Submission to the Senate Education and Employment Legislation Committee inquiry into the

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

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INTRODUCTION

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

3. 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.

4. 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.

5. 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.

6. The building and construction industry:

   a. consists of about 445,000 business entities, of which 98.6 per cent are considered small businesses (fewer than 20 employees);

   b. is home to over 260,000 independent contractors and self-employed tradies;

   c. 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;

   d. represents about 10.4 per cent of GDP, the second largest sector within the economy;

   e. 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

   f. performs building work each year to a value that exceeds $270 billion.

SUMMARY OF THIS SUBMISSION

7. Master Builders files this submission in respect of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* ('the Bill'). Master Builders does not support the Bill and we urge the Committee to recommend that it not be passed.

8. Although the Bill contains some non-controversial elements[1], the majority of the changes proposed are opposed on the basis they will result in significant and adverse outcomes for over 440,000 businesses that operate in building and construction and the 1.3 million people they employ.

9. The detailed grounds and reasons for this position are set out below, however the core reasons that Master Builders advances on behalf of our over 32,000 business members as

[1] *Master Builders supports the Private Members Bills introduced by Crossbench Senators Jacqui Lambie and David Pocock – namely the Fair Work Legislation Amendment (First Responders) Bill 2023; Fair Work Legislation Amendment (Asbestos Safety and Eradication Agency) Bill 2023; Fair Work Legislation Amendment (Strengthening Protections Against Discrimination) Bill 2023; and Fair Work Legislation Amendment (Small Business Redundancy Exemption) Bill 2023*

to why the Committee should recommend against the passage of this Bill are, in summary, that it:

a. Does not merely 'close loopholes' as its name infers. Instead, the Bill as introduced is a fundamental and comprehensive rewrite of core elements within the regulatory framework applicable to all workplaces that will result in greater complexity, uncertainty and additional cost which is unnecessary and unjustified.

   In many cases, such as the proposed new casual employment rules and definition of independent contractor, the changes undo existing elements of the law which are clear, simple and certain and replaces them with arrangements that are unwieldy, unworkable and complicated arrangements.

b. Threatens the use of independent contracting and subcontracting: The Bill proposes to abandon or undermine a range of legitimate arrangements under which work is necessarily performed in the building and construction industry, including the use of independent contractors and specialist service subcontractors. These arrangements are not 'loopholes' and but are lawful and long-standing, and they are central to how building works are undertaken both domestically and internationally.

   Core parts of the Bill, such as changes to the definition of 'employee' and the proposed 'Same Job, Same Pay' labour hire provisions, strike at the very heart of these arrangements. Self-employed tradies and the use of subcontractors are crucial elements which both underpin, and are essential for the ongoing operation of, an industry that performs over $260 billion worth of construction work each year and is home to more small businesses than any other sector within the Australian economy.

c. Creates uncertainty, risk and more disputation: The Bill will deliver a range of negative impacts for the industry, community and consumers, by introducing significant uncertainty, commercial risk and legal complexity in circumstances that are simply unnecessary.

   Changes in the Bill will require employers to spend a lot more time working on compliance and paperwork while introducing uncertainty and significant increased legal risk. This will make it far harder for employers who need to estimate costs in advance, make future business plans or tender for new work. This will undermine business confidence and could not come at a worse time for building and construction which, after years of disruption and uncertainty, continues to experience a range of growing industry pressure points against a backdrop of general economic uncertainty and growing inflationary concerns.

d. Will exacerbate key industry challenges and hurt small business: Current national economic conditions mean builders and small subcontractors are already struggling with a long list of pressures and challenges, including material supply, heavy compliance burdens and labour shortages.

   Many elements of the Bill, such as restricting existing options for lawful and legitimate methods under which work is performed, will not alleviate any of these

issues and will only worsen them. This is especially the case for small businesses and subcontractors who face increased legal risk and big penalties if they don't get it right.

e. Hurts other parts of the economy on which builders depend: 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 building and construction with negative consequences.

   The significant additional regulation proposed for the road transport industry is one obvious example of why the Bill causes grave concern and uncertainty amongst builders. The industry relies on efficient and stable transportation of product to building sites and increased costs arising will flow on to construction costs.

f. Stifles competition and drives up costs of building: The Bill contains several provisions that will lessen competition within the sector and artificially drive-up costs for business operations and consumers.

   The 'Same Job, Same Pay' and 'employee-like worker' provisions are two key examples where competition laws are either deliberately and explicitly excluded, or that open the door to artificially increase costs and compliance burdens, especially for those businesses operating in the residential construction sector. This will make other Government priorities, such as increasing residential housing supply, harder to achieve and cause the cost of home ownership to become even more unaffordable.

g. Does nothing to improve or support workplace productivity: The Bill contains no measures to support or improve workplace productivity. In fact, the word 'productivity' appears only twice in the entire Bill – and only in the context of proposed new powers needing to be exercised in a way to "avoid unreasonable adverse impacts" on productivity and business viability. This clearly contemplates the likelihood of "reasonable adverse impacts" arising from the Bill and its provisions.

h. Leaves key matters to be set by regulation: There many parts to the Bill that will be subject to matters "to be prescribed by regulations" which won't be released until after it becomes law and are therefore unknown.

   These things are often crucial and central to how the Bill will operate and who it will capture, meaning the Government can fundamentally change how the laws work in practice by the stroke of a pen at any time, and include matters such as:

   i. What is defined as 'digital platform work';
   ii. statutory characteristics to determine who is an 'employee-like worker';
   iii. key matters that can be contained in 'minimum standards orders';
   iv. what represents an 'unfairness ground' in the FWC's new 'unfair contracts' jurisdiction; and

v. what category or class of applicant can access, or not access, the above mentioned jurisdiction (thereby creating a complex and two-tiered system of rights and access regarding unfair contract laws).

i. Bill at odds with other Government priorities: The Bill and its provisions is at odds with a range of other policy goals being pursued by Government It is important that this Bill not be implemented in a 'siloed' manner that contradicts, and makes harder, pursuit of other key issues in other portfolios.

10. If the Bill is passed into law, there will be a range of adverse impacts on the building and construction industry. These are outlined in greater detail later herein; however key concerns are as follows:

a. Independent contracting is under serious threat: The changes in this Bill will mean independent contractors face several distinct new hurdles and barriers that undermine or unfairly challenge their decision to be their own boss and work as an independent contractor.

It is well understood that many people choose to work as an independent contractor to give them the flexibility and freedom to choose the hours they work, the projects they work, who they work for and negotiate their own fees and conditions.

The Bill places all these benefits under significant jeopardy and puts at risk the ongoing viability of some 260,000+ self-employed tradies and independent small business contractors in building and construction.

b. Same Job, Same Pay will capture subcontracting: The proposed 'Same Job, Same Pay' provisions dealing with labour hire clearly capture subcontracting in building and construction.

As a result, builders and subcontractors either face a complex and lengthy process to contest relevant applications (much of which a tribunal 'may' have regard to) or face higher costs which impact viability or hurt consumers.

This change will be particularly hard for smaller subcontractors in residential building and construction. It opens the door for this part of the sector to be subject to many of the same practices that have plagued the commercial and civil aspects of construction for decades (and which have become more acute since the abolition of the Australian Building and Construction Commission). These practices include the significant prominence of pattern bargaining and related practices which force employers to adopt union EBA pattern agreements which impose standardised conditions, rates and working arrangements which hurt productivity, destroy innovation and drive up the costs of housing.

For the otherwise vibrant and innovative residential building sector, it simply means more disputes, higher costs, lower productivity and fewer small residential builders, tradies and specialist contractors – all in return for higher construction costs and less new homes for Australians. This is in direct contradiction to other current Government policy priorities, including for the construction of more social and

community housing, and the housing accord target of 1.2 million new homes over five years.

c. Unfair contract changes mean more uncertainty, loss of protections and more third-party interference: The proposal to give the FWC a new jurisdiction to deal with unfair contracts matters create a plethora of problems, that all mean uncertainty for everyone and opens the door for unions to interfere in, and control, commercial matters between contracting parties. As proposed, the changes will remove several crucial existing protections for independent contractors and expose them to undue pressure, tactics and conduct which the industry already experiences in certain subsectors.

d. Attacks flexibility and independence: Independent contracting is not only a critical element of building and construction work, but also provides people with the flexibility they need to juggle family responsibilities. Maintaining the huge benefits associated with running your own business is particularly important in attracting and retaining more women in the sector. It also allows their partners to both support them, their children and achieve a better work/life balance.

e. Presumes all business conduct is deliberate and intentional: There are a range of areas in the Bill which appear premised on the notion that all employers conduct themselves in a manner that is deliberate and intentional, and therefore all employers should have extra compliance obligations. This is obviously not the case, is the wrong presumption to underpin significant workplace change, and operates to foster a workplace atmosphere that undermines the positive relationships that actually exist between workers and their employer.

11. Master Builders urges the Committee to not underestimate the potential damage the changes in this Bill will bring to the building and construction industry. The amendments proposed are significant and represent a radical 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 is simply bad law and policy.

12. Ever since it was first flagged, Master Builders Australia has held serious concerns about many aspects of the Government's "*Secure Jobs Policy*" and why many of the commitments therein opened the door to go further than the commonly made arguments said to justify their necessity. On numerous occasions since, we have sought to have these concerns clarified or resolved, and forensically explained the basis why they were held and the ramifications for building and construction if left unresolved.

a. In particular, we have noted that the "*Same Job, Same Pay*" commitment – said to be all about the exploitative use of labour hire – could capture the legitimate and long-standing use of specialist services subcontracting in building and construction. Subcontracting is inherent in building and construction and underpins the entire model deployed within our industry. It is not labour hire and is certainly not used to undercut EBA conditions. Despite this, these concerns have gone unheeded, and subcontracting is clearly captured by this element of the Bill.

b. We have explained that the "*Employee-like*" changes left the door open to capture independent contracting and self-employed tradies in building and construction. We have repeatedly made clear that independent contracting in construction is not a "new and emerging form of work" and certainly are not arrangements without minimum standards or good pay and conditions. Despite this, independent contracting is captured by numerous elements of the Bill and people's rights to be their own boss and work for themselves are under significant threat.

13. These are just two examples of our long-standing concerns which now manifest in the Bill under consideration by this Committee. Building and construction as an industry was never stated as being the 'problem' to be solved – yet the entire sector and key elements that have underpinned it for decades are now under severe threat – for no justifiable reason and without any sound evidence.

14. Noting the above matters, and when regard is had to the detail of the submission that follows (which only lists a sample of the many problems within the BIll) the only conclusion that the Committee could reasonably draw is (regrettably) that the majority of its provisions are an attempt to give legislative effect to a long-standing and extensive list of union driven demands and wishes. For example, in building and construction, industry-based unions have long sought to:

    a. treat misclassification of independent contracting as 'sham contracting' – which this Bill does;

    b. have greater control of independent contractors and subcontractors – which this Bill allows them to do;

    c. impose control and pattern-like EBA 'one size fits all' conditions on subcontractors, especially in the residential building sector – which this Bill facilities;

    d. create more uncertainty and complication about workplace laws, and increase legal risks and liability for employers – which this Bill does;

    e. allow unions to challenge the rights of people to decide to be their own boss, work as self-employed or independent contractor tradies and interfere with commercial contractual arrangements – which this Bill does; and

    f. create more special rights and privileges for union delegates and officials that only apply to them and don't apply to the majority of those engaged on construction sites – which this Bill again does.

