Master Builders Australia

Submission to the Senate Education and Employment Legislation Committee

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

5 February 2021

MASTER BUILDERS AUSTRALIA

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Introduction

1. This submission is made on behalf of Master Builders Australia Ltd.

2. Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 130 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

3. The building and construction industry is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 10.7 per cent of gross domestic product, and around 9 per cent of employment in Australia.

4. The building and construction industry:

   - Consists of about 395,000 business entities, of which 98.5% are considered small businesses (fewer than 20 employees);
   - Employs almost 1.2 million people (around 1 in every 11 workers) and is the number one provider of full-time jobs in the Australian economy;
   - Represents about 11% of GDP, the second largest sector within the economy;
   - Trains more than one third of the total number of trades-based apprentices every year, with over 55,000 construction trades apprentices and trainees; and
   - Performs building work each year to a value that exceeds $210 billion.

Summary of Submission

5. This submission is made to the Senate Standing Education and Employment Legislation Committee ('the Committee') to assist in its inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* ('the Bill').

6. The Bill seeks to amend the:

   - *Fair Work Act 2009;* ('FW Act')
   - *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009;* ('FW TCPA')
   - *Building and Construction Industry (Improving Productivity) Act 2016;* ('BCIIP Act')
   - *Federal Court of Australia Act 1976;* ('Federal Court Act') and the
   - Federal Circuit and Family Court of Australia Act 2020 ('Federal Circuit and Family Court Act').

7. The aim of the Bill is to make a series of minor changes to the Fair Work regime that will, considered collectively, improve its overall operation, and assist workplaces to better contribute to, and enjoy the benefits of, a national economic recovery in the context of COVID-19.

8. While taken as a whole, Master Builders **supports** the Bill and urges the Committee to recommend it be passed by the Parliament. The general basis for this support is, in summary, that the Bill:

   - will provide greater certainty for workplaces insofar as the rules applicable to casual employment and related obligations;
   - makes significant inroads to address a range of procedural and technical complexities in the existing laws that discourage the use of enterprise bargaining agreements ('EBAs');
   - will improve the prospect of attracting additional new investment and the creation of new jobs in the construction of major projects by giving FWC discretion to approve greenfield agreements ('GFAs') with a nominal length of up to eight years; and
   - will go some way to simplifying Modern Awards and providing more flexibility to save and create jobs as part of the COVID-19 recovery.

9. The Committee should, however, note that Master Builders' support for the Bill is given on the basis that the amendments it contains will improve the general operation of the Fair Work laws, but only when considered as an **overall package**.

10. This means that the Bill contains many individual amendments that Master Builders does not support and consider to be contrary to our members interests. However, when considered holistically, the amendments proposed by the Bill will be to the overall benefit of our members and those of employers generally.

11. We agree with the sentiment expressed by the Minister for Industrial Relations when introducing the Bill, who stated:

> *"These reforms address known problems in the industrial relations system and will be crucial to securing Australia's economic recovery and safeguarding the workplace for future generations. This bill is not ideologically based; rather, it is founded on a series of practical, incremental solutions to key issues that are known barriers to creating jobs. They are balanced and pragmatic and seek to create a fair and efficient industrial relations framework for all Australians."*[1]

12. The submission that follows provides a summary of matters relevant to the measures within the Bill from a building and construction industry context. The remainder of the submission deals with the five broad schedules set out within the Bill.

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

Reforms to Tackle Unlawful and Illegal Conduct in Building and Construction remain urgently needed

14. The Committee should further note that Master Builders considers there are elements within the proposed Bill where further changes could be made, and many other areas within the Fair Work regime more broadly that require urgent reform which are, regrettably, left untouched by the Bill.

15. Chief amongst those other areas is the existing legislative gap that allows registered organisations and officials thereof to repeatedly engage in determined campaigns

[1] *House of Representatives Hansard, Wednesday, 9 December 2020 p. 11016*

to break workplace laws without commensurate or meaningful penalty. The building and construction industry is, regrettably, home to the greatest extent of such illegal and unlawful conduct by a significant margin and reforms to appropriately tackle this situation remains urgently needed.

16. There are countless sources that forensically describe the conduct and history of registered employee organisations in building and construction. One of the most recent was the Final Report of the *Royal Commission into Trade Union Governance and Corruption*[2] ('Heydon Royal Commission') which devoted some 1160 pages to the building and construction sector alone. Of the five volumes in the Final Report, almost one and a half volumes were specific to the building and construction sector and the conduct of the CFMEU. In respect of this conduct, the Royal Commissioner summarised:

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

Then further observed:

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

And later:

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

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

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

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

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

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

And:

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

Then further:

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

And:

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

19. Of the seventy-nine recommendations made for law reform in the Final Report, seven were specific to the building and construction sector. These recommendations largely went to addressing the conduct displayed by building unions which the report identified as being home to a *"longstanding malignancy or disease"*[11] with over 100 adverse court finding against the union since 2000.

20. The CFMEU have been penalised over $12 million in cases brought by the ABCC[12], the FWBC and their predecessors and building unions generally have been penalised over $16 million in total. Despite this woeful track record, the conduct continues unabated which is why Master Builders emphatically supported the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* ('Ensuring Integrity Bill' or 'EI Bill').

21. The Committee will therefore be unsurprised to learn that the Prime Minister's announcement of May 2020 that the "*government will not pursue a further vote in the Senate on its Ensuring Integrity Bill*"[13] was greatly disappointing to members of Master Builders.

22. However, Master Builders was somewhat heartened when the Prime Minister went on to observe that the withdrawal of the EI Bill:

> "*does not reflect any change or lack of commitment to the principle that lawful behaviour of registered organisations should be strictly required on*

[7] *Heydon Report, Chapter 5, page 396*
[8] *Ibid*
[9] *Ibid*
[10] *Ibid*
[11] *Heydon Royal Commission, Volume 5, p401*
[12] *"Latest penalty takes CFMEU fines past $10m mark" Courier Mail, August 4, 2017*
[13] *Prime Minister, Address to National Press Club, 26 May 2020*

> *all work sites in Australia. The government maintains its complete lack of tolerance for the kinds of behaviour we have particularly seen from the CFMMEU on Australian construction sites in recent years. It's not only illegal, it's costing jobs. Given how critical the construction sector will be to the task of rebuilding the Australian economy, the government remains committed to ensuring the law breaking stops. We are committed to ensuring that this happens in the simplest, fairest and most effective statutory form possible, which we will consider going forward."*

23. Master Builders remains of the strong and emphatic view that achieving the above end remains the most pressing item of workplace reform and that this should attract the urgent attention of Government.

