Master Builders Australia

Submission to the Productivity Commission

on

the Review of the

Workplace Relations Framework

Issues Papers 1-5

11 March 2015

MASTER BUILDERS AUSTRALIA

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RECOMMENDATIONS

Recommendation 1 (see page 8)	That recommendations 13.1 and 13.2 as follows from the Public Infrastructure report be included in the current report's recommendations to Government. "Australian, State and Territory governments should adopt codes and guidelines with an essentially similar framework to the Victorian Code of Practice for the Building and Construction Industry for their own major infrastructure purchases. The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments. The Australian Government should: • increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry; and • ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime."
Recommendation 2 (see page 11)	Delete s3(c) of the FW Act and give greater emphasis to producing productivity.
Recommendation 3 (see page 14)	That the ABCC Bills be passed by the Parliament and that their content is endorsed by the Productivity Commission as suitable for the building and construction industry.
Recommendation 4 (see page 16)	That weekly hours under the NES be able to be averaged over up to 52 weeks.
Recommendation 5 (see page 20)	That payment for public holidays only be available where an employee is providing service as defined under s22 FW Act.
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Recommendation 7 (see page 21)	That section 130(2) of the FW Act be repealed.
Recommendation 8 (see page 25)	That modern awards be further rationalised as to content and that they sunset after a period of 5 years.
Recommendation 9 (see page 26)	The system should transition over the period where Awards were reduced so that at the time of the sunsetting of awards there was one minimum wage rate for juniors and one minimum wage rate for adults in place.
Recommendation 10 (see page 28)	That there should be more robust measures in workplace law to discourage pattern bargaining, inclusive of a proscription on the grant of a protected action ballot order where pattern bargaining has occurred or is occurring.
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Recommendation 12 (see page 34)	That employer greenfields agreements be reinstated.
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Recommendation 14 (see page 42)	That the workplace relations system permits IFAs to be about any matter pertaining to the employment relationship and that a provision to that effect should be a mandatory term of an enterprise agreement.
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Recommendation 19 (see page 55)	Section 347(b)(v) of the FW Act should be removed, as it unfairly protects union members from legitimate disciplinary action in relation to their behaviour as employees.
Recommendation 20 (see page 55)	The test for whether adverse action has occurred should require a comparison of whether the action taken against the employee concerned would have also been taken against other employees in the same circumstances.
Recommendation 21 (see page 55)	Section 360 should be amended so that an employer will be held to have taken action for a particular reason only if it is the sole or dominant reason.
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Recommendation 23 (see page 55)	Access to an interim injunction prior to proceeding to conciliation should be abolished.
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Recommendation 25 (see page 56)	Consideration be given to repealing the anti-bullying laws and focussing resources on this subject on to WHS regulations.
Recommendation 26 (see page 60)	That the ABCC be vested with concurrent jurisdiction to combat secondary boycott activity in the building and construction industry.

Recommendation 27 (see page 60)	Master Builders recommends that the law should be changed to ensure that an enterprise agreement which prevents, hinders or restricts a business in acquiring goods or services from, or supplying goods or services to another business does not fall within the exemption in section 51(2)(a) of the Competition and Consumer Act.
Recommendation 28 (see page 62)	Master Builders recommends no change to the sham contracting laws.
Recommendation 29 (see page 67)	In summary Master Builders' recommendations are that: • commercial law should categorically govern independent contractors with provisions which regulate their contract via workplace agreements made unlawful; • a voluntary negative licensing registration system should be introduced; • individuals may seek registration as a contractor; • the system could be underpinned by requiring applicants to provide evidence from a legal practitioner or other suitably qualified professional that the circumstances of the worker have been assessed as those of a contractor; • provide registration only in relation to the contractor's circumstances as assessed by the relevant professional; • provides registration that is time limited; and • has the consequence of individuals being precluded from registration, where misuse of the system occurs.
Recommendation 30 (see page 70)	Simpler transfer of business rules be introduced.
Recommendation 31 (see page 74)	That the Queensland model of 24 hours' notice for investigative entry under model work health and safety laws is adopted nationally.
Recommendation 32 (see page 76)	That the law relating to right of entry better reflect the fact that union officials are exercising functions akin to those exercised by public officials.
Recommendation 33 (see page 76)	That the name of the principal statue be changed to better reflect its functions.

1 Introduction

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

1.2 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

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

2 Purpose of Submission

2.1 On 19 December 2014, the Government released the Terms of Reference for the inquiry into Australia's workplace relations framework being conducted by the Productivity Commission. On 22 January 2015, five Issues Papers were released by the Commission for feedback. The closing date for submissions to the first stage of the Commission's inquiry is 13 March 2015 and the inquiry report is expected to be handed to the Government in November 2015**.** This inquiry represents the opportunity for a major review of Australia's workplace relations system by an agency that operates through transparent and independent processes. The inquiry is commended.

2.2 This submission provides Master Builders' perspective on the matters raised in all Issues Papers. The matters dealt with are addressed in the sequence raised via the Issues Papers. Not all topics are addressed. Before discussion of the matters dealt with in the Issues Papers, we set out Master Builders' fundamental principles that guide our assessment of the workplace relations system. We also discuss some of Master Builders' fundamental concerns about the issues associated with industrial relations in the building and construction industry. That discussion is sparked by the exclusions from the

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

3 Fundamental Principles

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

1. Respect for and adherence to the rule of law must guide workplace relations in the building and construction industry.

2. Independent contractors' legislation that preserves and enhances the subcontracting system must be maintained and strengthened.

3. A workplace bargaining system in which employers and employees may freely enter into appropriate and lawful workplace agreements underpinned by a simple safety net of conditions must be adopted.

4. There should be only one industry Award that is not overly prescriptive, an Award that permits necessary divergence from the National Employment Standards on demonstrated evidence; the need for a dual safety net of statutory conditions as well as 122 modern awards is questioned. One fair safety net of minimum conditions should suffice.

5. The workplace relations system should focus on cooperative relations between employees and employers. It should emphasise the resolution of any disputes at the workplace level without the need for external party involvement.

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

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

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

> *There are four tenets that should drive reform and cultural change.*
>
> *First, there should be as clear a definition as possible of that industrial activity which is permitted, and that which is not.*
>
> *Second, the rule of law should be re-established so that conduct which is not permitted attracts serious consequences. Penalties for breaches must be increased substantially.*
>
> *Third, those who engage in unlawful conduct or practices should bear the loss suffered by other participants in the industry. A quick, cheap and effective method of establishing and imposing liability for that loss must be established.*
>
> *Fourth, it should become widely known and accepted within the industry that there is an independent body, not subject to the pressures applicable to participants in the industry, which will, with vigour, uphold the law and prosecute any participant in the industry who breaches.*[1]

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

[1] Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry February 2003*, www.royalcombci.gov.au Volume 11, page 11, paragraphs 34 – 39 and 42. Accessed 12 February 2015

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

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

4.1 Scope of the Inquiry – Rule of Law Issue Raised

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

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

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

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

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

[2] http://www.tradeunionroyalcommission.gov.au/reports/Pages/default.aspx at para 260 p1114

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

4.1.4 As Singleton from the Cato Institute has said:

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

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

4.1.6 The second exclusion relevant to this submission is:

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

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

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

RECOMMENDATION 13.1

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

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

RECOMMENDATION 13.2

The Australian Government should:

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

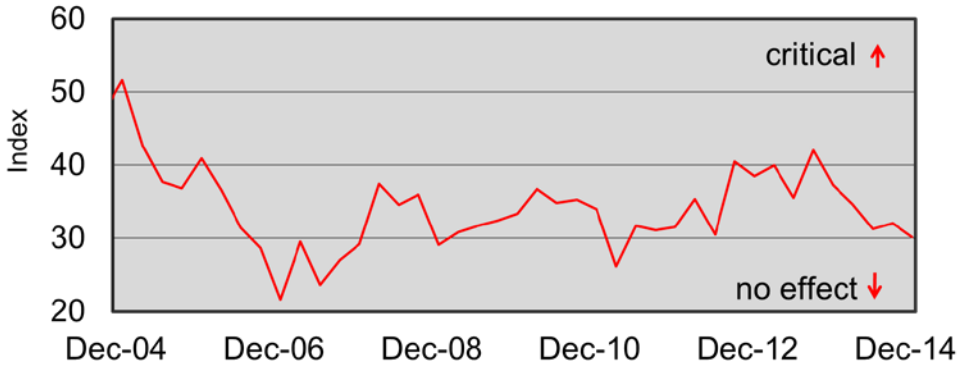
4.1.8 As Master Builders submitted to the Productivity Commission in the context of its inquiry into infrastructure, builder concerns about the constraining influence of industrial relations on business activity fell markedly with the introduction of the BCIIA and establishment of the ABCC. The Productivity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

[4] http://www.pc.gov.au/inquiries/completed/infrastructure/report Accessed 12 February 2015

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

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

Figure 1: Are Industrial Relations Constraining Activity?



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

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

[5] Id at Vol 2, p.542

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

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

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

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

[6] Id Vol 2, p.543

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

The Australian Government should:

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

4.2 The stated objectives of Australia's workplace relations system

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

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

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

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

[9] Id at p34

4.2.3 The extract just quoted goes on to indicate that an identified policy for releasing the brake is to "disempower employees." This disempowerment is taken to equate with reducing the role of third parties. These are named by the authors as "unions and arbitrators." However, reducing the role of third parties especially those which act in their own interests, eschewing their representational role for separate aims as has been demonstrated in the behaviours of the CFMEU, can only empower employees.