15. Master Builders is the only industry association that represents the entirety of the building and construction industry, and all businesses therein. We are the oldest industry association in Australian history and are proud to represent a sector with well over 400,000 businesses that directly employs over 1.3 million people that makes a significant contribution to the overall economic welfare of the Australian economy and community at large. Why any Government would want to unnecessarily disturb, disrupt and jeopardise such a significant sector in the way this Bill will do is something that perplexes both Master Builders, our members and those who participate in our industry.

16. Master Builders urges the Committee to recommend that, for the reasons advanced in this submission, the Bill not proceed nor be passed into law. Put simply, the Government should withdraw this Bill and go back to the drawing board.

THE IMPORTANCE OF CONTRACTING IN BUILDING AND CONSTRUCTION

Subcontracting in building and construction

18. When considering the issues advanced in this submission, regard should be had to key general background about the building and construction industry (BCI). This is necessary not only in order to contextualise the responses in this submission, but also as the structure of the BCI and the work it undertakes is unique and widely mischaracterised.

19. Commonly held perceptions are often inconsistent with the actual reality of worksite and industry practices, a circumstance which creates a high risk of incorrect assumption and relatedly incorrect conclusions. It is essential that this be avoided in context of assessing regulatory impact of the Bill. To this end, we outline below some key background information to contextualise the current status of the BCI.

Industry size

20. In the year to June 2023, the total value of construction work done across Australia was $269.72 billion. This is equivalent to 10 per cent of GDP.

Employment size

21. As at August 2023, the building and construction industry employs 1.307 million persons2. It is important to recognise that this number is a total of those directly employed within the BCI and does not include employees indirectly employed as a result of the BCI and its operations. Master Builders estimates that we will need to attract about a half a million new entrants to our industry by November 2026 in order to allow the industry to grow while still replacing those who retire from the industry.

Industry composition

22. The BCI is dominated by business entities that are small in size, mainly SMEs and subcontractors. As at 30 June 2023, there were 444,419 business entities within the BCI of which:

    a. 413,045 have turnover of less than $2 million;

    b. 439,086 are SMEs (employing less than 20 people); and

    c. 262,000 are self-employed independent contractors.

Industry Model

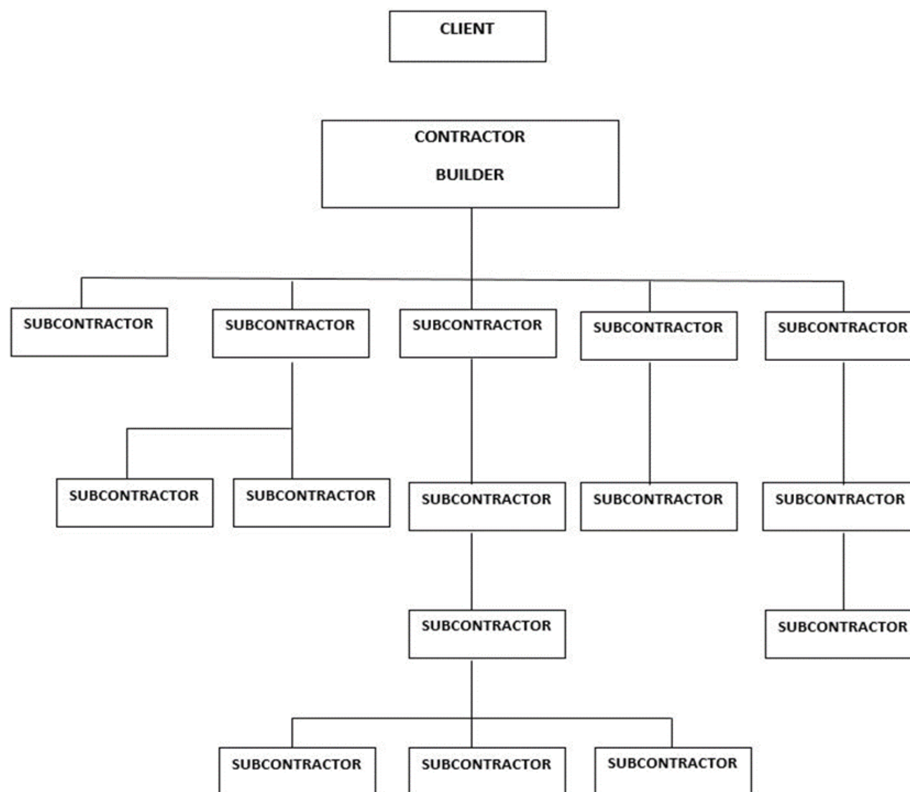
23. The contracting model which underpins the BCI arises from the way in which work is performed. In general terms, building and construction work conventionally involves a client engaging a building contractor that will act as a 'project manager'. The building contractor uses sub-contractor companies to perform particular tasks at different stages of construction.

24. Sub-contractors often specialise in specific phases of construction work and it is common for them to also engage sub-contractors who are specialists in specific types of work. For example, a contractor may engage a sub-contractor to undertake the internal fit-out stage of a construction project. That sub-contractor may require the services of further sub-

[2] *August 2023 ABS Labour Force, Australia, Detailed series (catalogue number 6291.0.55.001)*

contractors who undertake specific aspects of the fit-out, such as joinery or air-conditioning.

25. The impression commonly gleaned from passing a large commercial construction site is that the work is performed by one building company. That impression, while reasonable, is entirely contrary to reality. At any point in time, a large commercial construction site may involve work being performed by dozens of separate small business sub-contractors. A graphical explanation follows:



26. The ramifications of the Bill for the above circumstances described above can be easily seen. This is particularly so insofar as its provisions dealing with independent contractors and subcontracting. However, key points to note are:

    a. A builder or head contractor may utilise dozens of different sub-contractors or sub-sub-contractors over the life of a project;

    b. Those sub-contractors can be all operating on the same site at the same time;

    c. sub-contractors may be working on numerous sites at any one time, often for different head contractors;

    d. the work performed by sub-contractors is often technical and specialised, involving practices, activities and equipment that are unique and distinct from other forms of construction work;

e. the use of sub-contractors at a particular time is dependent upon the particular phase of construction and is therefore dependent upon factors that are fluid and beyond the control of a builder/head contractor; and

f. the work performed by specialised sub-contractors is often of a type that requires specialised tasks not necessarily known to the sector more broadly.

27. These points emphasise the complexities of construction work and are supported by a range of reports and reviews focussed on the sector. For example, in its 1999 Report "*Work Arrangements on Large Capital City Building Projects"* the Productivity Commission described the underpinnings of the industry as follows:

> *"Work on any one project is generally concentrated at a particular site, is of finite duration, and requires a broad range of skills which are usually provided by a combination of enterprises, many of which specialise by trade. From an industrial relations perspective, this means many enterprises and their workers need to coexist at the one workplace. In addition, appropriate sequencing of tasks is critical to successful completion of a building project. The level of complexity increases with project size, and is high on large capital city projects."* [3]

28. The same report[4] goes on to explain how the underpinning 'Contractual chain' within building and construction operates as follows:

> *"The production process for buildings involves a complex sequence of interdependent tasks from the design through to the finishing stages, that require different types of specialist workers. Typically, the client (increasingly institutional investors) has very little to do with either the design or construction of the building. The design phase is usually undertaken by specialist consultants, while management of the construction work is awarded to a head contractor, who usually employs only a small workforce on site for project-wide duties. Most of the construction work is sub-let to specialist subcontractors, who may employ up to 90 per cent of workers on a site.*
>
> *Thus, there is no direct relationship between head contractors, who have ultimate responsibility for a project, and the majority of employees on site. Selection of head contractors and subcontractors is often done on the basis of tender bids. Costs of market entry are low for many types of subcontracting and so the bidding process can be highly competitive at that level.*

29. Bruner (2007) argues that the contract-based nature of how building and construction work is performed can be traced back as far as Roman times and argues that the birth of what we identify as the contemporary contract-based underpinnings of construction occurred around the mid-1800s.[5]

30. Watkins (2017) also pinpoints this era, by noting:

> *"However, by the nineteenth century (1800s) architects, engineers, and contractors increasingly were separate parties who were responsible for separate parts of the*

[3] *Productivity Commission, 1999, page XVII*
[4] *Ibid, pages XIX to XX/*
[5] *Bruner, Philip L. (2007) "The Historical Emergence of Construction Law," William Mitchell Law Review: Vol. 34: Iss. 1, Article 6. Available at:* http://open.mitchellhamline.edu/wmlr/vol34/iss1/6

project. Architects designed along with engineers and contractors built along with subcontractors. The contract arrangement continues to evolve, but this was the starting point and beginning contract structure for construction projects".[6]

Independent contractors in building and construction

31. It is a core policy position of Master Builders that we support the use of independent contracting as a legitimate and legal method of engagement and oppose measures that seek to undermine or erode its standing as a lawful and acceptable practice.

32. The entire building and construction industry is underpinned by a comprehensive system of relationships between contractors that is inherent in terms of both conventional industry structure and necessary in performing the tasks associated with construction work. This ensures:

    a. the labour force experiences high levels of utilisation

    b. construction costs are not inflated due to delay or damages claims,

    c. delivery of much needed personal and public infrastructure (and the entire every day-built environment) is achieved in a productive way; and

    d. boosts levels of employment, innovation and entrepreneurship that flow from a high concentration of SME and family businesses.

33. There are currently over 262,000 independent contractors engaged in the building and construction industry alone, representing around twenty percent of the total number within all sectors of the economy. It is clear that this is form of engagement is vital to the ongoing and future successes and economic output of the BCI.

34. There are a number of identified reasons for the prevalence of independent contracting in the building and construction industry as follows:

    a. the production process on construction projects comprises a diverse range of tasks. Many workers are only required at one point on a project. Production therefore tends to be carried out by a collection of subcontractors working under the supervision of a head contractor;

    b. demand for housing and commercial buildings is sensitive to the economic cycle. As demand is uncertain, the environment encourages the use of contract labour;

    c. fluctuations in employment mean workers enter from other industries during periods of high labour demand; and

    d. The building and construction industry is historically cyclical and demand for both employees and contractors varies.

Key points about contracting in building and construction

35. Having regard to the above, the Committee should note the following key points that underpin this submission:

[6] *Watkins, Lawrence (2017) "A brief history of construction law". Available at:* http://www.constructionlawresource.com/construction-law/2402/

a. The use of independent and subcontracting within building and construction is a long-standing and legitimate method of engagement. This is a model that underpins the entire operation of the building and construction industry, both domestically and internationally, and has done so for many decades.

b. This contracting-based approach is deployed in building and construction simply and solely because of the phased way in which all building work is performed. It is not used as a method to undermine wages, deprive workers from job security, or to avoid the use of directly employed labour.

c. It is the only way in which building and construction work can be performed in a manner that ensures improvements to the built environment are delivered efficiently and affordably.

d. Various laws recognise the special role that subcontracting and independent contracting plays in building and construction, and accounts for this in specifically excluding building and construction from potential coverage. This is a method to preserve and not disturb long-standing and legitimate practices. For example, the current labour hire licencing laws in Queensland exclude building and construction as follows:

> *However, a person does not provide labour hire services merely because—*
>
> *(a) the person is a private employment agent under the Private Employment Agents Act 2005; or*
>
> *(b) the person is a contractor who enters into a contract to carry out construction work within the meaning of the Building and Construction Industry Payments Act 2004, section 10, and engages subcontractors to carry out the work; or*
>
> *(c) the person is, or is of a class of person, prescribed by regulation.*

PART 1 - CHANGES TO CASUAL EMPLOYMENT

37. Part 1 of the Bill will change existing provisions relating to the employment of casual employees. The effect of these changes will be to reverse the existing definition of casual in the Fair Work Act and replace it with a new uncertain and evolving definition and create an additional new 'employee driven' pathway to change from casual to permanent that will operate in conjunction with existing employer obligations to offer casual conversion.

