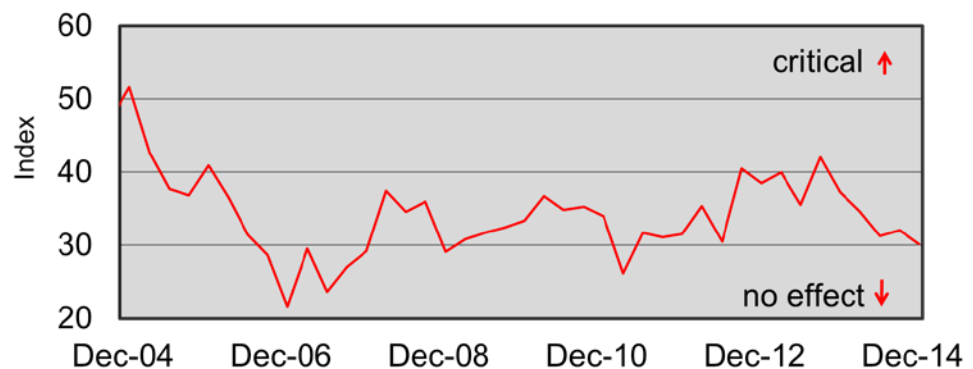
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<sup>4</sup> <http://www.pc.gov.au/inquiries/completed/infrastructure/report> Accessed 12 February 2015

*In January 2004, more than 40 per cent of businesses perceived IR as a critical or large constraint, while at the other scale of severity, 45 per cent saw it as of slight or no effect. In April 2014, 20 per cent of the businesses considered IR to have a large or critical effect, while around 65 per cent perceived no or slight impacts.<sup>5</sup>*

- 4.1.9 Respondents to the survey are asked to indicate the degree to which they perceive industrial relations is acting as a constraint on their business. The survey data over the decade from 2004 show that concerns about the constraining influence of industrial relations on business activity weakened rapidly until the end of 2006, and have been relatively stable since (Figure 1).

**Figure 1: Are Industrial Relations Constraining Activity?**



Source: Master Builders National Survey of Building and Construction, December Quarter 2014

- 4.1.10 A dramatic fall in the index occurred in 2005 and 2006 associated with the introduction of the BCIIA and establishment of the ABCC. The index rose in the first three quarters of 2008 as industrial relations increased as an issue for builders then eased back in the wake of the G.F.C. The index oscillated around 30 to 32 for three and a half years to the middle of 2012 before elevated readings in the next six quarters. The sharp rise in the index experienced in the second half of 2012 was primarily due to major industrial relations disputes including the Grocon blockade in Melbourne and the Children's Hospital project in Brisbane. In the December quarter 2014, the index continued to trend down, recording a reading of 30.2.

<sup>5</sup> Id at Vol 2, p.542

- 4.1.11 Although the degree to which the benefits of workplace reform show up in aggregate construction industry productivity is a matter of debate, there is agreement that workplace relations improvement (establishment of the Building Industry Taskforce and the ABCC) had net positive productivity and cost impacts:

*The Commission's view is that given the case studies, industry surveys and other micro evidence, there is no doubt that local productivity has been adversely affected by union (and associated employer) conduct on some building sites, and that the BIT/ABCC is likely to have improved outcomes.<sup>6</sup>*

- 4.1.12 Whilst the Productivity Commission has sought to exclude consideration of these matters, we believe that it would be worthwhile for the Commission to at least allude to the relevant recommendations as being critical to building and construction industry industrial relations as a distinct matter. In other words, recognition that there are additional and contemporaneous reforms required in the building and construction industry that are separate from any other reform proposals the Commission derives would be useful. The utility of this approach is given weight in the context of the Victorian Code referred to in Recommendation 13.1 having been abolished by the new Andrews Government in Victoria. On 18 January 2015, the Victorian Government announced the abolition of the *Victorian Code of Practice for the Building and Construction Industry* (Victorian Code) and its monitoring body, the Construction Code Compliance Unit.<sup>7</sup>

<p><b>Recommendation 1</b></p> <p><b>That recommendations 13.1 and 13.2 as follows from the Public Infrastructure report be included in the current report's recommendations to Government.</b></p> <p><b>“Australian, State and Territory governments should adopt codes and guidelines with an essentially similar framework to the Victorian Code of Practice for the Building and Construction Industry for their own major infrastructure purchases.</b></p> <p><b>The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments.</b></p>
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<sup>6</sup> Id Vol 2, p.543

<sup>7</sup> “Abolition of Vic Construction Code Creates Urgency for IR Reform” – 12 February 2015. See more at: <http://sourceable.net/abolition-victorian-construction-code-creates-urgency-ir-reform/#sthash.XlmpgPUg.dpuf> and Master Builder's media release dated 6 February 2015: [Abolition of Victorian Building Code Regrettable](#)

**The Australian Government should:**

- **increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry.**
- **ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime.”**

## **4.2 The stated objectives of Australia’s workplace relations system**

4.2.1 Master Builders’ policy emphasis is on industrial relations reform that must deliver productivity benefits and our submissions in that regard received great scrutiny during the holding of the Public Infrastructure inquiry. Industrial relations reform must be a high priority to meet Australia’s current and future economic needs. This requires productivity based reform that includes assessment of the effectiveness of current labour market policy and regulation and reforms that redress the economic vulnerability of contractors against unlawful industrial action, a matter taken up in this submission. In this context the reference to the promotion of “productivity and economic growth for Australia’s future economic prosperity” as set out in s3(a) of the *Fair Work Act, 2009* (Cth) (FW Act) must be given greater prominence in shaping the terms of the law.

4.2.2 Whilst some controversy attends whether or not industrial relations affects productivity, there can be little doubt that where it entrenches outmoded work practices and self-serving union-based interests, it damages productivity. As for example isolated by Hancock et al:<sup>8</sup>

*Productivity, in our view, should be regarded as a long-term rather than a short-term policy issue. From that perspective, industrial relations, if relevant, are likely to be so for two main reasons. **One is that resistances to change in the areas of production, numbers of workers, technology and work practices are likely to act as a brake on productivity growth. This is generally understood. Disagreements arise with respect to the means of releasing the brake.***<sup>9</sup>

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<sup>8</sup> K Hancock, T Bai, JFlavel & A Lane, *Industrial Relations and Productivity in Australia*, 29 June 2007, National Institute of Labour Studies, Flinders University, Adelaide, South Australia <http://www.flinders.edu.au/sabs/nils-files/reports/Productivity.pdf>

<sup>9</sup> Id at p34



- 4.2.3 The extract just quoted goes on to indicate that an identified policy for releasing the brake is to “disempower employees.” This disempowerment is taken to equate with reducing the role of third parties. These are named by the authors as “unions and arbitrators.” However, reducing the role of third parties especially those which act in their own interests, eschewing their representational role for separate aims as has been demonstrated in the behaviours of the CFMEU, can only empower employees.
- 4.2.4 External party involvement is not a necessary corollary of empowerment; the available research suggests that “an integrated approach to employee voice that is characterised by multiple, mutually reinforcing channels”<sup>10</sup> provides benefits to organisations. This includes direct employee voice but also the voice of trade unions in fulfilling a proper representational role. Employers and employees raise employee job satisfaction where they act co-operatively and enter into agreements that focus on the enterprise as a venture that delivers greater benefits to participants. This has been demonstrated to occur where innovative work practices and high employee involvement, through direct voice, are in place.<sup>11</sup> Master Builders’ experience is that employees are empowered when they have a direct voice. This does not occur optimally through institutions which are directed towards centralisation, such as unions and the third party umpire.
- 4.2.5 In essence the main problem with the FW Act at the basic level of achieving a diverse range of objectives is the tension between those who equate empowerment of employees with collectivism, with the ascendancy of third parties and the Fair Work Commission, and those who want alternative models of representation and a disempowerment of the third parties who have traditionally dominated the workplace relations landscape: unions, employer associations and the tribunal (under whatever name). Whilst the FW Act has a number of mechanisms which recognise that

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<sup>10</sup> A Pyman “A Comparison of the Effectiveness of Employee Voice Arrangements in Australia” (2005) Monash University at p13

<sup>11</sup> Holland, P., Pyman, A., Cooper, B., Teicher, J., 2011, “Employee voice and job satisfaction in Australia: The centrality of direct voice”, Human Resource Management [P], vol 50, issue 1, John Wiley & Sons Inc, Hoboken USA, pp. 95-111

individual empowerment is legitimate (for example by vesting individuals with the right to not be dismissed unfairly and to enter into Individual Flexibility Agreements (IFAs)) objective 3(c) of the FW Act is instructive of the philosophy against the recognition of individual agreements and a statement that is dubious, particular in the context of a competing object of a statute with the significance of the FW Act. It is as follows:

*Ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.*

4.2.6 This objective is misconceived at a number of levels. First, it confuses the form of an agreement with its substance: fairness does not follow form and in that sense seems to reflect political rather than substantive concerns. Secondly, it seems to be at odds with the fundamental notion underpinning employment law which is that each individual has a contract of employment. Why making that common law proposition a matter of statute should be inherently unfair is the relevant question in the context of such a political object. Thirdly, it ignores the existence of IFAs which are statutory arrangements where there is an ability to modify the otherwise guaranteed safety net, noting that an IFA has effect as if it were actually a term of a modern award or enterprise agreement and can be enforced as such.

4.2.7 Accordingly, Master Builders would recommend the deletion of section 3(c) of the FW Act. Other changes to the objects that would reflect the required greater concentration on productivity could be considered in the context of the substantive changes that Master Builders seeks and recommends in this submission.

<b>Recommendation 2</b>	<b>Delete s3(c) of the FW Act and give greater emphasis to promoting productivity.</b>
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### **4.3 The historical context: how the WR system evolved seems important**

- 4.3.1 The previous discussion drew attention to the particularity of the requirements for workplace relations measures that apply in the building and construction industry. The Cole Royal Commission comprehensively analysed the history of workplace relations in the building and construction industry.<sup>12</sup> Its recommendations and findings remain valid. A number of the findings from Cole have been reinforced by the current interim report of the Heydon Royal Commission.
- 4.3.2 Master Builders commends the content of the prior law that governed the building and construction industry that is the BCIIA. The current Bills before Parliament that would emulate the content of the BCIIA are fully supported that is the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the ABCC Bills).

### **4.4 What might need to change?**

- 4.4.1 Master Builders refers to the evidence in and the findings of the Productivity Commission's Public Infrastructure inquiry. We refer to the evidence and findings (albeit interim in respect of the Heydon Royal Commission) of the Cole and the Heydon Royal Commissions. As indicated above, the principal change that should emanate from these findings is that the ABCC Bills should be brought into law and the building and construction industry should be governed by workplace laws that are aimed at restoring the rule of law.
- 4.4.2 Other changes to the system that would advance the principles set out at paragraph 3.1 of this submission will be recommended as the discussion in this submission follows the structure of the Issues Papers.

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<sup>12</sup> See in particular M Thompson and the CSIRO Discussion Paper 7 "A History of Recent Industrial Relations Events in the Building and Construction Industry" 2002 <http://royalcombci.gov.au/docs/DP7.PDF>

## 4.5 The Productivity Commission's approach

4.5.1 We highlight two criteria that are in the list on page 16 of Issues Paper 1. The list comprises the criteria the Productivity Commission will apply in its examination of the workplace relations system. The two selected criteria are especially important when assessing the ABCC Bills. The Bills would have the effect of curtailing the abuse of power that adds significantly to social and economic costs and would achieve the outcome of ensuring that the behaviour of building unions is "consistent with community norms," particularly adherence to the rule of law. There are many strong points that may be extracted from the Cole Royal Commission which reinforce the application of these criteria.

4.5.2 Six powerful thematic considerations that arise from the findings of the Cole and Heydon Royal Commissions that affect this submission and the call for separate building and construction industry workplace arrangements as set out in the ABCC Bills are now highlighted:

- Before the establishment of the ABCC there were no or insufficient consequences for unlawful conduct;
- With the formation of the ABCC, an institution was established that was able to put itself in the shoes of the victims of unlawful behaviour, who historically were unwilling or unable to take legal action;
- Clients, including Governments, will not select contractors with industrial problems which is another reason that contractors' vulnerability to the actions of the building unions is enhanced in the industry;
- In the face of the unions' desire for control, small business has no prospect of resisting unreasonable union demands;
- Prior to the establishment of the ABCC, consumers and the public who rely on the industry for the creation of infrastructure did not get proper value for money; and
- At the end of the day, the contractor assumes the costs and risks associated with unlawful industrial conduct. This cost is

inevitably passed on to the consumer and creates a further disadvantage for potential developers wanting to invest in the building and construction industry.

<b>Recommendation 3</b>	<b>That the ABCC Bills be passed by the Parliament and that their content is endorsed by the Productivity Commission as suitable for the building and construction industry.</b>
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## 5 Issues Paper 2 – *Workplace Relations Framework: Safety Nets*

### 5.1 Providing Safety Nets

5.1.1 Master Builders supports the provision of a fair safety net of terms and conditions and minimum wages. Master Builders recognises the need for a safety net to be adequate to provide those who are unable to bargain with an adequate standard of living. The major difficulty with the safety net is its complexity. The NES is relatively simple although there are exceptions, as highlighted below. However, the modern Award system fails the test of simplicity and accessibility, as discussed below.

### 5.2 The Federal minimum wage

5.2.1 Master Builders supports minimum wages as a part of the safety net in the form of a minimum hourly wage for adults and a minimum hourly wage for juniors. No minimum rates for juniors are set out in the Building and Construction General On-Site Award (discussed at section 5.4 below) other than in respect of junior apprentices.