4.2.4 External party involvement is not a necessary corollary of empowerment; the available research suggests that "an integrated approach to employee voice that is characterised by multiple, mutually reinforcing channels"[10] provides benefits to organisations. This includes direct employee voice but also the voice of trade unions in fulfilling a proper representational role. Employers and employees raise employee job satisfaction where they act co-operatively and enter into agreements that focus on the enterprise as a venture that delivers greater benefits to participants. This has been demonstrated to occur where innovative work practices and high employee involvement, through direct voice, are in place.[11] Master Builders' experience is that employees are empowered when they have a direct voice. This does not occur optimally through institutions which are directed towards centralisation, such as unions and the third party umpire.

4.2.5 In essence the main problem with the FW Act at the basic level of achieving a diverse range of objectives is the tension between those who equate empowerment of employees with collectivism, with the ascendancy of third parties and the Fair Work Commission, and those who want alternative models of representation and a disempowerment of the third parties who have traditionally dominated the workplace relations landscape: unions, employer associations and the tribunal (under whatever name). Whilst the FW Act has a number of mechanisms which recognise that

[10] A Pyman "A Comparison of the Effectiveness of Employee Voice Arrangements in Australia" (2005) Monash University at p13

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

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

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

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

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

Recommendation 2	**Delete s3(c) of the FW Act and give greater emphasis to promoting productivity.**

4.3 The historical context: how the WR system evolved seems important

4.3.1 The previous discussion drew attention to the particularity of the requirements for workplace relations measures that apply in the building and construction industry. The Cole Royal Commission comprehensively analysed the history of workplace relations in the building and construction industry.[12] Its recommendations and findings remain valid. A number of the findings from Cole have been reinforced by the current interim report of the Heydon Royal Commission.

4.3.2 Master Builders commends the content of the prior law that governed the building and construction industry that is the BCIIA. The current Bills before Parliament that would emulate the content of the BCIIA are fully supported that is the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the ABCC Bills).

4.4 What might need to change?

4.4.1 Master Builders refers to the evidence in and the findings of the Productivity Commission's Public Infrastructure inquiry. We refer to the evidence and findings (albeit interim in respect of the Heydon Royal Commission) of the Cole and the Heydon Royal Commissions. As indicated above, the principal change that should emanate from these findings is that the ABCC Bills should be brought into law and the building and construction industry should be governed by workplace laws that are aimed at restoring the rule of law.

4.4.2 Other changes to the system that would advance the principles set out at paragraph 3.1 of this submission will be recommended as the discussion in this submission follows the structure of the Issues Papers.

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

4.5 The Productivity Commission's approach

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

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

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

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

Recommendation 3	**That the ABCC Bills be passed by the Parliament and that their content is endorsed by the Productivity Commission as suitable for the building and construction industry.**

5 Issues Paper 2 – *Workplace Relations Framework: Safety Nets*

5.1 Providing Safety Nets

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

5.2 The Federal minimum wage

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

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

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

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

5.2.3 During periods of skills shortages in the building and construction industry that have emerged as more than cyclical, the principal industry effect of higher minimum wages is twofold. The first is that higher minimum wages discourage employers from employing apprentices and trainees. Secondly, higher unskilled wage rates (assuming a flow on of minimum wages) create a disincentive to acquire skills and linked remuneration that is more appropriately differentiated on the basis of skills acquisition. This is an effect that dampens skills acquisition in the building and construction industry.

5.2.4 The awards system also still plays an important part in setting minimum wages, which remain very high in Australia relative to other advanced economies. The role of the award system in setting minimum wages should be diminished in order to reduce what is a significant barrier to the entry of low-skilled individuals into employment, particularly younger people who must, in the building and construction industry, compete for work against adults in respect of the same minimum wage being applied to them as to adults through the modern award. Master Builders recommends a reframing of the objects of minimum wage setting so that the process serves as a genuine safety net for the low paid. The setting of minimum wages relative to higher income earners undermines this objective and discourages bargaining and productivity improvement and discriminates against young people.

5.2.5 Minimum wage setting must promote youth employment to ameliorate the effects of youth unemployment rates which have reached record levels.[14]

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

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

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

5.3 National Employment Standards

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

Recommendation 4	**That weekly hours under the NES be able to be averaged over up to 52 weeks.**

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

absent on a public holiday if they have good reasons to refuse to work.[15]

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

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

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

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

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

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

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

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

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

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

[17] *Fair Work Act*, s22(2)(a), 87(2), 96(2)

[18] Explanatory Memorandum to the Fair Work Bill, illustrative example after item 461.

[19] Explanatory Memorandum to the Fair Work Bill, item 461.

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

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

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

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

[21] *Acts Interpretation Act 1901* (Cth), s13.

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

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

[24] *Acts Interpretation Act 1901* (Cth), s15AD(b).

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

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

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

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

[25] *Fair Work Act*, s130(2)

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

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

Recommendation 7	**That section 130(2) of the FW Act be repealed.**

5.4 The award system and flexibility

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

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

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

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

[27] http://docs.employment.gov.au/node/29150

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

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

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

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

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

[28] Note 1 above volume 8 chapter 9 page 43 paragraphs 4 and 5.

> *additional 23.3% of the hourly standard rate per day or part thereof.*
>
> *Under this award, you will be pleased to learn that "No apprentice under the age of 18 years will be required to work overtime…unless they so desire". If the apprentice is over 18? Then only "to enable requirements of the training plan to be met". This is undoubtedly designed to acclimatise them to the rigours and realities of the sector!*
>
> *But to really highlight how "modern" some terms of these awards are, bricklayers working in a tuberculosis hospital are entitled to have an x-ray every 6 months during work hours at the employer's expense. As an inconvenient aside, the last dedicated TB Ward was closed in 1981…*[29]

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

> *Parts of the On-site Award are complex and possibly outdated, reflecting the fact that they are a product of the variation of predecessor awards at various points of time. This is evident in some of the provisions raised by the MBA and other employer associations in the context of power questions raised in the current proceedings, most particularly in relation to the extensive allowance provisions in the On-site Award.*
>
> *Our observation, in this regard, is not new. During the Award Modernisation process through which the modern award was made, the Full Bench of the Australian Industrial Relations Commission made the following statement concerning, in part, allowances in the building and construction industry:*
>
> *"In a number of industries there are many different allowances in federal awards and NAPSAs, some of quite small amounts. It is often difficult to know the origin and purpose of the allowances and whether they are still relevant. In some cases the allowance will not be appropriate for inclusion in a safety net award because it is outmoded, is the result of enterprise bargaining or for some other reason.*

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

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

and

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

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

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

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

[30] *Master Builders Australia Limited* [2012] FWAFB 10080 at paras 80 and 81 (footnotes omitted)

20.4 Adjustment of expense related allowances

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

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

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

The award system today is outdated and redundant, and ought to be abolished in favour of the existing federal minimum wage and statutory conditions.[32]

Recommendation 8	**That modern awards be further rationalised as to content and that they sunset after a period of 5 years.**

5.4.10 In the period during which Awards were to be phased out, a mechanism which preserved the base wages in awards as a part of the minimum standard for employment would be introduced. Industry parties would have the opportunity to make submissions to an independent wage setting body to make the case

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

[32] Id at p14

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

Recommendation 9	**The system should transition over the period where Awards were reduced so that at the time of the sun-setting of awards there was one minimum wage rate for juniors and one minimum wage rate for adults in place.**

6 Issues Paper 3 – *Workplace Relations Framework: The Bargaining Framework*

6.1 Bargaining and industrial disputes

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

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

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

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

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

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

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

> *True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ. So too will the needs and aspirations of individual workers. If they are to be considered and accommodated in ways that are mutually beneficial and acceptable, the workers and their employers need to discuss how an agreement can be structured which advances their respective interests. Ninety four percent of employers in the building and construction industry have less than five employees. Given the relatively small number of employees engaged by most contractors in the building and construction industry, there is clearly scope for discussions to take place, both formally and informally, at the workplace in order to arrive at mutually beneficial outcomes. Pattern bargaining and the impact of project agreements have meant that both workers and employers have become accustomed to merely adopting a common form of agreement which has been determined by others.*
>
> *One form of centralised wage and condition fixation has been replaced by another. Initiative is stifled; the scope for creativity is denied. The reforms introduced by successive Governments, to make agreements struck at enterprise level the principal instruments whereby terms and conditions of employment are established, are circumvented and negated. The results have been detrimental to both workers and employers, to the industry and to the national economy.*[33]

[33] Note 1 above, Volume 1, pages 27 – 28.

6.1.5 Long-term reliance on this system, coupled with industrial hostility and unlawful behaviour in the building and construction industry, has disempowered employees and employers, leading to failure to manage human resources properly. Rigid working conditions have therefore resulted and continue to characterise the industry, inclusive of the terms and conditions that comprise the On-Site Award and terms and conditions which exist in the CFMEU pattern agreements that are proffered on a "sign up or else" basis. These conditions reduce productivity and, importantly in times of skill and labour shortages, limit opportunities within the industry to those workers whose circumstances fit into the inflexible industrial framework.

