MASTER BUILDERS
AUSTRALIA

Submission to the Education and Employment Legislation Committee inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

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.

3. 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.

4. 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 10.4 per cent of gross domestic product, and around 9 per cent of employment in Australia.

5. The building and construction industry:

    - Consists of about 445,000 business entities, of which 98.6 per cent are considered small businesses (fewer than 20 employees);
    - Employs almost 1.3 million people (around one in every 11 workers) and is the number two provider of full-time jobs in the Australian economy;
    - Represents about 10.4 per cent 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 121,000 construction trades apprentices and trainees; and
    - Performs building work each year to a value that exceeds $230 billion.

Summary of this submission

6. Master Builders files this submission in respect of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* ('the Bill').

7. Master Builders does not support the Bill. Although it contains some positive elements, these are outweighed by a range of fundamental changes that we oppose outright, including the abolition of the Australian Building and Construction Commission ('ABCC') and those that expand the use of multi-employer bargaining.

8. The are some common areas within current workplace laws about which the need for improvement is generally agreed, such as enterprise bargaining. The Bill contains several parts related to those problems but fails to adequately address them. The provisions of the Bill are not solutions and will, in many respects, make enterprise bargaining even less attractive than the evidence confirms it has already become.

9. This Bill must be considered with reference to current national economic conditions and the current challenges these bring to workplaces. Builders and small subcontractors are already struggling with a long list of such pressures and challenges, including material supply and labour shortages. This Bill will not alleviate any of these issues and will only add to currently applicable pressures.

10. The building and construction industry does not operate in an economic silo. We depend on many other industries and parts of the economy and any adverse consequences this Bill imposes on them will also flow through to, and impact adversely, building and construction. Builders are concerned that this Bill has capacity to result in adverse impacts to national economic prosperity and future job creation.

11. While the remainder of this submission addresses each part of the Bill and sets out in detail Master Builders' comments and position with respect to each, Master Builders holds a series of general concerns about the Bill and its ramification. These are, in summary:

    a) ABCC should not be abolished – Master Builders emphatically opposes any moves that abolish the ABCC. All available evidence shows that the ABCC has been an effective and efficient regulator. The ABCC has made a significant difference in ensuring building industry participants comply with the rule of law and it has driven much needed positive industry cultural change. There are no sound grounds to abolish the ABCC or divert from the long-standing bipartisan approach of maintaining special industrial relations laws for the building and construction industry. The work of the ABCC is not yet done and its removal will undo the significant improvements it has delivered for our building and construction industry. Master Builders strongly opposes the abolition of the ABCC.

    b) FWO is not an effective replacement for the ABCC – while Master Builders supports the work of the FWO, it will simply not be an effective replacement for the ABCC. This Bill does not give the FWO any new powers, allocate the necessary resources, or do anything to ensure it is appropriately equipped to tackle the unique sector specific problems that have been forensically documented over several decades and are widely known. Without these necessary elements, and despite their best intentions, we predict that the FWO will not be in any way as effective as the ABCC for the building and construction industry.

    c) Industry-wide bargaining is a retrograde step – Master Builders opposes all parts of the Bill that expand or create multi-employer bargaining streams. There is no doubt that these elements of the Bill will see a return to industry-wide pattern deals and

entrench sector-wide strike action that will be damaging to workplaces and the broader Australian economy.

d) Removes the 'enterprise' from 'enterprise bargaining' **–** Master Builders believes that workplace laws must encourage workplaces to drive productivity and foster innovation at the individual enterprise level. The Bill does the exact opposite and will significantly undermine the capacity for building and construction workplaces to negotiate, agree and implement workplace arrangements that suits their specific needs. If passed, the Bill will entrench and actively encourage a 'one size fits all' approach to the detriment of individual enterprises and workplaces.

e) Removes the 'agreement' from 'enterprise agreements' – Master Builders has long supported workplace laws that provide a comprehensive and strong safety net of minimum employment conditions, above which workplaces may negotiate and bargain for a collective set of workplace specific arrangements that are reached in good faith and genuinely agreed by all parties. This Bill gives the Fair Work Commission unprecedented power to reach into this process and make workplace determinations where the parties cannot agree. This will not only discourage meaningful and genuine discussions at the workplace, but will likely see workplaces being forced to adopt an 'agreement' that is not actually agreed by that workplace and has been determined by a third party who is not part of that workplace. Such changes effectively remove the 'agreement' aspect from 'enterprise agreements' and are opposed by Master Builders.

f) Gives unions more say than workers – the Bill contains several elements that will give unions a greater say over workers terms and conditions than are available to those actual workers to whom the conditions apply. Master Builders has long believed that workplace laws should recognise and respect that workers and employers are the primary and most important parts of any employment relationship, and we oppose changes that would give unions more rights than available to everyday workers. Master Builders supports the right for workers to be represented by a union if requested by members, however only 10 per cent of the building and construction workforce are union members. That leaves around 90 per cent of a 1.1 million plus workforce who have chosen to not join a union. The rights of this overwhelming majority cannot be subservient to those of a small majority.

g) Leaves non-union and single enterprise agreements stuck in the slow-lane and mired in red tape – while the Bill proposes some changes said to reduce the complex and technical aspects currently faced by parties when seeking to have agreements approved, many of these only apply to agreements made under the proposed multi-enterprise bargaining streams or are not applicable to single enterprise agreements. This will mean those making single enterprise or non-union agreements will face many of the same complexities and barriers that feature in the current law and are universally agreed to be a significant disincentive to workplace bargaining. The message this sends to workplaces is that unless a union is involved, workers don't know what is good for themselves, nor can they be trusted to negotiate and implement workplace arrangements that suit their needs. This is the wrong message and is not supported by Master Builders.

h) Policy Intent vs Bill provisions – the Bill contains many areas where the stated policy intent does not match the provisions of the proposed Bill. This leaves the door open for such changes to be used in other ways not stated or intended. Many of these

areas have been highlighted by the business community for some time, yet the Bill and supporting materials do not adequately address them.

i) Arbitration ignores importance of encouraging workplaces to resolve their problems – the Bill significantly increases powers available to bodies and persons who are not direct parties to an employment relationship. There are, for example, numerous parts within the Bill that expand the arbitration powers of the Fair Work Commission. Master Builders, as a general principle, believes that Australian workplace laws should always focus on encouraging employers and employees to discuss concerns and resolve disputes at the workplace level. The amendments in this Bill are contrary to that approach.

12. More generally, Master Builders is gravely concerned about the truncated processes adopted in both the development and consideration of this Bill. The changes proposed are significant and represent a departure from several long-standing approaches that previously enjoyed bi-partisan support. The Bill represents a fundamental upheaval of many tried and tested components of Australian workplace laws that have been features for decades and deserves a far more considered and thorough analysis than that presently afforded.

13. Master Builders urges the Committee to recommend that, for the reasons advanced in this submission, the Bill not proceed nor be passed into law.

Abolition of the Registered Organisations Commission

14. Master Builders supported the initial establishment of the Registered Organisations Commission as a standalone regulator and has maintained this support throughout its period of operation.

15. Almost all State and Territory associations within the Master Builders network are registered organisations pursuant to the FW RO Act, one of which was the very first to be recognised by, and registered under, an Australian workplace law. The continuous maintenance of this status for the subsequent 149 years demonstrates Master Builders commitment to the special standing, rights and obligations, associated with registration under workplace laws and the need to ensure the building and construction industry is represented in a manner that makes a positive and civil contribution to the operation our national workplace relations system.

16. Parts 1 and 2 of the Bill will amend the *Fair Work (Registered Organisations) Act 2009* ('RO Act') to the effect that the functions of the Registered Organisations Commission are transferred to the Fair Work Commission, and that the powers and role of the Registered Organisations Commissioner are transferred to the Fair Work Commission General Manager.

17. While Master Builders considers there is merit in retaining a separate and stand-alone regulator for registered organisations, we do not oppose the transfer of power and function noted above, noting that there will be no substantive change to the powers and functions so conferred.

Abolition of the Australian Building and Construction Commission

18. Part 3 of the Bill would abolish the ABCC and repeal the *Code for the Tendering and Performance of Building Work 2016* ('Building Code 2016').

19. Master Builders strongly opposes this change.

20. The amendments will operate with the effect that it will:

    a. Remove an effective and comprehensive set of industry specific workplace relations laws, the need for which has been justified and forensically documented over many decades;

    b. Abolish the Office of the Australian Building and Construction Commissioner which has been a highly effective regulator for the building and construction industry in ensuring compliance with the rule of law and driving improvements in overall industry culture;

    c. Remove the higher penalties applicable for breaches of workplace laws for building and construction industry participants;

    d. Remove particular parts of the *Building and Construction Industry (Improving Productivity) Act 2016* ('BCIIP') Act that exist to tackle conduct and illegal behaviour that commonly occurs in building and construction, including unlawful picketing and specific types of coercive conduct;

    e. Remove additional safeguard obligations and sanctions for non-compliance with a range of other laws, including competition, security of payment, and safety laws; and

f. Removes the additional obligation on industry participants to ensure compliance with workplace laws, report instances of actual or threatened non-compliance, and take steps to prevent non-compliance.