5.2.2 The primary concern of Master Builders is to articulate the importance of the minimum wage setting function regarding apprentices, trainees and juniors. Obviously, it is in this cohort that minimum wages have the greatest impact as economic analysis shows that this subsector has higher elasticities of labour demand than other labour market cohorts:

*There is a very large body of evidence that demonstrates that the negative effects of a minimum wage (or an increase in a minimum wage) is felt most acutely in the employment and employment prospects of young people. In a survey of over two dozen empirical studies of the effects of an increase in the minimum wage on youth employment, Brown et al found that*

*on balance, a 10 percent increase in the minimum wage is estimated to result in about a 1-3 percent reduction in total teenage employment. All studies find a negative employment effect for all teenagers together and the signs are almost exclusively negative for the various age-sex-race subgroups.*<sup>13</sup>

- 5.2.3 During periods of skills shortages in the building and construction industry that have emerged as more than cyclical, the principal industry effect of higher minimum wages is twofold. The first is that higher minimum wages discourage employers from employing apprentices and trainees. Secondly, higher unskilled wage rates (assuming a flow on of minimum wages) create a disincentive to acquire skills and linked remuneration that is more appropriately differentiated on the basis of skills acquisition. This is an effect that dampens skills acquisition in the building and construction industry.
- 5.2.4 The awards system also still plays an important part in setting minimum wages, which remain very high in Australia relative to other advanced economies. The role of the award system in setting minimum wages should be diminished in order to reduce what is a significant barrier to the entry of low-skilled individuals into employment, particularly younger people who must, in the building and construction industry, compete for work against adults in respect of the same minimum wage being applied to them as to adults through the modern award. Master Builders recommends a reframing of the objects of minimum wage setting so that the process serves as a genuine safety net for the low paid. The setting of minimum wages relative to higher income earners undermines this objective and discourages bargaining and productivity improvement and discriminates against young people.
- 5.2.5 Minimum wage setting must promote youth employment to ameliorate the effects of youth unemployment rates which have reached record levels.<sup>14</sup>

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<sup>13</sup> J Butler *Minimum Wage Laws and Wage Regulation: Do Changes to a Minimum Wage Affect Employment Levels?* 2006 (29(1)) University of New South Wales Law Journal p181 at 188

<sup>14</sup> See Brotherhood of St Lawrence "One in five Australians who are out of work are teenagers as youth bear burden of worsening national unemployment: new report" 2 March 2015 <http://www.bsl.org.au/media-centre/media-releases/media-release/one-in-five-australians-who-are-out-of-work-are-teenagers-as-youth-bear-burden-of-worsening-national-unemployment-new-report/>

5.2.6 Having regard to the recommendations below relating to the phasing out of modern awards, the Productivity Commission should recommend that Australia move to one minimum adult wage and one junior minimum wage. This matter is covered in Recommendation 9 below.

### **5.3 National Employment Standards**

5.3.1 Master Builders' major complaint with the substantive content of the NES concerns averaging of hours. Section 64 of the FW Act only permits employees to average their hours over 26 weeks (for award/agreement free employees). Restrictions on averaging of hours under modern awards are considerably tighter. Master Builders considers that averaging over 52 weeks better facilitates the engagement of professionals, such as project managers, whose hours are often averaged due to the intensity of some of their work during peak periods. Master Builders submits that averaging of hours provides freedom to employers and employees to achieve work outcomes more productively. This change would facilitate a work practice that engendered efficiency, especially amongst those businesses which regularly experience peak periods of activity as well as periods between projects where little activity occurs. The change would not adversely affect those who are low paid or vulnerable in the event that the current 26 week period was changed to 52 weeks.

<b>Recommendation 4</b>	<b>That weekly hours under the NES be able to be averaged over up to 52 weeks.</b>
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5.3.2 Master Builders also considers there to be uncertainty regarding the operation of s116 FW Act, which indicates when an employee is to receive payment for absence on a public holiday. Under s114 of the FW Act, an employee has a right to be absent from work on a public holiday. While an employer may request an employee to work, where that request is reasonable (having regard to the factors in s114(4)) an employee may also refuse such a request, if their refusal is reasonable (again having reference to the considerations in s114(4)). Accordingly an employee is always entitled to be

absent on a public holiday if they have good reasons to refuse to work.<sup>15</sup>

5.3.3 Section 116 provides that an employee who is 'absent from his or her employment on a... public holiday' must be paid at the employee's base rate of pay. Several restrictions arise on the payment for employees who are absent from work on a public holiday, which are not immediately apparent from the terms of s116.

5.3.4 The first restriction arises from the fact that under s116, an employee absent on a public holiday only needs to be paid for their 'ordinary hours of work.' Some of the implications of this are set out in a legislative note to s116 which indicates that:

*If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.*

5.3.5 This note resolves any ambiguity about the meaning of 'ordinary hours' for part-time or casual employees, which are often ambiguously defined under modern awards or agreements, which might only define ordinary hours for full-time employees.<sup>16</sup> What the legislative note at s116 indicates is that it is an employee's actual usual hours which determine their ordinary hours, such that part-time or casual employees who are absent from work on a public holiday are only entitled to payment where they would have ordinarily worked (or were rostered to work) on the day on which the public holiday falls.

5.3.6 However, a further ambiguity arises in relation to employees (whether full-time or otherwise) who are absent from work on unauthorised or extended unpaid leave. It should be noted that where workers are on unauthorised or unpaid leave (except in relation to community service leave) they will not be providing

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<sup>15</sup> However those reasons must be revealed for a refusal to be reasonable: *Pietraszek v Transpacific Industries Pty Ltd t/as Transpacific Cleanaway* [2011] FWA 3698, (2011) 63 AILR 101-373, at para 85.

<sup>16</sup> For example, *Building and Construction General On-Site Award 2010*, clause 33. Ordinary hours for award/agreement free employees are defined as their 'usual hours of work', which cannot be more than 38 hours per week: *Fair Work Act*, s22.



'service'<sup>17</sup> and so will not accrue paid annual or paid personal/carer's leave. Oddly, payment for absences on public holidays is not tied to whether or not an employee is relevantly providing service, which means that it is less certain whether employees on unpaid or unauthorised leave need to be paid for public holidays.

5.3.7 There is some support for the restriction of payment for public holidays to such employees within the terms of s116. Considering first those employees on extended unpaid leave, Master Builders submits that such workers will not be entitled to payment for public holidays due to the fact that their ordinary hours can no longer be said to include the public holiday. This interpretation reflects an example given in the Explanatory Memorandum to the Fair Work Bill, which indicates that an employee who is 'on unpaid parental leave for the first half of 2010... would not be entitled to payment for the public holiday on 26 January 2010,'<sup>18</sup> presumably on the basis that they would 'not ordinarily have worked on that day.'<sup>19</sup>

5.3.8 With respect to employees on unauthorised leave, Master Builders submits that such workers might also be considered to have altered their ordinary hours such that they could not be said to fall on a public holiday. A further argument arises from the fact that s116 only requires payment where an employee is absent from work 'in accordance with this Division', i.e. Division 10 of the NES, comprising s114-116. Accordingly, where an employee is on unauthorised leave because they have unreasonably refused a reasonable request to work on a public holiday, they will be absent from work contrary to Division 10, meaning that payment does not have to be made. Less certain is whether an employee on an extended unauthorised absence, such that they cannot be contacted, would also be absent contrary to s114. While it is clear that an employee must actually provide reasons for not working<sup>20</sup>

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<sup>17</sup> *Fair Work Act*, s22(2)(a), 87(2), 96(2)

<sup>18</sup> Explanatory Memorandum to the Fair Work Bill, illustrative example after item 461.

<sup>19</sup> Explanatory Memorandum to the Fair Work Bill, item 461.

<sup>20</sup> *Pietraszek v Transpacific Industries Pty Ltd t/as Transpacific Cleanaway* [2011] FWA 3698, (2011) 63 AILR 101-373, at para 85.

(where reasonably requested to do so) it is uncertain whether an employee who cannot be contacted to make such a request would be absent contrary to s114.

5.3.9 Master Builders submits that s116 should be amended to make it clear that payment does not have to be made to those employees who are on extended authorised unpaid leave, or to those on unauthorised leave. It has been suggested by Master Builders' members that this might be achieved by adding to the legislative note at s116. However, there are problems with such an approach. Legislative notes do not form part of an Act<sup>21</sup> and have traditionally been rejected by courts as interpretive aids due to the fact that they cannot be amended in Parliament (but can be altered by the drafter consolidating the Act).<sup>22</sup> Nevertheless, it is possible to have recourse to legislative notes where the meaning of a legislative provision is unclear.<sup>23</sup> However, legislative examples cannot be relied upon where they are inconsistent with the terms of an Act.<sup>24</sup>

5.3.10 While Master Builders considers that s116 does support the exclusion of public holiday pay to those employees who are either on extended authorised unpaid leave or unauthorised leave, it would be preferable for a subsection to be added to s116 to put this matter beyond doubt. As a matter of policy, Master Builders submits that such employees should not be entitled to payment for public holidays, as this is an entitlement which is supposed to accrue only to those employees who would have otherwise worked on that day. As noted, employees who are on unauthorised or unpaid leave (apart from community service leave) do not accrue paid annual or paid personal carer's leave, due to the fact that they are not providing 'service' as defined under s22 of the FW Act. Master Builders submits that 'service' could be similarly used in s116 regarding public holiday payments, to resolve the ambiguities that we have raised.

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<sup>21</sup> *Acts Interpretation Act 1901* (Cth), s13.

<sup>22</sup> Pearce DC, Geddes R S, *Statutory Interpretation in Australia* (6<sup>th</sup> Ed, LexisNexis) at pp 161-163; citing *Bradley v Commonwealth* (1973) 1 ALR 241 at 256; *Wacando v Commonwealth* (1981) 148 CLR 1 at 15-16.

<sup>23</sup> *Acts Interpretation Act 1901* (Cth), s5AB. See also *The Ombudsman v Moroney* [1983] 1 NSWLR 317.

<sup>24</sup> *Acts Interpretation Act 1901* (Cth), s15AD(b).

**Recommendation 5**      **That payment for public holidays only be available where an employee is providing service as defined under s22 FW Act.**

5.3.11      Sections 66 and 112 of the FW Act “carve out” State and Territory provisions in each particular subject area where the State and Territory laws are more beneficial to an employee. State or Territory legislation relating to the subject matter of these sections override the NES where the State and Territory legislation is more beneficial. Master Builders is not opposed to the underlining purpose of this provision. However, Master Builders is concerned that the NES is, in large part, otherwise self-contained and does not need an employer to make reference to other documents in order to readily understand the safety net to be applied. Accordingly, we recommend their deletion in order to better effect a simple, comprehensive safety net as the desired outcome.

**Recommendation 6**      **That sections 66 and 112 of the FW Act be repealed.**

5.3.12      Similar concerns arise in relation to s130 FW Act which indicates that leave will not accrue and cannot be taken where an employee is absent from work but receiving workers’ compensation. Because this exclusion is itself subject to State and Territory law,<sup>25</sup> which will apply where it provides accrual to employees on compensated absences, employers must have regard to confusing and often uncertain State and Territory workers’ compensation laws. This matter is addressed in the Fair Work Amendment Bill 2014 (Amendment Bill 2014) where it provides that an employee cannot take or accrue leave under the FW Act during a period in which the employee is absent from work and in receipt of workers’ compensation.<sup>26</sup> Again Master Builders emphasises that in an increasingly unitary system the confusing reference to State and Territory laws does nothing to advance understanding of the nature

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<sup>25</sup> *Fair Work Act*, s130(2)

<sup>26</sup> cf outcome in *NSW Nurses and Midwives Association v Anglican Care* [2014] FCCA 2580 (11 November 2014) <http://www.austlii.edu.au/au/cases/cth/FCCA/2014/2580.html>

of the safety net. It is noted that the relevant provision of the Amendment Bill 2014 responds to the report entitled *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation review*<sup>27</sup> (Fair Work Review Panel Report) recommendation 2.

<b>Recommendation 7</b> <b>That section 130(2) of the FW Act be repealed.</b>
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## 5.4 The award system and flexibility

5.4.1 Master Builders' primary position in relation to modern awards is that to the extent that they have continuing relevance, modern awards should reflect their safety net characteristics and be simply worded and accessible to the layperson; they should only reflect necessary departures from the NES that are required because of specific industry conditions. On the basis of that criterion, over time they could be folded into one industry award which sets out those exceptions.

5.4.2 Awards should not continue to be used as a yardstick to determine safety net terms and conditions or as the comparison documents for enterprise bargains in the long term. Master Builders agrees with the proposition set out at page 12 of the Issues Paper thus:

*(S)ome argue that the tax and transfer system, the NES and minimum wages already serve as adequate safety nets, and that awards, in effect, set a multitude of further 'minimum wage floors for jobs scattered across almost the entire wage distribution'.*

5.4.3 Despite the "modernisation" process of awards, the modern award which affects the building and construction industry most centrally, the Building and Construction General On-site Award 2010 (On-Site Award) in large part replicates a prior federal award, the National Building and Construction Industry Award 2000. That award and award arrangements generally in the building and construction industry have, historically, hampered productivity. As noted by the Cole Royal Commission:

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<sup>27</sup> <http://docs.employment.gov.au/node/29150>

*The principal award of the Australian Industrial Relations Commission (AIRC) which bears upon the building and construction industry in Australia is the National Building and Construction Industry Award 2000 (NBCIA). Despite attempts to simplify the NBCIA and circumscribe the number of allowable award matters the NBCIA is highly prescriptive. Among other matters, it prescribes a wide range of allowances and special rates, and complicated provisions in relation to rostered days off (RDOs), crib time, overtime, special time, shift work and weekend work.<sup>28</sup>*

5.4.4 The On-Site Award is lengthy and Master Builders publishes a manual to help explain its terms. Despite that fact, the level of complexity and the fact that there are a range of obscure allowances payable for many different tasks and situations, a multitude of which are outmoded, means that the On-Site Award is an instrument that continues to hamper productivity. It contains prescriptive requirements relating to work practices and therefore makes compliance with the basic safety net a nightmare. As noted in the Issues Paper, awards and, we say, particularly the On-Site Award, contribute to the complication of human resource management and payment errors by employers. The Master Builders' manual is over 200 pages long but we will be happy to make it available to the Productivity Commission and it will be supplied at the same time as this submission is lodged. From its terms, it is evident that the On-Site Award is badly drafted, difficult to apply, contradictory and overly prescriptive.

5.4.5 We are not alone in our criticism of the On-Site Award. The Minister for Employment, the Hon Senator Eric Abetz, has lambasted the On-Site Award thus:

*The Building and Construction General On-site Award 2010, at 140 pages, includes some 69 separate allowances, including:*

- *Where two or more forklifts or cranes are engaged on any lift the drivers thereof must be paid an additional 16.2% of the hourly standard rate for each day or part thereof so occupied.*
- *Employees who are regularly required to compute or estimate quantities of materials in respect of the work performed by other employees must be paid an*

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<sup>28</sup> Note 1 above volume 8 chapter 9 page 43 paragraphs 4 and 5.