38. Master Builders opposes these amendments.

New definition of casual employment

39. Under the proposed new definition, an employee will be considered a casual employee of an employer only if:

    a. the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

    b. the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

40. For the purposes of determining whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, the Act will require a consideration of the 'real substance, practical reality and true nature of the employment relationship' having regard to the mutual understanding or expectation between the employer and the employee.

41. To assess how the relationship works in practice, the amendments in the Bill outline that regard should be had to:

    a. whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);

    b. whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;

    c. whether there are full time employees or part time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and

    d. whether there is a regular pattern of work for the employee (although this doesn't have to be "absolutely uniform").

42. This means that where an employee is employed as a casual, and their employment documentation confirms they are a casual, they may actually be considered "permanent" based on how the employment relationship actually works in practice.

43. The resulting effect is that the parties will need to look beyond the terms of a contract to determine whether an employee is truly a casual under the new approach. They will also need to make a continual assessment having regard to the 'real substance, practical reality and true nature of the employment relationship'.

44. As noted above, Master Builders opposes these amendments for the following reasons:

    a. the existing definition of Casual employment at s.15A of the Act is clear, simple and provides certainty to all parties in an employment relationship;

    b. the existing statutory definition creates certainty for business, particularly small business, which boosts business confidence to provide additional employment opportunities;

    c. there is no evidence that the existing provision is uncertain, unclear or not working as intended;

    d. the proposed definition takes workplaces backwards to the days of uncertainty and unpredictability creates by Workpac v Skene and Workpac v Rossato which departed from the commonly accepted definition of a casual employee;

    e. the proposed new test is complex and brings with it deliberate uncertainty and unreliability in the way it is applied and the indicia used;

    f. the proposed definition opens the door to significant disputation and disruption at the workplace level and undermines the agreement of the parties when entering into a casual employment relationship; and

    g. the proposed definition introduces variability to a relationship that could change over time and requires a broader assessment than what the parties agree upon commencement of the relationship.

45. What this means in practice is that employers in the building and construction industry, particularly small businesses, will be less likely to offer employment resulting in fewer job opportunities.

46. This will hinder the need for building and construction workplaces to be nimble and responsive to the peculiarities of work in the sector and introduce unnecessary rigidities at the expense of flexibility that many workers in the sector embrace and actively seek.

<u>New ‘employee-driven pathway’ from casual to permanent</u>

47. The Bill creates a new alternative ‘casual conversion’ process, whereby employees engaged as casual employees continue this way until a defined ‘specified event’ happens. This new and alternative process will work in addition to existing casual conversion laws which require employers to notify employees of their rights to convert.

48. A ‘specified event’ is where the employment of a casual is changed or converted to permanent employment at the employee’s election.

49. The new and alternative pathway to convert to permanent proposed in the Bill provides casual employees the ability to give written notification to their employer that they believe they no longer meet the requirements set out in the casual employment definition.

50. What this means is that a casual employee effectively notifies their employer that they should be permanent (and no longer casual) and the employer must either accept this notification (converting their status from casual to permanent) or contest/decline the notification.

51. The Bill proposes that once a notification is made (following mandatory consultation) an employer will have 21 days to respond in writing to say whether or not they accept the notification.

52. If the employer decides to accept the notification and convert the status of the casual employee to permanent employment, the employee will need to be notified whether the employee is changing to full or part time; their hours of work after the change; and the day the change will take effect.

53. If the employer decides to not accept the notification and decline to convert the status of the casual employee to permanent employment, employers will need to provide the employee detailed reasons for declining; a statement that the employee may dispute the decision; and a statement that if a dispute is not resolved, the employee may apply to the Fair Work Commission.

54. There are only a handful of grounds proposed in the Bill under which an employer can refuse. These are that:

    a. the employee still meets the definition of casual employment;

    b. substantial changes to the employee's terms and conditions would be necessary to meet the request; or

    c. accepting notification would affect compliance with a recruitment or selection process required under a law of the Commonwealth, a State or Territory.

55. If the employer declines the notification, the employee will have the ability to ask the Fair Work Commission to examine the particular circumstances involved and make an order deciding if they stay casual or must become permanent full-time or part-time.

56. Again, Master Builders opposes these amendments. The reasons for this position are:

    a. Where an employee no longer meets the ongoing test of being a casual, they will have a right to notify their employer of the purported change in status, and an employer must confirm their permanent status, subject only to very narrow exceptions. These exceptions are far too narrow and effectively prevent an employer from contesting the notification;

    b. It creates a new, different and conflicting pathway to permanent employment for employees engaged as a casual that will create uncertainty, confusion and a large administrative burden for employers;

    c. In contrast to the existing statutory conversion pathway, this mechanism focuses on the employee's belief as to whether their engagement no longer meets the legal definition of a casual employee, having regard to the post-contractual "practical reality" of the engagement. This means that an employee merely needs to hold a belief to trigger the provisions – yet an employer will need to go to the Fair Work Commission to contest the employees belief, regardless of whether or not that belief was reasonable, accurate or had any prospect of success; and

    d. The pathway is founded on a complex and inherently uncertain definition of casual which opens the door to significant workplace disruption and delay.

<u>New Misrepresentation offence – 'sham casual'</u>

57. The Bill creates a new offence for an employer who represents a job as "casual" when it is something other than a true casual employment relationship.

58. The offence is structured such that an employer must not represent to an individual that a contract of employment is a contract for casual employment if the employee performs or would perform work other than as a casual.

59. Master Builders does not support this amendment. In addition to the reasons already noted above about Part 1 of the Bill generally, additional reasons for this position are:

    a. There will be only limited defences available to employers who face allegations of breaching this new "sham casual" offence – one exception listed is if the employer "reasonably believed" the contract of employment was a casual contract;

    b. However, in order to use the above defence an employer will need to appear before a Court or tribunal and bring evidence to prove their reasonable belief. The onus will be on the employer to demonstrate the defence – rather than the applicant needing evidence to commence the proceeding in the first place;

    c. The offence is based on the proposed confusing and unclear statutory definition of 'casual' which makes it virtually impossible to ascertain whether an employer has "misrepresented" the nature of a contract of employment to an employee;

    d. It makes casual employment more legally risky and contestable and therefore less attractive for business. This is because even if an employer thinks they are offering casual employment and the employee agrees, if they have in fact got the test wrong and their belief was not "reasonable" they will have misclassified the employee in breach of the Act. This will be the case even in circumstances where the employee clearly desires to be engaged on a casual basis.

60. As noted above, Master Builder strongly opposes the changes in this part of the Bill. The combined effect of the proposed amendments will be to render the use of employment on a casual basis as some that is so uncertain and legally risky that it simply won't be offered except in rare and exceptional circumstances.

61. Master Builders supports the use of casual employment in the building and construction industry. It is an extremely important method of engagement that is lawful, legitimate and can help businesses, particularly small businesses, offer flexibility to their workers for things like family responsibilities or other commitments.

62. In addition, it helps employers attract workers from a wider employment pool of people who prefer or need fewer hours of work and assists in retaining employees who may not be able to, or want to, work full-time. It assists employers respond to fluctuating business demands and allows more opportunities for greater work-life balance for employees, more flexibility to pursue other activities or projects while enhancing workplace productivity.

63. The changes proposed in these amendments will only reduce workplace flexibility, and undermine the capacity of employers to maintain productive, nimble and responsive workplaces – all while increasing legal risk and uncertainty for business for reasons that are unjustified and unnecessary.

PART 2 - SMALL BUSINESS REDUNDANCY EXEMPTION

64. Part 2 of the Bill will would provide an exception to the operation of the small business redundancy exemption in downsizing contexts where an NES entitlement to redundancy becomes unavailable in circumstances of bankruptcy or insolvency due to liquidation. The intention of the provision is stated to address anomalies for employees who remain employed to assist in the wind-down but falls below the usually applicable threshold.

65. Master Builders does not oppose this change.

PART 3 - FRANCHISEE ACCESS TO SINGLE-ENTERPRISE BARGAINING STREAMS

66. Part 3 of the Billl deals with the capacity for franchisees to enter into single-enterprise bargaining streams.

67. The current provisions have restricted franchisees in this regard and created limitations as to access to the range of bargaining streams newly introduced into the Fair Work Act. At present, the existing provisions at s.172 may operate such that it forces franchisees into multi-enterprise agreements.

68. Master Builders does not support multi-enterprise bargaining for reasons outlined in our submission to the Committee during its inquiry into the *Fair Work Laws Amendment (Secure Jobs, Better Pay) Bill 2022* and this amendment will clarify that franchisees may have access to other streams that actually reflect the intended purpose of bargaining at the individual enterprise level.

69. As such, Master Builders does not oppose this change.

PART 4 - TRANSITIONING FROM MULTI-ENTERPRISE AGREEMENTS

70. Part 4 of the Bill deals with scenarios in which organisations drawn into multi-employer bargaining (following the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 202*2 changes) wish to return to direct enterprise bargaining and implement an agreement appropriate to their specific business and its employees.

71. To achieve this, the amendments in this part allow for the making of a single enterprise agreement where an enterprise is subject to a multi enterprise instrument.

72. As noted above, Master Builders does not support multi-enterprise bargaining for reasons outlined in our submission to the Committee during its inquiry into the *Fair Work Laws Amendment (Secure Jobs, Better Pay) Bill 2022* and these amendments provide employers forced into multi-enterprise streams with a pathway out by regulating the circumstances in which a proposed single enterprise agreement may be put to a vote of employees of an enterprise subject to a multi-employer instrument.

73. While Master Builders applauds the intent of these amendments, there are several key areas in which they are deficient, and they are therefore not supported.

74. These include that:

    a. The permission of each union party to the multi-employer agreement will be required in order to put the proposed single interest agreement to a vote of their

employees. This creates a situation where permission must be sought from unions that may not be relevant to those employees to which a proposed single-interest agreement will apply which is unwieldy and problematic;

b. More fundamentally, it provides unions with the right of veto over the wishes of employees who may support that a vote take place and/or support transitioning to a single-enterprise agreement. This opens the door to union intransigence. Master Builders does not support any provision that gives third parties more influence and power than affected workers in an enterprise. While the circumstances of union intransigence or refusals to allow a vote are partly addressed through allowing employers to seek a voting request order via FWC, this is an unwieldy approach that again infers that the democratic wishes of employers and those they employ are less important than those of unions or tribunals; and

c. There will also be a more complex and higher requirement to pass the relevant BOOT, meaning that the proposed single interest agreement must be assessed against the terms of the multi the employer is trying to leave. This is completely contradictory to the conventional approach of requiring comparison against the relevant modern award as usually applicable and is a departure from one of the core principles that underpinned the concept of enterprise-based bargaining when introduced.

PART 5 - MODEL TERMS

75. Part 5 of the Bill would change the process for determining the model flexibility, consultation and dispute resolution terms for enterprise agreements and the model term for settling disputes arising under a copied State instrument.