21. The abolition of the ABCC and associated Code means that, for the first time since 2001, there will be no industry-specific body to regulate industrial relations and enforce compliance with workplace laws for building and construction workplaces. This will be a disaster for every single participant within the building and construction industry.

22. The reason Master Builders has always supported the need for the ABCC and sector-specific industrial relations laws is because they recognise and tackle the problems and conduct which is unique to the building and construction industry. As outlined hereunder, these problems are not new – they have existed for many decades and, while the ABCC has made inroads, they remain a regrettably common feature of the sector today.

23. In a general sense, the work of the ABCC to drive meaningful and lasting cultural change is not yet done. We submit its abolition is premature and if the Government proceeds with this change, it will undoubtedly deliver a range of adverse outcomes for an industry that plays such an important role in, and contribution to, the overall economy.

24. The broader community also stands to suffer if the ABCC is abolished. A key benefit of the ABCC is that it ensures that projects funded directly or indirectly by the Commonwealth are delivered in a way the ensures taxpayers receive value for money and the community can enjoy much needed public infrastructure, such as roads, schools and hospitals. This benefit will be lost.

25. This cost to the community will be significant. Master Builders commissioned Ernst and Young ('EY') to undertake an analysis of the economic impacts were the ABCC to be abolished. EY's modelling found that in the context of building Australia's economic recovery from COVID-19 and acute supply-side pressures currently facing the industry, abolishing the ABCC could lead to significant economic losses including:

    a. A fall in the output of the construction sector of around $18.4 billion by 2025 and $35.4 billion by 2030;
    b. A decline in overall economic activity of $16.3 billion by 2025 and $47.5 billion by 2030;
    c. A fall in manufacturing output of $4.8 billion by 2025 and $13.1 billion by 2030;
    d. A decline in services output of $5.9 billion by 2025 and $19.5 billion by 2030; and
    e. A fall in economic investment of $24.7 billion by 2025 and by $45.6 billion by 2030.

26. While Master Builders submits that the economic self-harm and community cost of abolishing the ABCC is clear, those who want the ABCC abolished have not been able to provide any similar evidence to back their claims. Master Builders has examined most of the commonly advanced reasons to justify abolishing the ABCC and none of them stack up when compared to the actual law, evidence and reality on the ground.

27. Two of the most common grounds we see mentioned are to the effect that it (a) creates different laws for those in building and construction, and (b) that it is in some way an 'anti-union' body.

28. In respect of the first ground, Master Builders notes the concept of implementing sector-specific laws to target sector-specific problems is one commonly adopted by Governments at every level. The Bill under consideration itself recognises this by retaining the Office of the Federal Safety Commission ('OFSC') that administers the Australian

Government Work Health and Safety Accreditation Scheme ('the Scheme') which will also be retained.

29. The Bill also proposes to exempt certain types of building work from the application of its provisions that will be otherwise generally applicable (discussed later below) and earlier iterations of the Bill had provisions clearly designed to only apply to building and construction.

30. There are a range of other non-workplace laws that apply specifically to building and construction or are designed to target conduct which commonly occurs in our sector, which have long-standing bi-partisan support. These include taxation laws, payment times reporting, and other laws regarding commercial conduct.

31. In respect of the second ground, the evidence shows that the ABCC is not 'anti-union' and is in actually 'anti-lawbreaking'. The fact that one building union has been for decades the most common perpetrator of breaches of Australian workplace laws, not only in building and construction but throughout all sectors, demonstrates that the ABCC only does exactly what its underpinning legislation requires it to do – to uphold compliance with workplace laws and to prosecute breaches of those laws amongst participants in the industry.

32. Even when narrowed to only those unions which operate in building and construction, the evidence shows again that one specific building union is responsible for around 97 percent of the total $17,206,523.00 in penalties handed to unions by Courts in judgements involving ABCC matters since 2016.

33. Penalties given to other unions over the same period total $584,000 – a total lower than the amount awarded against building and construction employers. To assert that the ABCC is 'anti-union' is like asserting that the police are 'anti-criminal'. Statutory law enforcement agencies don't operate by only bringing prosecutions that are reflective of, or proportionate to, the diversity of those to who the law applies – they operate by prosecuting only those who break the law.

34. To be clear, the need for the ABCC and industry specific industrial laws is not a source of pride for Master Builders or anyone in the building and construction industry. We suggest that all building industry participants would prefer to be covered by the same laws that cover other industries and other unions – but the reality is that construction sites are not like normal workplaces and building unions are not like normal unions – and this requires specialist laws and regulators to enforce them.

35. The sources of evidence that describe the conduct and history of building unions in, and impact on the culture of, the building and construction industry is vast. One of the most recent was the Final Report of the Heydon Royal Commission[1] which devoted some 1,160 pages to the building and construction sector alone.

36. 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*

[1] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015,*

of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."[2]

37. 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."* [3]

38. 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."* [4]

39. Insofar as the need for an industry specific regulator, the Heydon Royal Commission observed:

> *"One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need. Given the high level of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector."*[5]

40. And later:

> *"Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained".*[6]

41. It was also observed:

> *"Specialised treatment of a particular industry is not a novel concept: different areas of the financial services industry, for example, are subject to specialised laws and the supervision of a specialised regulator. Many professions are, likewise, subject to specialised laws that govern the manner in which their work is undertaken. It is not necessary to demonstrate in detail the public interest in that state of affairs. In the case of the building and construction industry, the justifications for special treatment have already been advanced".*[7]

42. The Heydon Royal Commission recommended as follows:

> *"There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of* investigating *and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants."*[8]

---

[2] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1*
[3] *Ibid at para 2*
[4] *Ibid at para 3*
[5] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 83*
[6] *Ibid at para 97*
[7] *Ibid at para 108*
[8] *Ibid refer to recommendation 61*

43. The above findings were made following broader commentary about the building industry, and particularly the CFMEU. They complimented observations from earlier commentary in the Interim Report[9] 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."*

44. 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"*[10]

45. 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)"*[11]

46. 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."*[12]

47. And:

> *"Nor is the conduct revealed in the Commission's hearing unrepresentative"*[13]

48. Of the 79 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.

49. With respect to the CFMEU, the Heydon Royal Commission found that it is home to *"longstanding malignancy or disease"*[14] within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000. The report considered this history and found[15] that:

---

[9] *Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.*
[10] *Heydon Report, Chapter 5, page 396*
[11] *Ibid*
[12] *Ibid*
[13] *Ibid*
[14] *Heydon Royal Commission, Volume 5, p401*
[15] *Heydon Report Chapter 5, p397*

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

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

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

(Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)

"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."

(Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407)

"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)

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

(Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

"The CFMEU is to be regarded as a recidivist rather than as a first offender."

(Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry."

(White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432)

"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."

(Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134)

51. The above selection is just a very small sample from the array of evidence to which we earlier referred, and we would be happy to provide the Committee with any additional materials as requested.

52. The amendments in this part also transfer the ABCC's case load to the FWO, along with the overall responsibility for enforcing compliance with workplace laws in the building and construction industry.

53. Master Builders opposes these amendments because, in simple terms the FWO will not be anywhere near as effective as the ABCC in discharging this vital role. This will not be the fault of the FWO and Master Builders continues to support the work of the Ombudsman and her agency – rather, it will be because the FWO will not have the same powers and overall core function as the ABCC.

54. The ABCC has a range of powers carefully designed to target the types of illegal conduct that are a feature of building and construction. These include additional powers to gather

evidence which are mostly used to protect individuals providing that evidence from retribution and threats. The FWO will not have these powers.

55. The ABCC has a role to intervene in permit-qualification matters that are heard before the FWC and provides very important evidence to assist the Commission determine disputes and proceedings involving right of entry laws and compliance by permit holders. The FWO will not have this role.

56. The ABCC is obliged at law to take action and bring prosecutions against industry participants who break the law, including by providing representation to industry participants where relevant. The FWO does not provide this representation and its compliance policy is discretionary.

57. The ABCC is obliged at law to ensure its resources are deployed and functions are focussed commensurate with the level and type of inquiry received. The FWO does not have this obligation. This means that although the additional FWO funding announced in the most recent Federal Budget was said to help it "*more comprehensively regulate the Fair Work Act 2009 in the building and construction industry*"[16] the Bill as presented does not contain any provision to ensure this is the case.

58. Any notion or assertion that the FWO will 'take over' the work of the ABCC or be an equivalent or effective regulator for building and construction is completely false. The reality is that for the first time in decades, the entire building and construction industry will be left without any industry-specific protections or laws and left without any industry specific regulator to enforce those laws.

59. Combined with the other measures in this Bill, the abolition of the ABCC represents one of most significant setbacks for building and construction workplaces and industrial relations in Australia that Master Builders has ever witnessed.