*additional 23.3% of the hourly standard rate per day or part thereof.*

*Under this award, you will be pleased to learn that “No apprentice under the age of 18 years will be required to work overtime...unless they so desire”. If the apprentice is over 18? Then only “to enable requirements of the training plan to be met”. This is undoubtedly designed to acclimatise them to the rigours and realities of the sector!*

*But to really highlight how “modern” some terms of these awards are, bricklayers working in a tuberculosis hospital are entitled to have an x-ray every 6 months during work hours at the employer’s expense. As an inconvenient aside, the last dedicated TB Ward was closed in 1981...<sup>29</sup>*

- 5.4.6 At page 12 of Issues Paper 2 the statement is made that: “Awards are more flexible than minimum wages.” We contest that statement. The On-Site Award has proven inflexible. Whilst Master Builders has, from the commencement of the award modernisation process, called for a rationalisation of the multiplicity of allowances, that rationalisation has been resisted by union parties. That resistance has applied in the face of Commission Full Bench comments as follows:

*Parts of the On-site Award are complex and possibly outdated, reflecting the fact that they are a product of the variation of predecessor awards at various points of time. This is evident in some of the provisions raised by the MBA and other employer associations in the context of power questions raised in the current proceedings, most particularly in relation to the extensive allowance provisions in the On-site Award.*

*Our observation, in this regard, is not new. During the Award Modernisation process through which the modern award was made, the Full Bench of the Australian Industrial Relations Commission made the following statement concerning, in part, allowances in the building and construction industry:*

*“In a number of industries there are many different allowances in federal awards and NAPSAs, some of quite small amounts. It is often difficult to know the origin and purpose of the allowances and whether they are still relevant. In some cases the allowance will not be appropriate for inclusion in a safety net award because it is outmoded, is the result of enterprise bargaining or for some other reason.*

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<sup>29</sup> The Hon Senator Eric Abetz Minister for Employment “Industrial Relations After The Thirty Years War” speech to the Sydney Institute 28 January 2014 <http://australianpolitics.com/2014/01/28/abetz-industrial-relations-speech.html>

*In some industries there is a strong case for rationalising allowances. The manufacturing and building and construction industries are examples. We encourage parties to give attention to the number, amount and purpose of allowances with a view to rationalising them and eliminating those that are no longer relevant.”*

and

*“We have deleted cl.20.6 from the exposure draft. That provision was based on rates payable under the Building and Construction Award but applied only to forepersons in Tasmania and bridge and wharf carpenters in New South Wales. Transitional arrangements may be required in respect to these State based payments. Otherwise, we have retained the allowances provisions in the exposure draft. They reflect current award provisions. We have referred above to our preference for a rationalisation of such allowances, as expressed at paragraphs [20] and [21] of our statement of 23 January 2009. Notwithstanding, efforts by the MBA to address this issue, most recently in its eleventh submission (dated March 2009), we have not received sufficient material and input from interested parties to allow us to attempt to rationalise allowances at this stage. Such an exercise should, however, be given some priority in any future review of the modern award.”<sup>30</sup>*

5.4.7 The Issues Paper at page 12 in addition says that awards afford flexibility because:

*for example, at times payments have gone down as illustrated by recent decisions by the FWC to change its initial versions of some modern awards.*

5.4.8 Whilst that might be the case in other sectors, that has not occurred in relation to the On-Site Award. In fact, in the context of the allowances just discussed, clause 20.4(a) of the On-Site Award only permits increases in expense related allowances; they cannot fall. Where expenses as reflected in the indices set out in clause 20.4(b) decline, the expense related allowances remain unadjusted. When they increase, the expense related allowances in turn increase. Expense related allowances are increased annually from 1 July each year. The rates which are adjusted under clause 20.4 are those set out in clause 20 as well as clauses 24 and 25 of the award. The subclause is as follows:

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<sup>30</sup> *Master Builders Australia Limited* [2012] FWA FB 10080 at paras 80 and 81 (footnotes omitted)

#### 20.4 Adjustment of expense related allowances

- (a) *At the time of any adjustment to the standard rate, each expense related allowance will be increased by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.*

5.4.9 Master Builders has not given up hope that the 2014 modern award review now underway might bring greater simplicity and rationalisation to allowances and the like in the On-Site Award. However, the extent of the litigation generated by the review, the intensity of resource allocation and the polarisation of stances between unions and employer groups where all matters seem destined for adversarial outcomes, detracts from optimism that the outcome will bring any radical changes to the matters only touched on in this submission. We note that Philipatos<sup>31</sup> has provided cogent argument for abolition of awards. We endorse his conclusion as follows:

*An efficient and fair labour market regime should provide minimum standards and leave the rest to employers and employees/unions to negotiate. This ensures that wages and employment conditions are tailored to the needs of the business, which can, in turn, provide bigger opportunities to more workers and customers.*

*The award system today is outdated and redundant, and ought to be abolished in favour of the existing federal minimum wage and statutory conditions.*<sup>32</sup>

<b>Recommendation 8</b>	<b>That modern awards be further rationalised as to content and that they sunset after a period of 5 years.</b>
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5.4.10 In the period during which Awards were to be phased out, a mechanism which preserved the base wages in awards as a part of the minimum standard for employment would be introduced. Industry parties would have the opportunity to make submissions to an independent wage setting body to make the case

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<sup>31</sup> A Philipatos *Relics of a Byzantine IR System: Why Awards Should Be Abolished*, The Centre for Independent Studies, Issue Analysis No 140 23 May 2013

<sup>32</sup> Id at p14



for the appropriate rate of pay in an occupation/sector. A reframed set of minimum wages' objectives administered by that body would be empowered to set minimum wages based on industry and regional differentials if necessary to satisfy the wage setting objectives but the aim of the system would be to move to one adult minimum wage and one junior minimum wage in the five year period identified in Recommendation 8. That move would mean the grandfathering of prior arrangements in order to ameliorate any disadvantage in moving to one system of legislated conditions and the setting of one minimum wage for juniors and one for adults.

<b>Recommendation 9</b>	<b>The system should transition over the period where Awards were reduced so that at the time of the sun-setting of awards there was one minimum wage rate for juniors and one minimum wage rate for adults in place.</b>
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## **6 Issues Paper 3 – *Workplace Relations Framework: The Bargaining Framework***

### **6.1 Bargaining and industrial disputes**

6.1.1 The Productivity Commission at page 1 of Issues Paper Number 3 expresses a central concern as follows:

*An overarching concern will be the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them – a broad issue for stakeholders in this inquiry.*

Master Builders notes that in the building and construction industry pattern bargaining is rife and proscribes the process of reaching “genuinely crafted” enterprise agreements.

6.1.2 Disputes at the workplace are neither inevitable nor desirable. Yet for a long time the industrial relations jurisdictions within Australia required the existence of a dispute, paper or otherwise, to shape the relationships between employees and employers. This system encouraged parties to make broad claims in order to advance their industrial objectives. Ambit claims provoked ambit responses, which led to excessive reliance on external parties to achieve

outcomes in an environment where both parties occupied unreasonable positions to maximise their (perceived) chances in an arbitrated or negotiated outcome. This long, complicated and unduly technical process of dispute resolution did not create an environment in which it was possible to move forward for the benefit of all parties.

6.1.3 A dispute-oriented system based on this type of claim drives a wedge between employers and employees, instead of allowing them to embrace mutual self-interest in working cooperatively within an enterprise, a matter that we gave some prominence to in the discussion at paragraph 4.2.4 of this submission.

6.1.4 The centrality of wage fixing in a formal sense has been replaced under the FW Act with centralised wage and conditions setting in an informal sense at least in respect of the building and construction industry. As stated by the Cole Royal Commission:

*True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ. So too will the needs and aspirations of individual workers. If they are to be considered and accommodated in ways that are mutually beneficial and acceptable, the workers and their employers need to discuss how an agreement can be structured which advances their respective interests. Ninety four percent of employers in the building and construction industry have less than five employees. Given the relatively small number of employees engaged by most contractors in the building and construction industry, there is clearly scope for discussions to take place, both formally and informally, at the workplace in order to arrive at mutually beneficial outcomes. Pattern bargaining and the impact of project agreements have meant that both workers and employers have become accustomed to merely adopting a common form of agreement which has been determined by others.*

*One form of centralised wage and condition fixation has been replaced by another. Initiative is stifled; the scope for creativity is denied. The reforms introduced by successive Governments, to make agreements struck at enterprise level the principal instruments whereby terms and conditions of employment are established, are circumvented and negated. The results have been detrimental to both workers and employers, to the industry and to the national economy.<sup>33</sup>*

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<sup>33</sup> Note 1 above, Volume 1, pages 27 – 28.

- 6.1.5 Long-term reliance on this system, coupled with industrial hostility and unlawful behaviour in the building and construction industry, has disempowered employees and employers, leading to failure to manage human resources properly. Rigid working conditions have therefore resulted and continue to characterise the industry, inclusive of the terms and conditions that comprise the On-Site Award and terms and conditions which exist in the CFMEU pattern agreements that are proffered on a “sign up or else” basis. These conditions reduce productivity and, importantly in times of skill and labour shortages, limit opportunities within the industry to those workers whose circumstances fit into the inflexible industrial framework.
- 6.1.6 As indicated earlier, we hold strongly to the view that the workplace relations system must encourage the creation of workplace arrangements that suit the needs of employees and employers. In this context Master Builders has recently lodged a submission with the Senate Committee concerned with examining the Fair Work Amendment (Bargaining Processes) Bill 2014. A copy of that submission is attached as Attachment A, inclusive of its attachments. It sets out Master Builders’ position with regard to the current problems with pattern bargaining, a matter that the Cole Royal Commission labelled as a new set of centralised wage fixing apparatus as per the quotation in paragraph 6.1.4. The matters set out in that submission remain a central concern of Master Builders.

<p><b>Recommendation 10</b> That there should be more robust measures in workplace law to discourage pattern bargaining, inclusive of a proscription on the grant of a protected action ballot order where pattern bargaining has occurred or is occurring.</p>
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- 6.1.7 The entrenchment of unions in the bargaining process, regardless as to whether this is reflective of the wishes of the majority of employees in a workplace, has undermined the direct and cooperative relationship between employers and employees and drives workplaces into conflict based adversarial processes that disrupt otherwise harmonious and productive workplaces. Trade union membership is continuing to decline yet bargaining under the

workplace relations system preferences unions. In particular, the FW Act facilitates an extraordinary amount of third party involvement in bargaining processes epitomised in the default position of the union as an employee's bargaining representative unless the employee appoints an alternative in writing or resigns: see s176(1)(b) FW Act.

6.1.8 The default right discussed in the prior paragraph should be abolished. It is discriminatory by affording a default right to representation to union members that is not available to non-members. In addition, it also requires employers to have a state of knowledge as to whether their employees are union members or not – which in turn makes employers more vulnerable to general protections claims (e.g. 'this adverse action occurred shortly after the boss asked me whether I was a union member'): see discussion of adverse action under the section of this submission dealing with general protections. If an employer does not have the relevant state of knowledge, they are in a position of not knowing whether a union is a bargaining representative or not that is until such time as either the employee or the union make them so aware.

6.1.9 There is no legitimate justification for default union representational rights. It presupposes that an employee who is a union member will always want the union to be his/her representative. In industries such as construction where employees are routinely coerced into joining the union in flagrant disregard for freedom of association law, this is simply not the case. An employee should be their own bargaining representative unless or until they formally appoint a union or someone else in writing to that role.

<b>Recommendation 11</b>	<b>That s176(1)(b) of the FW Act be repealed and that bargaining representatives should be appointed in writing by any employee eligible to be involved in the bargaining process.</b>
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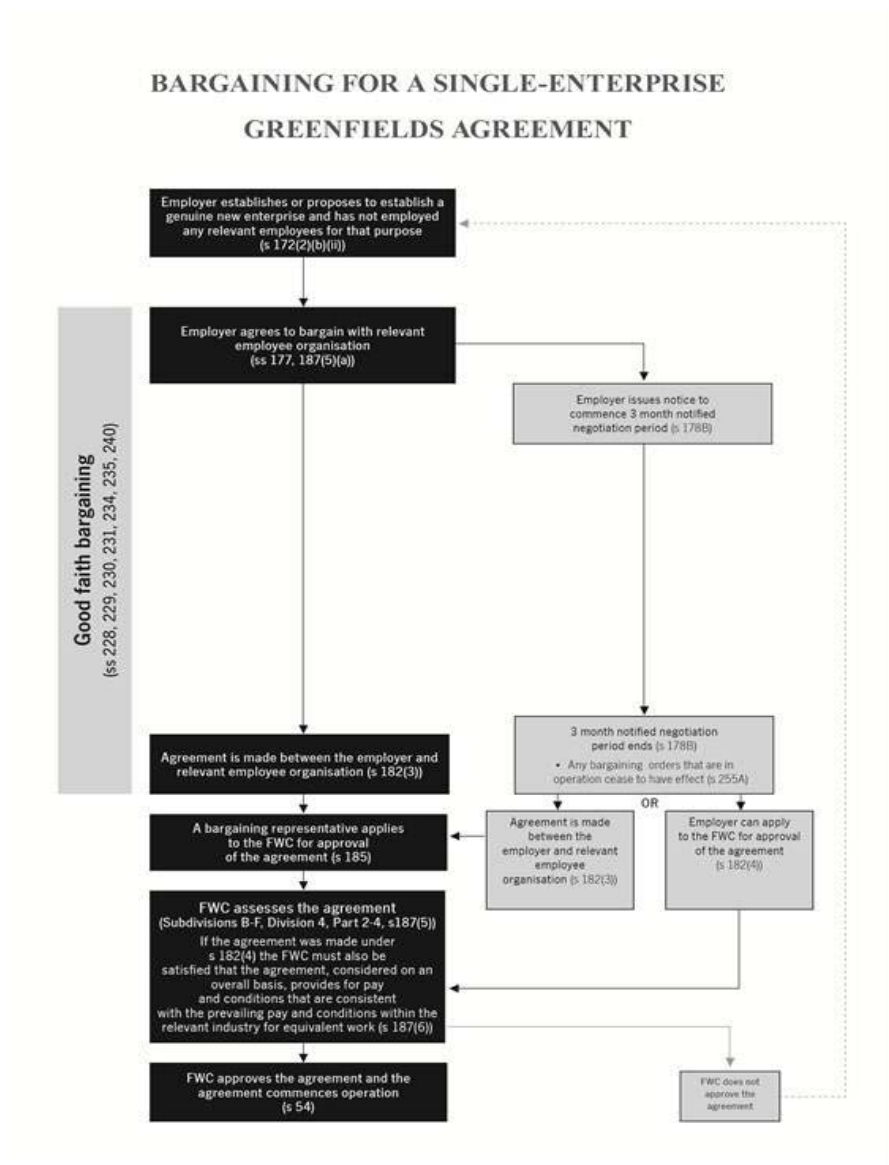
## 6.2 Greenfields agreements

6.2.1 Greenfields agreements are frequently used in the building and construction industry for large infrastructure projects, and they have

often proved to be a reliable projection of labour costs. They are a vital factor in the decision about whether to invest. They are the only means to have an agreement where employees are to be engaged in the future.