Industrial Relations Reform Working Groups – Involvement of Master Builders

24. The genesis of the Bill under consideration arises from the outcomes of five Industrial Relations Reform Working Groups ('IRWGs') as announced by the Prime Minister on 26 May 2020.

25. On 11 June 2020, the Government confirmed that Master Builders would be involved in the IRWG process in two of the five working groups, one of which dealt with general Enterprise Bargaining ('EBAWG') and the second dealing with Greenfield Agreements ('GFAWG').

26. Throughout the period over which the IRWGs met, Master Builders adopted an approach that was guided by several core principles, being that reform should:

- promote new jobs and economic growth/recovery opportunities;
- be pragmatic, sensible and balanced; and
- acknowledge that all workplaces are different and one size rarely fits all.

27. In adopting this approach, Master Builders noted the Prime Minister's comments that participants in the IRWGs would be invited "*without prejudice to their positions*"[14] and made a deliberate decision to ensure our contribution was focussed on solutions to identified problems that would be broadly acceptable to all working group participants – including those representing unions. As a result, Master Builders temporarily put aside a raft of long-held policy positions and instead focussed efforts in areas we assessed as holding a potential for reform mutually agreed by all IRWG participants in the context of a "*genuine good faith process to get some real outcomes, to make the jobs that Australia needs*"[15].

28. Master Builders, as did the employers generally, did not pursue an 'ambit' approach or pursue proposals with no prospect of success. On several occasions, employers expressed a willingness to discuss changes to address union concerns irrespective of whether we shared the nature of that concern.

29. This is relevant, as the Bill as introduced is largely reflective of this approach in that it contains a range of minor amendments that will improve the operation of the laws, but only when considered holistically. The Bill contains some amendments that employers would conventionally oppose and those amendments we do support are by no means reflective of what Master Builders would ordinarily consider to be necessary more broadly. Put another way, there is simply no 'ambit' within the Bill

[14] *Prime Minister, Address to National Press Club, 26 May 2020*
[15] *Ibid*

and, as the Minister noted upon introduction, it represents "*practical, incremental solutions to key issues that are known barriers to creating jobs. They are balanced and pragmatic.*" Any amendment proposed must be considered in the above context.

30. Master Builders would note, however, that the IRWG process was, in and of itself, an extremely positive process in terms of increased dialogue and building positive working relationships with other organisations representing employers and employees alike.

Schedule 1 – Casual Employees

31. The amendments proposed in this Schedule seek to:

- create a definition of casual employee that provides both certainty to both employers and employees about this category of employment;
- create a casual conversion entitlement in the NES that allows an eligible casual to convert to ongoing full-time or part-time employment;
- oblige employers to provide new casual employees with a Casual Employment Information Statement, published by the FWO;
- give courts the ability to offset casual loading amounts paid to a casual against certain entitlements applicable during a period when that employee was not casually engaged.

32. Section 15A creates a statutory definition of casual employee. This definition provides that a person is a casual employee if:

- an offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

33. The concept of a statutory definition is supported by Master Builders as this will create much needed certainty for workplace participants as to what represents 'casual' employment, while boosting business confidence.

34. This definition is needed as recent decisions in recent Workpac v Skene[16] and Workpac v Rossato[17] have departed from the hereto commonly accepted definition of a casual employee – being those casuals who were engaged and paid as such. This departure, and the consequential findings that an entitlement to Annual Leave existed despite already being paid through a casual loading (a 'double dip') has created much uncertainty for workplaces.

35. In addition, the above decisions have opened the door for Courts to adopt variable approaches to determining whether particular employees are 'casual' – giving rise to even further uncertainty. Combined with the prospects of large class actions, legislative certainty is entirely appropriate and more necessary than ever - any ambiguity must be resolved.

[16] *[2018] FCAFC 131*
[17] *[2020] FCAFC 84*

36. Master Builders preference would be for the definition of a casual employee to be simply one that is engaged and paid as a casual, with a casual loading of 25% of the employee's base rate of pay for ordinary hours. This notwithstanding, the definition of a casual as proposed is supported on the basis that it will bring certainty and confidence to workplaces.

37. Subsection 15A(2) provides an exhaustive list of factors against which regard must be had in determining the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work. Master Builders notes this list and particularly supports the exhaustive nature thereof as this will provide certainty to employers and employees (which is critical) while limiting the prospect for further unfettered re-interpretation by Courts.

38. Master Builders supports the notion of a "firm advance commitment" as this allows the nature of the engagement to be assessed at the time the offer was made and accepted. This not only gives effect to the intention of the parties, but also avoids the prospect for the status of an employee to unintentionally change throughout its course.

39. Master Builders supports the concept advanced at subsection 15A(3) which provides that "a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work" and subsection 15A(4) which clarifies the assessment is made at the time at which the employment is offered and accepted.

40. New subsection 15A(5) details the circumstances under which a person's casual employment ends, including where the employment is converted to full or part time, or the person accepts an alternative offer of employment (other than as a casual employee).

OFFERS AND REQUESTS FOR CASUAL CONVERSION

41. Proposed new Division 4A of Part 1 of Schedule 1 of the Bill will insert a new right for eligible employees to request to convert to full-time or part-time employment.

42. Master Builders does not oppose this amendment and notes that it contains new obligations for employers, such as the need for business to offer the 'right to convert' as opposed to a 'right to request' and that the period of service over which a regular pattern must be worked is reduced from 12 months to six months. In addition, all employers will now have to provide employees with a Casual Employee Information Statement.

Schedule 2 —Modern Awards

43. There are two central parts to this Schedule that deal with amendments relevant to certain Modern Awards. These changes include:

- The capacity for part-time employees and their employers to agree to work additional agreed hours at ordinary rates;
- The capacity for certain employers to issue 'flexible work directions' relating to employees' duties and location of work; and
- Commensurate changes to FWC processes giving effect to the above amendments.

44. Master Builders notes that the amendments in Schedule 2 will only have application to those sectors applying twelve specific Modern Awards to be known as 'identified modern awards'. The list of 'identified modern awards' does not include the Modern Awards commonly applicable to building and construction workplaces.

45. This notwithstanding, Master Builders supports the amendments as proposed. In doing so, Master Builders notes that several of the facilitative provisions proposed in this Schedule mimic those contained in an Application made by Master Builders Australia to vary two key construction awards in light of the COVID-19 pandemic. Regrettably, the application was only partly granted.

Schedule 3 – Enterprise Agreements

ENTERPRISE AGREEMENTS IN BUILDING AND CONSTRUCTION

46. There is an inextricable link between enterprise bargaining and the building and construction industry.

47. Approximately one in every three EBAs made will operate within, and be applicable to, workplaces in the building and construction industry[18]. Of the 9804 agreements current at the end of the September 2020 quarter, some 2823 were construction sector agreements – the largest user of any economic sector.