60. Master Builders urges the Committee to recommend that the ABCC be retained, and that related elements in this Bill be abandoned.

Objects of the Fair Work Act

61. Part 4 amends section 3 (a) of the Act by inserting the words "promote job security and gender equity" into its Object. Related changes are proposed to sections 134 (Modern Awards Objective) and 248 (Minimum Wages Objective).

62. The overall importance of the Object of the Act to its function, and performance of powers thereunder, cannot be understated. It is a relevant and operative central part of our entire workplace system and actively shapes the way in which the Commission discharges its functions.

63. Changes to the Object should not be considered as tokenistic nor be taken lightly. It is crucial that workplaces have a clear and full understanding of both the intent and ramifications of such change before it is made.

64. The Bill as drafted does not afford this understanding. One example of this is the proposed amendment which adds "the need to improve access to secure work across the economy" to the Modern Awards Objective. There is no guidance or direction in the Bill or supporting materials that indicates an intention as to how it should (or should not) be applied in practice.

[16] Federal Budget 2022-23, Budget Paper Number 2, p.98

65. This element of the Bill reflects an election commitment outlined in the Government's "Secure Jobs" Policy announced well ahead of the election. One common question arising consistently in the subsequent period went to the absence of any definition for concepts of "secure jobs", "job security" or "secure work" – elements that are central to the proposed operation of those commitments and central to understanding of their likely practical effects on workplaces.

66. Regrettably, the Bill does not contain any such definitions. The associated supporting materials also fail to provide any guidance as to how Commission should apply these concepts, which leaves them open to a very wide range of interpretations with potentially far-reaching consequences.

67. For example, the Commission may interpret proposed amendments to the Modern Awards Objective in such a way that causes it to remove provisions within Awards that allow for casual engagement. Although this is unlikely, the amendments make it a possibility. If this is not the intended policy intent, it should be ruled out.

68. The absence of necessary guidance and lack of core definitional concepts creates too much uncertainty and, unless resolved, these amendments are not supported by Master Builders.

Equal remuneration and Expert Panels

69. The amendments at Part 5 of the Bill provide altered guidance to the Commission about how it considers matters involving equal remuneration and work value. The related amendments at Part 6 establish a Pay Equity Expert Panel and a Care and Community Sector Expert Panel within the FWC to oversee specific types of matters pertinent to that sector.

70. The female proportion of the building and construction workforce, although gradually increasing, remains disproportionately low. Master Builders is supportive of measures that aim to address this issue and drive better gender equity amongst those who pursue a career in building and construction.

71. To the extent that these changes support similar aims, they are supported by Master Builders.

Prohibiting pay secrecy

72. The use of so-called "pay secrecy" clauses is not a feature commonly found in building and construction. Where such clauses do exist, Master Builders suggests they are rarely enforced by employers.

73. The Bill will mean that an employer cannot include a "pay secrecy" clause in contracts of employment and cannot enforce those clauses. A new workplace right will be added to the "General Protections" for employees to choose to either disclose or not disclose their remuneration. There will also be prohibitions on coercing employees to exercise or not exercise this right.

74. The new right will operate prospectively and not invalidate any existing arrangements unless an employment contract is varied. It will also be an offence (with a potential penalty of $63,000) for an employer to enter into an employment contract with "pay secrecy clause".

75. Master Builders notes the exemptions outlined in these amendments and, in principle, do not oppose them. We are, however, concerned that the structure of the proposed change may result businesses, particularly small businesses, being exposed to hefty financial penalties in circumstances where such a clause has been included inadvertently.

76. Master Builders recommends that the Committee consider a revised approach that better targets those employers who unfairly and unreasonably seek to enforce a 'pay secrecy' provision, where one exists.

Prohibiting sexual harassment in connection with work

77. Part 8 of the Bill expands the existing provisions of the FW Act dealing with sexual harassment. The key changes are:

    a) to insert a new and broader prohibition on sexual harassment in the workplace where harassment occurs "in connection with" a worker, a prospective worker or a person conducting a business or undertaking; and

    b) to allow employees, prospective employees, and unions to make application to either the Commission or the Federal Court for assistance to deal with a dispute about workplace sexual harassment (beyond the existing stop sexual harassment orders) and seek related orders for relief.

78. These changes are intended to ensure the FW Act prohibits sexual harassment in the workplace where harassment occurs in connection with a worker, a prospective worker or a person conducting a business or undertaking. This scope is broader than the current laws and extends the related prohibition to capture sexual harassment that is perpetrated against employees and prospective employees by third parties.

79. Additionally, the changes allow employees and prospective employees, as well as unions (on an employee's behalf), to apply to the Fair Work Commission or the Federal Court for relief to deal with a dispute about workplace sexual harassment beyond the existing stop sexual harassment orders. Such relief could include:

    a) compensation;

    b) payment for remuneration lost; or

    c) an order to take any reasonable action or course of conduct to redress any loss or damage suffered by an aggrieved person.

80. The relief could be made either by:

    a) the FWC (where at least two parties to the dispute agree to the Commission arbitrating the dispute); or

    b) the Federal Court/Federal Circuit Court (where no consent is provided for arbitration by the Commission).

81. While Master Builders do not oppose these changes, we are concerned that there are a number of inconsistencies in this part of the Bill with existing and concurrent duties under the Model WHS laws.

82. This inconsistency was highlighted when the Parliament considered mirror provisions to the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 ('Respect at Work Bill').

83. The related Senate Committee inquiry heard evidence[17] from Safe Work Australia, that highlighted inconsistencies in the wording of vicarious liability provisions of that bill with existing duties under WHS laws.

84. The same inconsistencies are contained within this Bill. This is important as the Bill requires a positive duty on employers to take *'all reasonable steps'* to prevent an employee or agent from contravening the relevant provisions - which is inconsistent with a PCBU's primary duty under the Model WHS laws to ensure, *'so far as is reasonably practicable'* the health and safety of workers.[18]

85. Master Builders submits that this will cause confusion and uncertainty for workplaces as it will result in different standards of duty to ensure related obligations are being met.

Anti-discrimination and special measures

86. The amendments at Part 9 expand the range of "protected attributes" in the anti-discrimination provisions of the FW Act to include three new attributes - breastfeeding, gender identify and intersex status. These definitions adopt the existing definitions of "gender identity" and "intersex status" contained in the Sex Discrimination Act.

87. Part 9 also contains amendments which clarify that 'special measures to achieve equality' are matters pertaining to the employment relationship, while clarifying that 'special measures to achieve equality' are not discriminatory terms making their inclusion in an enterprise agreement as lawful.

88. These changes are not opposed by Master Builders.

Fixed term contracts

89. Part 10 will prohibit fixed term contracts of employment of more than two years, as well as consecutive contracts with a combined duration of more than two years. exemptions.

90. The Bill contains exceptions to the two-year rule including but not limited to:

    a) engaging an employee who has specialised skills required to complete a specific task;

    b) apprentices or trainees;

    c) essential work during a peak period, including seasonal work;

    d) emergency situations or where a permanent employee needs to be replaced for a period of leave; and

    e) where an employee earns more than the high income threshold (calculated from the first year of the contract, noting that the threshold is currently $162,000 per annum).

91. The FWC would be empowered to resolve disputes regarding an employee's status as a fixed term employee, including by consent arbitration. Employees would also be able to access the small claims jurisdiction in eligible courts to enforce the legislative provisions.

92. These changes are not opposed by Master Builders.

[17] *The Senate Legal and Constitutional Affairs Legislation Committee - Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions] Report, November 2022 at pages 17-19*
[18] *See section 19 of the Work Health and Safety Act 2011 (Cth)*

Flexible work

93. Part 11 amends existing provisions in the FW Act that allow an employee to request a change to his or her working arrangements in certain circumstances, such as requesting a change in hours or location of work due to parenting/caring responsibilities or a disability.

94. The Bill seeks to expand the operation of these entitlements, enabling an employee to request a flexible working arrangement due to family and domestic violence that extends beyond violence perpetrated by a member of the employee's immediate family or household.

95. The Bill updates the procedures that govern how employees may request a flexible working arrangement from their employer. Specifically, an employer will be required to respond to the request within 21 days with a written response that either:

    a) grants the request;

    b) provides an agreed amended request (if, following discussion, the parties agree to amend the request); or

    c) refuses the request with reasons.

96. Where an employer refuses a request, they must provide the reasons for the refusal, the business grounds that underpin the refusal, and any changes the employer would be willing to make.

97. The grounds for refusing a request have been tightened and a request can only be refused following discussions where the parties genuinely tried to reach agreement and the employer has had regard to the consequences of refusing such a request

98. The Bill restricts the definition of "reasonable business grounds" to:

    a) when the request is too costly for the employer;

    b) when there is no capacity to change the working arrangements;

    c) when the changes would be impractical by changing work arrangements of existing employees or require the hiring of new employees;

    d) when the change would likely result in significant loss in efficiency or productivity; and

    e) when the changes would be significantly detrimental to customer service.