6.1.6 As indicated earlier, we hold strongly to the view that the workplace relations system must encourage the creation of workplace arrangements that suit the needs of employees and employers. In this context Master Builders has recently lodged a submission with the Senate Committee concerned with examining the Fair Work Amendment (Bargaining Processes) Bill 2014. A copy of that submission is attached as Attachment A, inclusive of its attachments. It sets out Master Builders' position with regard to the current problems with pattern bargaining, a matter that the Cole Royal Commission labelled as a new set of centralised wage fixing apparatus as per the quotation in paragraph 6.1.4. The matters set out in that submission remain a central concern of Master Builders.

Recommendation 10	**That there should be more robust measures in workplace law to discourage pattern bargaining, inclusive of a proscription on the grant of a protected action ballot order where pattern bargaining has occurred or is occurring.**

6.1.7 The entrenchment of unions in the bargaining process, regardless as to whether this is reflective of the wishes of the majority of employees in a workplace, has undermined the direct and cooperative relationship between employers and employees and drives workplaces into conflict based adversarial processes that disrupt otherwise harmonious and productive workplaces. Trade union membership is continuing to decline yet bargaining under the

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

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

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

Recommendation 11	**That s176(1)(b) of the FW Act be repealed and that bargaining representatives should be appointed in writing by any employee eligible to be involved in the bargaining process.**

6.2 Greenfields agreements

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

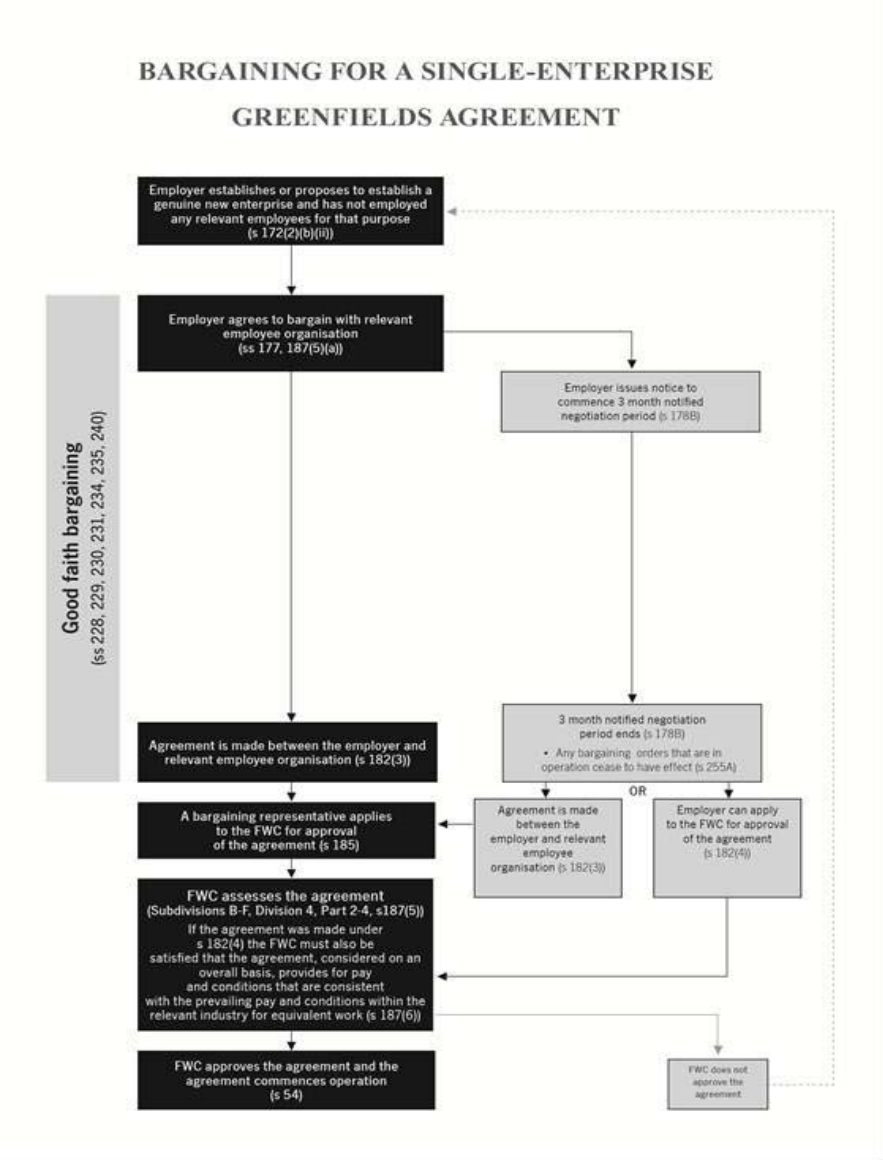
often proved to be a reliable projection of labour costs. They are a vital factor in the decision about whether to invest. They are the only means to have an agreement where employees are to be engaged in the future.

6.2.2 Master Builders notes that the Amendment Bill 2014 mentioned in paragraph 5.3.12 of this submission also contains a proposal about changing the current law about greenfields agreements, mentioned at page 2 of Issues Paper 3.

6.2.3 Master Builders' policy of seeking reform in this area is by way of advocating the reinstatement of employer greenfields agreements. These are not exploitative instruments, as has been suggested by unions, because employees would be protected by the better off overall test and market conditions in any event. A better and recommended solution to the complex provisions in the Amendment Bill 2014 is the reintroduction of employer greenfields agreements.

6.2.4 In contrast with the Master Builder's position set out in the prior paragraph, the Government has determined that the changes represented in Part 5 of Schedule 1 of the Amendment Bill 2014 are an appropriate element to bring about reform in relation to greenfields agreements. Essentially, the concept of appointing a bargaining representative has been extended to greenfields agreements negotiations and their completion. In essence, Part 5 enables an employer to take a proposed greenfields agreement to the FWC for approval where agreement has not been reached within three months of the commencement of a notified negotiation period. The agreement will need to satisfy the existing approval tests under the FW Act as well as a new requirement that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing standards and conditions within the industry in relation to the notion of "equivalent work". The arrangements for this new line of reform are extraordinary complex. This, in part, reflects the existing complexity of the agreement-making provisions of the FW Act generally. But the manner in which the reform is proposed adds to that complexity.

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



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

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

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

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

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

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

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

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

6.2.12 The failure in the criteria to take into account the market will also be evident in the fact that many of the enterprise agreements that will "evidence" the prevailing conditions were made during the resource construction boom period. The approach, therefore, makes future resource projects less economically viable as labour costs will be reflective of rates set when skilled labour was in short supply. As the mining resource boom transitions to the production phase and investors look at more economically attractive resource projects off-shore, requiring FWC to assess resource sector enterprise agreements through the prism of outdated, and potentially unrealistically inflated labour rates, would only act as a disincentive for investment.

6.2.13 It is anticipated that complex and potentially lengthy litigation in the FWC to determine first the meaning of these new concepts and thereafter their differential application, having regard to the location where the greenfields agreement would operate, will exacerbate delays in completion of greenfields agreements contrary to the intent of the new provision. This delay is especially likely in the early stages of application of the new provisions. In addition, this test has not been introduced following supportive evidence of its necessity. There is no evidence of market failure that the test is required to address.

6.2.14 The analysis reveals that a simpler and fairer position would be derived from revisiting employer greenfields agreements.

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

6.3 Pattern agreements

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

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

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

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

[34] In relation to employee claim action see subsection 409(4)

[35] [2010] FWAFB 526

[36] Id at para 39

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

Recommendation 13	**That the exception at s412(2) be removed, such that a person cannot be held to be genuinely trying to reach an agreement if they are pattern bargaining.**

6.4 Protected Action – the abuse of safety

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

(c) action by an employee if:

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

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

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

6.4.3 Workplace health and safety is a serious issue. The model Work Health and Safety law emphasises coordination, cooperation and consultation. The Cole Royal Commission confirmed the long-standing practice of construction unions using safety stoppages as a device to advance industrial objectives.

6.4.4 More recently during the course of the Heydon Royal Commission it was found that the TWU had entered into an agreement with Toll where in return for the TWU exercising its statutory powers of right of entry at Toll's request or in Toll's interest, Toll would make a payment to an entity associated with the TWU.

6.4.5 Commissioner Heydon found that the nature of these arrangements means they may take on the character of a payment by Toll for the indirect benefit of the TWU in return for officials and employees of the TWU exercising the statutory powers in a certain way and in the absence of a reasonable suspicion of contravention.[37]

6.4.6 This positive finding reinforces the Master Builders' submission that safety has been used by unions as an industrial weapon. The abuse of safety in this way frustrates cooperation and devalues the importance of the role of safety.