- 6.2.2 Master Builders notes that the Amendment Bill 2014 mentioned in paragraph 5.3.12 of this submission also contains a proposal about changing the current law about greenfields agreements, mentioned at page 2 of Issues Paper 3.
- 6.2.3 Master Builders' policy of seeking reform in this area is by way of advocating the reinstatement of employer greenfields agreements. These are not exploitative instruments, as has been suggested by unions, because employees would be protected by the better off overall test and market conditions in any event. A better and recommended solution to the complex provisions in the Amendment Bill 2014 is the reintroduction of employer greenfields agreements.
- 6.2.4 In contrast with the Master Builder's position set out in the prior paragraph, the Government has determined that the changes represented in Part 5 of Schedule 1 of the Amendment Bill 2014 are an appropriate element to bring about reform in relation to greenfields agreements. Essentially, the concept of appointing a bargaining representative has been extended to greenfields agreements negotiations and their completion. In essence, Part 5 enables an employer to take a proposed greenfields agreement to the FWC for approval where agreement has not been reached within three months of the commencement of a notified negotiation period. The agreement will need to satisfy the existing approval tests under the FW Act as well as a new requirement that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing standards and conditions within the industry in relation to the notion of "equivalent work". The arrangements for this new line of reform are extraordinary complex. This, in part, reflects the existing complexity of the agreement-making provisions of the FW Act generally. But the manner in which the reform is proposed adds to that complexity.

6.2.5 The Explanatory Memorandum at paragraph 80 contains a diagram showing how the new process for making greenfields agreements would operate. That diagram is reproduced below.



6.2.6 Item 23 of Part 5 Schedule 1 of the Amendment Bill 2014 contains proposed s177 which sets out who would be bargaining representatives for greenfields agreements. It stipulates that an employer will be a bargaining representative. In addition, an employee organisation which was entitled to represent the interests of one or more of the employees who would be covered by the agreement in relation to the work to be performed under the agreement will be a bargaining representative. That would be the case where the employer agrees to bargain with that union for a

greenfields agreement per proposed s177(b)(ii). A facility also exists for an employer to appoint, for example, an industry association to be a bargaining agent per s177(c).

6.2.7 Paragraph 89 of the Explanatory Memorandum makes it clear that the legislation does not define whether and when an employer has agreed to bargain with an employee organisation. That paragraph indicates that this would be “a question of fact”. The example is used in the Explanatory Memorandum that an employer could “agree to bargain with an employee organisation by writing to it requesting to commence bargaining in relation to a proposed new enterprise”. Master Builders supports the notion that this should be in the control of the employer but the question should not be left open in the manner proposed.

6.2.8 The Government is also committed to implementing an appropriate period for negotiation of greenfields agreements. Item 27 inserts proposed s178B which sets out the new process in relation to greenfields agreements. Under this process, in essence, a three month time limit for negotiating enterprise agreements will be able to be set. Following that period an employer may apply to the FWC to have the agreement made invoking the tests discussed above. A mechanism by which the three month period is established is in proposed s178B(1). It provides that a notice must be given to each employee organisation as a bargaining representative which specifies the day on which the notified negotiation period for the agreement will commence. The Bill contains some complex subsidiary provisions concerning that rule.

6.2.9 It should be made clear there is no mandated requirement to issue the relevant notice to the employee organisation. If it is the case that no notice is issued, it is envisaged that bargaining for the agreement will proceed within the existing good faith bargaining framework of the FW Act until agreement is reached. The Bill stipulates, however, that if an employer chooses to issue the relevant notice, inclusive of at a point after bargaining has commenced, the bargaining for the proposed greenfields agreement will be for a period of three months from the date set out in the notice. After that time the good faith bargaining framework no

longer applies and, as stated, the employer may apply to the FWC for approval of the agreement. This approval process is set out under new s182(4).

6.2.10 Item 28 of the Bill makes provision for a new s182(4) and it contains the process where a greenfields agreement has not been able to be made within the relevant three months' time period. There are three pre-conditions set out before the employer may apply to the FWC to approve the agreement. First, the employer must give notice of the notified negotiation period. Secondly, the negotiation period has ended. Thirdly, the employer gave each employee organisation that was a bargaining representative a reasonable opportunity to sign the agreement and they did not so sign the agreement. The latter pre-condition is reinforced via s182(4)(d) where an employer is required to give each employee organisation a reasonable opportunity to sign the agreement. The Explanatory Memorandum indicates that this process is intended to ensure to the greatest extent that the agreement an employer takes to FWC for approval is the same as is provided during negotiations to the employee organisation.

6.2.11 The FWC must apply the existing approval requirements for agreements. In addition, the FWC would be required to consider a new matter. The FWC must consider that the agreement overall provides for pay and conditions which are consistent with the prevailing pay and conditions within the relevant industry for equivalent work per proposed s187(6). Master Builders opposes this provision. Because even though a note to s187(6) states that "in considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area", the uncertainty caused by this proposed provision and the high levels of discretion vested in the FWC may cause further uncertainty about what is or is not appropriate content; the notion also appears to reinforce the bias in the building and construction industry towards pattern bargaining. It appears to contradict the basis of each agreement being registered to take into account the specifics of the project not industry conditions.



- 6.2.12 The failure in the criteria to take into account the market will also be evident in the fact that many of the enterprise agreements that will “evidence” the prevailing conditions were made during the resource construction boom period. The approach, therefore, makes future resource projects less economically viable as labour costs will be reflective of rates set when skilled labour was in short supply. As the mining resource boom transitions to the production phase and investors look at more economically attractive resource projects off-shore, requiring FWC to assess resource sector enterprise agreements through the prism of outdated, and potentially unrealistically inflated labour rates, would only act as a disincentive for investment.
- 6.2.13 It is anticipated that complex and potentially lengthy litigation in the FWC to determine first the meaning of these new concepts and thereafter their differential application, having regard to the location where the greenfields agreement would operate, will exacerbate delays in completion of greenfields agreements contrary to the intent of the new provision. This delay is especially likely in the early stages of application of the new provisions. In addition, this test has not been introduced following supportive evidence of its necessity. There is no evidence of market failure that the test is required to address.
- 6.2.14 The analysis reveals that a simpler and fairer position would be derived from revisiting employer greenfields agreements.

**Recommendation 12** That employer greenfields agreements be reinstated.

### **6.3 Pattern agreements**

- 6.3.1 Pattern bargaining is a practice which subverts and inhibits the capacity of the parties at the workplace to understand and explore alternatives. Making an effective workplace agreement that genuinely reflects the interests of the parties to the enterprise is often a laborious and confronting process. Master Builders’ policy was and remains that the structures in place under the BCIIA assisted to provide a comprehensive series of protections to the

bargaining parties that led to an environment where building and construction industry enterprises had begun to reach new and innovative agreements with their employees. At the time that the FW Act was proposed, we believed that the then protections in the BCIIA and the protections about pattern bargaining in the repealed *Workplace Relations Act* should not be fundamentally altered. Industrial action based on achieving a pattern bargain should be unlawful and prima facie remains so under the FW Act. An employee bargaining representative must not be engaged in pattern bargaining in relation to the proposed agreement.<sup>34</sup> The decision in *John Holland v AMWU*<sup>35</sup> is, however, a major barrier to halting the roll out of union pattern agreements: this matter is argued in some detail in Attachment A.

6.3.2 In the *John Holland* case, the Full Bench highlighted the definition of the expression 'genuinely trying to reach an agreement' under the pattern bargaining laws in s.412 of the FW Act and the fact that s.412(5) states that the definition does not affect the meaning of the expression as used elsewhere in the Act. On the basis of the construction of this provision, the Full Bench decided that there is no requirement for a union which applies for a protected action ballot to satisfy FWC that it is not pattern bargaining. In other words, you can want and pursue a pattern so long as the other means of establishing that you are genuinely trying to reach an agreement are present. This is subject to one exception noted by the Full Bench but which is based upon the nature of pattern bargaining rather than on the notion of protection by way of the provisions of section 412 as follows:

*While there might be circumstances in which the terms of the pattern agreement sought are so much in conflict with the employer's operations that the conclusion can be reached that the bargaining representative is not genuinely trying to reach an agreement, that conclusion would be reached without reference to or reliance on the terms of s.412.*<sup>36</sup>

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<sup>34</sup> In relation to employee claim action see subsection 409(4)

<sup>35</sup> [2010] FWA 526

<sup>36</sup> Id at para 39

- 6.3.3 The decision is disappointing as it has essentially gutted the protections against pattern bargaining. It means that, rather than pursuing arguments about pattern bargaining when a protected action ballot is applied for, employers must, unacceptably, pursue arguments about pattern bargaining at a later stage. In practice in the construction industry, this does not occur. The construction industry approach to pattern bargaining is one that relates directly to a change in culture. Without measures to effectively control pattern bargaining the culture addressed by the BCIIA will become even more entrenched. The construction industry is particularly vulnerable to industrial action – a matter recognised in the specific provisions of the BCIIA and highlighted by the Cole Royal Commission. We recommend the statutory recognition of the need to close out pattern bargaining at an earlier stage.

<p><b>Recommendation 13</b> That the exception at s412(2) be removed, such that a person cannot be held to be genuinely trying to reach an agreement if they are pattern bargaining.</p>
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#### **6.4 Protected Action – the abuse of safety**

- 6.4.1 At page 12 of Issues Paper 3, the notion of protected industrial action is mentioned. S19(2)(c) of the FW Act excludes from “industrial action” the following:

*(c) action by an employee if:*

*(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and*

*(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.*

- 6.4.2 Unfortunately this position is often abused and stands as a means by which unions seek to overcome the need to obtain orders and the like before taking industrial action. Master Builders views safety as a priority issue. Hence its abuse to achieve industrial objectives is deplorable.

- 6.4.3 Workplace health and safety is a serious issue. The model Work Health and Safety law emphasises coordination, cooperation and consultation. The Cole Royal Commission confirmed the long-standing practice of construction unions using safety stoppages as a device to advance industrial objectives.
- 6.4.4 More recently during the course of the Heydon Royal Commission it was found that the TWU had entered into an agreement with Toll where in return for the TWU exercising its statutory powers of right of entry at Toll's request or in Toll's interest, Toll would make a payment to an entity associated with the TWU.
- 6.4.5 Commissioner Heydon found that the nature of these arrangements means they may take on the character of a payment by Toll for the indirect benefit of the TWU in return for officials and employees of the TWU exercising the statutory powers in a certain way and in the absence of a reasonable suspicion of contravention.<sup>37</sup>
- 6.4.6 This positive finding reinforces the Master Builders' submission that safety has been used by unions as an industrial weapon. The abuse of safety in this way frustrates cooperation and devalues the importance of the role of safety.
- 6.4.7 Commissioner Heydon found evidence of intimidating, abusive and verbally violent behaviour toward others by CFMEU officials especially towards FWBC inspectors,<sup>38</sup> and recommended that a number of officials of the CFMEU be referred to the relevant prosecuting authorities for the consideration of criminal charges.<sup>39</sup>
- 6.4.8 To combat the use of safety as an industrial weapon the BCIIA placed the burden of proving that a safety stoppage was based on a reasonable concern by the employees about an imminent risk to their health or safety.<sup>40</sup>
- 6.4.9 The abolition of the BCIIA has reversed this position, placing important advances in safety management and practices in

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<sup>37</sup> Above note 2, Interim Report volume 1 page 988 Para 39-55

<sup>38</sup> Id page 45 para 91

<sup>39</sup> Id page 30 para 100

<sup>40</sup> This was recommended by the Cole Royal Commission above note 1, Recommendation 200 at p 168 of Vol 1, 'Summary of Findings and Recommendations', February 2003.

jeopardy. The situation must be restored by the passage of the ABCC Bills where the situation under the BCIIA has been reinstated.

## 6.5 Individual Flexibility Arrangements (IFA)

6.5.1 In the lead up to the 2007 Federal election the then Federal Labor Opposition issued its “Forward with Fairness” Policy<sup>41</sup>, which amongst other things, included provisions dealing with flexibility in the workplace. The Policy specifically set out that “Labor will ensure there is genuine flexibility for both employers and employees in these new arrangements.” Chapter 4 Flexibility in Collective Agreements of the Policy set out the following:

*Under Labor’s new collective enterprise bargaining system all collective agreements will be required to contain a flexibility clause which provides that an employer and individual employee can make a flexibility agreement.*

*The aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and an individual employee.*

6.5.2 Subsequent to the election of the Rudd Government in 2007, the FW Act was introduced in July 2009. Section 203 prescribes that enterprise agreements must have an IFA as a mandatory term. The Fair Work Regulations 2009 in Schedule 2.2 set out a model enterprise agreement flexibility term for an IFA. The core elements of the content of the model IFA for an enterprise agreement are:

- Arrangements for when work is performed;
- Overtime rates
- Penalty rates
- Allowances; and
- Leave loading

6.5.3 The model IFA content prescribed by the Regulations as just discussed reflects the content of the model IFA clause of each

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<sup>41</sup> *Forward with Fairness* April 2007 <http://www.hsu.net.au/news/files/forwardwithfairness.pdf>

Modern Award. However, a review on the content of IFAs in enterprise agreements that have unions as a party, following the introduction of the FW Act, reveals many of these IFAs fall well short of the content of the Regulations' model term. As a result, the original intent of what an IFA was supposed to permit is absent from many enterprise agreements where a union is party to them, particularly CFMEU pattern agreements.

6.5.4 The Review Panel Report considered IFAs and referred to a 2011 Fair Work Australia survey<sup>42</sup> which indicated only 6% of the employers surveyed had used IFAs. The Review Report did not address the lack of genuine flexibility of IFAs that form part of enterprise agreements, especially those with unions as a named party, which is curious as one of the thrusts of the Report was to assess productive and equitable workplaces. There appeared to be no testing of the benefits offered to the employment relationship by the model IFA clause in enterprise agreements or Modern Awards, or conversely, what the impact of the restricted content of IFAs in enterprise agreements have on productivity and equity at the workplace.