48. Aside from being an inherently domestic sector, there are many reasons for this high degree of use which is be viewed both positively and negatively.

49. On the one hand, an EBA provides future stability and certainty in terms of both working arrangements and labour cost, which is obviously crucial to building and construction, the types of work performed therein, and the project-based nature thereof.

50. More broadly, efficient, sensible and fair bargaining at the workplace level is fundamental to ensuring workplaces can put in place arrangements that suit their needs and unlocks their potential to be more productive, more successful and create more jobs. Every workplace is different - one size rarely fits all - and enterprise bargaining offers an avenue to really boost productivity, drive innovation and maximise success for both employers and employees – outcomes that are more important now than they ever have been.

51. On the other hand, building and construction continues to suffer a very high degree of pattern bargaining and almost all industrial action can be linked in some way to matters arising directly or indirectly from the existence (or otherwise) of a union approved pattern EBA.

52. While there are countless documented examples of both how this occurs and the ramifications thereof, the Heydon Report at Chapter 5 neatly summarised industry reality by reference to case studies.

53. One of these case studies revealed the operation of (at paras 46-47):

> *"what one CFMEU organiser referred to as 'the system': a process by which the major contractors in a sector of the industry agree to identical enterprise agreements, and the rest of the contractors are then told that this is the industry enterprise agreement and that they need to sign it. The agreements contain terms that confer financial benefits on the CFMEU, and 'jump up'*

[18] *Trends in Federal Enterprise Bargaining Report September quarter 2020*

> *clauses that require subcontractors to pay CFMEU enterprise agreements rates. Contractors who refuse to sign are targeted by the CFMEU in different ways, by abuse of rights of entry provisions, by using audit clauses in an existing enterprise agreement, and by applying similar pressure to builders to engage only 'preferred contractors'."*

And later at para 50:

> *"The 'system' has many unsatisfactory features. Some are dealt with by the existing law. Some (such as the benefits that flow to the CFMEU under pattern enterprise agreements and anti-competitive aspects) are dealt with in some of the recommendations to this report."*

And at para 51 the Commission observed:

> *"Stopping industry wide pattern bargaining would go a long way towards redressing the unsatisfactory aspects of the construction industry referred to above."*

54. It is for conduct such as this that the ABCC was established to tackle and, despite their ongoing efforts, continues to flourish within the building and construction industry.

INDUSTRY AGREEMENT NUMBERS ARE FALLING

55. While debates about the benefit or otherwise of enterprise bargaining to the building and construction industry will remain perennial, there is clear evidence that the extent to which EBAs are used within the industry is lessening over time.

56. For example, in the September Quarter 2017 there were 4195 current agreements which applied to construction. For the equivalent quarter in 2020, that amount had dropped to 2823 – a decrease of almost 33 per cent.[19]

57. Master Builders notes that this decrease appears broadly congruent with the experiences of all economic sectors, suggesting that there are broad or systemic issues that discourage its use.

58. However, in terms of building and construction, Master Builders submits that the below feedback from members will provide the Committee with a current snapshot of how employers view enterprise bargaining in the sector:

> *"I can't think of anyone who actually wants to make an EBA. Instead, EBAs are something you have to have because the client wants you to have one, or to keep the union off your back. "*

> *"There is no negotiation. It's their way, or your sites suddenly get hit with trivial issues or they make up problems to have a dispute about. Sometimes, you get leant on by others who have signed the union EBA and can't get onto jobs until you've signed up."*

> *"We're on our fourth EBA and when the union comes to talk about a new one, it's going through the motions really. Here's the new EBA, sign there, all the blokes signed up? Great, see you next time."*

[19] *Ibid*

> *"We could be easily three times bigger than we are, but we want to stay small so we knock back jobs all the time. If you get too big, the union starts to notice and then you'll have to sign their pattern deal which we just couldn't afford. So we just stay small and fly under the union radar best we can."*

> *"We've never had the union around here, and we had negotiated a deal with our workers directly. Once it was filed the union spotted it as a non-union deal, and they were all over us, too much pressure, so we withdrew and had to cop the union EBA."*

> *"There are so many hurdles and processes involved in making EBAs that it's just not worth it. Even if you can negotiate a good deal, it could be months before it finally gets FWC approval, and before then you're asked to provide all sorts of information that deals with situations that just won't ever happen in reality."*

59. In addition to these sentiments, Master Builders regularly receives complaints from members regarding a range of administrative difficulties experienced during the approval process within FWC. These include:

- A predisposition for building unions to intervene in FWC matters involving attempted approvals of non-union EBAs, or where they have not been involved in negotiations, with a view to stymying, frustrating or delaying the process;
- The necessity to provide large tranches of readily available information in a hard copy form if referenced in a proposed EBA. This is particularly problematic as it is common for industry agreements to reference over 150 separate, additional document sources (see example **Attachment A**);
- The apparent ease by which parties seeking to oppose an EBA are heard by FWC;
- The need to provide information, documentation or other undertakings that deal with hypothetical situations that would never be adopted by a workplace;
- Disparate and lengthy times taken by FWC to approve EBAs, particularly non-union agreements; and
- The filing of two EBAs in the same terms, where one is approved swiftly and the other delayed for months following numerous requests for additional information.

60. The above complaints are just a selection of those commonly reported and, while generally administrative and procedural in nature, they are the cause of quite significant practical problems resulting in many adverse consequences for workplaces and participants therein, particularly those who experience a delay in receiving approval.

61. Master Builders submits that Schedule 3 of the Bill will partly address these concerns and is supported as discussed below.

PART 1 – OBJECTS

62. The amendment to the objects of Part 2-4 by the inclusion of a re-cast s.171 will expand upon the existing objects of this section to better reflect the intended operation and outcomes of the enterprise agreement framework, which the FWC

must take into account when exercising powers and performing functions under that Part.

63. The amendments also provide that the FWC will be required to exercise powers and perform functions under Part 2-4 in a manner that recognises the outcome of bargaining at the enterprise level, thereby promoting the primacy of bargained outcomes between employers and employees in the enterprise agreement framework.

64. Promoting the primacy of outcomes bargained between employers and employees is a minor but significant and important change. It is common for Master Builders members to report a view suggesting that FWC is more focussed on finding reasons to not approve or disturb negotiated outcomes, than they are giving effect to those outcomes.

65. The amendment proposed sets the tone for how Part 2-4 should operate and will guide how the other proposed amendments will be applied.