99. The amendments also allow workers to dispute an employer's refusal to grant a flexible working arrangement. This is available in circumstances including where the employer does not grant the request or does not respond in 21 days with a written explanation for the refusal.

100. The amendments create new rights for a party to apply to the FWC seeking an order to resolve the dispute. FWC will receive new powers to arbitrate a dispute and issue orders relating to a refusal where there is no reasonable prospect of the parties resolving the dispute themselves, taking into account fairness between the employer and the employee before making any order.

101. Master Builders opposes these amendments. While we accept there is some benefit in aligning the FW Act with standard equivalent provisions within Modern Awards, we do not support the expansion of FWC arbitration powers to disputes under this section.

102. Giving FWC powers to arbitrate disputes in this manner undermines the capacity of all employers to determine what might constitute reasonable business grounds for the business that they own and run. FWC is not appropriately equipped to second guess the decision of an employer about their own business matters, and it is not appropriate that they be asked to do so.

103. The amendment unreasonably impinges upon the prerogative rightly afforded to employers to manage their own business affairs and is therefore opposed by Master Builders.

Termination of enterprise agreements after nominal expiry date

104. The amendments at Part 12 alter current laws which allow for the termination of enterprise agreements by agreement between the parties, or on application to the FWC by one party.

105. The Bill will amend the FW Act so that enterprise agreements could only be terminated without employee agreement where they have passed their nominal expiry date and fall into one of the following categories:

    a) The FWC is satisfied that the continued operation of the enterprise agreement would be unfair for the employees covered by the enterprise agreement, or

    b) The FWC is satisfied that the enterprise agreement does not, and is not likely to, cover any employees, or

    c) All of the following apply:

        i. the FWC is satisfied that the continuing operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer or employers covered by the enterprise agreement; and

        ii. the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of termination of employment by reason of redundancy or insolvency for employees covered by the enterprise agreement; and

        iii. if the agreement contains terms providing for entitlements relating to termination of employment by reason of redundancy or insolvency, the employer has given a guarantee to the FWC that it will continue to honour those provisions contained in the enterprise agreement (unless the underlying modern award provisions on the subject matter are more beneficial). This guarantee must be given for the earlier of the following periods:

            - four years;
            - a shorter period the FWC may determine if appropriate; or
            - until the employees become covered by another enterprise agreement that covers the same or substantially the same group of employees.

106. This will apply to all new and existing termination applications.

107. Master Builders does not support the amendments in this Part. The practical effect of the amendments will be that it will become all but impossible to terminate an agreement.

108. Master Builders understands that the genesis of this amendment comes from concerns about the use of potential agreement termination during agreement negotiations. This is not a common practice in workplaces and recent research confirmed that 97% of termination applications are not contested.[19] In this sense, the proposed amendment is a legislative overreach.

109. Within building and construction, agreement terminations occur most commonly with respect to agreements established for specific building projects or in major infrastructure projects undertaken by head contractors in joint venture arrangements. The completion of these projects leaves related agreements with simply no work to do.

110. Considered in the broader context of this Bill and its overall aims, this amendment is counterproductive. If the goal is to reinvigorate enterprise bargaining, especially for workplaces or industries that have not commonly used enterprise agreements, making it harder to get out of an agreement once made will only discourage workplaces from entering into one in the first place.

Sunsetting of 'zombie agreements'

111. The amendments at Part 13 will introduce a mandatory "drop dead date" applicable for all "zombie agreements" made prior to the commencement of the Fair Work Act. This will be 12 months after commencement of the Bill.

112. Employers must notify employees of the drop-dead date within six months of commencement. Failure to notify would attract a civil penalty and the FWC will be able to extend the operation of such agreements by up to four years in certain circumstances.

113. This change is not opposed by Master Builders.

Enterprise agreement approval

114. Part 14 of the Bill contains amendments that are aimed to reduce some of highly technical and complex requirements associated when seeking FWC approval of a proposed agreement.

115. The amendments operate to remove some of the existing steps that an employer must do within strict timeframes, including the requirement to take all reasonable steps to provide employees with access to the agreement during a seven day 'access' period ending immediately before the start of the voting process.

116. The requirements to provide a notice of employee representational rights (NERR) and to wait until at least 21 days after the last notice is given before requesting employees to vote would no longer apply. However, this will only be the case if bargaining for a proposed single interest employer agreement, supported bargaining agreement or cooperative workplaces agreement. They will otherwise be retained in the case of a proposed single enterprise agreement.

117. The Bill notes that where pre-approval requirements are removed, they would be replaced with a broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

[19] *ACTUS Workplace Lawyers "Workplace relations policy and research paper - Termination of enterprise agreements" 19 August 2022*

118. While Master Builders acknowledges that this amendment will somewhat address the rigid and technical hurdles associated with having agreements approved, it does not go far enough.

119. Operating collectively, these amendments will have the effect of creating a 'two-tiered' approach that removes 'unnecessary and complex red tape' for multi-employer bargaining streams (that will inevitably involve unions) but retains several of those elements for 'single enterprise' agreements (that are less likely to involve unions) where they then become regarded as 'safeguards'.

Initiating bargaining

120. Part 15 amends the Act and creates a new right for unions to unilaterally initiate bargaining (for single enterprise agreements) where a previous agreement expired within the last five years. This will no longer require a Majority Support Determination, as is currently the case.

121. The amendments insert a new provision which specifically provides that:

    a) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (other than a Greenfields agreement or an agreement in relation to which a single interest employer authorisation is in operation) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:

        i. The proposed agreement will replace an earlier single-enterprise agreement that has passed it nominal expiry date; or

        ii. A single-interest employer authorisation did not cease to be in operation; or

        iii. No more than five years have passed since expiration; or

        iv. The proposed agreement will cover the same (or substantially similar) group of employees.

122. Master Builders opposes these amendments. The basis for this position is that we do not support any change that would undermine, or detract from, the rights of employees to make their own decisions as to when, or if, to commence bargaining for a new agreement. As drafted, these amendments hand unions powers to decide when bargaining commences irrespective of the views of workers. This is not appropriate.

123. Supporting materials accompanying the Bill do not make this clear. For example, the Statement of Compatibility with Human Rights contained within the Explanatory Memorandum states:

> *"Where the qualifying conditions are met, the amendments would enable an employee, via a bargaining representative, to initiate bargaining for an agreement simply by making a written request to the employer."* [20]

124. This statement does not reflect the provisions of the Bill which, as noted above, do not actually require involvement of an employee as a precondition for a union to initiate bargaining. In addition, not only does the amendment give a unions a right to initiate bargaining irrespective of the wishes of workers, it limits the rights for workers to initiate bargaining unless agreed by their union.

[20] *See Explanatory Memorandum*

Better off overall test

125. Part 16 would amend the Better Off Overall Test (BOOT) in several ways.

126. At the approval stage, the amendments will in some circumstances simplify the BOOT. There will be no requirement for the FWC to consider any prospective award covered employee, and it will only need to be satisfied that each existing award covered employee would be better off overall.

127. The Bill also clarifies that the FWC must undertake a global assessment (not a line-by-line assessment) of whether each employee is better off having regard to the more beneficial and less beneficial terms of the EA. The FWC may also only have regard to reasonably foreseeable patterns or kinds of work or types of employment (rather than hypothetical kinds of work that are not foreseeable). The assumption that employees are better off overall if a class to which they belong would be better off overall has also been retained.

128. During the life of the agreement, the amendments in this part will allow employers, employees, or unions covered by the agreement to apply to the FWC for a re-consideration of the BOOT where the employees covered by it work other patterns or kinds of work or other types of employment that were not previously considered by the FWC at approval stage.

129. In the above circumstance, the conventional BOOT process would be triggered and, if FWC considers that the BOOT is not met, then undertakings can be accepted, or the agreement itself can be amended by FWC to address related concerns.

130. While Master Builders welcomes moves to make the application of the BOOT more practicable and relevant, other amendments made by this part are opposed.

131. One of the most concerning elements of the amendments made in Part 16 is that unions are given more say over as to whether or not a proposed agreement meets the BOOT than the workers that agreement will eventually cover.

132. The Bill makes it clear that the FWC must give consideration to any views of the employer, employees and bargaining representatives as to whether the agreement passes the BOOT. However, this consideration is subservient to a further new step that requires FWC to give *primary* consideration to any *common view* of the employer and employee bargaining representatives (unions) as to whether the agreement should pass the BOOT.

133. The practical effect of this amendment is that unions will always have a greater say as to whether an agreement meets the BOOT than the actual workers and employers to which that agreement will apply. The view of the employer is not given any additional primacy, unless their view is also a 'common view' as held by a union. The effect of this amendment is that unless a union agrees, a proposed EBA risks being rejected for non-compliance with the BOOT.

134. As a result, Master Builders strongly opposes these amendments. As noted above, the message this sends to workplaces is that unless a union involved, workers do know what is good for themselves, nor can they be trusted to negotiate and implement workplace arrangements that suit their needs.