76. The existing provisions operate to the effect that the Model terms are provided by Regulation and the proposed amendments would allow the FWC power to determine these terms and their content, in a set timeframe.

77. Master Builders does not support this change for the following reasons:

    a. There is no evidence or grounds that justify the departure from the existing approach and the proposed amendments open the door to confusion and complexity that does not otherwise exist. Put simply, there is no problem that needs to be fixed.

    b. In particular, we observe that the development of revised Model terms will inevitably involve lengthy proceedings before the Fair Work Commission and result in change that may not be agreed by those to whom the model terms would otherwise apply, or otherwise require workplaces to familiarise themselves with yet another regulatory change determined by a third party.

    c. It is also noted that the Model terms made are specifically noted as being exempt from Parliamentary disallowance which erodes the capacity of the legislature to hold appropriate oversight over the laws it makes.

    d. While there is a limitation on the period under which the Fair Work Commission will hold the power to revise and determine new model provisions (12 months) this

appears to be at odds with the requirement for FWC to consider 'best practice' approaches as part of its considerations. By default, the notion of 'best practice' is variable and changes over time, meaning the proposed amendment locks in provisions that may not be relevant for the future.

e. The existing approach is sufficient, need not change, and creates circumstances that either overcome the concerns noted above or prevents their manifestation in the first instance.

PART 6 - "SAME JOB, SAME PAY" CHANGES TO LABOUR HIRE ARRANGEMENTS

78. Part 6 of the Bill contains amendments that introduce an entirely new regime into the Fair Work Act that gives legislative effect to what the Government originally called its "Same Job, Same Pay" policy.

79. Master Builders strongly opposes the amendments in this part.

80. It is new and extremely complex regime that will operate as follows:

a. The Fair Work Commission will be given powers to create what will be known as a "Regulated Labour Hire Arrangement Order" ('RLHAO'). The intention of this power is to make orders that will capture the 'host employer' and the 'labour hire provider' who is the actual employer of the workers to be supplied to the host employer.

b. 'Regulated Labour Hire Arrangement Orders' are orders requiring the employer providing labour to pay the applicable rate pay under the host employer's enterprise agreement.

c. Broadly, this will mean that where an enterprise agreement covers a particular type of work at a host employer, orders can be made requiring employees provided to the host employer to be paid in accordance with the host employer's enterprise agreement, even if they are not direct employees of the host employer or covered by the host employer's enterprise agreement.

d. This reform is aimed at ensuring that so-called 'bargained rates' cannot be undercut through the use of outsourced labour (however, it goes far further – see below)

e. Unions and employees will be able to apply to Fair Work Commission for such an order.

f. The FWC must make the order, unless it is satisfied that it was not fair and reasonable to do so (see more on this below).

g. In deciding this, the Fair Work Commission can have regard to submissions from affected businesses and employees. However, the Bill as drafted does not appear to mandate this and appears to only require this consideration if submissions are actually advanced by affected businesses and employees (see more below).

h. There are various criteria that FWC will need to consider before making the order including existing pay arrangements, whether the performance of the work is for

the provision of services rather than the supply of labour, and the history of industrial arrangements applying to the host and the employer.

i. In order to demonstrate this, an affected business will need to appear before the Commission and make submissions addressing this criteria. In other words, this means arguing that they shouldn't be covered by the order and outlining the reasons why (see more later below).

j. If FWC makes such an order, labour hire providers will (generally) be required to pay their employees no less than what they would be entitled to be paid under the host business' enterprise agreement (or other employment instrument) if the employee were directly employed by the host. This is achieved by the order specifying what is known as a 'protected rate of pay' ('PROP').

k. The PROP will generally specify the Full Rate of Pay as provided in the host EBA. There are other provisions that allow for FWC to make 'Alternative protected rate of pay' orders ('APROP').

l. If a PROP order is made, it will require host businesses to provide certain information to labour hire providers on request to assist them in meeting their payment obligations.

m. Certain exemptions are said to be built into the framework. However, these are expressed in a problematic manner (see more below) but are said to apply including where:

    i. a labour hire employee is engaged for a short-term period (3 months) or

    ii. where a training arrangement applies to the employee.

n. The provisions also will not apply where the host is a small business employer as defined in the FW Act (i.e. less than 15 employees).

o. However, the above small business provision only applies where the host employer has less than 15 employees. It does not apply to the provider of the labour (such as a subcontractor) and it will not matter if they employer fewer than 15 employees (see more below)

p. The provisions are by an anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations under these changes.

q. The FWC would be able to resolve disputes about the operation of these changes, including by mandatory arbitration.

81. As noted above, Master Builders strongly opposes the amendments in this part. The grounds for this position are as follows:

    a. <u>Subcontracting in building and construction is not labour hire:</u> As noted earlier in this submission, the use of subcontracting in the building and construction industry is not labour hire in its conventional sense. When it was first announced, the Government said that the "Same Job, Same Pay" policy would be designed to prevent bargained wages for workers doing a job from being "undercut" by the use

of labour hire workers who are paid less than EBA rates for that same job. A conventional labour hire provider is a business that has an arrangement in place with one or more individuals to supply the individuals to perform work in and as part of a host's business or undertaking and is obliged to pay the individual for the work performed for the host. However, the Bill as introduced clearly go further than what was promised, and it isn't limited to what most people think of as traditional and conventional "labour hire". Instead of being limited to the supply of labour only, the Bill extends these arrangements to involve the supply of services – and this will extend to capture subcontracting in building and construction.

b. Despite this, services subcontracting is captured: The reforms clearly envisage capturing a contract wholly or principally performed for the provision of services (such as subcontractors in building and construction) rather than simply the supply of labour as was originally promised. What this means is that an affected subcontractor will need to appear before the Commission and make submissions that address the criteria as to whether the performance of the work is or will be wholly or principally performed for the provision of a service rather than the supply of labour to the host. Those submissions will need to provide evidence to allow the Fair Work Commission to make a decision, having regard to:

    i. whether the employer of the employee is involved in the performance of the work (as opposed to the host);

    ii. the extent to which, in practice, the employer (or a person acting on behalf of the employer) directs, supervises or controls the employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;

    iii. the extent to which the employees use or will use the system, plant or structures of the employer to perform the work;

    iv. the extent to which either the employer (or another person) is or will be subject to industry or professional standards or responsibilities in relation to the employee;

    v. the extent to which the work is of a specialist or expert nature; and

    vi. the extent to which, in the circumstances, the host employs, has previously employed or could employ employees to whom the enterprise agreement applies, applied or would apply.

c. Other areas that would need to be addressed include:

    i. the history of industrial arrangements applying to the host and employer;

    ii. the relationship between the employer and the host, including whether the related bodies corporate are engaged in a joint venture or common enterprise;

    iii. the terms and nature of the arrangement under which the work will be performed, including:

        1. the period for which the arrangement operates or will operate; and

2. the location of the work being performed or to be performed under the arrangement; and
3. the industry in which the host and the employer operate; and
4. the number of employees of the employer performing work, or who are to perform work, for the host under the arrangement; and

iv. any other matter the Fair Work Commission considers relevant.

d. Orders must be made by default, if application sought: New s.306E(1) provides that the FWC must make such an order, on application, if satisfied that an employer supplies or will supply employees to a regulated host to perform work, either directly or indirectly, and where, had the regulated host employed those employees directly to perform that work, a covered employment instrument that applies to the regulated host would apply to the employees.

   The practical effect of this provision is that FWC will by default have no choice but to make an order every time an application is made, unless someone contests the order under s. 306E(2).

e. The "fair and reasonable" criteria only applies if order challenged: new s.306E(2) provides that the FWC must not make the order if it is satisfied that it is not fair and reasonable to do so in the circumstances, having regard to considerations arising under subsection s.306E(8).

   In other words, the Commission only needs to consider a "fair and reasonable" element if a party contests the order, otherwise the order must be made. This is evidenced by the title of subsection 306E(8) which outlines "Matters to be considered if submissions are made" confirming these matters are only to be considered if the order is contested.

f. Affected contractors and subcontractors are "in" unless they can argue their way "out": Section 306E(8) means that affected contractors and subcontractors to whom a proposed RLHAO is proposed to apply, would have to not only actively contest the making of the proposed order, but appear before the FWC to make lengthy and complex submissions that go to, and satisfy, all of the 14+ criteria listed in this section.

   In other words, an order could be sought and unless the subcontractor takes the time and trouble to appear before FWC to contest the order and argue that they shouldn't be captured, then FWC will consider they are captured. Put simply, they are "in" unless they can argue their way "out".

g. The "exemptions" are confusing, unclear and unworkable: The stated exemptions from RLHAO's are complex, unclear and unworkable. For example:

   i. Unworkable: the exemption for small businesses only applies to the "host" and not the "provider". This means that in building and construction, even the smallest services subcontractor will be captured unless they can argue against an order being made. Given the lack of resources and time available

to small building and construction services subcontractors, the likelihood of them being able to argue this successfully is highly unlikely.

ii. Complex: the exemption for training arrangements only applies to an employee, not the host. This leaves the door open for a Group Training Organisation to be captured by a RLHAO, even though its employees are likely to be covered by training arrangements.

iii. Unclear: it is unclear as to exactly how the "three-month" exemption for surge labour will apply. As currently worded, it again appears as though this exemption will only be considered if a RLHAO is proposed to be made (and, as noted earlier above, such order is contested) otherwise the FWC will not have any knowledge or information about whether such an exemption is necessary. Alternatively, if FWC makes a RLHAO with a three-month default exemption, it will require those affected to keep track of the period for which affected employees work at the host site to determine when the exemption ceases and the RLHAO will apply.

82. As structured, the amendments in this part will have a significant and severely adverse impact on the building and construction industry if they become law.

83. Master Builders cannot stress enough that specialist services subcontracting in building and construction is not labour hire as conventionally envisaged, nor are they the target of the stated intent behind this policy.

84. As noted earlier in this submission, the use of subcontracting in building and construction arises from the necessary and conventional manner under which building works are performed. This is the case both domestically and internationally and has existed in this form for well over 150 years.

PART 7 - UNION DELEGATE RIGHTS

85. Part 7 of the Bill will create a range of new provisions for workplace union delegates. These include:

    a. New definitions for 'delegates' rights term' and 'workplace delegate';

    b. a requirement that all modern awards, new enterprise agreements and new workplace determinations include a delegates' rights term;

    c. a new general protection in Division 4 of Part 3-1 applicable only to union workplace delegates; and

    d. giving workplace delegates rights in relation to representing the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer.

86. Master Builders strongly opposes these amendments.

87. Proposed s.350C sets out that a workplace delegate is defined as "a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise".

88. New s.350C also outlines the rights of workplace delegates as “The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.”

89. That section also provides that union workplace delegates are entitled to:

    a. reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and

    b. for the purpose of representing those interests:

    c. reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and

    d. unless the employer of the workplace delegate is a small business—reasonable access to paid time, during normal working hours, for the purposes of related training.