PART 2 – NOTICE OF EMPLOYEE REPRESENTATIONAL RIGHTS (NERR)

66. This amendment extends the time for an employer to provide the notice of employee representational rights (NERR) from 14 days to 28 days and requires the FWC to publish the NERR on its website.

67. The practical effect of this change is that it removes the need for the NERR to be provided in a hard copy form, meaning that employees involved in bargaining need only be referred to the standard information on an independent website.

68. The benefits arising from this change will be to remove a burdensome administrative process which has gained some infamy in terms of being grounds for the rejection of a proposed EBA. In addition, there will be no change to the requirement to take reasonable steps to give the NERR to employees; Employers will still need to give the NERR as soon as practicable; the 28-day period is the maximum or default period, beyond which reasonable practicability could not be asserted; and Employees will continue to receive the NERR and the information it provides prior to voting on a proposed agreement.

PART 3 – PRE-APPROVAL REQUIREMENTS

69. The amendments in this part seek changes to the steps required of employers prior to asking employees to decide whether or not to approve a proposed agreement.

70. Proposed subsection 180(2) requires an employer to take reasonable steps to ensure that relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the proposed agreement. 'Relevant employees' are those the employer requests under new subsection 181(1) to approve a proposed enterprise agreement.

71. The reasonableness of the steps will be determined with reference to actions the employer takes to enable employees to make an informed decision about a proposed agreement and to ensure they genuinely agree. The opportunity will be fair if employees were treated equally and without any discrimination. The opportunity will be reasonable if it was objectively sensible, rational, practical and logical in the circumstances.

72. Proposed subsection 180(3) provides that new subsection 180(2) will be satisfied if the employer has taken reasonable steps to ensure that:

- during the access period for the agreement, the relevant employees can access a copy of the written text of the agreement and any other material incorporated by reference in the agreement but only when this is not publicly available;
- the employer has notified the employees of the time and place that the vote to approve the agreement will occur, and the voting method that will be used; and
- the terms of the agreement and the effects thereof are explained to the employees taking into account their particular circumstances and needs.

73. Amendments to subsection 180(4) clarify that the access period is the 7 day period ending immediately before the day the voting process referred to in subsection 181(1) starts. As the Explanatory Memorandum notes, this is consistent with existing case law.[20]

74. The changes proposed in Part 3 are focussed on ensuring the core obligations required of parties as part of the negotiation process can be maintained, while concurrently giving flexibility to those parties as to how these core obligations are to be met. Master Builders, therefore, supports the amendments.

PART 4 – VOTING REQUIREMENTS

75. The amendments proposed in this part will alter existing s.181(1) to ensure certainty as to the involvement of casual employees in voting on a proposed agreement. This is achieved by clarifying that an employee may vote to approve an enterprise agreement if they will be covered by it and are employed:

- other than as a casual employee at the time of the request to vote; or
- as a casual employee and performed work at any time during the access period for the agreement.

PART 5 – BETTER OFF OVERALL TEST (BOOT)

76. There are four broad changes proposed by the Amendments in Part 5 that all go to addressing problems with the application of the existing BOOT, being:

- Reasonable foreseeability of workplace arrangements;
- Overall benefits, including non-monetary benefits; and
- Determinative weight.

77. Master Builders supports these changes and submits that they will address the cause of significant problems in terms of approval delays and assist the COVID-19 recovery.

REASONABLE FORESEEABILITY

78. The bulk of problems our members experience generally arise from the need to furnish information that is irrelevant or deals with hypothetical circumstances or situations that do not exist on building and construction sites. This arises from the

[20] *See Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd [2018] FWCFB 2732).*

operation of s.193 and the approach increasingly adopted by FWC to consider scenarios that are sometimes fanciful or improbable.

79. Some examples of these include:

    - Excavation companies being required to provide information about the application of multi-story allowances when working on projects involving buildings of four storeys or more; and
    - Application of Award crib provisions for tradespeople engaged as casuals who are recalled to work after completing a shift on a Sunday that is a 'lockdown' weekend.

80. While agreements in the building and construction industry are well known for providing employees covered with higher average earnings than most sectors, there is no logical reason why regard needs to be given to circumstances that simply do not happen.

81. Proposed s 193(8)(a)(ii) deals with the above problem of hypothetical scenarios and Master Builders submits it creates a practical, balanced and fair solution to such problems.

82. It retains the requirement that the BOOT be satisfied in regard to perspective employees but seeks to apply it not to all possible or theoretical circumstances, but only to those which are reasonably foreseeable.

83. There are many positives that Master Builders submits will arise from this change, particularly insofar as improved processing times and less delay, and is supported by Master Builders.

NON-MONETARY BENEFITS

84. Proposed s.193(8)(b) provides that the FWC may have regard, in determining whether an enterprise agreement passes the BOOT, to the overall benefits (including non-monetary benefits) an award covered employee or prospective award covered employee would receive under the agreement when compared to the relevant modern award.

85. Examples of non-monetary benefits include,

    - flexible working arrangements;
    - time off in lieu;
    - time off to participate in community service activity;
    - provision of training; or
    - health care benefits.

86. This amendment is sensible and reflective of existing case law. The core factors associated with the BOOT are preserved (financial assessment) while retaining capacity to take a holistic approach to considering benefits provided by EBAs.

87. This amendment recognises that workplaces are vastly different and the needs and wants of workers are not all the same. The value of non-monetary benefits (such as flexible working arrangements) to workers will always differ and it is important that this is recognised by the law.

WEIGHT OF BOOT CONSIDERATIONS

88. Proposed s 193(8)(c) addresses the weight to be attached to employee and employer views, and those of bargaining representatives when assessing the BOOT.

89. It provides that the FWC must give significant weight to any views expressed by:

- the employer or employers that are covered by the agreement; or
- if the agreement is not a greenfields agreement – the award covered employees for the agreement; or
- in any case – a bargaining representative for the agreement.

90. This amendment is supported by Master Builders and complements amendments earlier in this Schedule regarding the objects of Part 2-4 at s.171.

91. This is an important amendment as it recognises the primacy of the key components of any employment relationship – being the employer and their employees – and that the views of those who will actually work under a proposed agreement should be prioritised.

92. As noted earlier, a key problem experienced by Master Builders members is the intervention of parties in FWC approval proceedings that have had no role in the bargaining process. Our experience is that this frustrates employees as much as employers, particularly when the intervention is designed to delay an approval so as to allow the pursuit of a union pattern EBA.

93. Proposed new subsection 189(1A) outlines some of the temporary circumstances in which the FWC could approve enterprise agreements that do not pass better off overall test where in public interest. This is a temporary amendment that will sunset after two years and is designed to accommodate the unprecedented nature of COVID-19 and associated volatility which is obviously ongoing.