135. This is the wrong message and is not supported by Master Builders.

Dealing with errors in enterprise agreements

136. The amendments at Part 17 of the Bill expand the powers of FWC to vary enterprise agreements to correct or amend obvious errors, defects or irregularities. This will include instances where the wrong version was submitted to, and approved by, the FWC.

137. The FWC will have the discretion to vary an EA to correct an obvious defect or omission, or to vary an approval decision so that it applies to the correct version of an EA

138. While Master Builders does not oppose this amendment in-principle, we are concerned to ensure it is not used in such a way as to unreasonably open-up or vary the substantive effect wherever it is used. Where possible, Master Builders recommends that the exercise of this power be conditional upon first affording the relevant parties an opportunity to resolve the relevant issue. We remain unclear as to what situation or issue might fall within the definition of 'irregularity' and further guidance in the EM is warranted.

Bargaining disputes

139. The amendments at Part 18 create a range of new powers for FWC to exercise arbitration powers to resolve disputes during bargaining, which are 'intractable'.

140. Master Builders opposes the amendments in this provision. Master Builders does not support any change that expands existing FWC powers to make binding determinations about terms of a proposed agreement that are in dispute. These amendments, in a practical sense, remove the notion of 'agreement' from the concept of 'enterprise agreements' and fundamentally undermine the long-standing notion of a bargained outcome.

141. Under the current FW Act, there are only limited situations in which parties can ask FWC to seek a binding decision on what terms should or should not be included in a collective agreement. Master Builders believes that the terms of an agreement are for the parties to agree to or for the employer to determine and put to an employee vote.

142. As drafted, the amendments will operate so as to allow FWC to make an 'intractable bargaining declaration' where there is "no reasonable prospect of agreement being reached" and it is "reasonable in all the circumstances to make the declaration, taking into account the views of the bargaining representatives for the agreement".

143. More recent amendments made in the House of Representatives are intended to require that before issuing an intractable bargaining declaration, the FWC must be satisfied that a prescribed minimum period of good faith bargaining has elapsed.

144. Before making an application, a bargaining representative is still required to participate in the existing bargaining dispute processes under the FW Act (s240 disputes), which includes attending conciliation (an informal process).

145. Once an intractable bargaining declaration is made, the FWC must either:

    a) arbitrate the outstanding matter(s) between the parties, imposing an intractable bargaining workplace determination on them (which operates like an enterprise agreement); or

    b) provide the parties with a post-declaration negotiating period to agree on terms, after which the FWC must arbitrate the outstanding matters between the parties, imposing a workplace determination on them to resolve any matters on which agreement had not been reached by the parties.

146. The timing of the post-declaration negotiating period, like all aspects of this process, is left to the discretion of the FWC.

147. These amendments unlock 'unilateral arbitration' into enterprise bargaining for the first time since the inception of the FW Act. This means that one party needs to disagree to the claims made in bargaining as a trigger to seek to have terms imposed on all parties by way of arbitration. It is available in both single enterprise agreements and all multi-employer bargaining streams.

148. This a retrograde step and represents return to an arbitral-based bargaining regime more commonly experienced in the 1980s and 1990s. The FWC will have the discretion to move parties to compulsory arbitration very quickly which is costly exercise, particularly for small business that may now be compelled to bargain for multi-employer agreements.

149. As noted earlier herein, Master Builders believes these amendments are unproductive and will take the final decision-making away from those who best understand their workplace.

150. Master Builders submits that, even accounting for the most recent amendments made in this part, far greater clarity is needed around the circumstances that will lead to an "intractable bargaining declaration" being issued so as to ensure it is not left to the discretion of the FWC.

151. However, even were such clarity provided, it would not disturb our fundamental opposition to any change that gives a third-party power to make a binding determination about provisions within a document that purports to be an 'agreement'.

Industrial action

152. Master Builders opposes the amendments in Part 19 as they are made to accommodate other parts of the Bill that enables industry-wide bargaining and, as such, open the door to industry-wide strike action.

153. We note that recent amendments have been made to this area of the Bill, to the effect that protected action ballot orders ('PABO') will now be issued with respect to each employer on an enterprise-by-enterprise basis.

154. While this recent amendment does provide some clarity as to how this process is intended to operate, it does little to alleviate Master Builders broader overall concern about industry-wide bargaining and leaves the door to industry-wide strikes wide open.

155. Other amendments in this part require FWC to convene a conciliation conference between bargaining representatives every time a PABO is filed. While this does not prevent protected industrial action being taken, it involves a third party in a dispute resolution process in response to each time employees seek to commence the process of taking industrial action.

156. Part 19 amendments also change the process for conducting PABOs. It establishes a process involving a list of 'fit and proper persons' who may now also conduct PABOs. This enables bargaining representatives to more easily seek alternative persons to conduct their PABOs.

157. While Master Builders opposes these amendments, we recommend that in the event they are adopted by the Senate, that there be a very tight and objective set of criteria established to determine who is 'fit and proper'. This should include that there be no relationship, past, present or likely future, between parties and the Agent, and that they should have no shared interests.

Supported bargaining

158. The amendments at Part 20 of the Bill are identified as reforms to the existing low-paid bargaining provisions in Part 2-4 of the FW Act and will create a "supported bargaining stream" as a replacement stream.

159. Supporting materials for the Bill all state that the aim of this stream is to assist low-paid employees and their employers to make a multi-employer agreement that meets their needs and addresses the constraints and issues facing low paid workers.

160. Under this stream, employers may be compelled to bargain once a "supported bargaining authorisation" is granted by the FWC. A supported bargaining authorisation can be obtained by application to FWC who must consider whether it is appropriate for the parties to bargain together.

161. The FWC would consider the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. Industrial action will be available for the first time in this bargaining stream.

162. Master Builders opposes the amendments in this Part. The primary reason for this position is that, despite being advanced with references to employees that are "low paid", it is not limited to that end. This arises as the Bill amends the definition of "low-paid" to instead consider "prevailing wage levels" in an industry.

163. Similarly, the "history of bargaining" test will be removed, which in practice has excluded classes of employees who have previously bargained for a collective agreement.

164. The overall ramifications of these changes are that, despite their stated policy intent, the "supported bargaining stream" will not be limited to instances of "low-paid bargaining". Instead, as the supporting materials make abundantly clear:

> *"The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level"*

165. The breadth of change is significant and could operate to compel significant parts of the building and construction industry into bargaining.

166. Master Builders does not support these amendments. We continue to maintain our position that bargaining should be a voluntary process undertaken with the support of workers and employers at the single enterprise level.

Single interest employer authorisations and varying agreements to remove employers and their employees

167. Parts 21 and 22 contain amendments that vastly expand the current "single-interest employer authorisation" bargaining stream resulting in what Master Builders would describe as a 'industry-wide' bargaining.

168. Master Builders does not support industry-wide bargaining and considers it a retrograde step.

169. Under the current laws, multi-employer bargaining is a voluntary process. Employers with a "single-interest" can opt to make an application to the Minister (and the Fair Work Commission) to bargain together. The existing definition of "single-interest" is very narrowly defined. If employers choose to go down this route, then they knowingly expose themselves to industrial action across the relevant employers.

170. The Bill substantially changes the operation of this stream. It does this by:

a) making it compulsory through allowing unions and employees to seek a "majority support determination", which will compel the employer to bargain with other employers if the union can demonstrate that the majority of employees across all workplaces (critically, not each workplace) want to bargain Additional employers can be added to the authorisation in this way. MSDs do not require an employee vote;

b) opening up and broadening the types of employers who fall under this stream and who may now be compelled to bargain together; and

c) retaining the ability of employees to take industrial action.

171. By broadening the types of employers who can be covered by this stream the Bill significantly increases the risk of multi-sector industrial action.

172. The Bill also removes the requirement for Ministerial approval for a single interest authorisation. The FWC will instead issue authorisations. Either a business or a union may apply and there is no limit to the number of businesses an application can cover.

173. The definition of "common-interest" in the Bill as originally presented was drafted too broadly and, even taking account of further amendments moved in the House of Representatives, there remains a significant risk that an extensive range of businesses will now be compelled to bargain together. The Bill provides no guidance or information as to which businesses may be covered by this test, as it leaves it to the discretion of the FWC.

174. Master Builders is concerned that this could allow FWC to order and compel competitor businesses to bargain together. Indeed, there is no prohibition on competitors being "single-interest" employers, meaning that one business with sound financial resources could set pay rates at such a level that the smaller competitor cannot afford and eventually goes out of business. This is anti-competitive.

175. This will be especially problematic for employers on building sites. It opens the door for smaller contractors to be compelled to bargaining together, simply because they are all engaged to work on the same building project, despite offering a range of vastly different services and performing different types of building work.

176. Master Builders is also concerned that, as drafted, there is a real risk that employers spread out across the country could be compelled to bargain together because of, for example, the fact that they provide the same services and have similar customers but are operating in different areas.