90. New s.350A creates specific protections for workplace delegates. These new protections would prohibit an employer from:

    a. unreasonably failing or refusing to deal with a workplace delegate;

    b. knowingly or recklessly making a false or misleading representation to a workplace delegate; or

    c. unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

91. As noted above, Master Builders strongly opposes these amendments. The grounds for this position include:

    a. <u>No grounds for change or evidence requiring amendment</u>: There are no grounds or evidence that justify why these provisions are necessary, or why the existing laws are not already appropriate or working. The existing general protections provisions, for example, provide clear and strong protections for all workers including those who seek to exercise a workplace right and ensure that the principle of freedom of association must be upheld at all times. These existing laws work well and there has been no case made or advanced requiring the changes proposed in these amendments.

    b. <u>Provisions only apply to union delegates – not workplace delegates</u>: New s.350C makes it clear that these provisions only apply to union delegates – not workplace delegates or delegates democratically elected by a group of workers who are not union members. This is unfair to those workers who want to be represented by a delegate but are not union members – for example, the over 1.1 million workers in building and construction who are not union members.

    c. <u>Mandates union delegates representation rights</u>: The new s.350C is broadly expressed to mandate union delegates a right to represent all “industrial interests” of members, or persons eligible to be members. There is no definition of “industrial interests” and the reference to “including disputes with their employer” infers these are intended to capture a range of issues external to a particular workplace.

d. The meaning of “reasonable communication” is unclear: the right for “reasonable communication” is unclear and opens the door for significant workplace disruption and disputation.

e. The meaning of “reasonable access” is unclear: similar to the above concern, the phrase “reasonable access” to the workplace and facilities is unclear and ripe for disputation.

f. Paid time off for union training: This proposed right is entirely inappropriate and unjustified. Employers of workplace union delegates should not, under any circumstance, be forced to pay for them to have time off to attend union training. This is particularly so when there are no clear limits on what is “reasonable time off” nor where the particular training is unclear or not specified.

g. No basis for unfair proposed protections in s.350A: As noted above, the existing general protections provisions applicable to all workers are comprehensive and work well. The creation of a special additional layer or protection simply for union delegates is unfair, unwarranted and inconsistent with the principle of freedom of association. The proposed provision at s.350A is a recipe for workplace chaos and disputation.

92. Master Builders submits that the amendments proposed in this part are unwarranted, inappropriate and should be strongly resisted by the Committee.

PART 8 - PROTECTIONS AGAINST DISCRIMINATION

93. Part 8 of the Bill contains amendments that would mean persons subjected to family and domestic violence would have this recognised as a protected attribute within anti-discrimination provisions within the FW Act.

94. Other changes in this part would make amendments that prohibit modern awards and enterprise agreements from including terms that discriminate against employees because of, or for reasons including, family or domestic violence.

95. Importantly, this part also includes amendments that would also require the FWC, when performing functions or exercising its powers, to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of subjection to FDV.

96. Master Builders supports these amendments.

97. They are consistent with the core purpose of our Building and Construction Industry Sustainability Goals 2050. These goals guide Master Builders policy development insofar as ensuring active pursuit of substantive and positive improvements to the building and construction industry as a whole, which include the need to improve levels of workforce diversity and inclusivity.

PART 9 - SHAM CONTRACTING

98. Part 9 of the Bill would change existing provisions at s.357 of the Act that deals with ‘sham contracting’. The effect of this change is to water down the existing defence by removing the element of ‘recklessness’ such that it will only involve a ‘reasonable belief’ element

requiring an assessment of an employer's behaviour according to what the employer reasonably believed. Additional changes provide guidance to the Court as to what factors should be considered in determining if the employer's belief was reasonable.

99. The effect of this change is to water down the existing defence by removing the element of 'recklessness' such that it will only involve a 'reasonable belief' element. This will mean that employers who make a mistake and classifies an arrangement as one of 'independent contractor' will be guilty of an offence of 'sham contracting'.

100. Master Builders strongly opposes this change. The grounds for position include:

    a. Has the effect of changing the definition of 'sham contracting': Sham contracting is directly related to the matters proscribed by the FW Act in sections 357 to 359. A sham contract arrangement arises where an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. This is different to misclassification which may arise from having a poor understanding of the law or through inadvertence. This is accepted by both the Productivity Commission (which the EM to this Bill, along with Black Economy Taskforce Final Report, cites as justification for recommending a test alteration) who adopted the following definition in its public infrastructure report:

        "Sham contracting 'involves misrepresenting or disguising an employment relationship as one involving a principal and contractor under a contract for services', which is unlawful under the Fair Work Act 2009 (Cth)"

    Employers should not suffer from the difficulties in certain circumstances of making the relevant distinction between employee and independent contractor. They should, however, suffer harsh consequences when they deliberately flout the law. An employer can already be liable for a breach of the terms of the modern award or other provisions which would attract substantial civil liability. There are a range of other serious consequences that can flow from a breach of a number of statutes including taxation laws, superannuation, long service leave and workers compensation laws. The current law is adequate to deal with those who take deliberate action and enter into a sham with knowledge.

    b. Evidentiary basis is not clear: Master Builders notes that one ground cited in to justify the need for change is the recommendations in the Black Taskforce Final Report. This report was the subject of a Treasury Consultation Paper in 2018 which considered changing the provisions in the Fair Work Act. However, that consultation paper noted [at p.15] that "it is difficult to estimate the size of the issue around sham contracting" and referred back to the Taskforce Final Report suggesting it contains evidence. However, the Final Report [at page 231] actually stated "we do not have specific estimates on the size of the sham contracting problem" and found that while "it may be growing" it was "an area which requires further examination".

    c. "Authority of their own work" not reliable: The Final Black Economy Taskfroce Report also notes ABS data which notes there is a growing level of contractors who report they have no control over their own work and infers this represents a rise in

sham contracting. Unfortunately, self-reported ABS data relating to an independent contractor 'authority over their own work' cannot be relied on as an accurate reflection of 'instances of sham contracting'. Authority over how work is carried out is only one element of understanding this relationship, and, especially in the BCI, is by no means a determinant of the head and subcontractor relationship. For example, an independent contractor engaged to carry out the brickwork at a new residential property on behalf of a builder may subjectively report no control or 'authority' of how they work. This contractor may very well be required to follow specified plans, use specified materials, follow a specified method to achieve a specified finish - and do so on a specified timeframe. This contractor may consider they have no authority over the way they carry out this role – but this is simply because the terms of the head contract (and their subsequent engagement) dictate specifications. However, nothing stops this contractor determining their hourly rate, method of invoicing or choice of branding - and ultimately deciding whether they chose to work with that same builder into the future.

d. Flawed grounds for justifying change to existing test: The Black Economy Taskforce Final report outlined several grounds in an attempt to justify the recommendation to amend the existing test. These included difficulties for regulators and others in establishing the proof required to satisfy the existing recklessness test and the associated recommendation of the Productivity Commission, expressed [at page 237] as follows:

> *"The Productivity Commission reviewed these provisions in 2015 and found that the 'recklessness' test was generally too high a bar for regulators and others to prove, and should be lowered to a test of 'reasonableness'."*

The 2018 Treasury Consultation Paper referenced Fair Work Ombudsman v Ecosway Pty Ltd [2016] FCA 296 (the Ecosway Case) as guiding how a potential altered 'reasonableness' test might be applied. Master Builders submits there are two major flaws that underpin both the PC and Taskforce recommendation.

First, the 'recklessness' test is not one that a prosecutor must satisfy. A demonstration that the conduct was 'not reckless' is an available defence and not a barrier to be satisfied in bringing a prosecution. The burden of proving that conduct was not reckless is the responsibility of the defendant. The concerns from regulators, therefore, that 'recklessness' is difficult to establish and therefore is a deterrent to brining prosecutions is clearly misguided. If there are difficulties in terms of establishing 'recklessness', those difficulties are experienced by employers and not prosecutors.

Secondly, the Ecosway case is one that actually confirmed that in order to demonstrate the absence of recklessness, the employer must also demonstrate that they could not be expected to have known that the contract was a contract for employment rather than a contract for services. At para 199 of Ecosway, White J said:

> *"Accordingly, I consider that employers seeking to discharge the s 357(2) onus must prove that they did not know that the contract was a contract of*

employment rather than a contract for services and further that, in the circumstances known to them at the time they made the misrepresentation, they could not reasonably be expected to have known that the contract may be a contract of employment. That is the approach which I will apply in this case."

In reaching the above conclusion, White J noted earlier cases which considered similar discussions. One of these was Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd [2013] FCCA 216 in which Judge Barnes noted that different considerations may apply when the absence of recklessness is a criterion of a defence as opposed to its presence being a necessary element of liability. At para 184, White J noted that:

"Her Honour considered that recklessness in s 357 relates to the respondent's state of mind as to whether the contract was one of employment, at [387], but did not elaborate on the state of mind it required. However, it is evident that Judge Barnes considered that recklessness involves an element of objectivity:

[403] On all the evidence it is apparent that, notwithstanding this advice and knowledge, Metro acted in a manner that was careless or incautious as to whether the contracts with the complainants were in fact contracts of employment. ...

[405] Mr Bizimovski was or should have been aware that there was a real risk that the contracts with the complainants were contracts of employment, notwithstanding the statement in the Independent Agent Agreement that they were not employees. He was aware of the possibility of ramifications if a complainant was wrongly categorised."

It was also noted that in Director of the Fair Work Building Industry Inspectorate v Bavco Pty Ltd (No 2) [2014] FCCA 2712; (2014) 291 FLR 380, Judge Manousaridis considered that the approach of the plurality should be applied in relation to s 357(2) so that it should not be understood as including any element of objectivity. Essentially, this was because both provisions used the term "reckless as to whether" and because if the legislature had intended that recklessness should be determined objectively, terminology indicating that was so had been readily available to it.

On the above basis, Judge Manousaridis concluded at [65] that an employer seeking to establish that it had not been reckless within the meaning of s 357(2)(b) had to prove one of two things: first, that it did not know there was a possibility that the employee might be an employee; alternatively, if the employer was aware that there was a possibility that the employee was an employee, that it had not been indifferent about whether the employee was in fact an employee.

In addition, White J in Ecosway had regard to the legislative history behind s 357(2)(b) and observed at [190-191]:

[190]…….Section 357 had predecessors in ss 900 and 901 of the Workplace Relations Act 1996 (Cth). The former proscribed a representation that a current contract was a contract for services when it was in fact a contract of

employment. The latter proscribed a representation by a person offering to enter into a contract that the contract was one for the provision of services when it would in fact be a contract of service. Each of s 900 and s 901 provided for a defence which, while not identically expressed, had the same effect as s 357(2). In the case of s 900, subs (2) provided for a defence if misrepresentors proved that at the time the representation was made, they did not know that, and were not reckless as to whether, the contract was a contract of employment rather than a contract for services.

[191] In relation to this provision, the Minister gave the following explanation in the Explanatory Memorandum accompanying the Second Reading Speech:

Subsection 900(2) would provide a defence to the civil penalty in subs 900(1). Subsection 900(2) would provide that a person would not contravene the civil penalty if, when they made the representation that there was an independent contracting relationship, they believed the contract was for independent contracting and could not have reasonably been expected to know that the contract was one of employment. The onus to prove the defence in subs 900(2) would rest with the person who made the representation. This is a reversal of the burden of proof; the burden of proof normally rest with the person making the civil remedy application. The reason for this reversal is that the matter in subs 900(2) would be peculiarly within the knowledge of the defendant and would be significantly easier for the defendant to disprove and for the person making the application to prove.

White J then found:

"The emphasised portion is a clear indication of an understanding that the term "reckless" in s 900(2) was to have an objective element. It is reasonable to suppose that the term has the same meaning in s 357(2), the successor provisions."