6.5.5 The Report contained 5 Recommendations on proposed changes to the IFA provisions. These are:

**Recommendation 9:** *The Panel recommends that the better off overall test in s.144(4)(c) and s.203(4) be amended to expressly permit an individual flexibility agreement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is, insignificant, and the value of the non-monetary benefit is proportionate.*

**Recommendation 10:** *The Panel recommends that the FWAct be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.*

**Recommendation 11:** *The Panel recommends that the FWAct be amended to provide a defence to an alleged contravention of a flexibility term under s.145(3) or s.204(3) where an employer has complied with the notification*

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<sup>42</sup> Above note 27 at p108

*requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.*

**Recommendation 12:** *The Panel recommends that s.144(4)(d) and s.203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for the termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.*

**Recommendation 13:** *The Panel recommends that s.144 and s.230 be amended to include the prohibition currently under s341(3) preventing a prospective employer making an offer of employment conditional on entering into an individual agreement.*

6.5.6 Recommendations 9, 12 and 13 highlight the shortcomings of the current IFA provisions and why so few employers have taken these up as evidenced by the FWA 2011 survey. Recommendation 9 identifies the very limited nature of what can be included in an IFA. Recommendation 12 finds the existing ability to terminate an IFA by a party providing 28 days written notice to terminate it as being simply unattractive to employers as it provides poor certainty under a contractual arrangement, and Recommendation 13 makes IFAs simply of little real value for employers.

6.5.7 A further barrier to the wider implementation of IFAs under enterprise agreements is the opposition to these legislative instruments by the union movement. An example of this opposition can be identified by examining clause 12 of a CFMEU(WA) pattern agreement by way of example. Clause 12.1 "Flexibility" contains the following limitations on the content of an IFA:

*12.1 The Employer may agree with an Employee covered by this Agreement to vary the following clauses of this Agreement to meet the genuine needs of the Employer and Employees:*

*Clause 51.6 Compassionate Leave*

*Clause 52 Parental Leave*

*Clause 54 Jury Service*

*Clause 59 Clothing Issue & Safety Footwear & Equipment*

- 6.5.8 The extracted clause appears in the 2011-014 union pattern enterprise agreement in WA and also in its replacement 2015 pattern enterprise agreement. A comparison of the employment matters dealt with by the CFMEU standard IFA with the model IFA set out in Schedule 2.2 of the FW Act Regulations shows the union version offers nothing in the way of flexibility for either party. In essence, the CFMEU IFA strangles any concept of real workplace flexibility from the enterprise agreement with the pattern enterprise agreement adopting a “one size fits all” approach. Similar meaningless flexibility clauses populate many more pattern enterprise agreements approved by the FWC, again reinforcing Master Builders’ stance against pattern agreements.
- 6.5.9 Despite the lack of genuine benefit to either an employer or employee contained within many current IFAs, such as the CFMEU example just explained, these clauses are approved by the FWC, and continue to be approved by FWC, despite what the then Deputy Leader of the Opposition in 2007 set out in the Federal Labor Opposition’s Forward with Fairness Policy that:
- The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure: the clause provides for genuinely agreed individual flexibilities.*<sup>43</sup>
- 6.5.10 Arguably, the intent of the then Deputy Opposition Leader was that IFAs set out in enterprise agreements would offer genuine flexibilities at the workplace between the parties. This is evidenced by the model IFA set out in Schedule 2.2 of the FW Act Regulations which stand in stark contrast to the CFMEU version.
- 6.5.11 Master Builders’ submission to the Review Panel was that the content of what can be included in IFAs ought be expanded and that the Office of the Fair Work Ombudsman (FWO) undertake assessments of IFAs on their meeting the better off overall test under the FW Act.
- 6.5.12 Recommendation 9 of the Review Panel Report reflects in part what Master Builders has called for. However, a closer examination of

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<sup>43</sup> *Forward with Fairness – Policy Implementation Plan*, August 2007, [http://www.rcsa.com.au/documents/info\\_update/p070828249.pdf](http://www.rcsa.com.au/documents/info_update/p070828249.pdf) at p.14



Recommendation 9 shows it seeks to limit the inclusion of non-monetary benefits to “insignificant” amounts thereby making it so fettered for employers and employees the reform would have little value. Master Builders accepts Recommendation 10 of the Final Report on the basis it is coupled with Recommendation 11.

<b>Recommendation 14</b>	<b>That the workplace relations system permits IFAs to be about any matter pertaining to the employment relationship and that a provision to that effect should be a mandatory term of an enterprise agreement.</b>
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## **7 Issues Paper 4 – *Workplace Relations Framework: Employee Protections***

### **7.1 Unfair dismissal, general protections and ‘adverse action’**

7.1.1 Issues Paper 4 at page 3 poses the question of whether the unfair dismissal processes have achieved their purpose. The questions at page 6 of Issues Paper 4 are more specific but, in essence, those questions may be responded to by asking the same question in context: have these provisions of the law achieved their purpose? This submission thus next deals with unfair dismissal and general protections with that question in mind.

7.1.2 The unfair dismissal laws under the FW Act have failed to deliver a fair outcome for employers. There is growing anecdotal evidence that the objectives of the FW Act in relation to unfair dismissals remain purely aspirational, and the needs of business are not being met. The procedures for dealing with unfair dismissal are neither quick, nor flexible, nor informal. Compliance is not easy for business. Whilst there has been some recent improvement in dealing with some jurisdictional matters on the papers, the reality is employers are forced to spend time and money defending often speculative claims, with the vast majority being resolved through commercial settlements. It remains a jurisdiction of “go away” money, where reinstatement remains impracticable.

7.1.3 These are significant issues which must be taken into account in a review of Australia’s unfair dismissal laws. In particular, the FW Act

has failed to provide fundamental protection for small business employers, with the legislative balance clearly favouring employees. The lack of such protection is damaging Australia's resilience in the face of the uncertainty and instability in local and international economies.

7.1.4 This imbalance is not unique to Australia which, along with approximately 35 other countries, is a signatory to the ILO Convention "Termination of Employment Convention" (1982) No 158. In recent years, employers and some government representatives to the ILO have expressed concerns at the operation of the convention, including its low penetration globally, which has disadvantaged the original signatories. Australia is one of only 35 of 183 member states in the ILO which have signed the Convention since its inception. Many developed and developing economies, including most Asia-Pacific nations, do not endorse the Convention.<sup>44</sup>

7.1.5 Employer experts from among the original signatories to the Convention, (especially Europe), now challenge the efficacy of the Convention in the provision of job security. The insights of these experts are worth examining, particularly as they apply equally to Australia. The Convention was based on the premise that one aspect of worker protection, namely termination of employment, could be regulated in isolation, without taking into account the broader picture, and particularly the impact of protective regulation on other socio-economic objectives. The Convention did not take into account changing priorities, such as the achievement of high employment rates and inclusive labour markets, and it has posed a potential barrier to the achievement of other ILO objectives.<sup>45</sup> Such is the disenchantment with the convention that the Employer

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<sup>44</sup> Background paper, *Tripartite Meeting of Experts to Examine the Termination of Employment Convention*, 1982 (No. 158) and *Termination of Employment Recommendation*, 1982 (No. 166) (Geneva, 18-21 April 2011) at page 85.

<sup>45</sup> Final report, *Tripartite Meeting of Experts to Examine the Termination of Employment Convention*, 1982 (No.158) and *Termination of Employment Recommendation*, 1982 (No. 166) (Geneva, 18-21 April 2011) at page 25.

experts have called on the ILO to refrain from promoting the Convention, and called for its repeal.<sup>46</sup>

7.1.6 The concerns held by European employers on the barriers to higher employment rates are equally valid for Australian businesses. Australia is no longer insulated from global markets. Over the past 30 years, the world of business and work has changed rapidly and significantly. Like the broader economy, the building and construction sector relies heavily on investment and growth. It is vital to the health of the sector that it is encouraged to rebuild its workforce, with certainty and fairness. The Government must provide a regulatory framework to support sustainable, flexible enterprises which will provide employment.

7.1.7 The “unfair dismissal” exemption standards for small business are facilitated by Article 6 of the ILO Convention. In Australia this has translated into three different unfair dismissal exemption policies over the past 30 years, since the first standard termination law was established.

7.1.8 This exemption applied as follows:

- Employers with fewer than 15 employees, (no remedy to reinstatement/compensation for employees) 1985-2006 (via awards);
- Employers with fewer than 100, (no remedy for employees) 2006-2009, (Workchoices 2006); and
- Employers with less than the equivalent of 15 full time employees, (no remedy for employees under 12 months’ service.) 2009-present (FW Act).

7.1.9 Clearly, the current Australian small business exemption is unlike earlier versions, both which gave a complete exemption by eliminating any unfair dismissal remedy under the relevant legislation for any employees of the small business. The difference is significant as the current exemption law still exposes the small business to the high standards of procedural and substantive

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<sup>46</sup> Id at page 26.

requirements. After the first 12 months of service of an employee, a dismissal by a small business employer can be challenged on both substantive fairness and procedural grounds. The consequences can be long mediation and FWC procedures with uncertain outcomes, especially with regard to compensation. The dismissal might be declared invalid by the FWC and create uncertainties, particularly if reinstatement is ordered. The unreasonable additional costs and resources expended by a typical small business to introduce advanced employee management systems and to contest potential claims of unfair dismissal have been acknowledged by every government since 1982. Notwithstanding this prior consideration the current termination laws are the least supportive of small business in 30 years.

- 7.1.10 Master Builders supports the reintroduction of a true 'exemption', where a remedy for alleged unfair dismissal is unavailable to employees of small business. The exemption should be set at a threshold of a business employing fewer than 20 people. Further, the small business definition (for identifying the number of employees) should not include related entities. Related entities are often operationally and financially distinct. It does not follow that an employer will have sufficient resources to justify being described as other than a small business simply because they are related to other organisations which, in the aggregate, employ 20 or more people.

<p><b>Recommendation 15</b>    <b>That an exemption from unfair dismissal should be introduced for businesses employing fewer than 20 people.</b></p>
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- 7.1.11 The preferred form of exemption would have no need for a supplementary instrument, such as the current unworkable Small Business Fair Dismissal Code (SBFDC). The SBFDC is a poor substitute for a genuine small business exemption.
- 7.1.12 The termination laws must be recalibrated, so as to place more emphasis on the employer's prerogative to manage their business. This can be achieved by reinstating in legislation that substantive

and valid reasons for termination will be the primary test for fairness.

- 7.1.13 The existing valid reason for termination referenced in the FW Act is consistent with Article 4 of the ILO Convention. In determining whether the right to terminate is properly exercised, the first obligation of an employer is to justify a termination on one or more valid reasons, being conduct, capacity or operational requirements. Pursuant to Article 7 of the Convention, the employer is also required to give an employee a warning if the reasons for termination are for conduct or performance. The extension of this Article, by existing Australian common law practice, resulted in the phrase “harsh, unjust or unreasonable”, being superimposed on the mandatory requirements to identify a valid reason. The Convention makes no mention of harsh, unjust or unreasonable considerations.
- 7.1.14 Over time, a mountain of case law has accumulated in the determination of applications for alleged unfair dismissal. This has resulted in the refining and weighting of harsh, unjust and unreasonable factors in termination. Unfortunately, this has also made the assessment of any application for remedy much more unpredictable than if the assessment was largely confined to addressing the valid reason and written warnings to the employee. Such is the reputation of the existing test for “unfair dismissal”, employers are more concerned with what they may have done wrong, than what they have done right.
- 7.1.15 It is widely accepted that the risk of failing a “harsh unjust, or unreasonable” assessment has bewildered employers and opened the way to monetary settlements for applicants and their agents, in the form of “go away” money. This is an unsatisfactory state of affairs. It demonstrates a serious departure from the Convention’s purpose, which is to define a balance between the rights of the employer to dismiss a worker for a valid reason, and the worker’s rights not to be deprived of work unfairly.
- 7.1.16 A recent case<sup>47</sup> serves to illustrate this point. The employee was dismissed for failure to comply with safety instructions and abusive

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<sup>47</sup> *Scott Challenger v JBS Australia Pty Ltd* [2014] FWC 7963

and offensive language to senior staff. Dismissal followed an investigation and took into account the employee's 10 years of employment, including disciplinary issues. The Commissioner found that whilst there had been a valid reason for dismissal, it was "harsh" due to the "significant impact" the dismissal would have on the worker being able to gain future employment. Reinstatement was ordered, despite evidence showing that the employee had disparaged his employer at the local pub. This is one of a number of decisions<sup>48</sup> where a termination for a valid reason, carried out in a procedurally fair manner, has been held to be 'unfair' by the Commission. Such outcomes are inconsistent with a balanced approach that recognises the need for employers to fairly and efficiently manage their workforce.

- 7.1.17 Applications for remedy of alleged unfair dismissal must be limited to claims that the employer did not have a valid reason, and, excluding serious misconduct, did not provide a written warning. If a valid reason is established, the application must be dismissed.

**Recommendation 16** That an unfair dismissal remedy should not be available where an employer has a valid reason for the dismissal and has provided appropriate written warnings.

- 7.1.18 The ILO Convention does not use the term 'unfair dismissal'. However, the term appears throughout the language of Australian industrial law. As a result, it is confusing to law-abiding employers that a termination made for a valid reason is described and tested thereafter as being an 'unfair dismissal.' This categorisation and labelling of a valid termination is neither benign nor incidental and needs to be corrected.

**Recommendation 17** The phrase "termination of employment", should be used to describe what is now outlined in Part 3-2 of the FW Act.

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<sup>48</sup> See for example, *Harley Schofield v Broadmeadow Mine Service Pty Ltd*; *Mark Winterton v Broadmeadow Mine Services Pty Ltd* [2014] FWC 9309

- 7.1.19 This is consistent with the ILO standard and preserves the employer's prerogative to manage the business, to respond to market changes, to restructure and otherwise aim for best practice.
- 7.1.20 In the context of redundancy, the existing requirement, first introduced in the FW Act via section 389, effectively deems that a termination for operational reasons is not valid and therefore unfair if the employer did not offer the employee redeployment in the employer's business, or associated entity. This is despite the primary definition indicating the termination is valid as the job the employee was performing is no longer required due to operational requirements. The primary test, which was introduced in the Termination Change and Redundancy test case<sup>49</sup> is manifestly adequate to establish the termination is for operational reasons. The courts are now well ahead of and will not abide a sham or device on the employer's part to disguise an ordinary termination as a redundancy.
- 7.1.21 Further, the test of 'redemption opportunities', unreasonably extends legislation into the employer decision making prerogative. As stated above, this extended definition presumes the lack of an offer by an employer of redeployment opportunities makes invalid an otherwise valid operational decision. The effect of the current law on employer's discretion is reflected in the following extract of a decision of the then Fair Work Australia:
- If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative (such as the making or varying of a policy which employees are required to observe) was laid down in Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales 7 (XPT case).<sup>50</sup>*
- 7.1.22 A 2012 case<sup>51</sup> in the building and construction industry demonstrates the alteration of the operational valid reason by the addition of the redeployment criterion. It also highlights the dilemma

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<sup>49</sup> 1984 Print F6230

<sup>50</sup> *Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited* [2011] FWA 8288.