6.4.7 Commissioner Heydon found evidence of intimidating, abusive and verbally violent behaviour toward others by CFMEU officials especially towards FWBC inspectors,[38] and recommended that a number of officials of the CFMEU be referred to the relevant prosecuting authorities for the consideration of criminal charges.[39]

6.4.8 To combat the use of safety as an industrial weapon the BCIIA placed the burden of proving that a safety stoppage was based on a reasonable concern by the employees about an imminent risk to their health or safety.[40]

6.4.9 The abolition of the BCIIA has reversed this position, placing important advances in safety management and practices in

[37] Above note 2, Interim Report volume 1 page 988 Para 39-55

[38] Id page 45 para 91

[39] Id page 30 para 100

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

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

6.5 Individual Flexibility Arrangements (IFA)

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

> *Under Labor's new collective enterprise bargaining system all collective agreements will be required to contain a flexibility clause which provides that an employer and individual employee can make a flexibility agreement.*
>
> *The aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and an individual employee.*

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

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

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

[41] *Forward with Fairness* April 2007 http://www.hsu.net.au/news/files/forwardwithfairness.pdf

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

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

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

> ***Recommendation 9:*** *The Panel recommends that the better off overall test in s.144(4)(c) and s.203(4) be amended to expressly permit an individual flexibility agreement to confer a non-monetary benefit on an employee in exchange for a monetary benefit , provided that the value of the monetary benefit foregone is specified in writing and is, insignificant, and the value of the non-monetary benefit is proportionate.*
>
> ***Recommendation 10:*** *The Panel recommends that the FWAct be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.*
>
> ***Recommendation 11:*** *The Panel recommends that the FWAct be amended to provide a defence to an alleged contravention of a flexibility term under s.145(3) or s.204(3) where an employer has complied with the notification*

[42] Above note 27 at p108

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

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

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

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

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

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

Clause 51.6	*Compassionate Leave*
Clause 52	*Parental Leave*
Clause 54	*Jury Service*
Clause 59	*Clothing Issue & Safety Footwear & Equipment*

6.5.8 The extracted clause appears in the 2011-014 union pattern enterprise agreement in WA and also in its replacement 2015 pattern enterprise agreement. A comparison of the employment matters dealt with by the CFMEU standard IFA with the model IFA set out in Schedule 2.2 of the FW Act Regulations shows the union version offers nothing in the way of flexibility for either party. In essence, the CFMEU IFA strangles any concept of real workplace flexibility from the enterprise agreement with the pattern enterprise agreement adopting a "one size fits all" approach. Similar meaningless flexibility clauses populate many more pattern enterprise agreements approved by the FWC, again reinforcing Master Builders' stance against pattern agreements.

6.5.9 Despite the lack of genuine benefit to either an employer or employee contained within many current IFAs, such as the CFMEU example just explained, these clauses are approved by the FWC, and continue to be approved by FWC, despite what the then Deputy Leader of the Opposition in 2007 set out in the Federal Labor Opposition's Forward with Fairness Policy that:

> *The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure: the clause provides for genuinely agreed individual flexibilities.*[43]

6.5.10 Arguably, the intent of the then Deputy Opposition Leader was that IFAs set out in enterprise agreements would offer genuine flexibilities at the workplace between the parties. This is evidenced by the model IFA set out in Schedule 2.2 of the FW Act Regulations which stand in stark contrast to the CFMEU version.

6.5.11 Master Builders' submission to the Review Panel was that the content of what can be included in IFAs ought be expanded and that the Office of the Fair Work Ombudsman (FWO) undertake assessments of IFAs on their meeting the better off overall test under the FW Act.

6.5.12 Recommendation 9 of the Review Panel Report reflects in part what Master Builders has called for. However, a closer examination of

[43] *Forward with Fairness – Policy Implementation Plan,* August 2007, http://www.rcsa.com.au/documents/info_update/p070828249.pdf at p.14

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

Recommendation 14	**That the workplace relations system permits IFAs to be about any matter pertaining to the employment relationship and that a provision to that effect should be a mandatory term of an enterprise agreement.**

7 Issues Paper 4 – *Workplace Relations Framework: Employee Protections*

7.1 Unfair dismissal, general protections and 'adverse action'

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

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

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

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

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

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

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

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

experts have called on the ILO to refrain from promoting the Convention, and called for its repeal.[46]

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

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

7.1.8 This exemption applied as follows:

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

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

[46] Id at page 26.

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

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

Recommendation 15	**That an exemption from unfair dismissal should be introduced for businesses employing fewer than 20 people.**

7.1.11 The preferred form of exemption would have no need for a supplementary instrument, such as the current unworkable Small Business Fair Dismissal Code (SBFDC). The SBFDC is a poor substitute for a genuine small business exemption.

7.1.12 The termination laws must be recalibrated, so as to place more emphasis on the employer's prerogative to manage their business. This can be achieved by reinstating in legislation that substantive

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

7.1.13 The existing valid reason for termination referenced in the FW Act is consistent with Article 4 of the ILO Convention. In determining whether the right to terminate is properly exercised, the first obligation of an employer is to justify a termination on one or more valid reasons, being conduct, capacity or operational requirements. Pursuant to Article 7 of the Convention, the employer is also required to give an employee a warning if the reasons for termination are for conduct or performance. The extension of this Article, by existing Australian common law practice, resulted in the phrase "harsh, unjust or unreasonable", being superimposed on the mandatory requirements to identify a valid reason. The Convention makes no mention of harsh, unjust or unreasonable considerations.

7.1.14 Over time, a mountain of case law has accumulated in the determination of applications for alleged unfair dismissal. This has resulted in the refining and weighting of harsh, unjust and unreasonable factors in termination. Unfortunately, this has also made the assessment of any application for remedy much more unpredictable than if the assessment was largely confined to addressing the valid reason and written warnings to the employee. Such is the reputation of the existing test for "unfair dismissal", employers are more concerned with what they may have done wrong, than what they have done right.

7.1.15 It is widely accepted that the risk of failing a "harsh unjust, or unreasonable" assessment has bewildered employers and opened the way to monetary settlements for applicants and their agents, in the form of "go away" money. This is an unsatisfactory state of affairs. It demonstrates a serious departure from the Convention's purpose, which is to define a balance between the rights of the employer to dismiss a worker for a valid reason, and the worker's rights not to be deprived of work unfairly.

7.1.16 A recent case[47] serves to illustrate this point. The employee was dismissed for failure to comply with safety instructions and abusive

[47] *Scott Challinger v JBS Australia Pty Ltd* [2014] FWC 7963

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

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

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

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

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

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

7.1.19 This is consistent with the ILO standard and preserves the employer's prerogative to manage the business, to respond to market changes, to restructure and otherwise aim for best practice.

7.1.20 In the context of redundancy, the existing requirement, first introduced in the FW Act via section 389, effectively deems that a termination for operational reasons is not valid and therefore unfair if the employer did not offer the employee redeployment in the employer's business, or associated entity. This is despite the primary definition indicating the termination is valid as the job the employee was performing is no longer required due to operational requirements. The primary test, which was introduced in the Termination Change and Redundancy test case[49] is manifestly adequate to establish the termination is for operational reasons. The courts are now well ahead of and will not abide a sham or device on the employer's part to disguise an ordinary termination as a redundancy.

7.1.21 Further, the test of 'redeployment opportunities', unreasonably extends legislation into the employer decision making prerogative. As stated above, this extended definition presumes the lack of an offer by an employer of redeployment opportunities makes invalid an otherwise valid operational decision. The effect of the current law on employer's discretion is reflected in the following extract of a decision of the then Fair Work Australia:

> *If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative (such as the making or varying of a policy which employees are required to observe) was laid down in Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales 7 (XPT case).*[50]

7.1.22 A 2012 case[51] in the building and construction industry demonstrates the alteration of the operational valid reason by the addition of the redeployment criterion. It also highlights the dilemma

[49] 1984 Print F6230

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

[51] *Robert Aldred v J Hutchinson Pty Ltd* [2012] FWA 8289

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

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

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

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

Recommendation 18	**Laws defining a valid reason for redundancy should be confined to termination for reasons based on the operational requirements of the employer's business.**

7.1.25 Unfair dismissal claimants should bear the onus of demonstrating reasonable grounds for success prior to a matter going to conciliation. Those that do not present such prospects should be disallowed on the papers. This combined with strict enforcement of deadlines and the ability for more jurisdictional matters to be determined on the papers, would enable the FWC to deal with

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

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

7.2 Adverse Action

7.2.1 Master Builders considers that the adverse action provisions of the FW Act should be abolished. Alternatively, if they are to be retained, they must be rebalanced in order to avoid potential scope for abuse. At the least, the 'sole or dominant reason' test should be reinstated.

7.2.2 There has been a significant widening of both "workplace rights" and "lawful industrial activities" under the FW Act compared to earlier federal workplace relations laws. Master Builders considers that the adverse action provisions of the FW Act provide an unnecessary layer of additional and excessive remedies to

[52] *Brett Ellis v Esso Australia Pty Ltd* [2015] FWC 45

[53] *Clause 13 of Explanatory Memorandum Fair Work Bill 2009*

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

7.2.3 The reverse onus of proof and the removal of the "sole or dominant reason" exemption, which was in the prior law, raise significant issues for employers. Add to this uncapped compensation available in adverse action remedies, as well as none of the unfair dismissal jurisdictional exemptions, the employee's preference towards bringing adverse action claims is obvious. This trend significantly compromises the positive policy outcomes in having a workplace relations tribunal with an emphasis on being 'quick, informal and avoid[ing] unnecessary technicalities'.

7.2.4 The broadening of "workplace rights" specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. The need to protect employees from termination for filing a formal complaint with a competent administrative authority (e.g. WorkSafe, Fair Work Ombudsman (FWO)) is obvious. However, its extension to situations where an employee makes a complaint to their union or employer is less so. This is particularly the case given the employee only needs to be adversely affected, rather than terminated. Adverse action claims in relation to complaints should be limited to those made to competent administrative authorities.