And went on to observe:

"It is also appropriate to have regard to the mischief to which s 357 is directed. North and Bromberg JJ referred to this in Quest South Perth at [95] as "the attempted avoidance of legal entitlements due to an employee through arrangements which falsely disguise the employee as an independent contractor". Their Honours went to describe ss 900 and 901 as "remedial and beneficial despite their penal nature". The same can be said of s 357.

In my opinion, construing the word "reckless" in s 357(2) as including an objective element is consistent with the purpose for which the provision was enacted."

When regard is had to the above decisions, it is clearly evident that a determination of 'reasonableness' is a necessary precursor to the establishment of 'recklessness'. As such, any change to the existing tests is unnecessary.

101. In addition, Master Builders also notes that there are a range of interests that endeavour to paint sham contracting as something different to the deliberate manipulation of the law.

This is done, we say, to promote a range of other agendas. For example, it enables unions where members are employees rather than a contractor to discourage the formation of independent businesses as a means to boost membership.

102. Much of the agenda of those who seek to oppose the current law is based upon making misclassification akin to sham contracting. This is lamentable given the state of the complex law (which existed prior to Jamsek etc) distinguishes between whether a worker is an employee or a contractor, as now proposed in this Bill. Employers can already suffer very problematic financial burdens following misclassification if they are then asked to reverse the status of a contractor. Adverse cost consequence should not be added to by labelling misclassification an offence.

103. The application of the 'reasonableness', or 'reasonable person' test is one of the most oversimplified, and paradoxically confused legal concepts within our common law system. Fundamentally the fact that the test exists, and requires judges to consider its application, highlights the apparent paradox that innately exists within its application. The need for judges, barristers, solicitors, and formal reams of evidence is indicative that the test often cannot be applied simply, particularly where circumstances are fluid, and the application of facts and circumstances to law changes over time. Fundamentally, where this test can be avoided by the application of an objective or qualitative test in its favour, it should be; and this is one of those cases.

104. There is a plethora of existing case law which assists in understanding the current test and related obligations. The existing obligations are well known and understood.

105. For the reasons outlined above, Master Builders opposes this part.

PART 10 - EXEMPTION CERTIFICATES FOR SUSPECTED UNDERPAYMENTS

106. Part 10 of the Bill would amend Part 3-4 of the Fair Work Act to make it easier for unions to seek entry to workplaces without providing 24 hours' notice as well as:

    a. Increasing the obligations of employers towards dealing with officials seeking entry; and

    b. watering down existing obligations for permit holders by allowing FWC to consider alternatives to revoking or suspending permits in circumstances where the official has broken the law regarding workplace entry.

107. Master Builders opposes these amendments.

108. The grounds for this position are that:

    a. The change to s.502(1) would greatly increase the chances for disputation at the workplace level by introducing a prohibition on conduct which will always be considered subjective. This will open the door for major disputation at the workplace level and increase the prospect of officials making allegations that this additional obligation has not been met by an employer. Allegations of this nature are notoriously difficult to have heard and determined and provides no certainty to employers about the standard this obligation imposes.

b. Similarly, there is no evidence that the existing obligations have failed to operate as intended nor is there any evidence of the need for change.

c. Amendments to s.519(1) are likewise unnecessary and made without any evidence of the need for change. Existing provisions allow for the relevant notice period to be waived in circumstances where it is justified and operate as intended.

d. The proposed change will operate on a 'must' basis meaning that any application for exemption will be granted on an 'ex-parte' basis without any capacity for the other party to object or provide submissions for the Commission to consider. It will, in essence, act in such a way that exemptions would be granted automatically if an application is made.

e. Amendments to s. 508 appear to suggest that the changes at s.519(1) will be, or are likely to be, subject to exploitation or abuse, requiring FWC to impose conditionality on the use of such exemption certificates.

f. Amendments to s.510 water down the existing powers available to the Commission by providing it with alternatives instead of suspension or revocation in circumstances where a permit holder has been found to have broken the law regarding their obligations when exercising entry pursuant to that permit. This is unnecessary and unjustified.

   The obligations imposed on permit holders exist for a reason – this being that the right of entry available to holders of such permits bring with them special obligations to act in a particular manner and exercise such powers in a responsible and appropriate manner. Allowing FWC alternatives to suspension or revocation mean that a permit holder may break the laws that are a condition of holding their permit, and still be able to retain their permit and exercise the powers available pursuant to that entry notwithstanding that they have not complied with their broad obligations that exist as a condition of holding that permit.

   This is non-sensical and essentially works to undermine the conditions that apply to permit holders and will discourage them from complying with applicable laws. This will only lead to increased workplace disputation and decrease the standard of industrial conduct displayed by organisations and their permit holders in workplaces.

109. In considering the proposed change, Master Builders draws the attention of the Committee to the main registered organisation of employees in the building and construction industry, and it's record and history of unlawful and illegal conduct in the sector. This record is well ventilated and the frequency by which compliance with workplace laws are ignored and exploited is extremely lengthy. Court judgments regularly call out the above conduct and have become increasing fervent in their criticisms of certain building unions, to the extent they are labelled 'recidivist' and their conduct such that it 'brings the trade union movement into disrepute'. In September 2023 alone, the Federal Court has imposed well over $110,000 in penalties against building unions and their officials for breaching entry laws,

abusive language and conduct which created risks to workplace health and safety.7 A selection of other key examples follows:

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."*[8]

> *"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."*[9]

> *"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."*[10]

> *"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."*[11]

> *"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."*[12]

> *"…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."*[13]

> *"...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'..."* [14]

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[7] *Fair Work Ombudsman v Blakeley [2023] FCA 1121 & Fair Work Ombudsman v Rielly [2023] FCA 1144*
[8] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[9] *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*
[10] *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*
[11] *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*
[12] *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*
[13] *Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145*
[14] *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."[15]

"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." [16]

"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." [17]

"The CFMEU is to be regarded as a recidivist rather than as a first offender." [18]

"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." [19]

"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling." [20]

110. Against the above backdrop, it is easy to appreciate why Master Builders cautions against giving further avenues to facilitate such conduct as the amendments in this Part will do.

PART 11 - PENALTIES FOR CIVIL REMEDY PROVISIONS

111. Part 11 of the Bill will increase a range of civil remedy provisions under the Act. The effect of these amendments is to increase a range of penalty provisions, in some circumstances by up to ten times their current amounts.

112. Further, the Bill lowers the hurdle requirement for conduct to be a "serious contravention". Currently, for an employer to have committed a "serious contravention", it must have formed part of a "systematic pattern of conduct". The new definition would remove this requirement, and only require that the conduct was done knowingly or recklessly.

113. Master Builders does not support these amendments.

114. The intention of these provisions is stated to be as a way to increase the deterrence against the exploitation of workers by increasing penalties for employers. The assumption behind these amendments is that wage underpayments occur through employers deliberately not complying with their obligations, as opposed to inadvertence or mistake, which is the overwhelming reasons giving rise to such circumstances.

115. It is Master Builders' view that the entire system of workplace laws that currently exist in Australia has become completely unwieldy and increasingly complicated ever since the

[15] *Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429*
[16] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[17] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[18] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[19] *White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432*
[20] *Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134*

Fair Work Act was first introduced. This complexity remains and continues to worsen with each and every change made to those laws applicable in a workplace. Workplace instruments remain complex and impenetrable, particularly for small business employers which comprise over 98 per cent of businesses in building and construction.

116. The compliance obligations on employers are no longer simply homed in the Fair Work Act, industrial instruments and other key select legislative instruments relevant to workplaces. Instead, they now exist in an expansive and wide range of laws that are increasingly diverse with strict obligations for which many workplaces simply struggle to keep abreast.

117. Of the key concerns regularly reported to Master Builders by our members, seemingly never-ending and increasing business compliance obligations is one of the top two most frequently noted. Many report that this is a disincentive to business expansion and growth, with some reporting they regularly avoid opportunities to achieve these aims simply due to the level of additional compliance and potential liability they bring simply for getting it wrong.

118. Further, the evidence shows that increased penalties for businesses simply do not work as a method to enhance legislative compliance. Enhanced compliance can only be achieved through making laws that are simple, clear and easy for business to understand and comprehend – which is the exact opposite of the direction adopted in relation to workplace laws in recent decades – made worse by many of the provisions contained in the Bill which remove some of the last remaining vestiges of legislative clarity and replace them with more ambiguity, uncertainty and complexity.

119. Master Builders submits that the Committee should recommend that, prior to considering any increase to civil penalty provisions for employers, the entire system of workplace laws should be reviewed, consolidated and simplified so as to give business, particularly small business, some chance of being able to ensure they are appropriately abreast of their responsibilities and ensure their existing obligations are clearly understood and being met.

PART 12 - COMPLIANCE NOTICE MEASURES

120. Part 12 of the Bill makes amendments with respect to compliance notice provisions.

121. While Master Builders does not oppose these amendments, we do note that they would not be necessary if our recommendation regarding the amendments at Part 11 of the Bill were given effect.

PART 13 - WITHDRAWAL FROM AMALGAMATIONS

122. Part 13 of the Bill contains amendments that would effectively reverse amendments made to the *Fair Work (Registered Organisations) Act 2009* ('RO Act') in 2020 that expanded options for constituent parts of an amalgamated union to withdraw from the broader organisation.

123. The changes made in 2020 established a procedure by which a constituent part of an amalgamated organisation may withdraw from that organisation beyond the five-year time limit. It allowed the FWC to accept an application from a constituent part to hold a ballot of its members on the question of whether to withdraw from an amalgamated organisation if

the FWC was satisfied it is appropriate to accept the application having regard to the following matters:

a. whether the amalgamated organisation has a record of not complying with workplace or safety laws (as defined in the amendments) and any contribution of the constituent part to that record, and;

b. the likely capacity of the constituent part seeking to withdraw to promote and protect the economic and social interests of its members as an independent registered organisation.

124. The intention of these changes was to uphold the principle of freedom of association, by giving all constituent parts of amalgamated organisations the freedom to decide on the governance and structure that will allow them to best represent the interests of their members. This was designed to give greater flexibility to constituent parts, such as branches and divisions, of amalgamated registered organisations by providing them with an opportunity to withdraw from an amalgamation if that will better serve them and their members.

125. Master Builders supported the 2020 changes, noting that they were made at a time following the merger between the Maritime Union of Australia and the Construction, Construction, Forestry, Mining and Energy Union into the now Construction, Forestry, Maritime, Mining and Energy Union, and in circumstances whereby several divisions within the CFMMEU had expressed a desire to de-merge from the Construction and General division.

126. While Master Builders and our Members do not, in practice, have the luxury of picking and choosing the unions with which we have to deal, we do support the democratic right of others to make their own democratic decisions as organisations to ensure they are best placed to represent their members and pursue a future that better supports their long-term interests.

127. Master Builders has long supported and backed the role of unions in workplaces and our system of workplace laws generally. Master Builders not only understands the desires of certain divisions within the CFMMEU to disassociate themselves from the broader organisation, but we also support those desires. To the extent that these amendments make it harder for these democratically determined desires to be given effect, or for those of other organisations who determine similarly in the future, they are not supported by Master Builders.

128. Master Builders emphatically supports and upholds the principle of freedom of association supports constituent parts of amalgamated organisations the freedom to decide on the governance and structure that will allow them to best represent the interests of their members, without unnecessary or inefficient legislative barriers or artificial regulatory complexity.