<sup>51</sup> *Robert Aldred v J Hutchinson Pty Ltd* [2012] FWA 8289

employers in the building and construction sector face in making a judgement about whether to offer redeployment to a redundant employee when its short term workforce is more efficiently sourced from areas close to the 'available' work. In the relevant case, the tribunal member awarded compensation to a redundant worker because the company failed to offer redeployment. In his decision the member noted:

- there was a valid operational reason for the termination; and
- the alternative work was short term; and
- the employer did not offer the transfer because of the remote location and limited duration; and
- the applicant may therefore have elected to not be transferred.

7.1.23 Despite this, the tribunal found the offer of redeployment should have been made and, therefore, the termination was not a genuine redundancy. As the alternative work was no longer available by the time of the decision, the member awarded compensation to the applicant.

7.1.24 Master Builders submits that the definition of genuine redundancy should be limited to that currently set out in s389(1)(a). An unfair dismissal claim should fail on jurisdictional grounds if the employer can demonstrate that it no longer required the person's job to be performed by anyone because of changes in the operational requirements of the enterprise.

<b>Recommendation 18</b>	<b>Laws defining a valid reason for redundancy should be confined to termination for reasons based on the operational requirements of the employer's business.</b>
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7.1.25 Unfair dismissal claimants should bear the onus of demonstrating reasonable grounds for success prior to a matter going to conciliation. Those that do not present such prospects should be disallowed on the papers. This combined with strict enforcement of deadlines and the ability for more jurisdictional matters to be determined on the papers, would enable the FWC to deal with



legitimate claims quickly. This in turn would significantly increase the likelihood of reinstatement as an outcome, and avoid unwarranted costs, both public and private.

- 7.1.26 The issue of strict enforcement of deadlines has recently come into focus, with a case<sup>52</sup> drawing attention to the manner in which the FWC's Rules can potentially frustrate this process. The issue arose over the fact that Rule 9 of the *Fair Work Commission Rules* provides an applicant making an unfair dismissal application by telephone additional time to lodge a completed application than is otherwise available. Provided that an applicant has commenced the application (i.e. telephoned FWC) with the 21 day time limit, they then receive an additional 14 days to lodge an application. In the particular case, the telephone application was made on the 21<sup>st</sup> day after termination, with the completed application being lodged 6 days later. The provision of 14 days to lodge an application that has been pre-filled by someone from the Commission is manifestly excessive, particularly as this will generally only require the applicant to sign the form. There is no reason why an applicant utilising the telephone application process should not be required to have lodged the application within 21 days of termination of employment. This appears particularly self-evident when one considers that the original intent<sup>53</sup> of the legislation was for applications to be lodged within 7 days of termination.

## 7.2 Adverse Action

- 7.2.1 Master Builders considers that the adverse action provisions of the FW Act should be abolished. Alternatively, if they are to be retained, they must be rebalanced in order to avoid potential scope for abuse. At the least, the 'sole or dominant reason' test should be reinstated.
- 7.2.2 There has been a significant widening of both "workplace rights" and "lawful industrial activities" under the FW Act compared to earlier federal workplace relations laws. Master Builders considers that the adverse action provisions of the FW Act provide an unnecessary layer of additional and excessive remedies to

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<sup>52</sup> *Brett Ellis v Esso Australia Pty Ltd* [2015] FWC 45

<sup>53</sup> *Clause 13 of Explanatory Memorandum Fair Work Bill 2009*

employees, who are already protected from unlawful or unfair termination and discrimination under other laws.

- 7.2.3 The reverse onus of proof and the removal of the “sole or dominant reason” exemption, which was in the prior law, raise significant issues for employers. Add to this uncapped compensation available in adverse action remedies, as well as none of the unfair dismissal jurisdictional exemptions, the employee’s preference towards bringing adverse action claims is obvious. This trend significantly compromises the positive policy outcomes in having a workplace relations tribunal with an emphasis on being ‘quick, informal and avoid[ing] unnecessary technicalities’.
- 7.2.4 The broadening of “workplace rights” specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. The need to protect employees from termination for filing a formal complaint with a competent administrative authority (e.g. WorkSafe, Fair Work Ombudsman (FWO)) is obvious. However, its extension to situations where an employee makes a complaint to their union or employer is less so. This is particularly the case given the employee only needs to be adversely affected, rather than terminated. Adverse action claims in relation to complaints should be limited to those made to competent administrative authorities.
- 7.2.5 Recent case law serves to underscore this point, with the Courts taking an increasingly liberal view. In *Shea*<sup>54</sup>, the Court held that to fall within the scope of the general protections provisions, a complaint can be any communication which, expressly or implicitly, conveys a grievance, finding of fault or accusation. In a recent Federal Circuit Court case<sup>55</sup>, Lucev J also took a broad approach, finding that the use of the words “in relation to” in s 341(1)(c)(ii) FW Act, protected complaints that: did not necessarily arise from a statutory, regulatory or contractual provision; and may only have an indirect nexus with a person’s terms or conditions of employment (for example, by way of a complaint relating to another person in the

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<sup>54</sup> *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271

<sup>55</sup> *Evans v Trilab Pty Ltd* [2014] FCCA 2464

workplace, or a workplace process, which affects the complainant's employment). A similar approach was taken in another recent case<sup>56</sup>, where Justice Blomberg found that the words "in relation to" in the section were of "wide report", the relationship could be 'direct or indirect' and the nexus likely satisfied where the subject matter of the complaint raises an issue with potential implications for the complainant's employment. The result is unworkable in practice, with the circumstances where an employee may be said to be protected under s 341(1)(c)(ii) unclear. This lack of clarity should be dealt with immediately and eliminated from future laws.

7.2.6 The protection of "workplace rights" should be limited to protecting employees from adverse action for filing a formal inquiry or complaint with a competent administrative authority that is directly in relation to his or her employment. Further, it should go without saying that in order for such inquiry or complaint to be protected, it must be one that has been made in good faith and not for an ulterior purpose. However, the Full Federal Court in *Shea*<sup>57</sup> recently cautioned against implying into section 341 any constraint that would inhibit an employee's ability to freely exercise his or her workplace right to make a complaint. The Full Federal Court's reasoning was that to imply a requirement that the complaint had to be "genuine" would risk discouraging employees, who may have mixed motives, from raising concerns. Such reasoning appears to disregard the fact that employees should be discouraged from making disingenuous complaints. A requirement for complaints to be genuine should not be implied, it should be made explicit in the legislation.

7.2.7 Even with the changes as sought above, the reality is the system enables an employee to make an unsubstantiated claim against their employer – with the employer having to prove otherwise. Small business has no protection from what is a more legalistic and potentially much more expensive exercise of defending a general protections application.

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<sup>56</sup> *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456

<sup>57</sup> *Shea v Energy Australia Services Pty Ltd* [2014] FCAFC 167

- 7.2.8 Accordingly, in addition to the introduction of the sole or dominant reason test outlined above, the reverse onus of proof provision required in adverse action cases should be amended to provide an exemption for small business employers.
- 7.2.9 The High Court decision in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education (Barclay)*<sup>58</sup> serves to demonstrate why Master Builders' policy on general protections is sound and defensible.
- 7.2.10 The course taken by the parties in the *Barclay* case was expensive, complex, and ultimately vindicated the employer's thorough and fair approach to disciplining an employee. The case exposed the flaws in the implementation of the general protections in FW Act, which left it open to the Full Federal Court to approach the first appeal using an "objective" test, usually confined to the stand-alone anti-discrimination laws. This reasoning by the court led to the following finding by Bromberg and Grey JJ:
- If adverse action is taken by an employer in response to conduct of a union, it is impossible for that employer to dissociate or divorce from that conduct its reasons for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee.*<sup>59</sup>
- 7.2.11 The combination of reverse onus of proof and the removal of the sole and dominant reason test in the FW Act, allowed the Full Bench to reach that conclusion. Whilst the High Court reversed the Full Federal Court decision, the fact is the High Court is not the legislator, and cannot translate the reasoning it applied in *Barclay* into a rewrite of the general protections in the FW Act. This responsibility rests squarely on the Government to address the scope of the general protections, and restore the balance for employers.
- 7.2.12 The 3-2 majority High Court decision<sup>60</sup> traversing the same law serves to illustrate this point, with disagreement on how *Barclay* should be applied. The majority in the case applied *Barclay* strictly,

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<sup>58</sup> [2012] HCA 42

<sup>59</sup> Id at para 74

<sup>60</sup> *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41

while the minority had followed it with some qualification. The majority found that section 346 of the FW Act does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the FW Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action. The judges said that the joint reasons of Chief Justice French and Justice Susan Crennan in *Barclay* demonstrated that it was incorrect to conclude that, because the employee's union position and activities were inextricably entwined with the adverse action, the employee was therefore immune, and protected, from the adverse action.

7.2.13 In contrast, Justice Kenneth Hayne in his dissenting judgement said that the delegate's use of the word "scab" on the union placard cannot be divorced from the circumstances in which it was used. Justice Hayne said it was not possible to draw a distinction between the delegate's participation in the union picket and "the manner" in which he expressed his protest – i.e. so long as the protest was conducted lawfully, it was not to the point to ask whether what was said or done in the protest would offend others, or in particular, would offend some employees.

7.2.14 Such a conclusion raises a number of obvious concerns. Firstly, it is discriminatory, in as much as it provides a protection that is not available to non-union members i.e. one would not be protected from adverse action for acting in exactly the same manner, if one was not deemed to be representing or advancing the views, claims or interest of an industrial association. Secondly, it appears to afford protection to conduct that may itself be deemed adverse action pursuant to s 347(b)(iii) and s 346(b). That is, it appears to protect an employee who was actively engaged in discriminating against so called "scab" employees i.e. those who chose not to participate in a so-called lawful activity organised or promoted by an industrial association. Such a result is fundamentally at odds with the very objectives of Part 3-1 of the FW Act, including s 336(b), (c) and (d).

7.2.15 Balance can be achieved through the following recommendations:

**Recommendation 19** Section 347(b)(v) of the FW Act should be removed, as it unfairly protects union members from legitimate disciplinary action in relation to their behaviour as employees.

**Recommendation 20** The test for whether adverse action has occurred should require a comparison of whether the action taken against the employee concerned would have also been taken against other employees in the same circumstances.

**Recommendation 21** Section 360 should be amended so that an employer will be held to have taken action for a particular reason only if it is the sole or dominant reason.

**Recommendation 22** Adverse action applicants must show reasonable grounds for their application during conciliation conferences before the FWC.

**Recommendation 23** Access to an interim injunction prior to proceeding to conciliation should be abolished.

**Recommendation 24** The reverse onus of proof provision required in adverse action cases should be amended to provide an exemption for small business employers.

### **7.3 Anti-bullying laws – a new addition to the WR framework**

7.3.1 These laws were enacted in circumstances where there was already a regulatory environment addressing bullying behaviour in the workplace. The injection of the new laws into this environment adds a layer of complexity and gives rise to the possibility of bullying complaints being raised simultaneously through a range of channels. These channels include:

- The grievance procedures and associated investigatory processes in place within individual workplaces;
- WHS legislation at federal and state levels which include anti-bullying codes;

- The regime of anti-discrimination laws contained within the Act and other legislation (federal and state);
- In Victoria, provisions making bullying a criminal offence ('Brodie's law').

7.3.2 Master Builders' position on these laws has been articulated in detail in the two attached papers, Attachment B and Attachment C.

<b>Recommendation 25</b> <b>Consideration be given to repealing the anti-bullying laws and focussing resources to WHS regulations.</b>
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## **8    Issues Paper 5 – Workplace Relations Framework: Other Workplace Relations Issues**

### **8.1    Is competition law a neglected limb of the WR system?**

8.1.1 Master Builders notes that laws dealing with anti-competitive conduct have failed in their application to secondary boycott conduct by unions in the building and construction industry. The Cole Royal Commission and the recent Boral evidence to the Heydon Royal Commission illustrates that militant unions use secondary boycott conduct as a frequent industrial weapon. It is this concern that motivates both the need for there to be a specific jurisdiction for the building and construction industry to deal with this conduct and for there to be greater reform to these provisions or at least strengthening of the information gathering powers of the Australian Competition and Consumer Commission (ACCC) in this context, a matter dealt with in detail in Master Builders' submissions to the Competition Review Panel.

8.1.2 As reported in Boral Annual Report 2014:

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

*Over that time, our trucks have been stopped, our people intimidated and many of our customers in Victoria have had a*

*“friendly visit” from union officials warning them, essentially, not to do business with us. Many clients have refused to toe the union’s line, for which we are grateful, but it’s difficult for small operators.*

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

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

*Boral is not anti-union. In fact, we work closely with our employees and the various unions that represent them. We should be allowed to continue to carry out our business without this unlawful campaign.<sup>61</sup>*

8.1.3 We note that the ACCC has subsequently commenced Federal Court action in the context of the alleged secondary boycott action by the CFMEU against Boral.

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

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

8.1.5 When the Building Code is fully operative, the ABCC will be provided with a great deal of information relating to the issue of secondary boycotts. Master Builders urges the Productivity

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<sup>61</sup> Boral Limited Annual Report 2014 at p5. See also J Mather and S Patten, *Corrupt culture in super fund*, Australian Financial Review p1, 3 November 2014



Commission to recommend to Government that the ABCC be given the capacity to act quickly within its jurisdiction to act on that information and to be vested with jurisdiction to prosecute in this context. Otherwise, there could be difficulties with acting to stop the reported conduct where there was a requirement for all matters to be referred to the ACCC which has a plethora of other priorities.