94. This provision builds on that in existing s.189, acknowledges the potential impacts of COVID-19 are varied and unpredictable, and still requires the FWC to give close consideration to the views, circumstances, impact and extent of employee support as part of the approval process.

PART 6—NES INTERACTION TERMS

95. Part 6 proposes an amendment that would require enterprise agreements to include a model "NES Interaction Term" that explains the interaction between the NES and enterprise agreements.

96. The model NES interaction term will explain the provisions of the Act that regulate interaction between the NES and enterprise agreements and, if not specifically included, it will be taken to be a term of that agreement.

97. This is a sensible amendment that will deliver a practical benefit in terms of minimising potential for unnecessary approval delay, reducing the need for undertakings, and ensuring the interaction between the NES and enterprise agreements is clear.

PART 7 – FRANCHISES

98. The amendments in this part create a process for an enterprise agreement to be varied to cover an eligible franchisee employer and its employees. While Master

Builders supports this amendment, franchise arrangements are rare within the building and construction industry.

PART 8—TERMINATING AGREEMENTS AFTER NOMINAL EXPIRY DATE

99. The amendments proposed have the effect of preventing an application to terminate an EBA being made within three months following its nominal expiry date.

100. Master Builders understands that this amendment is moved in response to concerns raised by unions to the effect that the prospect of agreement termination was being capriciously used as a tactic (or 'weaponised') during agreement renegotiations.

101. Master Builders holds some reservations as to the extent of the problem that the unions purport to raise, and (having regard to comments earlier herein regarding the realities of EBA negotiation within the industry) are unaware of any instances where this tactic is deployed.

PARTS 9 & 11 — HOW THE FWC MAY INFORM ITSELF & FWC FUNCTIONS

102. As earlier noted, a key disincentive for building and construction employers to proactively engage in enterprise level bargaining is the capacity for external third parties to involve themselves in the approval process, notwithstanding they have no members or have thereto not actively involved themselves in any of the bargaining processes.

103. Master Builders regularly receives complaints from members involving these very situations which almost entirely manifest only when approval is sought for either a non-union agreement, or an agreement made with a rival union.

104. Of the many examples that demonstrate this concern, the following case[21] is a succinct and pertinent example.

- In 2019, Civmec Construction and Engineering Ltd ('CCE') sought FWC approval for a single enterprise agreement negotiated directly with employees.
- After filing the application, the CEPU sought to intervene in the approval proceeding and filed documentation claiming it was a bargaining agent. This was disputed by CCE.
- FWC then directed the CEPU to provide a confidential list of members it said were employed by CCE when the agreement was negotiated and asked CCE to do the same.
- The CEPU list contained more names than CCE's list, and *none* of the names matched. The Commission went on to conclude that (at paras 8-9):

  "Self-evidently the CEPU, contrary to its repeated assertions that it was, was not a bargaining representative for the Agreement."

  "The CEPU provision of erroneous information to the Commission has caused a delay in dealing with this matter. CCE is right to be aggrieved by this in circumstances where on 16 August 2019 (well before the CEPU submitted its list of members) in a submission to the Commission copied to the CEPU, they had explained that there are a number of separate legal entities within

[21] *Williams C [2019] FWC 6662 - Application for approval of the C.C.E. Pty Ltd Enterprise Agreement 2019 - union seeking to be heard.*

the Civmec group of companies and CCE had noted that employees of the other separate legal entities may be members of the CEPU but those legal entities are not a party to the Agreement."

- Despite this, the CEPU continued a push to be heard in the approval following which the Commission determined (at para 18):

  "It is not the case that the CEPU or its members would be directly affected by a decision to approve the Agreement. Neither were involved in the bargaining process and there is no guarantee that the CEPU or its members will be covered by the Agreement in the future."

- And went on to find (at paras 22-23):

  "In this application the CEPU was not involved in the bargaining process and it has neither any right, interest nor legitimate expectation concerning the Agreements approval. Neither the CEPU's interests nor its members will be directly affected by the outcome of this application."

  "I note that the members of the CEPU who were employed by another legal entity, not CCE, will not be affected by this Agreement unless they are in future employed by CCE on work covered by the Agreement. These members of the CEPU are in the same situation as any member of the CEPU employed by any other business in the country that is not the Applicant."

105. While FWC eventually determined that the CEPU had no right to be heard, the case highlights the tactic of seeking to intervene where no grounds exist and caused a significant delay to the agreement being approved, not to mention additional cost to the company.

106. Master Builders has also examined eight non-union building and construction enterprise agreements lodged in New South Wales over the last 18 months to compare the length of approval times. Four of these proceedings involved interventions from building unions, and four did not.

- Where unions sought to intervene, they were all speculative and not supported by evidence. All four agreements were eventually approved, however these were all delayed by the union intervention by (on average) 117 days – the longest being a 141 day delay.

- Where unions did not seek the intervene, the agreements were approved slightly sooner than the expected 28 days (26.75 days on average) – the shortest being approved within 12 days after lodgement.

107. Master Builders submits that the agreement approval process has become one that involves (as one Member reported) an 'open slather' approach where interventions are not only almost always entertained, but in some circumstances appear to be actively encouraged.

108. This may not be problematic for industries with low-bargaining rates or cooperative trade unions, however the nuances and history of the building and construction industry leads to it being a significant and common problem for employers in the sector. Put simply, interventions are used to stymy or delay the approval of non-union EBAs in order to create pressure to sign a pattern union EBA.

109. The grounds on which such interventions are mostly entertained are set out at s590 of the existing FW Act, a provision which is broad and interpreted as such. However,

this provision requires qualification in circumstances where it is capable of being exploited for other, unrelated industrial purposes.

110. Proposed section 254AA is generally supported by Master Builders as this exhaustively lists all those who should have an interest and be heard on agreement approval, including:

- The employer
- An employee or employees who will be covered by an agreement.
- Appointed bargaining representatives of the employer or employees, which may be a trade union.
- Where an agreement is to be varied, a trade union party to that agreement.

111. However, the proposed section does provide an exceptional circumstances provision for circumstances that may justify the FWC receiving or requesting submissions from another person or body. Arguably, this provision could be considered as unnecessary given the range of remedies provided elsewhere in the FW Act and that the role of determining whether an agreement meets the BOOT is that of the Commission alone. Having regard to the history and nature of the industrial participants in the building and construction industry, Master Builders is concerned that this exemption is a potential avenue for misuse and in those circumstances the provision should only be enlivened rarely and applied with great caution.

112. The notes proposed for insertion at the end of subsection 590(1) and subsection 625(1) are especially noted and supported.

113. Part 11 of Schedule 3 is a related provision and proposes a new section 254B which requires the FWC to perform its functions and exercise its powers under Part 2-4 in a manner that recognises the outcome of bargaining at the enterprise level.