177. A further significant concern is that the Bill allows new employers or employee organisations covered by an existing single interest employer agreement with broad scope to apply to the FWC to extend coverage of that agreement to the new employer and its employees.

178. The recent amendments made by the House include a number that we understand are intended to operate such that it excludes certain types of building and construction work from the operation of elements within the multiemployer streams.

179. While Master Builders remains opposed to multi-employer (or 'industry wide') bargaining becoming a feature of Australian workplace laws, we do acknowledge those amendments and welcome them as recognition from Government that the building and construction industry, its workplaces and participants, operates differently to all other industry sectors and contains unique features not observed elsewhere.

180. While our overall position on the Bill remains unchanged, we do cautiously note that exempting certain types of work from the operation of other elements within this Bill is a positive step. However, the amendments were put to a vote within hours of being first introduced and more time is needed to analyse their impact and ramifications.

181. This is not only important in context of a Bill with makes significant and fundamental changes to workplace laws, but also in context of other existing laws and potential broader ramifications for the construction industry and its structure.

182. Further, the building and construction industry does not exist in an economic silo, and we are dependent on almost all other industry sectors to operate successfully. If other sectors are adversely affected by this Bill, so is the construction industry

183. Master Builders also notes that, as drafted, the amendments may give rise to problems in terms of practical application on the ground, something we would be concerned to avoid.

184. Lastly, it should be remembered that regardless of any exemption for building and construction work, existing bargaining options remain available and unchanged and nothing in this Bill will impact building unions capacity to bargain using the conventional, existing approach.

Cooperative workplaces Stream

185. Co-operative workplace agreements are multi-employer agreements that were not made through a supported bargaining or single interest bargaining process. Master Builders understands that this stream is intended to target smaller businesses but is open to all.

186. It will be voluntary for employers who may opt in to bargaining but also opt-in to an agreement once it is in place, subject to an employee vote. Businesses will not be restricted in opting out of bargaining at any time during the process, if they wish.

187. While there is no protected industrial action available under this stream, Master Builders is concerned that the Bill as drafted operates to the effect that this it mandates and requires the involvement of unions.

188. For this reason, in addition to our general concern about a reduced focus on negotiations at the enterprise level, Master Builders does not support these amendments.

National Construction Industry Forum

189. Recent amendments moved in the House of Representatives include a new insert a new Part 25A to establish a National Construction Industry Forum as a statutory advisory body.

190. Master Builders supports this proposal. It is further recognition of the unique features and conduct that exist in the building and construction industry, as evidenced by the scope of matters it is proposed to encompass.

191. However, Master Builders notes that the Forum should in no way be considered as a replacement for the ABCC and does little to fill the void its abolition will leave.

Small claims process

192. The amendments at Part 24 increase the maximum threshold on the amounts that can be awarded in small claims proceedings from $20,000 to $100,000.

193. This change is not opposed by Master Builders.

Prohibiting employment advertisements with pay rate that would contravene the Act

194. Part 25 creates a new prohibition on employers from advertising jobs with wage rates that are less than the Federal Minimum Wage or the applicable rate in an industrial instrument

195. Employers will not contravene this provision if they have a "reasonable excuse" for non-compliance.

196. This change is not opposed by Master Builders.

Workers' compensation presumptions for firefighters

197. Part 27 would amend existing presumptive liability provisions in subsection 7(8) of the SRC Act.

198. This change is not opposed by Master Builders.

Additional Reform Options for Committee Consideration

199. Master Builders remains opposed to the abolition of the ABCC. In the event that the Senate votes to abolish the ABCC, we submit that there is a range of alternative options for changing the Fair Work Act to provide sector workplaces some protection against unlawful conduct and building union bullying.

200. Although the option below could not never completely match the many benefits industry currently enjoys with the ABCC in place, it would go some way to providing better protections for workplaces and supports Master Builders long-standing goal to improve industry culture and conduct, and stamp out unlawful conduct and bullying.

201. Importantly, the option does not change or alter any law covering workers' pay and conditions of employment, nor will it have any bearing on workplace safety.

Overview

202. In short, the option involves key changes to the FW Act that, if implemented, would operate as follows:

a) The Fair Work Ombudsman ('FWO') is given power to make a 'Priority Industry' declaration, based on factual assessment of consistent criteria applied objectively. If a particular industry meets that set criteria, the FWO must declare that particular industry as a 'Priority Industry'. The declaration would operate for a five-year period.

b) When an industry is declared a 'Priority Industry':

i. the FWO would be given greater powers to more effectively tackle the repeated or common areas of non-compliance with workplace laws that gave rise to the declaration;

ii. additional obligations are imposed on employers operating in declared 'Priority Industry' that are designed to also target and eliminate the conduct that gave rise to the declaration.

c) Registered Organisations and employers operating within a declared 'Priority Industry' would be subject to a 'three strikes' approach, after which greater penalties and broader sanctions would be automatically triggered for the remainder of the declared period for future offences. Higher penalties would also be available in relation to specifically identified types of conduct.

d) In additional to the higher penalties and broader sanctions, the FWO would also be required recommend additional sanctions to Government for it to consider and implement.

e) Before making the recommendation, the FWO would be required to consult with the Courts or Tribunals that determined the 'strikes' had occurred to ensure any recommendation is effective and targeted towards preventing future repeated instances of that conduct.

f) Government would be required to implement the FWO recommendation. If Government decides to reject the recommendation, or implement an alternative variation, it would be required to table an explanation of its grounds and reasons to the Parliament.

Key Benefits

203. If implemented as proposed, the option will deliver a range of positive outcomes for the industry, including the potential to improve overall sector productivity and boost wages for workers. Key features and benefits of the proposal include:

a) Government can deliver its election promise: The proposal is consistent with the Albanese Government's election commitment to abolish the ABCC and ensure building and construction workers are covered by the Fair Work Act.

b) Will drive other Government workplace policy priorities: The proposal will assist in the pursuit of other Government industrial relations priorities, such as reinvigorating enterprise bargaining and improving real wages growth underpinned by better workplace productivity.

c) A simple and effective deterrent against illegal conduct: The proposal is underpinned by a simple 'three strikes' approach and contains wide range of deterrence measures that can be scaled to ensure any penalty is commensurate to the level of illegal conduct where established.

d) Comprehensive checks and balances to ensure the law is fairly applied: The proposal builds in a range of measures to ensure the laws are applied objectively, fairly and without inappropriate influence at any stage.

e) Transparent and underpinned by objective criteria: The proposal is designed to operate in a way that ensures the rules are clear; decision makers are transparent; and uses objective criteria and historical data so as to ensure it only applies to particular problems and conduct within particular industries.

f) No unintended consequences: The proposal avoids unintended consequences for, or application to, any workplace sector, employer or Registered Organisation who inadvertently or unintentionally breaks workplace laws.

g) Cannot be manipulated or gamed: The proposal is designed to avoid manipulation or 'gaming' by ensuring extra powers are only available to an independent umpire, being the FWO.

204. More detail about the above option and how it might operate is at **"Attachment A**" to this submission

Conclusion

205. Master Builders Australia appreciates the opportunity to assist the Committee with its inquiry into the provisions of this Bill and would be pleased to provide any other further information as requested. To this end, please contact Shaun Schmitke on 02 6202 8888.

206. A range of other materials and information containing history and examples of conduct experienced by building and construction workplaces can be found in the following submissions:

- Submission to Senate Education and Employment Committee Inquiry into the Proper Use of Worker Benefits Bill
- Submission to the Senate Education and Employment Legislation Committee on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019
- Submission on Building & Construction Industry (Improving Productivity Bill) 2013

ATTACHMENT A

1. ALLOW FWO TO DECLARE 'PRIORITY INDUSTRIES' AND TARGET PROBLEM AREAS

What?

- To ensure FWO resources are used effectively, the FWO should be required to assess industry sectors and identify if they should be deemed a 'Priority Industry'.
- Such a process would use existing ABS definitions to determine scope of industry sector and involve a set of objective criteria against which an assessment of historical data would be undertaken.
- Where criteria have been met, the FWO will be required to make a determination declaring an existing industry sector a 'Priority Industry'.
- This declaration would operate for a period of not less than five years, with a review at the start of the fourth year determining if it should be extended.

Why?

- At present, the FWO is not required to focus its resources to areas where the problems are. Instead, the Ombudsman and its inspectors have universal coverage and retain broad discretion as to where they focus, when they act, and even if they will investigate or prosecute.
- The declaration of a 'Priority Industry' will mean that the FWO can focus its resources to better target sectors with a demonstrated history of known problems and non-compliance with workplace laws.
- This will make it a more effective regulator and make sure agency resources are maximised.

Impact?

- This change would mean that the FWO is required to assess criteria that enables them to focus attention on particular industries and target problems where there is historically high levels of non-compliance.
- The FWO can then use its resources more effectively to tackle and eliminate those problems.

Example?