7.2.5 Recent case law serves to underscore this point, with the Courts taking an increasingly liberal view. In *Shea*[54], the Court held that to fall within the scope of the general protections provisions, a complaint can be any communication which, expressly or implicitly, conveys a grievance, finding of fault or accusation. In a recent Federal Circuit Court case[55], Lucev J also took a broad approach, finding that the use of the words "in relation to" in s 341(1)(c)(ii) FW Act, protected complaints that: did not necessarily arise from a statutory, regulatory or contractual provision; and may only have an indirect nexus with a person's terms or conditions of employment (for example, by way of a complaint relating to another person in the

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

[55] *Evans v Trilab Pty Ltd* [2014] FCCA 2464

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

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

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

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

[57] *Shea v Energy Australia Services Pty Ltd* [2014] FCAFC 167

7.2.8 Accordingly, in addition to the introduction of the sole or dominant reason test outlined above, the reverse onus of proof provision required in adverse action cases should be amended to provide an exemption for small business employers.

7.2.9 The High Court decision in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (*Barclay*)[58] serves to demonstrate why Master Builders' policy on general protections is sound and defensible.

7.2.10 The course taken by the parties in the *Barclay* case was expensive, complex, and ultimately vindicated the employer's thorough and fair approach to disciplining an employee. The case exposed the flaws in the implementation of the general protections in FW Act, which left it open to the Full Federal Court to approach the first appeal using an "objective" test, usually confined to the stand-alone anti-discrimination laws. This reasoning by the court led to the following finding by Bromberg and Grey JJ:

> *If adverse action is taken by an employer in response to conduct of a union, it is impossible for that employer to dissociate or divorce from that conduct its reasons for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee.*[59]

7.2.11 The combination of reverse onus of proof and the removal of the sole and dominant reason test in the FW Act, allowed the Full Bench to reach that conclusion. Whilst the High Court reversed the Full Federal Court decision, the fact is the High Court is not the legislator, and cannot translate the reasoning it applied in *Barclay* into a rewrite of the general protections in the FW Act. This responsibility rests squarely on the Government to address the scope of the general protections, and restore the balance for employers.

7.2.12 The 3-2 majority High Court decision[60] traversing the same law serves to illustrate this point, with disagreement on how *Barclay* should be applied. The majority in the case applied *Barclay* strictly,

[58] [2012] HCA 42

[59] Id at para 74

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

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

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

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

7.2.15 Balance can be achieved through the following recommendations:

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

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

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

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

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

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

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

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

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

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

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

Recommendation 25	Consideration be given to repealing the anti-bullying laws and focussing resources to WHS regulations.

8 Issues Paper 5 – *Workplace Relations Framework: Other Workplace Relations Issues*

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

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

8.1.2 As reported in Boral Annual Report 2014:

> *Since February 2013, the Construction division of the Construction, Forestry, Mining and Energy Union (CFMEU) has run an orchestrated campaign against Boral because we refused to give in to demands by the union that we stop doing business with a long-standing client, the Grocon group, in Melbourne.*
>
> *Over that time, our trucks have been stopped, our people intimidated and many of our customers in Victoria have had a*

> *"friendly visit" from union officials warning them, essentially, not to do business with us. Many clients have refused to toe the union's line, for which we are grateful, but it's difficult for small operators.*
>
> *So far, this unlawful secondary boycott has cost you – our shareholders – around $10m in lost EBIT, including legal fees.*
>
> *We have gone to the Australian Competition and Consumer Commission (ACCC) and to Fair Work Australia. We have taken the union to court – and won our case. We have asked the Federal and State Governments for help. And we have presented our case to the Royal Commission into Trade Union Governance and Corruption, detailing the campaign against Boral.*
>
> *Boral is not anti-union. In fact, we work closely with our employees and the various unions that represent them. We should be allowed to continue to carry out our business without this unlawful campaign.*[61]

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

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

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

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

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

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

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

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

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

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

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

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

[64] Id at p5

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

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

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

> *In the ACCC's experience, conduct the subject of a complaint to the ACCC under the secondary boycott prohibitions can also be the subject of other complaints relating to breaches of industrial relations or other legislation. Accordingly, from time to time, other regulators such as Fair Work Australia and Fair Work Building and Construction may be concurrently investigating potential breaches of legislation that they administer. In addition, a party aggrieved by a secondary boycott may also have a cause of action under common law.*
>
> *In determining what enforcement action to take, the ACCC will consider whether litigation under the CCA is the most appropriate way to achieve its enforcement and compliance objectives, including whether alternative causes of action that are being pursued are likely to be sufficient to deter future offending conduct.*[65]

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

[65] Id at p7

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

> *In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:*
>
> *(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees*

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

Recommendation 26	**That the ABCC be vested with concurrent jurisdiction to combat secondary boycott activity in the building and construction industry.**

Recommendation 27	**Master Builders recommends that the law should be changed to ensure that an enterprise agreement which prevents, hinders or restricts a business in acquiring goods or services from, or supplying goods or services to another business does not fall within the exemption in section 51(2)(a) Competition and Consumer Act.**

8.2 Sham contracting

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

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

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

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

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

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

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

[67] http://www.fwbc.gov.au/sham-contracting-research-released-0. Accessed 12 February 2015

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

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

Recommendation 28	**Master Builders recommends no change to the sham contracting laws.**

8.3 Independent Contracting

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

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

[68] See Appendix C Forms of Work in Australia Productivity Commission April 2013 - http://www.pc.gov.au/__data/assets/pdf_file/0020/122870/forms-of-work.pdf

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

- *fluctuations in employment mean workers enter from other industries during periods of high labour demand.*[70]

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

8.4 Independent Contractor Regulation

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

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

[70] Id at para 4.23

[71] Master Builders 2014 National Survey

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

[73] See Workplace Express 2 October 2012 W*ork resumes on Brisbane Children's Hospital after two months stoppage*

state of the law was only enhanced following the handing down of the findings of the Fair Work Act Review Panel Report.[74]

8.4.3 We find puzzling the conclusion of the Panel that the very large volume of costly litigation relating to whether or not particular clauses that regulate contractors are matters which pertain to the employment relationship is "largely … a return to agreement-content rules that developed over more than a century".[75] This is particularly the case in the light of the fact that inter alia there is a test in s172(1)(b) of the FW Act which talks about matters being permitted if pertaining to the relationship between an employer and a union covered by the agreement. This is a completely new test and one which we believe is inappropriate as there is no formal relationship between an employer and a union representing the employees. Unions have a representative role rather than a direct relationship with employers.

8.4.4 The Panel did not consider this matter, merely asserting that the new test addresses "some uncertainties that would otherwise exist as to the outer reach of matters pertaining, and are an appropriate balance between the freedom of employers and the legitimate rights of employees to be represented in the workplace."[76] It is unclear from this statement and from the surrounding text how this balance can be said to exist. We submit that the balance does not exist in the current law.

8.4.5 Testing of the "outer limits" of contractor regulation is proving costly, time consuming and damaging to productivity. Unions want this provision because the subcontractors who go to work on site are presented with a pattern agreement that is in the same terms as the pattern agreement that applies to the principal contractor or "employer". Coverage by the pattern agreement will deliver mirror conditions with those signed up to by the employer. Hence, it is highly likely in practice that if an agreement has been reached outside of the pattern or template process, there will be lesser

[74] Above note 27

[75] Id p159

[76] Ibid

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

8.4.6 In order to give greater clarity and certainty to this subject area Master Builders has developed a proposal that has been formally placed before the Government that would establish a government supervised register, in our view best placed within the Australian Tax Office (ATO), where contractors can voluntarily register subject to tests, that provides them and other related parties with a high degree of certainty of their bona fides to operate lawfully as an independent contractor. This would be reinforced by a clear separation between commercial law which should govern independent contractors, and workplace relations law which should govern employers and employees.

8.4.7 The application for registration could be accompanied by a certificate from a legal practitioner or other suitably qualified professional or an industry association, to the effect that, having regard to the statutory criteria (which would accommodate external indications of the status of a contractor being applied to reinforce the common law test or otherwise) the contractor should be registered and for which particular project or job inclusive of a temporal limitation.

8.4.8 This factor acknowledges the dynamism of the relevant relationships and does not lock the individual or entity into a static framework. The registration would be for fixed periods but renewable where circumstances changed if the contractor was an individual who also worked occasionally as an employee.

8.4.9 Master Builders strongly argues that registration of this type would increase certainty in the subcontractor system. This process would require minimal Australian Government supervision, probably

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

8.4.10 The work of the ATO and other government agencies shows that there are many factors that could lead a small number of persons or entities to fall foul of what is complex and confusing law dealing with the legal status of who is an employee or who is a genuine independent contractor.

8.4.11 Further there is a view that some seek to take advantage of the perceived major incentive for income splitting between individuals and interposed entities because of the difference between the company tax rate and the top individual marginal tax rate. It is not difficult to see why these incentives resonate for the higher income earners. The predominately smaller contractors in the building and construction industry do not use incorporation or other business structures as devices for income splitting because these are relatively expensive measures.

8.4.12 Master Builders' proposal is based on our strong support of clarity of the legal distinction between an employee and contractor across all laws. The current *Independent Contractors Act, 2006* (Cth) (IC Act) provides a basis upon which contracting arrangements may be distinguished from employment arrangements, thus preserving freedom of contract.

8.4.13 In distinguishing between contractors and employees, it is recommended that the current common law test adopted in the IC Act be modified and codified. Master Builders' proposal is based on a system of statutory registration that would assist the task of distinguishing contractors and employees more clearly.