PART 15 - DEFINITION OF EMPLOYMENT

129. Part 15 of the Bill makes amendments that create interpretive principles for defining employment with reference to a multi-factorial assessment to determine the status of an employee and employer.

130. This will be done by inserting 'interpretive principles' into the laws that will define the ordinary meaning of employee and employer. This will, by default, have significant consequences and ramifications for determining the status of an 'independent contractor' which will cause confusion, complexity and negative outcomes for the building and construction sector and participants therein.

131. Master Builders submits that the changes proposed are a significant threat to independent contracting in building and construction. If passed, the Bill will mean that an independent contractor may be required to satisfy a complex and time-consuming set of tests, simply to justify their own decision to be their own boss and prove they are independent contractors.

132. Master Builders strongly opposes this change.

133. While we detail the grounds for this position later hereunder, for clarity we note that the change proposed is as follows:

    a. for the purposes of this Act, whether an individual is an employee of a person within the ordinary meaning of that expression or whether the person is an employer of a person within the ordinary meaning of that expression is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person

    b. for the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:

    c. the totality of the relationship between the individual and the person must be considered; and

    d. in considering the totality of the relationship between the individual and the person regard must be had not only to the terms of the contract but also to other factors relating to the totality of the relationship including but not limited to how the contract is performed in practice.

134. The key elements of this new definition will mean that the new approach will be one where the 'real substance, practical reality and true nature' of the employment relationship is considered rather than looking to the freely agreed and clear terms of a written contract.

135. The amendment, per the Explanatory Memorandum, is aimed at overcoming the recent High Court decisions in Personnel Contracting[21] and Jamsek[22]. These decisions created clear and simple rules about who is an employee vs who is an independent contractor.

136. Master Builders notes that the current law is clear, simple and provides certainty to both parties. The existing approach is effective working on the correct basis that legal rights and obligations existing under the contract are decisive in determining the worker's status if:

    a. the rights and duties of the parties are comprehensively set out in a written contract; and

    b. the contract is not a sham and has not otherwise been varied.

[21] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1.

[22] ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

137. In other words, if people want the arrangement to be 'independent contractor' and this is freely agreed, then that is what sets the status and there is no need to look further (unless there is a challenge to the efficacy of the contract – see more on this point below).

138. As noted above, Master Builders strongly opposes the amendments in this part. The grounds for this position include the following matters:

    a. Re-introduces uncertainty and complexity: These amendments are a recipe for disputation, complexity and uncertainty in building and construction industry which, as noted earlier, is home to over 262,000 independent contractors who are self-employed tradies. The certainty provided by the existing approach determined by the High Court[23] to these small business tradies and those who engage them is extremely important in building and construction. As later noted, certainty and stability is crucial for all businesses, but particularly small businesses in building and construction who depend upon certainty for future business planning, stability of tendering, and estimation of future costs. This will be entirely undone and hurt small business. It will disincentivise small business entrepreneurship and discourage the formation of more small businesses which are crucial to the future of building and construction.

    b. Future uncertainty and complexity is built into multi-factorial test: The multifactorial approach is, by design, completely and inherently uncertain both now and for the future. The Explanatory Memorandum freely admits that and states "There is no exhaustive list of factors that will be relevant to a 'multi-factorial' assessment, ensuring a flexible approach that will enable the ordinary meanings of 'employee' and 'employer' to continue to adapt to changing social conditions, market structures and work arrangements." Master Builders fails to understand why Government would want to create such a significant barrier and disincentive to those who make the decision to work for themselves, have control over their own affairs and desire to be their own boss. Such aspirations should be supported by Government, not destroyed.

    c. No basis for change – existing approach works: There are no sound grounds, reasons or evidence as to why the existing approach requires such drastic change. The tests endorsed by the High Court provide independent contractors in building and construction with significant certain and simplicity. Everybody knows where they stand.

    d. Existing approach allows for deeper analysis when circumstances require it: The existing approach already allows for circumstances where one party doesn't believe the arrangement is genuinely independent, or the efficacy of the contract is challenged by one party or the other. In the Personnel Contracting case, the High Court noted that in certain cases it may be appropriate to consider the totality or substance of the relationship when considering the multiple indicia of employment (such as those proposed to automatically apply under the Bill) – but

[23] Ibid

this is not the case where the contractual terms are exclusively in writing and this is not under challenge. The Court said:

> *"Where no party seeks to challenge the efficacy of the contract as the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, there is no occasion to seek to determine the character of the parties' relationship by a wide ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require."*

e. Opens the door for independent contractors to be forced into employment arrangements: The proposed amendments raise the very real and likely prospect that independent contractors will have their status jeopardised and be forced into arrangements that either alter their status to become employees or be treated as such. Such a prospect is completely unnecessary and unwarranted.

f. Application of Multi-factorial tests in building and construction is problematic: These tests are broad, complex and not designed to work in building and construction. For example:

    i. Control: If the relationship is an employment relationship, the company generally has the right to direct what and how work is to be performed by employees, especially lower-level employees. In contrast, independent contractors currently retain a relatively high level of discretion in the work they perform and how they fulfil their duties. Work in construction will involve being subject to site safety rules, a phased approach to how construction works are undertaken, and under the coordination of a project or site supervisor.

    ii. Working arrangements: A company usually sets the general working conditions of its employees, including work hours and location. Independent contractors normally set their own work hours or locations, or both. Work in construction is usually subject to rules about the times it can be performed (e.g., council restrictions, site hours etc) and has to be performed at a specific location (e.g. you can't build a wall at home during times that suit the individual performing the work.)

PART 16 - "EMPLOYEE-LIKE" PROVISIONS RELATING TO REGULATED WORKERS

139. Part 16 of the Bill makes amendments that give legislative effect to the Government's "employee-like" worker policy. The effect of these amendment is to create a new jurisdiction in the Fair Work Commission to deal with independent contractors, including those in the 'gig' economy.

140. Master Builders opposes the amendments in this part. This is a significant new part of the Bill and, despite comments from Government, there is nothing in the Bill that makes it clear

or certain that the changes won't impact independent contractors in building and construction.

New powers for the Fair Work Commission

141. The FWC will be given new powers that affect "employee-like" workers who are engaged through "digital labour platforms". The FWC will have the power to:

    a. make minimum standard orders affecting pay and conditions for employee-like workers;

    b. make minimum standard guidelines for employee-like workers;

    c. register consent agreements between employee-like workers and digital platforms;

    d. provide remedies for unfair deactivation of employee-like workers on digital platforms; and

    e. deal with disputes between employee-like workers and digital platforms.

142. The new powers would apply to workers who are:

    a. engaged as independent contractors;

    b. perform all or a majority of the work under the contract;

    c. are engaged in digital platform work;

    d. are not employees; and

    e. satisfy one of three criteria (listed below) (i.e. an "employee-like" worker).

143. The three criteria, only one of which a worker must satisfy, are that they:

    a. have low bargaining power; or

    b. receive remuneration at or below the rate of an employee performing comparable work; or

    c. have a low degree of authority over the performance of the work.

144. "Digital platform work" essentially includes any work by an independent contractor in connection with a digital labour platform in return for payment. A "digital labour platform" is a platform that satisfies all three of the following:

    a. involves an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services;

    b. the operator of the platform engages the independent contractors or acts as an intermediary with users; and

    c. the operator processes payments in relation to the work.

145. Once an order is made that covers a class of workers and platforms, they will be bound by its terms irrespective of whether they consent or had an opportunity to participate in the FWC's standard-setting process.

Content of Minimum Standards Orders

146. The Bill contains a list that illustrates the terms which may be included in a minimum standard order for employee- like workers, and those which may not.

147. It should be noted that the list of terms which may be included in a minimum standards order are not exhaustive; the FWC has discretion to include any other terms that are not expressly prohibited.

148. Permissible Terms include:

    a. payment terms;

    b. deductions;

    c. working time;

    d. record-keeping;

    e. insurance;

    f. consultation;

    g. representation;

    h. delegates' rights; and

    i. cost recovery.

149. Prohibited terms include:

    a. overtime rates;

    b. rostering arrangements;

    c. matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of the relevant workers;

    d. a matter which would convert the relationship to one of employment;

    e. matters relating to work health and safety otherwise comprehensively dealt with by another law; and

    f. matters prescribed by the regulations.

150. As noted above, Master Builders opposes the amendments in this Part. The grounds for the position include:

    a. Scope too broad: As introduced, the proposed scope of the new jurisdiction is too broad and will capture many independent contracting arrangements in industries where Government has not made a case for the need for minimum standards to be set. This includes independent contractors in building and construction. The Bill therefore goes well beyond the Government's election commitment to set minimum standards for the rideshare and food delivery sectors. The broad scope can be evidenced because of the fact:

        i. most independent contractors now advertise their services through "digital labour platforms", such as apps and websites like Hipages, OneFlare and AirTasker; and

   ii. independent contractors can be found to be employee-like simply for setting a rate of pay that is the same as an employee doing similar work (or, alternatively, if they have "low bargaining power" or "low degree of authority" over work).

b. Interferes in commercial arrangements: This policy is a significant intervention into the commercial arrangements of business owners/the self-employed. It is contrary to the right of independent contractors to set their own rates and conditions and to work flexibly. In practice the types of independent contractors targeted will be determined by various unions.

c. Increases costs to consumers: The lack of guardrails around the new powers will mean that the breadth of the minimum standard orders are likely to include a range of matters which increase costs for businesses which are then passed down the supply chain onto consumers. The Government has itself said that these additional costs will "likely be borne by consumers and businesses, including down the supply chain".

d. Minimum Standards Orders go too far: Many of the restrictions on what terms cannot be included in a minimum standards order do not in fact curtail the FWC's discretion. For example, the prohibition on terms that would change the status of the workers would only have a very limited relevance for many proposed terms. What constitutes a term which "would change the status of the worker" is very unclear. For instance, companies would argue penalty rates or leave entitlements would constitute such a term, whereas unions have made it clear these are standards that they will push through this process for some sectors.

e. No grounds for change: There is no justification for giving greater breadth to the FWC for independent contractor matters. Independent contractors should not face the prospect of going to FWC to prove they shouldn't be categorised as 'employee like workers'.

f. Loss of benefits associated with being independent contractors: If captured and classified as 'employee like workers' independent contractors will be subject to orders about when, how and who they work for – how much they charge etc.

g. Exposed to union pattern agreements: They will also be exposed to being captured by 'collective agreements' that can only be negotiated by unions and cover groups of contractors – imposing pattern union conditions on independent contractors.

PART 16 - DISPUTES ABOUT UNFAIR CONTRACTS

151. Part 16 of the Bill also makes amendments that provide the Fair Work Commission with new powers to deal with disputes about unfair terms in services contracts to which an independent contractor is a party. These powers will replicate and expand certain elements of the existing Independent Contractors Act 2006 but also broaden the scope of what represents an "unfair contract term".

152. Master Builders strongly opposes the amendments.

153. Under these proposed changes, the FWC will be able to make an order in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.

154. The FWC may make the order only if a person has made an application for a remedy in relation to the services contract. The changes allow unions to bring applications on behalf of independent contractors.

155. The FWC must take into account fairness between the parties concerned in deciding whether to make an order under these new changes, and the kind of order to make. In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:

    a. the relative bargaining power of the parties to the services contract;

    b. whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;

    c. whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;

    d. whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;

    e. whether the services contract as a whole provides for a total remuneration for performing work that is:

    f. less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or

    g. less than employees performing the same or similar work would receive; and

    h. any other matter the FWC considers relevant.