- The criteria would involve an assessment of certain provisions within the Fair Work Act and the number of related breaches found in a particular industry sector over the preceding five-year period
- If the historical data shows that the number of breaches *meet or exceed* a set average yearly amount over the preceding five-year period, it would require the FWO to declare that sector as a 'Priority Industry'.
- The proposed criteria and relevant average yearly breach amount are:

FW ACT PROVISION	AVERAGE BREACHES PER YEAR	TOTAL BREACHES OVER PRECEDING 5 YEARS [21]
Coercion	10	50
Unlawful industrial action	20	100
Right of Entry	10	50
Freedom of Association	10	50
Misrepresentation	2	10
Discrimination	1	5
Hindering or Obstructing	10	50

[21] **Note:** The numbers in this table have been calculated with reference to historical breach data.

2. BOOST FWO POWERS TO TACKLE PROBLEMS IN 'PRIORITY INDUSTRIES'

What?

- Give the FWO enhanced responsibilities and powers when discharging its functions in relation to any declared as a 'Priority Industry'.
- These extra powers would enable FWO to ensure its focus and resources are used to target and eliminate any conduct or culture that gave rise to the declaration.
- This would involve an obligation for the FWO to proactively act when instances of conduct that caused an industry to be declared a 'Priority Industry' are identified.

Why?

- The FWO currently has broad discretion as to when it will or will not exercise its powers to investigate and prosecute breaches of workplace laws, and limitations on what it can do and how it goes about gathering evidence needed for such prosecutions.
- FWO is also limited as to which class of workplace participants it can represent and is not obliged to commence a proceeding even though it has discovered a breach of workplace laws.

Impact?

- This change would mean that the FWO, in relation to a declared 'Priority Industry' would be required to investigate alleged instances of conduct giving rise to the declaration and obliged to commence proceedings accordingly.
- They would have greater investigation powers capacity to gather evidence and be assisted by the additional obligations placed on those Employers operating within a declared 'Priority Industry' (see below).

Example?

- FWO receives reports about a building union who is allegedly not following right of entry rules on construction sites.
  - The report relates to a 'Priority Industry' and therefore the FWO is obliged to investigate.
- When reaching the site, representatives of the Employer are hesitant to confirm any details or provide any information to the FWO.
  - To overcome this, the FWO would be able to use its extra powers to compel evidence or information, enabling the builder to say they had 'no choice' but to assist the FWO.
- The alleged breach involves an area of law (ROE) against which the declaration was originally made.
  - As ROE is an area that the declaration is aimed to eliminate, the FWO is therefore obliged to commence a proceeding.

3. TOUGHER RULES FOR EMPLOYERS IN 'PRIORITY INDUSTRIES'

What?

- Employers operating within a 'Priority Industry' would be subject to special additional obligations.
- These additional obligations are designed to help eliminate any conduct or culture that gave rise to the declaration of a priority industry.
- These additional obligations would include:
  - Prohibition on side deals, non-written agreements and other arrangements;
  - Obligation to report unlawful conduct to the Fair Work Ombudsman; and
  - An obligation to take proactive steps to address or prevent the unlawful conduct.

Why?

- The conduct of employers can sometimes assist or contribute to unlawful conduct and breaches of workplace laws, especially if they are pressured by unions to turn a blind eye to wrongdoing.
- The union business model is based on exerting pressure on 'tier 1' companies, larger head contractors, and specialist sub-contractor groups so as to ensure that they comply with the industrial aims and demands of a particular union. This often manifests in terms of builders being involved in the practice of 'black-listing' and only using sub-contractors approved by the union, otherwise those builders run the risk of being targeted themselves for industrial action and site disruption.
- In other instances, employers have done special deals with unions (either written or by way of 'handshake deal') that allow them to 'put aside' usual application of particular laws, such as giving 24 hours' notice for right of entry, employing union nominated 'site delegates', providing worker details to unions for membership purposes, or advising unions if non-union workers or subcontractors are on site.
- Builders have done this to 'buy' industrial peace knowing that they will be unlikely to get penalised by regulators, and not have any site they operate disrupted by a union. For those who can afford to do so, such arrangements create a commercial advantage of being able to deliver projects on time and budget, while having the 'backing' of the union.

Impact?

- Imposing greater obligations on 'Priority Industry' employers would stop from 'doing handshake deals' with unions, assisting unions to engage in unlawful conduct, or turning a blind eye to wrongdoing.
- Instead, employers in a 'Priority Industry' have no other choice than to do the right thing, comply with the law, and report to regulators if they see others breaking the law.
- This obligation will also mean that employers cannot be threatened or coerced into turning a blind eye to breaches of workplaces laws, because they have no choice but to notify the FWO and be penalised if they don't.
- Requiring employers to notify the FWO when unlawful conduct is likely, threatened or occurring will also enable the FWO to act quickly and effectively to target common problems in 'Priority Industries'.

Example:

- A builder is approached by the union and told that they must employ a person nominated by the union to be appointed as a paid 'site delegate', not use any subcontractor unless they have a current CFMEU pattern EBA, and let the local organiser come and go from the site whenever they like.
- The union promises the builder that if it agrees to do the above things, the union will make sure that there will be 'no troubles or problems' on any site run by that builder. The union also tells the builder about a competitor builder who they have determined to target for site disruption because they used a subcontractor who has an EBA with the AWU instead of the CFMEU.
- Under the proposed changes, the builder would be:
  - obliged to immediately report this information to the FWO;
  - prohibited from agreeing to any of the union's demands; and
  - provide information about the unions plan to target the competitor building.
- If the builder agreed to any of the unions demands, or failed to report this information to the FWO, they would be subject to the 'three strikes' approach and possible higher penalties.

4. MORE EFFECTIVE PENALTIES FOR REPEAT OFFENDERS TRIGGERED BY A SIMPLE 'THREE STRIKES' APPROACH

What?

- Give FWO power to pursue a greater range of penalties and other sanctions if a Registered Organisation or employer operating within a 'Priority Industry' breaks specified workplace laws either:
  - three or more times within a 12-month period, and/or
  - a total of five times or more over the period for which the 'Priority Industry' declaration is in place.
- The specified workplace laws would be the same laws that gave rise to the declaration of a 'Priority Industry' being triggered in the first instance. For employers, the specified laws would also include any law that specifies the additional obligations imposed upon them as a result of the 'Priority Industry' being declared.
- The broader penalties and more effective sanctions would only be available:
  - to the FWO; and
  - for the remainder of the period for which the 'Priority Industry' declaration is operative; and
  - in relation to any future breaches of specified workplaces law and only for a Registered Organisation or employer who operates in a 'Priority Industry'.
- The additional penalties and sanctions available would include:
  - Suspended penalties;
  - Penalty bonds;
  - Cancelation/suspension of permits; and
  - Mandatory higher penalties determined with reference to the frequency of previous breaches within the period for which the 'Priority Industry' has been declared (e.g. penalties four times higher than the conventional maximum, for the fourth breach of a specified law within a 12 month period).

Why?

- Some industry participants consider the cost court action and penalties as being the 'lesser of two evils' when compared to the benefits they derive from engaging in unlawful conduct.
- Building and construction is home to a number of Registered Organisations which are actually proud of their historical record of law-breaking and consider fines and penalties as nothing more than a 'cost of doing business'.
- The uses of a 'strikes' approach is simple and fair because it is only triggered when there are repeated instances of law-breaking over a set period, or a pattern of unlawful conduct.
- A 'three strikes' approach avoids capturing any inadvertent or unintentional breaches of the law that may occur, and the 'five-strikes' approach creates an incentive to avoid continued law-breaking or future deployment of similar patterns of unlawful conduct.
- A greater range of penalties and sanctions allows the FWO to ensure that the consequences of breaking the law better 'fits the crime'.

Impact?

- This change will allow the FWO to more effectively target breaches of the law that gave rise to the declaration of a 'Priority Industry'.
- It will discourage those operating in a 'Priority Industry' from continuing to break workplace laws and provide an effective deterrent when repeated breaches are found.
- Industry participants will be forced to 'think twice' before they break workplace laws, knowing that the consequences for repeated breaches may have meaningful consequences and penalties.

Example?

- The FWO brings a prosecution against the CFMEU for breaching ROE laws. It is the fourth time the FWO has commenced proceedings for ROE breaches against the CFMEU, all of which occurred within a nine-month period.
- Because ROE is an area of law that gave rise to the 'Priority Industry' declaration which is operative, and there have been three or more breaches within a 12-month period, the FWO is able to seek a higher than conventional penalty amount for the 4th breach.
- The FWO decides it will seek a higher penalty with reference to the frequency of previous breaches. As this is the fourth time FWO has commenced a proceeding for breach of ROE laws against a Registered Organisation in a declared 'Priority Industry', they to seek a penalty equivalent to four times the conventional maximum.

Further Example?