8.4.14 In this context we note that, as discussed earlier in this submission in the context of sham contracting, the CFMEU has long, wrongly, contended that many bona fide contractual arrangements are artificial and that many subcontractors are, in fact, employees. The contention manifests itself in disruptive tactics against contractors

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

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

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

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

Recommendation 29

In summary Master Builders' recommendations are that:

- **commercial law should categorically govern independent contractors with provisions which regulate their contract via workplace agreements made unlawful;**
- **a voluntary negative licensing registration system should be introduced;**
- **individuals may seek registration as a contractor;**
- **the system could be underpinned by requiring applicants to provide evidence from a legal practitioner or other suitably qualified professional that the circumstances of the worker have been assessed as those of a contractor;**
- **provide registration only in relation to the contractor's circumstances as assessed by the**

[77] (1986) 160 CLR 16

[78] Id at para 9

relevant professional;

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

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

8.5 Other elements of the WR framework – transfer of business

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

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

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

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

8.5.5 Master Builders' concerns arise in relation to the surprisingly tenuous nature of the 'connection' required between the old employer and the new employer. These are indicated at s311(3) to s311(6) of the FW Act and include circumstances where there has been:

- a transfer of assets between the old and new employer (or associated entities of those employers (s311(3));
- outsourcing (s311(4));
- insourcing (s311(5)); or
- the two entities are associated entities (s311(6)).

8.5.6 The operation of these provisions has proven to be complicated, uncertain and highly unsatisfactory. The interaction between the transfer of business rules and complicated rules about accrued 'service' for the purposes of annual leave and redundancy add to the confusion.

8.5.7 The net effect of these rules has seen employees disadvantaged in a variety of ways, not least of which is a general distaste for incoming operators of a business to pick up existing employees. This can have particularly devastating consequences for employees when a business fails.

8.5.8 In addition to these difficulties, it is impossible to estimate how many transfer of businesses have, as a matter of law, occurred. Employment within the building and construction industry is relatively fluid and assets (or the use of assets) transfer between businesses on a regular basis. There have been many examples of potential unintended transfers occurring with businesses unaware that this has occurred, and not even thinking to seek advice as the definition is so unacceptably broad that it does not trigger consideration of the consequences of transactions covered by the definition.

8.5.9 Previous transmission of business rules, based on the actual transfer of a business, must be reinstated.

Recommendation 30 Simpler transfer of business rules be introduced.

8.6 Right of Entry

8.6.1 Union officials can lawfully enter construction sites under both the FW Act[79] and model WHS legislation.[80] Respectively, the FW Act allows for industrial organising or discussions with employees or investigations about employment law breaches, while model WHS legislation allows for safety consultations with workers or investigations about safety breaches.

8.6.2 The most common rights of entry exercised by unions in the construction industry are investigative rights of entry under model WHS legislation, which provide for an extremely broad entry regime. Unlike the FW Act, which requires 24 hours advance written notice prior to entry,[81] other than in Queensland, the model WHS legislation does not require any advance notice prior to investigative entry (and the wide powers entailed).[82] This severely limits an employer's ability to manage any illegitimate disruption. Similarly, unlike the investigative regime under the FW Act (which limits investigations to breaches relating to actual union members) the WHS Act entitles union officials to enter a workplace where any *potential* union member (rather than an actual union member) might perform work.[83] This provides unions with virtually industry-wide rights to enter workplaces, regardless of whether they actually represent employee-members in the workplace concerned.

8.6.3 Once a union official has entered on investigative safety grounds, although they cannot actually order that work cease,[84] their investigative rights necessarily entail a degree of disruption.

[79] FW Act, Part 3-4.

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

[81] FW Act, section 487, 518.

[82] Section 119 of the WHS Act only requires notice to be provided 'as soon as is reasonably practicable *after* entry'.

[83] i.e. under the union's membership rules. WHS Act, section 116, definition of 'relevant worker'; section 117.

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

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

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

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

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

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

[85] Above note 2, pages 1560-1561.

[86] Above note 2, pages 1400, 1431.

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

8.6.7 Rights of entry are significant statutory entitlements held on *trust*, i.e. that the person granted them will exercise them lawfully, for furthering safety. The perception that such trust is being abused for ulterior motives is highly dangerous – it 'trivializes' safety. This has the potential to inspire cynicism in relation to the system of safety regulation and enforcement in general.

8.6.8 While intentional disruption of a workplace by a union official is prohibited under the model WHS legislation, as is acting in an 'improper manner',[89] it is often difficult to prove that a union official's entry under model WHS legislation was industrially motivated, given the complexity of managing safety on construction sites and the fact that the core test of an employer's duty of care under model work health and safety legislation ('reasonably practicable') inherently lends itself to argument.

8.6.9 Master Builders' concern is that Australia's model work health and safety laws provide unions with unduly broad rights of entry, which are prone to abuse for ulterior purposes. Master Builders submits that it is clearly time that union rights of entry under model work health and safety laws were re-examined.

8.6.10 While there are genuine safety issues in the construction industry, it is far from clear that union rights of entry enhance safety, especially given the allegations that they are abused for industrial ends (a 'crying wolf' perception that might in fact trivialize safety). The structure of the model WHS legislation, which enables entry *without notice* onto any construction site where a union might have even a *potential member*,[90] provides the legal framework for the

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

[88] Above note 2, page 1043.

[89] WHS Act, section 146. See also section 500 of the FW Act.

[90] WHS Act, section 116, definition of 'relevant worker'; section 117.

'uncoupling' of unions from their more normal role of member advocacy.

8.6.11 The alleged abuse of safety rights of entry begs the question of whether unions such as the CFMEU should have them at all. Certainly, the existence of investigative rights of entry under safety laws appears to be something of an anomaly in the common law world. Master Builders understands that neither New Zealand nor the United Kingdom provide such rights to unions. Nevertheless, New Zealand has a better overall safety record than Australia, while the United Kingdom lags behind Australia.[91] This suggests that there is no clear correlation between granting investigative rights of entry to union officials and improved safety. Master Builders would support an enhanced role for government in regulating safety in-lieu of union rights of entry. After all, law enforcement is normally a role allocated to government, not interest groups.

8.6.12 Master Builders submits that model work health and safety legislation should be amended to reflect the Queensland model: unions should only be able to enter workplaces to investigate alleged breaches of safety laws where they have provided 24 hours written notice, with an exemption from such notice in emergencies. This mechanism would ensure that employers can manage union official(s)' entry so as to minimise any illegitimate disruption, while still affording unions with a capacity for swift entry in emergencies.

8.6.13 This regime would be proportional: it would afford unions with graduated rights of entry depending on the severity of the issue to be investigated. Just as importantly, it would enable construction industry employers to manage their sites so as to minimise the productivity-diminishing disruption. The ease with which sites can currently be disrupted enables the CFMEU to engage in a range of anti-competitive practices, such as coercion of contractors into pattern enterprise agreements on pain of exclusion from the market, as the findings of the Heydon Royal Commission have amply detailed. The restoration of the rule of law on construction sites via a modest re-working of union rights of entry is significantly 'low

[91] *Key Work Health and Safety Statistics, Australia* (Safe Work Australia, 2014) pg 3, figure 3.

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

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

8.6.14 The Cole Royal Commission found that the proper regulation of entry and inspection rights exercised by unions is a matter of considerable importance in bringing about change to the workplace relations of the building and construction industry. The overwhelming evidence presented to the Cole Royal Commission was that industrial disruption on building and construction sites followed upon union officials entering sites as a result of the exercise or purported exercise of a statutory entitlement. The Cole Report's finding was that industrial disputation was almost always the result of intervention in workplace relations by union officials. Nothing has changed since that time. Intervention is often contrived, uninvited and unwanted by affected employees.

8.6.15 The Cole Royal Commission found that entry and inspection provisions are routinely contravened in the building and construction industry. In order to restore the rule of law in the building and construction industry, entry and inspection provisions must be fundamentally reformed. That fundamental reform has not occurred and the provisions of the FW Act do not assist with the industrial realities faced by employers on a daily basis. Indeed, there is evidence that unions are deliberately seeking to eschew the FW Act's right of entry regime and to obtain "invitations" to enter premises[92]. Right of entry in this context requires root and branch reform.

8.6.16 There are a few immediate matters that should be changed in the FW Act so that union's true representational role and right of entry as a privilege are restored. First Master Builders supports the changes proposed by the Amendment Bill 2014. The elements of

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

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

- repealing amendments made by the Fair Work Amendment Act 2013 that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;

- providing for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers;

- repealing amendments made by the Fair Work Amendment Act 2013 relating to the default location of interviews and discussions and reinstating pre-existing rules; and

- expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

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

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

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

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

9 Name Change Recommended

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

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

10 Conclusion

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

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

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

10.2 In addition, Master Builders has pointed out a range of changes to the FW Act, with 33 recommendations in that regard, that would enhance the objectives on which the current workplace relations system is based and which would bring needed balance to the system.

10.3 Master Builders looks forward to publication of the Productivity Commission's draft report so that further interaction on this vital subject can occur.