8.1.6 One of the issues which arise in the context of secondary boycott activity appears to be the difficulty of gathering of sufficient evidence by the ACCC, as, for example, expressed in media coverage of the issue<sup>62</sup> now before the courts and as outlined in the ACCC submission to the Competition Review Policy dated 15 August 2014.<sup>63</sup>

8.1.7 In its 15 August 2014 submission to the Competition Policy Review, the ACCC commented on the relationship between the *Competition and Consumer Act, 2010 (Cth)* (CCA) and industrial relations legislation:

*The ACCC takes non-compliance with these prohibitions extremely seriously and seeks to enforce them whenever it can where the conduct is not otherwise being addressed by other regulators. However, at times there are challenges obtaining evidence, which in part may be due to limitations on the ACCC's enforcement powers. It is notable, though, that the ACCC receives relatively few complaints about potential breaches of the secondary boycott prohibitions involving employee organisations. All are investigated - there is no lack of commitment by the ACCC to enforce the law.*<sup>64</sup>

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

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<sup>62</sup> Nassim Khadem and Tom Cowie *ACCC Probe of Construction Union Boycott* Sydney Morning Herald 5 June 2014 <http://www.smh.com.au/business/acc-probe-of-construction-union-boycott-20140604-39jdt.html>

<sup>63</sup> ACCC *Supplementary submission to the Competition Policy Review Further matters* 15 August 2014 [http://competitionpolicyreview.gov.au/files/2014/08/ACCC\\_3.pdf](http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf)

<sup>64</sup> Id at p5

- fail to comply with a section 155 notice, to the extent that the person who receives the notice is capable of complying with it;
- knowingly furnish false or misleading information or give false or misleading evidence in response to a section 155 notice;
- obstruct an authorised ACCC officer who enters premises in accordance with s 155(2) to take possession of documents.

8.1.9 Any person found guilty of one of the above offences is liable to a fine of up to 20 penalty units or as noted above imprisonment for up to 12 months per s155(6A).

8.1.10 We note that the ACCC appears to acknowledge that other regulators may be included in dealing with “conduct the subject of a complaint to the ACCC” in this context. In isolating this overlap in the following terms, we submit that the ACCC is vindicating the Master Builders’ proposal for a newly formed ABCC to be vested with the jurisdiction concurrently or, at the least, raising questions of the capacity of the ACCC to assist with the necessary change of culture in the building and construction industry that underlies the current Government policy :

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

*In determining what enforcement action to take, the ACCC will consider whether litigation under the CCA is the most appropriate way to achieve its enforcement and compliance objectives, including whether alternative causes of action that are being pursued are likely to be sufficient to deter future offending conduct.<sup>65</sup>*

8.1.11 The CCA is also deficient in protecting the market from monopolistic conduct or other conduct that would otherwise contravene its

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<sup>65</sup> Id at p7

terms. This is because section 51(2)(a) CCA contains an exemption as follows:

*In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:*

*(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees*

8.1.12 Master Builders has examples of how this exemption is acting inappropriately. That evidence is in paragraph 4.5 of Attachment A. The discussion about regulation of independent contractors in paragraph 8.4 of this submission is also relevant.

<b>Recommendation 26</b>	<b>That the ABCC be vested with concurrent jurisdiction to combat secondary boycott activity in the building and construction industry.</b>
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<b>Recommendation 27</b>	<b>Master Builders recommends that the law should be changed to ensure that an enterprise agreement which prevents, hinders or restricts a business in acquiring goods or services from, or supplying goods or services to another business does not fall within the exemption in section 51(2)(a) Competition and Consumer Act.</b>
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## 8.2 Sham contracting

8.2.1 Master Builders rejects the proposition set out at page 12 of Issues Paper 5 that there is either a growing problem with the use of sham contracting or that the current law is insufficient.

8.2.2 A sham contract arrangement arises when an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. This is currently proscribed in s357 to s359 FW Act. Master Builders stresses that this behaviour is a deliberate act by those who choose to act illegitimately. It is a practice we condemn. It should not, however, be confused with

misclassifying an employee as a contractor, a mistake that may often be made because of the dense and confusing law that governs this distinction, inclusive of a multitude of statutory deeming provisions.

8.2.3 The attempts to paint sham contracting as something different to the deliberate manipulation of the law promotes a range of other agendas. Firstly, it assumes that sham contracting is an endemic problem in the building and construction industry or other industries. This is not the case. Secondly, it enables unions where members are employees rather than a contractor to discourage the formation of independent businesses as a means to boost membership.

8.2.4 Relatedly it appears that some of the fallacious assumptions about this subject arise from the CFMEU's "Race to the Bottom: Sham Contracting in the Australian construction industry".<sup>66</sup> This report contains completely unreliable statistics which seek to demonstrate that nearly \$2.5 billion a year is being allegedly lost in the tax system because of sham contracting. This is not the case. It is inaccurate and falsely damning of the industry.

8.2.5 In respect of the CFMEU's statistics in "Race to the Bottom" the former ABCC found that without further explanation by the CFMEU it is difficult to find other than the conclusions reached by the CFMEU are not reliable. We can be more direct. The Report is wrong and misconstrues the issues. The research released by the Fair Work Building Construction agency on 21 December 2012 about sham contracting<sup>67</sup> falls into error as well. The estimate of 50,000 people being potentially "on a sham contract" may indicate possible misclassification. But it does not represent a proper indication of sham arrangements – the deliberate misuse of the law. This is especially the case with the report's reliance on self-assessment combined with the finding that 54% of workers have never heard of the term "sham contracting". This finding leads to the conclusion that Government should provide funds for an industry-wide education programme; it does not call for a change to

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<sup>66</sup> <http://www.cfmeu.asn.au/downloads/nat/reports/race-to-the-bottom-sham-contracting-in-australias-construction-industry> Accessed 12 February 2015

<sup>67</sup> <http://www.fwbc.gov.au/sham-contracting-research-released-0>. Accessed 12 February 2015

the law about sham contracting but, instead underlines our reform proposed in section 8.4 of this submission.

- 8.2.6 Much of the agenda of those who seek to oppose the current law is based upon making misclassification akin to sham contracting. This is lamentable given the state of the complex law which distinguishes between whether a worker is an employee or a contractor. Employers can already suffer very problematic financial burdens following misclassification if they are then asked to reverse the status of a contractor. Adverse cost consequence should not be added to by labelling misclassification an offence. The current provisions in the law should not be changed.

<b>Recommendation 28</b> <b>Master Builders recommends no change to the sham contracting laws.</b>
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### 8.3 Independent Contracting

- 8.3.1 The building and construction industry relies heavily on independent contractors. There are an estimated 1 million independent contractors operating in the Australian economy with around one third working in the building and construction industry.<sup>68</sup> There are a number of identified<sup>69</sup> reasons for the prevalence of independent contracting in the building and construction industry as follows:

- *the production process on construction projects comprises a diverse range of tasks. Many workers are only required at one point on a project. Production therefore tends to be carried out by a collection of subcontractors working under the supervision of a head contractor;*
- *demand for housing and commercial buildings is sensitive to the economic cycle. As demand is uncertain, the environment encourages the use of contract labour; and*

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<sup>68</sup> See Appendix C Forms of Work in Australia Productivity Commission April 2013 - [http://www.pc.gov.au/data/assets/pdf\\_file/0020/122870/forms-of-work.pdf](http://www.pc.gov.au/data/assets/pdf_file/0020/122870/forms-of-work.pdf)

<sup>69</sup> *Sham Contracting Inquiry Report 2011* Office of the Australian Building and Construction Commission: <http://www.fwbc.gov.au/sites/default/files/ShamContractingInquiryReport-1.pdf>

- *fluctuations in employment mean workers enter from other industries during periods of high labour demand.*<sup>70</sup>

8.3.2 The building and construction industry is cyclical and demand for both employees and contractors varies, as indicated in the last two dot points. The medium term outlook, however, is sound with signs of a rebound from the GFC evident.<sup>71</sup>

## 8.4 Independent Contractor Regulation

8.4.1 The matter of the regulation of independent contractors via enterprise agreements is something that has plagued the industry since the enactment of the FW Act. This was given stark legal emphasis when a Full Court of the Federal Court of Australia rejected an argument that a so-called job security clause in an enterprise agreement, requiring parity of pay and conditions of contractors with existing employees, is an unlawful term because it requires or permits a contravention of the general protections provisions of the FW Act.<sup>72</sup> We believe that the law should reflect the proposition that the Federal Court rejected. Whilst members may theoretically resist clauses in enterprise agreements, unions know that the regulation of contractors via enterprise agreements is a means by which the union becomes the “gatekeeper” of rates pay on site and a basis for the union to exercise control of who is and who is not engaged.

8.4.2 The CFMEU in particular has been insistent that a provision that requires pay and conditions parity between contractors and workers is included in enterprise agreements. Ugly industrial action follows where this clause is opposed.<sup>73</sup> Agreement clauses which restrict the use of contractors and labour hire are having a negative effect on the industry, particularly its costs. Urgent consideration needs to be given to changing this area of the law. But our dismay with the

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<sup>70</sup> Id at para 4.23

<sup>71</sup> [Master Builders 2014 National Survey](#)

<sup>72</sup> *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (14 August 2012)

<sup>73</sup> See Workplace Express 2 October 2012 *Work resumes on Brisbane Children’s Hospital after two months stoppage*

state of the law was only enhanced following the handing down of the findings of the Fair Work Act Review Panel Report.<sup>74</sup>

- 8.4.3 We find puzzling the conclusion of the Panel that the very large volume of costly litigation relating to whether or not particular clauses that regulate contractors are matters which pertain to the employment relationship is “largely ... a return to agreement-content rules that developed over more than a century”.<sup>75</sup> This is particularly the case in the light of the fact that inter alia there is a 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. This is a completely new test and one which we believe is inappropriate 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.
- 8.4.4 The Panel did not consider this matter, merely asserting that the new test addresses “some uncertainties that would otherwise exist as to the outer reach of matters pertaining, and are an appropriate balance between the freedom of employers and the legitimate rights of employees to be represented in the workplace.”<sup>76</sup> It is unclear from this statement and from the surrounding text how this balance can be said to exist. We submit that the balance does not exist in the current law.
- 8.4.5 Testing of the “outer limits” of contractor regulation is proving costly, time consuming and damaging to productivity. Unions want this provision because the subcontractors who go to work on site are presented with a pattern agreement that is in the same terms as the pattern agreement that applies to the principal contractor or “employer”. Coverage by the pattern agreement will deliver mirror conditions with those signed up to by the employer. Hence, it is highly likely in practice that if an agreement has been reached outside of the pattern or template process, there will be lesser

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<sup>74</sup> Above note 27

<sup>75</sup> Id p159

<sup>76</sup> Ibid

conditions. This is the practical industrial reality. There is a linkage between coverage as well as terms and conditions. This is the productivity damaging reality because unions are given impetus to have their pattern agreement as the basis of all work on a site or the allegation is made that “lesser” conditions prevail. Master Builders believes that the law should be urgently changed so that regulation of independent contractors via workplace agreements is made unlawful per se.

- 8.4.6 In order to give greater clarity and certainty to this subject area Master Builders has developed a proposal that has been formally placed before the Government that would establish a government supervised register, in our view best placed within the Australian Tax Office (ATO), where contractors can voluntarily register subject to tests, that provides them and other related parties with a high degree of certainty of their bona fides to operate lawfully as an independent contractor. This would be reinforced by a clear separation between commercial law which should govern independent contractors, and workplace relations law which should govern employers and employees.
- 8.4.7 The application for registration could be accompanied by a certificate from a legal practitioner or other suitably qualified professional or an industry association, to the effect that, having regard to the statutory criteria (which would accommodate external indications of the status of a contractor being applied to reinforce the common law test or otherwise) the contractor should be registered and for which particular project or job inclusive of a temporal limitation.
- 8.4.8 This factor acknowledges the dynamism of the relevant relationships and does not lock the individual or entity into a static framework. The registration would be for fixed periods but renewable where circumstances changed if the contractor was an individual who also worked occasionally as an employee.
- 8.4.9 Master Builders strongly argues that registration of this type would increase certainty in the subcontractor system. This process would require minimal Australian Government supervision, probably



limited to random audits, for example, so that it took on the elements of a scheme of negative licensing. It would operate to take into account the dynamic nature of the contractor status and would permit registration as a contractor for a limited period or only in respect of particular projects.

- 8.4.10 The work of the ATO and other government agencies shows that there are many factors that could lead a small number of persons or entities to fall foul of what is complex and confusing law dealing with the legal status of who is an employee or who is a genuine independent contractor.
- 8.4.11 Further there is a view that some seek to take advantage of the perceived major incentive for income splitting between individuals and interposed entities because of the difference between the company tax rate and the top individual marginal tax rate. It is not difficult to see why these incentives resonate for the higher income earners. The predominately smaller contractors in the building and construction industry do not use incorporation or other business structures as devices for income splitting because these are relatively expensive measures.
- 8.4.12 Master Builders' proposal is based on our strong support of clarity of the legal distinction between an employee and contractor across all laws. The current *Independent Contractors Act, 2006* (Cth) (IC Act) provides a basis upon which contracting arrangements may be distinguished from employment arrangements, thus preserving freedom of contract.
- 8.4.13 In distinguishing between contractors and employees, it is recommended that the current common law test adopted in the IC Act be modified and codified. Master Builders' proposal is based on a system of statutory registration that would assist the task of distinguishing contractors and employees more clearly.
- 8.4.14 In this context we note that, as discussed earlier in this submission in the context of sham contracting, the CFMEU has long, wrongly, contended that many bona fide contractual arrangements are artificial and that many subcontractors are, in fact, employees. The contention manifests itself in disruptive tactics against contractors

and subcontractors from time to time as the CFMEU, amongst other things, seeks the right to challenge the bona fide legal status of subcontractors. Most complaints emanate from the union as the unions have a direct interest in reducing the number and minimising the growth of independent contractors because that activity decreases the pool of potential members and hence the flow of funds to the unions.

- 8.4.15 The ordinary common law test as established in *Stevens v Brodbribb Sawmilling Co Pty Ltd*<sup>77</sup> should continue to be used as the main basis upon which the distinction between a contractor and an employee is assessed. In that case, the High Court established that the major test is if an employer has the right to control the manner of doing the work. But that test is one of many:

*Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, and the provision of holidays, the deduction of income tax and the delegation of work by the putative employee.*<sup>78</sup>

- 8.4.16 External indications of the status of contractor should be used as a reinforcement of the common law test or otherwise. A strong indicator, for example, is an individual having an ATO personal service business determination in effect.

<b>Recommendation 29</b>	<b>In summary Master Builders' recommendations are that:</b> <ul style="list-style-type: none"><li>• commercial law should categorically govern independent contractors with provisions which regulate their contract via workplace agreements made unlawful;</li><li>• a voluntary negative licensing registration system should be introduced;</li><li>• individuals may seek registration as a contractor;</li><li>• the system could be underpinned by requiring applicants to provide evidence from a legal practitioner or other suitably qualified professional that the circumstances of the worker have been assessed as those of a contractor;</li><li>• provide registration only in relation to the contractor's circumstances as assessed by the</li></ul>
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<sup>77</sup> (1986) 160 CLR 16

<sup>78</sup> Id at para 9

**relevant professional;**

- **provides registration that is time limited; and**
- **has the consequence of individuals being precluded from registration, where misuse of the system occurs.**

8.4.17 We believe that the introduction of this system would reverse the tide of negative change that now affects independent contractors.