- The FWO brings a prosecution against the CFMEU for alleged coercive activity. The industry in which the coercion is alleged to have occurred is a declared 'Priority Industry' and this has been in place for over two years.
- This proceeding is the 7th occasion on the FWO has taken action against the CFMEU for coercion in the time since it declared construction as a 'Priority Industry'.
- Because coercion is an area of law that gave rise to the 'Priority Industry' declaration, and there have been five or more breaches anti-coercion laws found since that declaration commenced, the FWO is able to seek additional sanctions and penalties.
- The FWO decides to seek:
    - penalties seven times higher than the conventional maximum (as this is the seventh time FWO has commenced a proceeding for breach of coercion laws against a Registered Organisation in a declared 'Priority Industry'); and
    - that half of this higher penalty be 'suspended' and only payable if the CFMEU is found in breach of coercion laws on any further occasions within the period for which a 'Priority Industry' declaration is in place.

5. STOP PATTERN BARGAINING + GENUINE ENTERPRISE NEGOTIATIONS = MORE PRODUCTIVITY AND BETTER WAGES

What?

- Allow higher penalties to be triggered for instances of unlawful conduct in a declared 'Priority Industry', if that conduct occurs in relation to, or in connection with:
    - FW Act s.354 (Coverage by particular instruments) or;
    - FW Act s.355 (Allocation of duties etc. to particular person) or
    - FW Act s.412 (Pattern Bargaining).

Why?

- Much of the unlawful conduct which occurs in the building and construction industry arises in connection with the use of 'Pattern' enterprise agreements or over the decision to have a 'union EBA'.
- The adoption of union pattern EBAs is the primary way that construction unions wield influence and power over the industry, forcing workplaces to adopt standard or 'one size fits all' employment conditions.
- The conditions in union pattern EBAs are rigid, stifle productivity and innovation, and limit wage rises. They are the exact opposite of the outcome that genuine enterprise-based bargaining was intended to achieve.

Impact?

- This change would create a significant and effective deterrent against the reason why much of the unlawful conduct deployed within the building and construction industry is deployed.
- It would mean that prevalent use of 'one size fits all' pattern agreements is effective deterred and ensure that enterprise bargaining is genuine and able to drive better wage outcomes for workers.
- It would force workplaces to ensure that negotiations are:
  - Genuine and meaningful;
  - Enterprise focussed and centred on the needs and desires of participants in a particular workplace (especially workers) rather than the 'one size fits all' terms and industrial aims dictated by third parties (especially unions);
  - Undertaken in way that opens the door for workplaces to agree on terms and conditions that suit them and their particular workplace, by fostering innovative, flexible or other specific arrangements that drive productivity; and
  - Maximise the changes for agreements to drive enhanced wages and conditions.

Example?

- The FWO has investigated reports that the CFMEU has threatened to 'make trouble' for a builder unless they agree to sign the CFMEU pattern EBA.
- The builder says they want to negotiate their own arrangements with the workforce and reject using the pattern EBA, causing the CFMEU come onto site without notice during a concrete pour and allege non-compliance with safety laws.
- The FWO investigate and allege that the CFMEU has engaged in coercion and breached ROE laws. It commences proceedings, and the Federal Court finds that the CFMEU had breached those laws. Because the breaches occurred in connection with s.354 and s.355, the FWO is able to seek higher penalties.
- As a result, the builder and its workers are able to negotiate an EBA which implements a more flexible and efficient rostering system. The efficiencies generated as a result of this enterprise specific roster system means that the employer can afford higher wage systems and provide for each employee with an extra week of annual leave.

6. AN OBJECTIVE APPROACH TO SERIOUS SANCTIONS

What?

- If a Registered Organisation or employer operating within a 'Priority Industry' triggers either the "three strikes" or "five strikes" approach, the FWO would be required (in addition to higher penalties being triggered) to consider and recommend additional serious sanctions for consideration of Government.
- The additional serious sanctions for repeat offenders would include:
  - Mandatory training for officers, Directors, Managers or elected officials;
  - The imposition of regular and proactive reporting and compliance obligations;
  - Temporary appointment of an Administrator to ensure ongoing organisational compliance;
  - Organisation-wide penalty bonds;
  - Limitations being placed on the use certain rights, including that they be conditional, suspended, or cancelled (only in the case of Registered Organisations); and/or
  - Suspension on tendering for Government funded work (only in the case of an Employer).
- Before making any recommendation, the FWO would be required to:
  - Consult with the Courts or Tribunals that have made findings that the specific workplace law has been broken; and
  - Ensure any recommended additional serious sanction is targeted towards eliminating any future repeated breaches of that specific workplace law by that Registered Organisation or employer.
- Government would be required to:
  - assess and consider any such FWO recommendation; and

- take all necessary steps to implement the sanction recommended by the FWO.
- Where the adopts the FWO recommended sanction, implementation would need to be either ia an instrument that is disallowable, or open to review the Federal Court.
- Where the Government decides to not accept the FWO recommendation, or in any way deviates from the FWO recommendation, it would be required to table an explanation of its grounds and reasons to the Parliament.

Why?

- This approach obliges the FWO, which is an independent and objective regulator, to consider and recommend sanctions for repeated instances of unlawful conduct for consideration of Government.
- In making such recommendation, the obligation to consult with the Courts and Tribunals who made findings giving rise to the 'three strikes' ensures that the sanctions recommended are effective and impartially developed. This ensures that FWO makes recommendations that are independent and designed to be as effective as possible.
- If would be up to Government to implement the FWO recommended sanction, who would retain discretion as to whether it will accept or reject the recommendation.
- If Government *accepts* the FWO recommendation, the instrument by which implementation of the recommended sanction would be disallowable, providing a 'check and balance' against overreach or unreasonableness.
- If Government *rejects* the recommendation, the requirement to explain why provides transparency of its decision making to both the Parliament and industry in which a 'Priority Industry' declaration operates.

Impact?

- The FWO would have no choice but to consider and recommend additional sanctions for ongoing unlawful conduct, designed to be specifically targeted and having regard to the views of Courts and Tribunals.
- Government will be required to consider and respond to the FWO recommendation.
- If the Government *accepts* the FWO recommendation, it must take steps to implement the recommended sanctions. This must be done by disallowable instrument.
- If the Government *rejects* or deviates from the FWO recommendation, the relevant Minister would be required to table a statement to the Parliament that outlines the grounds and reasons for their decision.

Example?

- The FWO has just successfully prosecuted the CFMEU for four separate breaches of ROE laws, all of which occurred within a nine-month period.
- Because ROE is an area of law that gave rise to the 'Priority Industry' declaration which is operative, and there have been three or more breaches within a 12-month period, the FWO must also consider and recommend additional sanctions for consideration of Government.
- The FWO consults with the Courts and Tribunals who made findings that the CFMEU had breached the laws, and recommends to Government that it takes steps to:
  - Put strict conditions on ROE permits held by all officers of the CFMEU in the State where the breaches occurred, for a period of 12 months;
  - Require the CFMEU to ensure all officers and permit holders undergo ROE retraining to ensure they know how to comply with the law; and
  - Require the CFMEU to pay a 'penalty bond' equal to an amount of the total penalties already imposed for the ROE breaches so found. The 'penalty bond' should be held by the Government for the remaining period over which the 'Priority Industry' will operate, refundable at the end of that period if there are no future ROE breaches.
- The Government considers the FWO recommendation and decides the implement it in full.

7. CREATE A SPECIALIST 'CONSTRUCTION DIVISION' WITHIN THE OFFICE OF THE FAIR WORK OMBUDSMAN ('FWO')[22]

What?

- Create a specialist and dedicated 'building and construction' division within the FWO.
- The division would consist of staff and inspectors dedicated for the industry, who would have specialist knowledge/training in understanding and navigating the complexities of building work, industry history and culture, and commonly deployed industry-specific practices.

Why?

- The way in which building work is performed, both domestically and internationally, is contractor based and this makes the building and construction industry uniquely susceptible to disruption or pressures that simply don't exist in other industries or workplaces.
- This is why there is a history of problems and disruption that are unique to the building and construction industry. It has fostered a culture that doesn't exist in other sectors and resulted in common problems and sector-specific tactics which have plagued the industry for decades and continues to this day.
- There is a big difference between an inspector entering a coffee-shop to inspect roster sheets to determine if someone has been underpaid, compared to an inspector entering a highly dangerous construction site to manage a heated altercation involving a building union official and supervisor.

Impact?

- This division would allow the FWO to ensure its inspectors are familiar with the building and construction industry and are appropriately trained to deal with its unique history and industry participants.
- A specialist division would ensure that the industry is covered by regulators who know where to look, and what practices commonly lead or contribute to breaches of workplace laws on building sites.
- Given the building and construction industry would most likely declared a 'Priority Industry' under this proposal, such a division would be of significant utility to FWO and highly effective in context of the other changes outlined in this proposal (such as being familiar with the additional regulator obligations and powers as proposed).

[22] **Note:** While this item does not necessarily require amendment to the FW Act, we recommend that it be contained in legislation in order to facilitate the effective operation of other proposed changes.