****

Attachment A

Master Builders Australia

Submission to the Senate Education and Employment Legislation Committee

on

Fair Work Amendment (Bargaining Processes) Bill 2014

23 January 2015

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CONTENTS

1 Introduction

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

1.2 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

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

2 Purpose of Submission

2.1 On 4 December 2014, the Senate referred the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) to the Senate Education and Employment Legislation Committee (the Committee) for inquiry and report. The closing date for submissions to the Committee's inquiry is 23 January 2015**.** This submission provides Master Builders' perspective on the reforms to be implemented by the Bill.

2.2 In essence, the Bill represents a good start to the process of improving the provisions concerning enterprise bargaining in the *Fair Work Act* 2009 (Cth) (FW Act) and in providing a greater focus on the issue of productivity.

3 The Bill's Origins

3.1 As was indicated in the second reading speech on the Bill by the Leader of the House and Minister for Education, the Hon Christopher Pyne,[1] elements of the Coalition's May 2013 document entitled "The Coalition's Policy to Improve the Fair Work Laws" (Policy Paper) form the policy basis of the Bill.

[1] Hansard, House of Representatives, 27 November 2014, 13421

3.2 In particular, Master Builders notes that at page 32 of the Policy Paper, the following is said:

> *The Coalition will put productivity back on the agenda by making sure it is actively and genuinely considered by workers and business during enterprise bargaining negotiations. Productivity matters because productivity gains allow more jobs to be created, more investment to take place, higher real wage growth to occur, and higher living standards to be achieved. Workplace productivity is the fundamental mechanism by which workers, businesses, families and the economy are all better off.* [2]

3.3 The Bill encapsulates the promise made in this extract. Master Builders endorses the primacy given to productivity.

4 The Fair Work Act and Productivity

4.1 The then Government promised that the new bargaining system to be introduced by the FW Act would enhance productivity. For example, the following is said at paragraphs 178-180 of the Explanatory Memorandum for the Fair Work Bill 2008:

> *This Bill will place collective bargaining at the enterprise level at the heart of the workplace relations system.*
>
> *Enterprise agreements can ensure that increases in pay and entitlements are linked to productivity increases at the enterprise. This is due to negotiations at the level of the enterprise better reflecting the financial situation of the enterprise. Furthermore, collective bargaining will shift the focus of negotiations towards boosting productivity.*
>
> *Collective bargaining under the Bill will be less bound by regulation and red tape and is designed to have a positive impact on labour productivity.*[3]

4.2 Master Builders' experience of the FW Act and its regulation of enterprise bargaining has been that the reality of its application has fallen well short of the ideals expressed in the extract from the Explanatory Memorandum just quoted. Master Builders' policy emphasis is on industrial relations reform that delivers productivity benefits. Industrial relations reform must be a high priority to meet Australia's current and future economic needs. This requires productivity-based reform that includes assessment of the effectiveness of

[2] *The Coalition's Policy to Improve the Fair Work Laws*, May 2013, p32, http://lpaweb-static.s3.amazonaws.com/Policies/FairWork.pdf

[3] *Fair Work Bill 2008 Explanatory Memorandum* http://www5.austlii.edu.au/au/legis/cth/bill_em/fwb2008124/

current labour market policy and regulation as well as reforms that redress the union tactic of targeting the economic vulnerability of contractors in the building and construction industry against unlawful industrial action. In this context, we welcome the recent announcement of the Productivity Commission inquiry to examine the performance of the workplace relations framework and to identify improvements to it.[4]

4.3 During the course of that inquiry, Master Builders will emphasise the defects in the FW Act that prevent the enterprise bargaining system delivering productivity benefits. For present purposes and in the context of the Bill, we note that the extract from the Explanatory Memorandum quoted in paragraph 4.1 indicates that under the FW Act, the circumstances of the individual enterprise may be taken into account in reaching agreement. In the building and construction industry that is not the case in the majority of instances. Pattern bargaining, that is often presented by unions to Master Builders' members on a "sign up or else" basis, remains a major problem for the industry and prevents the very heart of what has been identified as promoting productivity in the FW Act from occurring. The FW Act does not appropriately address the issue of pattern bargaining and the restrictive work practices which proliferate in those pattern agreements.

4.4 Pattern bargaining remains a blight on the building and construction industry, a drag on productivity and detracts from value-for-money in government and private procurement. It is a practice that is sold by the unions as a means to obtain industrial peace. Pattern bargaining leads to poor outcomes for all concerned, particularly in relation to the loss of value-for-money in public works. As the Cole Royal Commission found, the results of pattern bargaining "have been detrimental to both workers and employers, to the industry and to the national economy."[5] Practices which do not permit changes or operations at the workplace to be made in the interests of the enterprise are common in building and construction industry pattern agreements. In addition, a number of the pattern agreements provide monopolistic commercial benefits to unions that entrench their power. Following are examples of the former kind extracted from a CFMEU pattern agreement operating in Queensland (Attachment A):

[4] Australian Government Productivity Commission, Workplace Relations Framework http://www.pc.gov.au/news-and-media/latest/workplace-relations-framework

[5] Final Report of the Royal Commission into the Building and Construction Industry Vol 1 p28

4.4.1 Casual Employment

The CFMU template agreement is restrictive in providing a minimum 8 hours engagement for a casual when compared to the *Building and Construction General On-Site Award 2010* (the Award) minimum 4 hours.

The CFMU template agreement is restrictive in providing a minimum weekly payment for a casual for superannuation and redundancy payments that cannot be pro-rated. Engagement of a casual for one day requires the employer to pay a full week's superannuation.

> *11.5 For the purposes of clarity, the applicable contributions to CBUS/BUSS(Q), BERT, CIPQ and BEWT must be made by employers in respect of casual employees.*

4.4.2 Notice of Termination

The CFMEU template agreement restricts the termination of some employees requiring a minimum of five days' notice (being five times the daily hire one day requirement in the Award) as well as mandated consultation.

> *14.4 In cases where the employer is considering transferring or terminating the services of an elected Union Delegate or a Workplace Health and Safety Representative, a five day mandatory consultation period shall be initiated by the employer prior to any final decision on transfer or termination being made. The affected employee will be immediately advised of the initiation of the consultation period and shall remain on the job during the consultation process. If the employer fails to comply with any of these requirements, the notice period that the employer must give to the affected employee shall be increased to 4 weeks.*

4.4.3 Higher Rates of Pay

The CFMEU template requires that employers pay higher rates on large projects via what is known as a "jump up" clause: [6]

17.4 Jump up Clauses

Where employees are working on a site where a site specific major project agreement is in place and is more favourable to such employees than this agreement, the more favourable entitlement applies.

4.4.4 Productivity Schemes Prohibited

The CFMEU template prohibits productivity schemes without the union's consent.

19.1 Productivity Schemes will be prohibited unless written agreement has been reached with all parties to this Agreement.

4.4.5 Restricted Normal Working Hours

The CFMEU template restricts normal working hours per day and per week without union consent.

24.2 The maximum number of hours worked on site by any employee will be not more than 58 hours per week, which shall be taken to mean no more than 10 hours per day Monday to Friday and 8 hours Saturday. In certain circumstances, hours may be extended to perform works which are critical to the ongoing productivity of other workers on the project or where a critical work task is delayed due to unforeseen circumstances. However, it is agreed that Sunday work and hours in excess of the aforementioned will not be worked unless written agreement is reached between the parties. Whilst such agreement will not be unreasonably withheld, an appropriate consultative process must be implemented prior to agreement being sought.

[6] These clauses are explained by Forsyth et al in *Workplace Relations in the Building and Construction Industry* (LexisNexis 2007) at paragraph 4.10.4 as follows:

In practice, if a site allowance or other terms and conditions of employment at a site upon which a subcontractor is to be engaged are superior to the terms and conditions set out in the subcontractor's agreement, the jump-up clause has the effect of applying the superior terms and conditions to the subcontractor's employees whilst they perform work at that site. Although it is not exclusively the case, the predominant purpose of a jump-up clause arrangement is to secure prevailing site allowances for employees who are not permanently engaged on the site.

4.4.6 Contractor Rates of Pay

The CFMEU template requires that contractors are paid the same rates as employees.

35.2 Use of Contractors

If the employer wishes to engage contractors and their employees to perform work in the classifications covered by this agreement, the employer must first consult in good faith with potentially affected employees and their union. Consultation will occur prior to the engagement of sub-contractors for the construction works. If, after consultation, the employer decides to engage bona fide contractors, these contractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under this agreement performing the same work. The use of sham subcontracting arrangements is a breach of this agreement.

4.4.7 All-In Payments Prohibited

The CFMEU template prohibits 'all-in payments' or piece work rates.

38 All-In Payments (Calculation of Default Rate)

All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and/or allowances and/or conditions, such as annual leave, sick leave, etc.

4.4.8 Multiple Crane Drivers

The CFMEU template requires two drivers for each crane.