114. This a simple yet highly important amendment and will ensure that FWC is focussed on the outcomes of bargaining when exercising powers under Part 2-4.

115. As earlier noted, Master Builders members often report that the approach adopted by FWC appears to be one where it seeks to find any possible reason to reject a proposed agreement, rather than assisting the employers and employers to whom the agreement will apply give effect to the outcomes they have negotiated.

116. Proposed section 245B works in conjunction with section 578, which sets out matters the FWC must take into account when performing functions or exercising powers.

117. Both Parts 9 and 11 are strongly supported by Master Builders.

PART 10—TIME LIMITS FOR DETERMINING CERTAIN APPLICATIONS

118. The amendments proposed will require FWC to, as far as practicable, determine an application to approve or vary an agreement within 21 working days after the application is made. If the determination cannot be made within this period, FWC will be required to provide written notice as soon as practicable to relevant parties that sets out why it was unable to determine the application during that period, including because of any exceptional circumstances.

119. Master Builders strongly supports this amendment as it will address a key concern raised by members regarding the time taken by FWC to consider and determine

agreement approval applications, particularly insofar as the perceived delays commonly experienced by non-union applications.

120. When approval delays are experienced these often flow on and delay wage increases anticipated by the parties which has an adverse impact on both the employer, employees and workplace generally. In many cases, it is reported that delays experienced can erode workplace trust and create an impression that 'something must be terribly wrong' when lengthy delays occur.

121. Concerns such as these will likely be reduced as the proposed amendment also allows parties to the application, particularly those employees to be covered by a proposed agreement, to have better visibility as to the grounds and reasons for any delay in determining an application. It will allow all parties to receive independent advice as to the actual reasons why an agreement will take longer than 21 days to be approved.

PART 12—TRANSFER OF BUSINESS

122. As the explanatory memorandum notes, the amendments proposed in this Part will effectively mean that the usual 'transfer of business' rules at Part 2-8 are 'turned off' for an employee who becomes employed with an associated entity of their former employer after seeking that employment on their own initiative before the termination of the employee's employment with the old employer.[22]

123. The result of the amendment will be that the employee in the above situation will then be covered by the relevant industrial instrument (if any) that covers the type of work performed by the employee for the new employer.

124. While Master Builders supports this amendment, we note that the operation of Part 2-8 has been highly problematic from the outset and there remains much scope for further reforms to be made in the interest of jobs. In practice, Part 2-8 operates as an incentive for a new employer to not engage employees of the vendor employer – an entirely perverse outcome.

PART 13—CESSATION OF INSTRUMENTS

125. These amendments insert additional sunsetting rules for particular transitional instruments currently preserved by the FW TCPA, with the effect that they will cease operation on 1 July 2022.

126. Master Builders understands that this amendment is moved in response to concerns held by unions regarding particular instruments which continue to exist given the operation of the FW TCPA.

127. Agreement-based transitional instruments include:

- collective agreement-based transitional instruments made under predecessor legislation to the Act (including collective agreements, workplace determinations, preserved collective State agreements, pre-reform certified agreements, old IR agreements, section 170MX awards); and

[22] Para 284, page 54.

- individual agreement-based transitional instruments (individual transitional employment agreements, preserved individual State agreements, Australian Workplace Agreements (AWAs) and pre reform AWAs).

128. The extent to which agreement-based transitional instruments continue to exist within the building and construction industry is unclear, yet likely to be extremely low. Our view, therefore, is that the changes are unnecessary.

Schedule 4 – Greenfields Agreements

129. The amendments set out in Schedule 4 seek to implement a range of changes that Master Builders considers will increase the prospect of attracting new investment into major projects and open the door for new jobs to be created.

130. The amendments proposed will have the effect of:

- Allowing a greenfields agreement to be made regarding the construction of a major project which have a nominal life of up to eight years after the day the agreement comes into operation;
- Creating a definition of a 'major project' and enable the Minister to declare, by legislative instrument, that a particular project is a 'major project'; and
- Requiring the FWC to be satisfied that a greenfields agreement provides for annual increases to the base rate of pay for each employee covered by the agreement for its nominal life where the nominal life exceeds four years in duration.

131. These amendments are particularly sensible as they will give much certainty in terms of projecting labour costs which is a particularly important consideration to the building and construction industry viz. project-based work and tendering.

132. Allowing a GFA to be made with a nominal expiry that better matches the life of a major project also provides an option for the parties to address a common problem of having to re-negotiate an agreement midway through the construction of a major project. This problem is not uncommon and there are numerous examples where renegotiations have become protected which causes project delays and unforeseen cost blow-outs.

133. Master Builders was invited to represent building and construction in the Greenfields Agreement IRWG and did so recognising that the changes such as those proposed will make investment in major projects more attractive, thereby increasing the prospects for new jobs to be created. Key arguments advanced by Master Builders included that:

- Extended life GFAs for major projects creates an additional option for parties if so desired;
- Certainty about project cost and duration is crucial and amendments as now proposed by this Schedule will create more ways to better manage future uncertainty and risk associated with a major project;
- Reducing uncertainty and risk are key to making domestic investment in major projects more attractive;
- The changes proposed would achieve greater certainty without any change to the protections and rights of the workforce;

- There should be a flexible mechanism to ensure rates of pay will be adjusted each year for which a GFA operates beyond the conventional four-year nominal life; and
- The definition of what constitutes a 'major project' should be clear, contemporary and applied consistently;

134. These amendments are supported by Master Builders as they will directly benefit domestic economic recovery from COVID-19 and ensure that existing protections and rights afforded to workers under the FW Act are preserved for those covered by a GFA with an extended nominal life.

135. The amendments will go a long way towards addressing any uncertainty, provide future workforce stability, and reduce investment risk – all of which increase the prospects of creating more jobs and stable employment.

Schedule 5 - Compliance

136. The amendments in this Schedule seek a number of changes to the compliance and enforcement regime within the Fair Work regime. The amendments proposed have the effect of:

- increasing civil pecuniary penalties for ordinary remuneration-related contraventions and sham arrangements by 50 per cent;
- introducing a new penalty for remuneration-related contraventions by bodies corporate to be determined based on a multiple of the 'value of the benefit' of the contravention;
- increasing the cap for amounts that can be awarded in small claims proceedings from $20,000 to $50,000;
- making provision for courts to refer small claims matters to the FWC for conciliation and, if conciliation is unsuccessful, enabling the FWC to subsequently arbitrate such matters with consent of the parties;
- introducing a new civil contravention that prohibits employers publishing (or causing to be published) job advertisements with pay rates specified at less than the relevant national minimum wage;
- increasing civil pecuniary penalties for non-compliance with a compliance notice and the maximum penalty payable under an infringement notice by 50 per cent;
- requiring the FWO to publish information relating to the circumstances in which enforcement proceedings will be commenced or deferred;
- codifying factors the FWO may take into account in deciding whether to accept an enforceable undertaking; and
- introducing a new criminal offence for employers who dishonestly engage in a systematic pattern of underpaying employees.