156. The above matters are to be assessed as at the time the FWC considers the application.

157. The remedies available by order of FWC may include orders that:

    a. sets aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or

    b. amend or vary all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

158. Applications can be made by a person who is party to a services contract, or an organisation that represents the industrial interests of a person who is party to a services contract.

159. As noted above, Master Builders strongly opposes the amendments in this part. While there have been several public comments made by Government suggesting that these amendments merely replicate existing provisions contained in the *Independent Contractors Act 2006* ('IC Act') and place them into the hands of the Fair Work Commission, this is most definitely not the case and significantly understates the magnitude of these amendments.

160. The grounds and reasons for Master Builders position in opposition to these amendments include the following matters:

    a. FWC not well placed to deal with unfair contract terms: The new jurisdiction will operate in the context of an employment tribunal (FWC) and won't be dealt with by Courts and Judges. FWC is an industrial tribunal – it has no experience in determining commercial matters that should properly remain the domain of experienced courts and existing state-based business dispute resolution bodies. There are no evidence or grounds to justify the need for an expanded FWC jurisdiction.

    b. More uncertainty and risk: the amendments will only serve to create further uncertainty and commercial risk for participants in building and construction. As noted earlier herein, existing industry pressure points would be worsened by such additional uncertainty and risk.

       For example, the IC Act requires matters of unfairness to be determined with respect to considerations of terms of a contract "when it [the contract] was made" whereas the FWC's expanded jurisdiction makes it clear that the terms are considered in context of the particular point in time that an application is made to enliven its jurisdiction. This creates uncertainty and complication for parties to a contract who may enter into a contract which contains terms that are not unfair, but which may be considered unfair at some point in the future. This completely undermines and undoes the certainty with existing contract law and renders it subject to a range of unknown variables that may or may not change at some point in the future, depending on some unclear future assessment of its terms which is not known at the point the contract is formed.

    c. Existing protections for contractors will be lost: Certain provisions within the existing IC Act are not replicated in the new matters to which the FWC will need to have regard when deciding what is an unfairness term. For example, provisions in the IC Act dealing with terms that are "unconscionable" is not available to the FWC, nor is the requirement that a term of the contract "be against the public interest". The result of these notable and glaring absences are that a contract term that is unconscionable, or against the public interest, or both – will not be considered to be an unfair contract term. This is a surprising omission and suggests that FWC will overlook key and crucial matters that would clearly be identified and rectified by a Court under the IC Act.

    d. Protections against undue influence, unfair pressure or unfair tactics will be lost: The existing considerations under the IC Act require a court to consider "whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract…". This consideration is not a factor to which the FWC will need to have regard. This is an entirely unfair and inappropriate omission and indicates that parties will no longer be protected from any undue influence, no longer protected from undue pressure, or no longer protected from any unfair tactics during the negotiation of a contract or the agreement to any of its terms. This is clearly not the message any Government should be sending to parties about

the standards they expect when negotiating contracts or the conduct that gives rise to the inclusion of particular terms.

e. <u>No regard to the conduct of persons acting on behalf of parties:</u> Making the concern above even more worrying, is the omission of a key provision in the existing IC Act which deals with determining the relative strengths of the bargaining positions of the parties to the contract which incorporates considerations "if applicable, any persons acting on behalf of the parties." Again, the deliberate exclusion of this element currently contained in the IC Act suggests that the conduct of persons acting on behalf of parties to a contract will not be relevant in determining if a term is unfair, or even as a factor to consider in determining the strengths of the bargaining positions during the negotiation of a contract. This is an unwarranted and worrying exclusion.

f. <u>Additional considerations proposed for FWC</u>: The proposed amendments give FWC additional matters to consider that are not within the existing IC Act. These include that:

    i. whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;

    ii. whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract; and

    iii. whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract.

    The first two of above matters are additional to those currently available to Courts under the IC Act and open the door to much uncertainty and potential litigation that is unnecessary. They do not deal with matters that involve discrete terms of a contract and whether they are unfair in and of themselves but go to an examination of the effect of terms on those who are parties on a holistic basis. They also raise questions as to concepts such as the 'legitimate interests' of the parties involved and whether a contract term is necessary to protect those interests. The third matter noted above introduces the notion of "unreasonable" – which is entirely subjective and uncertain - while expressing it in such a way as to again not declare a particular term "unreasonable" in and of itself, but the extent to which that term imposes an "unreasonable requirement" on a party. This means that a term of a contract may be completely unreasonable, but not considered "unfair" if the requirement it triggers is not unreasonable. This introduces a raft entirely unnecessary areas new uncertainty and more complexity for business and independent contractors which does not arise under the current laws.

g. "<u>Fair go all round" not appropriate for contractual environment:</u> The amendments make it clear at new section 536N that, when exercising powers proposed under these amendments, the FWC should ensure that a "fair go all round" is accorded to both the principals and independent contractors concerned. A legislative note follows this new section which notes "The expression "fair go all round" was used by Sheldon J in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95." The reference to this principle approach clearly injects a huge amount of

uncertainty and complication in context of contractual matters, given that "a fair go" necessarily involves parallel notions of what a "fair go" actually means to one party or another.

In short, the effect of this approach means that a contractual term may be found to be unfair in one particular situation – but may not be unfair if that entirely identical term is used in another situation. This means absolutely no certainty or stability for business, particularly small businesses in building and construction who depend upon stability of contractual terms for future business planning, stability of tendering, and estimation of future costs. This is a completely undesirable and unnecessary outcome for contractual matters which carry significant potential for financial and other ramifications and depend upon the primacy of contract and certainty.

SCHEDULE 2 - AMENDMENTS TO THE ASBESTOS SAFETY AND ERADICATION AGENCY ACT 2013

161. Schedule 2 to the Bill also makes a range of amendments to the *Asbestos Safety and Eradication Agency Act 2013* (‘ASEA Act’). These changes alter the functions of ASEA to include coordinating action on silica safety and silica-related diseases. This includes developing, promoting and reporting on a Silica National Strategic Plan and acting as a national coordination mechanism for action on silica-related diseases acts on the recommendations of the National Dust Diseases Task force.

162. This Bill broadens ASEA’s functions which are currently limited to asbestos. The renamed Agency’s functions would include responsibility for silica coordination, awareness raising, research, reporting and providing advice to the government on silica.

163. Master Builders supports the amendments in Schedule 2 of the Bill.

164. We support ASEA being handed this additional role. Master Builders considers that ASEA has made a significant and positive difference in discharging its existing remit to improve the level of asbestos related awareness, coordination and safety outcomes. Based on this, Master Builders welcomed the additional appropriation announced within the 2023-24 Federal Budget and supported an expanded remit to include the prevention of silicosis and other silica related matters.

165. As an Agency, ASEA should be acknowledged for its work to date on a number of levels. In pursuing its existing role in the prevention of asbestos related diseases, Master Builders and our members have consistently appreciated both the approach and focus taken by the Agency as well as the significant utility its work has been to both the building and construction industry and community generally. We commend ASEA’s development of guidance and materials that are useful, clear and practicable insofar as assisting a broad range of stakeholders to reduce the incidence of asbestos-related diseases, with a focus on the most at-risk groups within the community.

166. Master Builders also supports the Agency’s ongoing efforts to consolidate the work of State/Territory Regulators and become a centralised repository for guidance on the management and prevention of harm arising from asbestos containing materials. Members

report particular benefits arising from these efforts and consistently recognise the Agency as the first and most relevant 'point' from which to obtain any information about asbestos.

167. Likewise, the coordination function held by ASEA has been especially useful in overcoming or managing the broader trend for jurisdictions to diverge from the 'model' approach taken to WHS law and encouraged relatively consistent practices both 'on the ground' and amongst regulators. Master Builders has no doubt that this divergence from the model approach has been an unnecessary barrier to achieving improved asbestos safety practices, and that the work of ASEA has been a significant contributor towards overcoming these barriers and improved general safety outcomes.

168. To this end the Agency is well placed to take on additional functions with respect to silica-related diseases.

SCHEDULE 3 - AMENDMENTS TO THE SAFETY, REHABILITATION AND COMPENSATION ACT 2013

169. Schedule 3 of the Bill makes changes to the *Safety, Rehabilitation and Compensation Act 2013* ('SRC Act') to introduce a rebuttable presumption for post-traumatic stress disorders suffered by first responders was contributed to, to a significant degree, by their employment.

170. While this Schedule does not impact Master Builders or those we represent, Master Builders does not oppose this amendment.

SCHEDULE 4 - AMENDMENTS TO THE WORK HEALTH & SAFETY ACT 2011

171. Schedule 4 in the Bill makes amendments to the *Work Health and Safety Act 2011* ('WHS Act') to introduce a new industrial manslaughter offence and align Commonwealth WHS laws with the Model Act which was recently amended to provide for industrial manslaughter.

172. The amendment also includes associated penalties, being, in the case of an offence committed by an individual - 25 years imprisonment; or by a body corporate - $18,000.000.

173. While Master Builders does not oppose this amendment, we do make the observation that the penalties it contains do not accord with those under the Model WHS Act and represents a divergence of the Commonwealth away from the Model laws and the harmonised arrangements such Model laws are intended to encourage amongst jurisdictions (including the Commonwealth).

174. It should be noted that under the Model WHS Act, the recommended maximum penalty for an individual is 20 years imprisonment.[24] It is unclear why the Commonwealth Act is inconsistent with the penalties for industrial manslaughter as prescribed under the Model Laws.

175. Further, the amendment with respect to penalties is inconsistent with agreed outcomes following the meeting of WHS Ministers which took place on 28th February 2023. A communique of meeting was released shortly after which noted that:

[24] *Ref Section 30A Model Work Health and Safety Bill - as at 1 August 2023*

'Many jurisdictions have introduced industrial manslaughter offences or committed to doing so. The Commonwealth Minister indicated the Australian Government's intention to scope and consult on an industrial manslaughter offence under Commonwealth WHS laws.'[25]

In recognition of this decision, Ministers by majority agreed to amend the model WHS Act to include a jurisdictional note and model penalty dealing with industrial manslaughter.

The model penalty will be $18 million for a body corporate and 20 years' imprisonment for an individual.'

176. Master Builders has long supported the Model WHS regime and the consistency originally envisaged it would provide to State and Territory jurisdictions. We support harmonised laws as this reduces complexity in compliance and this assists business achieve better safety outcomes for workplaces and workers.

177. However, the steady diversion away from this framework by the States/Territories is creating confusion, complexity and compromising safety outcomes. On this occasion, regrettably, the Commonwealth is contributing to that diversion, notwithstanding it was the initiator of, and has responsibility to oversee, its and own inter-governmental agreement that underpins the Model WHS Laws.[26]

178. Whatever the regulatory framework, and through the Commonwealth's leadership, the States/Territories should continue to be encouraged to adhere to the process of harmonisation they have agreed to. This ensures a nationally consistent set of laws that facilitates trade across borders, reduces complexity and ultimately leads to better safety outcomes.

[25] *Communique of meeting of Work Health and Safety Ministers - 1 March 2023*

[26] *[26] See Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety - 3 July 2008*

CONCLUSION

180. Master Builders thanks the Committee for the opportunity to provide this submission on behalf of the building and construction industry.

181. Any further information, questions or related enquires can be directed to:

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