## **8.5 Other elements of the WR framework – transfer of business**

8.5.1 Transfer of Business rules under the FW Act are dense and difficult to apply. This particular part of the legislation has proved disappointing as it overturned the long established and well understood laws regarding transmission of business. The pre-existing laws operated on the simple premise that a person could not transfer a business and thereby avoid their industrial obligations.

8.5.2 The FW Act has expanded the reach of these laws to circumstances where it cannot reasonably be said that a business has actually been transferred. Moreover, it creates a framework that delivers absurd outcomes and which are unfair to employers and which have restricted opportunities for employees.

8.5.3 Under the former *Workplace Relations Act*, employment entitlements would transfer only where a new employer became the 'successor, transmittee or assignee' of another 'business' and an employee of that business employed immediately prior to the transfer (or recently made redundant) was engaged by the new employer within two months. Whether a person was a successor, transmittee or assignee of another business was settled in Federal and High Court cases, where a reasonably broad but common-sense view of what constituted a business was determined.

8.5.4 The rationale for this shift away from focusing on whether a business has transferred is unclear. What is evident is that certainty in business transfers has been replaced by inherent uncertainty and risk. This uncertainty affects the employment prospects of workers, as risk averse businesses shy away from complex laws.

- 8.5.5 Master Builders' concerns arise in relation to the surprisingly tenuous nature of the 'connection' required between the old employer and the new employer. These are indicated at s311(3) to s311(6) of the FW Act and include circumstances where there has been:
- a transfer of assets between the old and new employer (or associated entities of those employers (s311(3)));
  - outsourcing (s311(4));
  - insourcing (s311(5)); or
  - the two entities are associated entities (s311(6)).
- 8.5.6 The operation of these provisions has proven to be complicated, uncertain and highly unsatisfactory. The interaction between the transfer of business rules and complicated rules about accrued 'service' for the purposes of annual leave and redundancy add to the confusion.
- 8.5.7 The net effect of these rules has seen employees disadvantaged in a variety of ways, not least of which is a general distaste for incoming operators of a business to pick up existing employees. This can have particularly devastating consequences for employees when a business fails.
- 8.5.8 In addition to these difficulties, it is impossible to estimate how many transfer of businesses have, as a matter of law, occurred. Employment within the building and construction industry is relatively fluid and assets (or the use of assets) transfer between businesses on a regular basis. There have been many examples of potential unintended transfers occurring with businesses unaware that this has occurred, and not even thinking to seek advice as the definition is so unacceptably broad that it does not trigger consideration of the consequences of transactions covered by the definition.
- 8.5.9 Previous transmission of business rules, based on the actual transfer of a business, must be reinstated.

**Recommendation 30**    **Simpler transfer of business rules be introduced.**

## **8.6**    **Right of Entry**

- 8.6.1    Union officials can lawfully enter construction sites under both the FW Act<sup>79</sup> and model WHS legislation.<sup>80</sup> Respectively, the FW Act allows for industrial organising or discussions with employees or investigations about employment law breaches, while model WHS legislation allows for safety consultations with workers or investigations about safety breaches.
- 8.6.2    The most common rights of entry exercised by unions in the construction industry are investigative rights of entry under model WHS legislation, which provide for an extremely broad entry regime. Unlike the FW Act, which requires 24 hours advance written notice prior to entry,<sup>81</sup> other than in Queensland, the model WHS legislation does not require any advance notice prior to investigative entry (and the wide powers entailed).<sup>82</sup> This severely limits an employer's ability to manage any illegitimate disruption. Similarly, unlike the investigative regime under the FW Act (which limits investigations to breaches relating to actual union members) the WHS Act entitles union officials to enter a workplace where any *potential* union member (rather than an actual union member) might perform work.<sup>83</sup> This provides unions with virtually industry-wide rights to enter workplaces, regardless of whether they actually represent employee-members in the workplace concerned.
- 8.6.3    Once a union official has entered on investigative safety grounds, although they cannot actually order that work cease,<sup>84</sup> their investigative rights necessarily entail a degree of disruption.

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<sup>79</sup> FW Act, Part 3-4.

<sup>80</sup> E.g. *Work Health and Safety Act 2011* (ACT), Part 7. The ACT legislation will be used hereafter as the example of model WHS legislation.

<sup>81</sup> FW Act, section 487, 518.

<sup>82</sup> Section 119 of the WHS Act only requires notice to be provided 'as soon as is reasonably practicable *after* entry'.

<sup>83</sup> i.e. under the union's membership rules. WHS Act, section 116, definition of 'relevant worker'; section 117.

<sup>84</sup> They can only 'warn' employees to stop work where there is an imminent risk to their health and safety: WHS Act, section 118(1)(e).

Master Builders does not object to such disruption, where investigations are not used for ulterior (non-safety related) purposes.

8.6.4 However, it would appear that construction unions, in particular the CFMEU, routinely use investigative rights of entry under model WHS legislation for ulterior, usually industrially-motivated, purposes. These can vary, but often include intentional disruption of sites in order to compel builders to enter into pattern CFMEU enterprise agreements, engage CFMEU-preferred subcontractors or pay for union memberships.

8.6.5 For example, consider the following CFMEU case studies of the ongoing Heydon Royal Commission. The Commission found that, following the death of a construction worker on a Victorian construction site, the union used the opportunity to pursue an unrelated industrial agenda:

*Even if Mr Setka [the Victorian CFMEU State Secretary] and others initially held strong and genuine concerns about safety on the site, that does not excuse the behaviour that is now under consideration. That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement (the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).<sup>85</sup>*

8.6.6 Similarly, in Queensland, the Heydon Royal Commission found that the CFMEU engaged in a 'deliberate and protracted campaign of industrial blackmail and extortion' against the Smithbridge Group, aimed at 'forc[ing] companies in that group to enter into enterprise agreements with the CFMEU'.<sup>86</sup> As a part of that campaign, the Heydon Royal Commission found that CFMEU officials parked a car across the gate of a construction site on which a member of the Smithbridge Group was operating, as a cynical attempt to create a safety issue and prevent employees from entering the site. In a further case study concerning the now notorious CFMEU black-ban

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<sup>85</sup> Above note 2, pages 1560-1561.

<sup>86</sup> Above note 2, pages 1400, 1431.

against Boral,<sup>87</sup> the Victorian CFMEU State Secretary, Mr Setka, stated that 'truck emissions testing will be the next phase of the action the CFMEU will take against Boral'.<sup>88</sup>

- 8.6.7 Rights of entry are significant statutory entitlements held on *trust*, i.e. that the person granted them will exercise them lawfully, for furthering safety. The perception that such trust is being abused for ulterior motives is highly dangerous – it 'trivializes' safety. This has the potential to inspire cynicism in relation to the system of safety regulation and enforcement in general.
- 8.6.8 While intentional disruption of a workplace by a union official is prohibited under the model WHS legislation, as is acting in an 'improper manner',<sup>89</sup> it is often difficult to prove that a union official's entry under model WHS legislation was industrially motivated, given the complexity of managing safety on construction sites and the fact that the core test of an employer's duty of care under model work health and safety legislation ('reasonably practicable') inherently lends itself to argument.
- 8.6.9 Master Builders' concern is that Australia's model work health and safety laws provide unions with unduly broad rights of entry, which are prone to abuse for ulterior purposes. Master Builders submits that it is clearly time that union rights of entry under model work health and safety laws were re-examined.
- 8.6.10 While there are genuine safety issues in the construction industry, it is far from clear that union rights of entry enhance safety, especially given the allegations that they are abused for industrial ends (a 'crying wolf' perception that might in fact trivialize safety). The structure of the model WHS legislation, which enables entry *without notice* onto any construction site where a union might have even a *potential member*,<sup>90</sup> provides the legal framework for the

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<sup>87</sup> The black-ban was imposed following Boral's refusal to comply with the CFMEU's alleged demand that it cease supplying Grocon with concrete. The CFMEU is allegedly 'at war' with Grocon following a 'bitter industrial dispute' allegedly arising from Grocon's refusal to employ CFMEU-nominated safety officer, leading to a four-day blockade of Grocon's Meyer Emporium site: *Grocon Constructions (Victoria) & Ors v Constructions, Forestry, Mining, and Energy Union & Ors* [2013] VSC 275, at 100, 346.

<sup>88</sup> Above note 2, page 1043.

<sup>89</sup> WHS Act, section 146. See also section 500 of the FW Act.

<sup>90</sup> WHS Act, section 116, definition of 'relevant worker'; section 117.

‘uncoupling’ of unions from their more normal role of member advocacy.

- 8.6.11 The alleged abuse of safety rights of entry begs the question of whether unions such as the CFMEU should have them at all. Certainly, the existence of investigative rights of entry under safety laws appears to be something of an anomaly in the common law world. Master Builders understands that neither New Zealand nor the United Kingdom provide such rights to unions. Nevertheless, New Zealand has a better overall safety record than Australia, while the United Kingdom lags behind Australia.<sup>91</sup> This suggests that there is no clear correlation between granting investigative rights of entry to union officials and improved safety. Master Builders would support an enhanced role for government in regulating safety in-lieu of union rights of entry. After all, law enforcement is normally a role allocated to government, not interest groups.
- 8.6.12 Master Builders submits that model work health and safety legislation should be amended to reflect the Queensland model: unions should only be able to enter workplaces to investigate alleged breaches of safety laws where they have provided 24 hours written notice, with an exemption from such notice in emergencies. This mechanism would ensure that employers can manage union official(s)’ entry so as to minimise any illegitimate disruption, while still affording unions with a capacity for swift entry in emergencies.
- 8.6.13 This regime would be proportional: it would afford unions with graduated rights of entry depending on the severity of the issue to be investigated. Just as importantly, it would enable construction industry employers to manage their sites so as to minimise the productivity-diminishing disruption. The ease with which sites can currently be disrupted enables the CFMEU to engage in a range of anti-competitive practices, such as coercion of contractors into pattern enterprise agreements on pain of exclusion from the market, as the findings of the Heydon Royal Commission have amply detailed. The restoration of the rule of law on construction sites via a modest re-working of union rights of entry is significantly ‘low

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<sup>91</sup> *Key Work Health and Safety Statistics, Australia* (Safe Work Australia, 2014) pg 3, figure 3.



hanging fruit' for any government seeking to improve competition and productivity in the construction sector.

**Recommendation 31 That the Queensland model of 24 hours' notice for investigative entry under model work health and safety laws is adopted nationally.**

- 8.6.14 The Cole Royal Commission found that the proper regulation of entry and inspection rights exercised by unions is a matter of considerable importance in bringing about change to the workplace relations of the building and construction industry. The overwhelming evidence presented to the Cole Royal Commission was that industrial disruption on building and construction sites followed upon union officials entering sites as a result of the exercise or purported exercise of a statutory entitlement. The Cole Report's finding was that industrial disputation was almost always the result of intervention in workplace relations by union officials. Nothing has changed since that time. Intervention is often contrived, uninvited and unwanted by affected employees.
- 8.6.15 The Cole Royal Commission found that entry and inspection provisions are routinely contravened in the building and construction industry. In order to restore the rule of law in the building and construction industry, entry and inspection provisions must be fundamentally reformed. That fundamental reform has not occurred and the provisions of the FW Act do not assist with the industrial realities faced by employers on a daily basis. Indeed, there is evidence that unions are deliberately seeking to eschew the FW Act's right of entry regime and to obtain "invitations" to enter premises<sup>92</sup>. Right of entry in this context requires root and branch reform.
- 8.6.16 There are a few immediate matters that should be changed in the FW Act so that union's true representational role and right of entry as a privilege are restored. First Master Builders supports the changes proposed by the Amendment Bill 2014. The elements of

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<sup>92</sup> See for example *Lend Lease Building Contractors Pty Ltd v CFMEU* [2013] FWC 8659 (1 November 2013)

that Bill relating to right of entry would assist to restore balance in the system by:

- repealing amendments made by the Fair Work Amendment Act 2013 that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
- providing for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers;
- repealing amendments made by the Fair Work Amendment Act 2013 relating to the default location of interviews and discussions and reinstating pre-existing rules; and
- expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

8.6.17 One of the bases of entry by unions is to hold discussions with members. This is a legitimate representational role. However, that right should be limited to discussions with union members, rather than the current requirement that employees need only be eligible to be a member per s484(b) FW Act. We submit that a union should not have a statutory right to come onto site to canvass for business i.e. hold discussions with potential members which is a right the law currently confers. In this context we underline our support for the Amendment Bill 2014.

8.6.18 More importantly under the FW Act there are more fundamental issues that need reform. Currently, union officials in the building and construction industry regularly flout the law. If union officials are found to have breached workplace laws they should automatically have their federal permits revoked or suspended because right of entry is a privilege. This aligns with findings of the former Australian Industrial Relations Commission (AIRC) which indicate that the right of entry power has attached to it great responsibilities. In the

*Victorian Association of Forest Industries* case<sup>93</sup>, the AIRC found that when a union official who holds a relevant 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. Arguably, suspension should occur as soon as decision to prosecute occurs. Why should a union and/or its officials that continues to refuse to meet their obligations under the FW Act (breaking the laws without contrition) be entitled to exercise rights under the same legislation: Master Builders calls for the duty akin to that of a public official to be administered in that light. Further, Master Builders recommends that the Productivity Commission recommends an overhaul of right of entry laws so that union officials are required to act more like public officials.

**Recommendation 32** That the law relating to right of entry better reflect the fact that union officials are exercising functions akin to those exercised by public officials.

## 9 Name Change Recommended

9.1 Master Builders believes that the nomenclature of the principal statute, the FW Act, is inappropriate. The statute cannot of itself render fairness. The Commission of itself cannot render fairness which is often shaped by circumstances and context. The statute should better reflect its function and be entitled the Workplace Relations Act or a similar title that better points to its functioning.

**Recommendation 33** That the name of the principal statute be changed to better reflect its functions.

## 10 Conclusion

10.1 Master Builders has in this submission presented the case for building and construction industry specific regulation of workplace relations. The

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<sup>93</sup> 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

Productivity Commission's work in relation to Public Infrastructure and the findings in that report are called on to reinforce that view.

- 10.2 In addition, Master Builders has pointed out a range of changes to the FW Act, with 33 recommendations in that regard, that would enhance the objectives on which the current workplace relations system is based and which would bring needed balance to the system.
- 10.3 Master Builders looks forward to publication of the Productivity Commission's draft report so that further interaction on this vital subject can occur.

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