137. This Schedule also amends the BCIIP Act such that it would:

- enable the Australian Building and Construction (ABC) Commissioner to accept an enforceable undertaking in relation to a suspected remuneration-related contravention within their jurisdiction;

- require the ABC Commissioner to publish information relating to the circumstances in which enforcement proceedings will be instituted or deferred; and
- ensure the ABC Commissioner has the same role as the FWO in relation to investigating, etc., the new criminal underpayments offence in the building and construction sector.

138. Master Builders considers the above measures to be largely sensible, but we do not support moves to increase existing penalty provisions and are opposed to the introduction of a criminal penalty provision into the Fair Work regime.

139. Master Builders notes that National System workplaces are already subject to a comprehensive regime of industrial relations laws and we believe that those employers who engage in deliberate non-compliance unfairly undermine the overwhelming majority of employers who do the right thing.

140. Master Builders believes that when any building industry participant deliberately engages in conduct designed to flout industrial relations laws, they should be penalised in a manner that is proportionate to the offence, their conduct in committing that offence, and the need to ensure a necessary deterrent against further future offences. We support compliance regimes with penalty provisions that appropriately account for factors such as inadvertence, mistake, or other conduct that has been deployed in circumstances that are unintentional or erroneous.

141. Notwithstanding the above positions, Master Builders considers that increasing civil penalties and introducing a criminal offence into the Act are blunt and incorrect approaches.

INCREASED COMPLEXITY

142. The Fair Work regime of industrial relations laws is complex, and this is rapidly becoming worse for most workplaces.

143. The two examples below serve to illustrate how this complexity manifests itself.

- The dominant Modern Award in Building and Construction is the Building and Construction General On-site Award [MA000020], the current version of which is some 141 pages long. The FWO Pay guide relevant to this Award, is of itself over 130 pages long. Many variations to the Award made in recent years have referenced specific provisions within the FW Act meaning a copy of this legislation must also be at hand just to ensure the Award is fully understood and compliance is maintained.
- In 1996, a NSW business that engaged a clerical employee would have commonly referred to a range of instruments in order to determine that employment conditions for such employee, these being the:
    - NSW LSL Act
    - NSW AL Act;
    - NSW IR Act; and
    - NSW Clerks Award.
- The combined length of the above instruments in 1996 was 296 pages. In 2021, a business would commonly refer to two instruments, being the Fair Work Act and the Clerks Private Sector Modern Award. The length of these

two instruments combined is almost 1,100 pages – 800 pages more than in 1996.

144. Master Builders believes that reducing the complexity of workplace laws will be a key and more productive step in terms of boosting workplace compliance levels and this should be the key in tacking non-compliance with workplace laws.

DISPROPORTIONATE APPROACH TO INSTANCES OF DELIBERATE, WILFUL AND REPEATED BREACHES OF WORKPLACE LAWS

145. Master Builders has previously provided the Committee with a series of submissions that outlines in detail the extent to which unions in the building and construction industry deliberately deploy practices that are unlawful and illegal, selections of which can be found here, here and here.

146. These submissions contain literally hundreds of detailed examples where building unions adopt tactics that are not only unlawful, but:

- Are deliberately and strategically devised and deployed;
- Attract penalties and fines that building unions consider to be nothing more than a 'cost of doing business';
- For which no admission of wrongdoing is made, and no contrition or remorse is expressed;
- No undertakings are offered about future conduct to prevent further law breaking;
- Are treated almost like 'badges of honour' and talked up by those involved; and
- Openly and publicly encourages others to also break workplace laws, and only obey those laws that they choose to obey.

147. Court judgments regularly call out the above conduct and have become increasing fervent in their criticisms of certain building unions, to the extent they are labelled 'recidivist' and their conduct such that it '*brings the trade union* movement *into disrepute'.* A selection of key examples follows:

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."* [23]
>
> *"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."* [24]
>
> *"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a*

[23] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[24] *Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407*

disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act." [25]

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." [26]

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised." [27]

"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct." [28]

"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..." [29]

"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts." [30]

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct." [31]

"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means." [32]

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[25] *Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845*
[26] *Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436*
[27] *Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173*
[28] *Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145*
[29] *Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548; (2009) 182 IR 327*
[30] *Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429*

[31] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[32] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*

> *"The CFMEU is to be regarded as a recidivist rather than as a first offender."* [33]
>
> *"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry."* [34]
>
> *"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."* [35]

148. Against the above backdrop, it is easy to appreciate why Master Builders members have difficulties understanding why the Parliament cannot adequately address lawbreaking of registered organisations and their officials which has been forensically examined by four separate Royal Commissions of enquiry spanning four decades. Their conduct is intentional and deliberate, and is perpetrated by organisations labelled as recidivist.

Conclusion

149. Master Builders thanks the Committee for the opportunity to provide this submission.

150. We would be pleased to appear before the Committee to provide any additional evidence or information to assist in its inquiry.

[33] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[34] *White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432*
[35] *Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134*

"ATTACHMENT A"

APPENDIX X – Occupational Health and Safety

A
Accident Compensation
Workplace Injury Rehabilitation and Compensation Act 2013
Amenities
Compliance Code – Workplace Amenities and Work Environment
Compliance Code – Facilities in Construction
Asbestos
OHS Regulations 2017
Compliance Code: Managing asbestos in workplaces 2019
Compliance Code: Removing asbestos in workplaces 2019
National Asbestos Code of Practice and Guidance Notes NOHSC: 2002, 3002 & 3003

B
Balustrades
AS1288: Glass in Buildings
BCA
Blockwork
AS 2699: Built in components for masonry construction
Bridge Construction
Industry Standard – Construction and erection of bridge beams

C
Construction Regulations 2017
Catwalks
AS 3860: Fixed guideway people movers
Chains
AS 3775: Chain Slings – Grade T
AS 2550: Cranes Safe Use
Communication
Compliance code: Communicating occupational health and safety across languages
Concrete Pumping
AS 2550.15 Cranes – Safe Use (part 15 Concrete Pumps)
AS 4041 Pressure piping
AS 2452.3 Non-destructive testing – determination thickness – use of ultrasonic testing
AS 3920.1 Assurance of product quality – Pressure equipment manufacture
AS 4343 Pressure equipment – hazard levels
Industry Standard – Concrete cutting and drilling
Industry Standard- Concrete pumping
Confined Spaces
OHS Regulations 2017
Compliance code: Confined spaces.
AS 2865: Safe working in a confined space
Contaminated Soil
Industry Standard – Contaminated Construction Sites
Cranes
OHS Regulations 2017 (Plant)
AS 2550 Cranes – Safe use parts 1- 16
AS 1418.14: Requirements for Cranes subject to arduous working conditions
AS 1418.1: Cranes (including hoists and winches) General requirements
Crystalline Silica

Compliance code: Crystalline silica – engineered stone.
OHS Regulations (Crystalline Silica 2019)

D
Dangerous Goods
Dangerous Goods Act
OHS Regulations (Dangerous Goods)
National Standard for the Storage and Handling of Workplace Dangerous Goods [NOHSC: 1015 (2001)]
National Code of Practice for the Storage and Handing of Dangerous Goods [NOHSC: 2017 (2001)]
Demolition
Compliance code: Demolition
AS 2601: The Demolition of structures

E
Earth Moving Plant
AS 1418.8: Cranes, Hoists and Winches – Part 8: Special purpose appliances
AS 4772: Earth-moving machinery – Quickhitches for excavators and backhoe loaders
AS 2294: Protective structures for operators of earth moving equipment
Electrical
AS 2067 Substations and high voltage installations
AS 3000 Electrical installations (known as Australian wiring rules)
AS 3012 Electrical installations on construction and demolition sites
AS 2293.1: Emergency escape lighting and exit signs for buildings
AS/NZS 4636: Safe working on low-voltage electrical equipment
AS 3760: In Service Safety Inspection and Testing of Electrical Equipment
AS 3105: Approval and test specification- Electrical portable outlet devices
Industry Standard – Electrical Installation on Construction Sites
Elevated Work Platforms
AS 2550: Cranes (part 10 EWP)
AS 1418:10 Elevated Work Platforms
Emergencies
AS 3745: Emergency control organisation and procedures for buildings
AS 2293.1: Emergency evacuation lighting for buildings
AS 2444: Portable Fire Extinguishers and Fire blankets
Escalators
AS 1735: Lifts, escalators and moving walks
Excavations
Compliance code: Excavation.

F
First Aid
Compliance code: First aid in the workplace
AS 2675 Portable first aid kit for use by consumers
Formwork
Victoria Code of Practice Prevention of Falls in General Construction 2004
Victoria Construction – Basic Formwork and Concreting Checklist for Builders and Building Trades Contractors
AS 3610 Formwork for concrete
AS Visually stress – graded hardwood for structural purposes
AS 2269 Plywood Structural
AS 1170 Minimum design loads on structures

G
Gantries
Gantry Protection – Building Code of Australia BP 1.1 & BP 1.2
Gantry Protection - Code of Practice, City of Melbourne and/or local council

H

Hazard Substances
OHS Regulations 2017
Compliance code: Hazardous Substances
Health and Safety at Work
AS 1470: Health and safety at work - Principles and practices
Hoists
AS 1418.1: Cranes (including hoists and winches) General requirements
AS 2550.7: Cranes—Safe use Part 7: Builders' hoists and associated equipment

I
Issue Resolution
OHS Regulations 2017

L
Ladders
AS 1892- Portable Ladders
Lasers
AS 2397 – A guide to safe use of lasers in the building and construction industry
Lifts
AS 4431 Guidelines for Safe Working on New Lift Installation in New Construction (for false cars)
AS 1735 Lifts, escalators and moving walks
Lifting Equipment: Slings, shackles, chains, chain block & tackles
AS 1353.2: Flat synthetic-webbing slings - Care and use
AS 1380.2: Fibre Rope slings - Care and use
AS 1418.1: Cranes, hoists and winches Part 1: General requirements
AS 1666.2: Fibre Rope slings - Care and use
AS 2550.1: Cranes, hoists and winches - Safe use General requirements
AS 2741: Shackles
AS 4497.2: Roundslings - Synthetic fibre
Lifting Equipment – Bins, cages, kibbles, lifting devices, winches,
AS 1418.1: Cranes, hoists and winches Part 1: General requirements
AS 1418.2: Cranes (including hoists and winches), Part 2: Serial hoists and winches
AS 1418.17: Cranes (including hoists and winches) Part 17: Design and construction of workboxes
AS 2550.1: Cranes, hoists and winches - Safe use General requirements
AS 3775.2: Chain slings for lifting purposes - Grade T(80) and V(100) Care and use
Lighting
AS 1680 Interior lighting
AS 2293.1: Emergency evacuation lighting for buildings
Industry Standard – Electrical Installation on Construction Sites

M
Manual Handling
OHS Regulations 2017
Compliance code: Hazardous Manual Handling
National Standard for Manual Tasks
National Code of Practice for the Prevention of Musculoskeletal Disorders from Performing Manual Tasks at Work (2007)
Mast Climbing Work Platforms
AS2550.16: Mast climbing work platforms

N
Noise
OHS Regulations (Noise) 2017
Compliance code: Noise
AS 2436: Guide to noise control on construction, maintenance and demolition sites
National Code of Practice for Noise Management and Protection of Hearing at Work - 3rd Edition

O

Occupational Health and Safety Legislation
Occupational Health and Safety Act 2004 (Vic)
Occupational Health and Safety Regulations 2017 (Vic)
OHS Management Systems
ISO 45001: Workplace Health and Safety Management Systems—Requirements with Guidance for use Workplace

P
Personnel Protective Equipment
AS 4501.2 – Occupational protective clothing and general requirements
AS 1800 Occupational protective helmets – election care and use
AS 1336 Recommended practices for occupational eye protection
AS 1337:1992 Eye protection for industrial applications
AS 1558: Protective clothing for welders
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AS 2111:15 Textile floor coverings – test and measurements
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AS 3850: Tilt Up concrete construction
AS 3600: Concrete structures
National Code of Practice for Precast Tilt-Up and Concrete Elements in Building Construction

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AS 1576 Scaffolding general requirements
AS/NZS 1576.2: Scaffolding Couplers and accessories
AS/NZS 1576.3: Scaffolding - Part 3: Prefabricated and tube-and-coupler scaffolding
AS 4576 Guidelines for scaffolding
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AS 3828 Guidelines for the erection of building steelwork
AS 1170.2 Minimum Design Loads on structures, part 2: Wind Loads
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AS 1418.19: Cranes, hoists and winches - Telescopic handlers
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AS 4576 Guidelines for scaffolding
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AS 4626 Industrial fall arrest devices
AS 2626 Industrial safety belts and harnesses
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