28.4.1 The crane crew for each crane must consist of the following:

(i) A crane driver

(ii) A dog man/stand-by driver

(iii) A dog man

4.5 In respect of the sorts of provisions which entrench commercial advantage for the union mentioned in paragraph 4.4 of this submission, the requirement set out in the CFMEU pattern agreement promoted in the Australian Capital Territory requires monies to be placed with a company, ABN 69 009 098 864,[7] which uses a Built-Plus policy relating to income protection. We

[7] ABN for Jardine Lloyd Thompson P/L.

understand that the CFMEU receives a commission for moneys paid in respect of Built-Plus policies: Attachment B is a document which sets out the "promoter" Creative Safety Intiatives (sic) Trust (which we understand is controlled by the CFMEU) receives from 8.89% to 13.34% of all contributions made to Built-Plus. Clause 37 of the ACT pattern agreement dealing with this matter is as follows:

> ***Income Protection Insurance***
>
> *At a cost of no more than $20 per week, per Employee (see Clause 1.7 of this Agreement) the Company will provide the income protection insurance offered by Jardine Lloyd Thompson Pty Limited under its Built-Plus policy, to those Employees who are able to be insured under the terms and conditions of that policy.*
>
> *Income Protection will be paid for all periods of Employees (sic) authorised absence.*
>
> *The cost of BUILT-PLUS policy will not exceed $20 per week per Employee during the nominal term of this Agreement.*
>
> *It is agreed Income Protection Insurance will be paid quarterly.*
>
> *It is agreed that if the Company has not made a valid or current insurance payment the Company shall be liable for any loss of earnings or benefits that would have otherwise been given to the Employee.*

4.6 The FW Act does not contain a requirement that parties must be acting in good faith before accessing industrial action. Instead the threshold is that of "genuinely trying" to reach agreement, discussed in detail below. This means that the applicant must demonstrate "that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side."[8] One of the adverse effects of the requirement that parties not be acting in good faith before accessing industrial action is seen in the prevailing culture in the building and construction industry. This culture is reflective of the fact that unions force parties to sign up to pattern or template agreements or they will suffer the consequences of industrial disruption, both lawful and unlawful ie the 'sign up or else' culture that has been identified by the Cole Royal Commission. Recently this culture has been further exposed in the interim report of the Royal Commission into Trade Union Governance and Corruption.

[8] *Total Marine Services P/L v Maritime Union of Australia* (2009) 189 IR 407 at para 32

The conduct and activities of the CFMEU dominate the interim report. The related case studies in Part 8 of the interim report are said by the Royal Commissioner to raise 'fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU.'[9]

4.7 The FW Act does not contain a requirement that a party must satisfy the Commission that it is not pattern bargaining before applying for a protected action ballot.[10] This omission, combined with the absence of any constraints relating to good faith bargaining, has contributed to the culture of 'sign up or else' agreement making.

4.8 While the FW Act does permit an employer to seek to prevent industrial action from being taken where a party is pattern bargaining, this can only occur once it becomes clear that the action is taking place (typically three days' notice[11]). Importantly, the highly influential *John Holland* case[12] found that a party can still be genuinely trying to reach agreement even if it is pattern bargaining. This decision in its interpretation of the FW Act effectively permits pattern bargaining to be commonplace and is therefore a matter that stifles rather than promotes productivity. It permits unions in the building and construction industry to roll out pattern agreements that not only lock-in practices of the kind referred to in paragraphs 4.4 and 4.5 above but which also entrench its power.

4.9 Ideally, the FW Act should be changed by the Bill so that protected industrial action in pursuit of a pattern agreement is proscribed. This change would not prohibit the pursuit of pattern agreements per se. However, it would mean that protected industrial action to pursue the pattern without an adjustment for

[9] http://www.tradeunionroyalcommission.gov.au/reports/Pages/default.aspx. page 26 Volume 1

[10] See *John Holland Pty Ltd v the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2010) 194 IR 239; [2010] FWAFB 526, at paras 31-41.

[11] Section 414(1) and (2) of the FW Act are as follows:

414(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

414(2) The period of notice must be at least:

(a) 3 working days; or

(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph – that period of notice.

[12] Above note 10

a specific enterprise would not be available. In essence, this change would prevent protected industrial action being available where an un-amended pattern agreement is proffered on a 'sign up or else' basis.

4.10 Whilst some controversy attends whether or not industrial relations affects productivity, there can be little doubt that where it entrenches outmoded work practices and self-serving union-based interests, it damages productivity. As for example isolated by Hancock et al[13]

> *Productivity, in our view, should be regarded as a long-term rather than a short-term policy issue. From that perspective, industrial relations, if relevant, are likely to be so for two main reasons.* ***One is that resistances to change in the areas of production, numbers of workers, technology and work practices are likely to act as a brake on productivity growth.*** *This is generally understood. Disagreements arise with respect to the means of releasing the brake.*[14]

5 The Reforms Made by the Bill

5.1 The Bill provides the first steps towards a re-focus on productivity in the workplace relations system that Master Builders will be communicating to the Productivity Commission.

5.2 The reforms are fully supported and are next discussed in turn.

5.3 Item 1 of Schedule 1

5.3.1 Item 1 of Schedule 1 of the Bill would insert a new subsection in s187 FW Act, that is s187(1A). The Fair Work Commission (Commission) must approve an agreement submitted to it under s185 FW Act if the requirements in sections 186 and 187 are met. In this context, the requirements of s187 are referred to as 'additional requirements' in the terms of s 187(1).

5.3.2 The requirements of proposed s187(1A) are simple. Other than for greenfields agreements, the Commission must be satisfied that improvements to productivity *at the workplace* were discussed during bargaining for the agreement. This is the very essence of

[13] Keith Hancock, Tracy Bai, Joanne Flavel & Anna Lane, *Industrial Relations and Productivity in Australia*, 29 June 2007, National Institute of Labour Studies, Flinders University, Adelaide, South Australia http://www.flinders.edu.au/sabs/nils-files/reports/Productivity.pdf

[14] Id at p34

what was intended to be the basis of the bargaining system that was reflected in the former Government's intentions as expressed in the Explanatory Memorandum for the Fair Work Bill extracted earlier in this submission.

5.3.3 Provisions which add to the impetus to ensure that the enterprise bargaining system requires discussions about improvements to productivity at the workplace level are welcomed. They are essential discussions in the process of releasing the brake on productivity growth imposed by unproductive work practices.

5.3.4 Master Builders notes that the notion of productivity is not defined in the Bill. Usefully, however, the Explanatory Memorandum for the Bill indicates that the phrase has its ordinary meaning (clause 6). As well, clause 7 of the Explanatory Memorandum provides a helpful indication of what are examples of improvements to productivity as follows:

- ***elimination of restrictive or inefficient work practices;***
- *initiatives to provide employees with greater responsibilities or additional skills directly translating to improved outcomes; and*
- *improvements to the design, efficiency and effectiveness of workplace procedures and practices.*

5.3.5 Master Builders supports the emphasis on the elimination of restrictive or inefficient work practices which abound in the building and construction industry: we reiterate that the examples in paragraph 4.4 of this submission are not exhaustive.

5.4 Schedule 1 Items 2-4

5.4.1 These items would make changes to section 443 FW Act. When considering whether to make a protected action ballot order (the FW Act's precursor to the taking of protected industrial action), section 443 requires the Commission to make an order where an application has been made under section 437 FW Act and the Commission is satisfied that each applicant has been and is genuinely trying to reach agreement with the relevant employer: a matter referred to earlier in paragraph 4.6 of this submission.

5.4.2 Item 2 of Schedule 1 makes it clear that the Commission is only able to make a protected action ballot order where the circumstances in section 443(1) prevail. It could not make an order otherwise. Current section 443(2), which now contains the restriction on the Commission just discussed is repealed and replaced with a new s443(2) discussed below at paragraph 5.4.5.

5.4.3 Item 3 of Schedule 1 would insert a new subsection s 443(1A). This subsection would set out the non-exhaustive matters that the Commission must have regard to when considering if an applicant has been and is genuinely trying to reach an agreement. The Commission must also have regard to all relevant circumstances. The Explanatory Memorandum indicates that the principles which comprise the non-exhaustive list are derived from the Commission Full Bench decision in *Total Marine Services P/L v Maritime Union of Australia.*[15] The specific matters that the Commission must take into account are:

- the steps taken by each applicant to try to reach an agreement;
- the extent to which each applicant has communicated its claims in relation to the agreement;
- whether each applicant has provided a considered response to proposals made by the employer; and
- the extent to which bargaining for the agreement has progressed.

5.4.4 The Explanatory Memorandum for the Bill at clause 15 indicates that the addition of these specific matters is intended to provide "for greater transparency in relation to how an applicant for a protected action ballot order demonstrates it has been, and is, genuinely trying to reach an agreement, having regard to all relevant circumstances of bargaining." Master Builders welcomes this additional element of transparency, noting that the requirements are hence moved closer to the notion of good faith in bargaining as mentioned at paragraph 4.6 above. However, as indicated in clause

[15] Above note 8.

18 of the Explanatory Memorandum, the amendment is not intended to affect the meaning of "genuinely trying to reach an agreement" where the phrase occurs elsewhere in the FW Act. Accordingly, the manner in which pattern bargaining has been affected by the confining interpretation given to that phrase within section 412 FW Act, as expressed in the *John Holland* decision discussed above in paragraphs 4.7 and 4.8, will not be altered by the Bill. **Master Builders recommends that the law be reformed so that in section 412 there is a change to give the provision meaning.** That change should require an applicant for a protected action ballot order to show that it is not pattern bargaining by having an obligation to demonstrate a preparedness to negotiate an agreement which takes account of the individual circumstances of the business of the employer (or the relevant part of that business) with whom the applicant is negotiating.[16] This change would reinforce the intention of the framers of the FW Act as expressed in the extract from the Explanatory Memorandum quoted at paragraph 4.1 of this submission as well as reinforcing the intention of the Bill to advance productivity.

5.4.5 Item 4 of Schedule 1 would introduce a new subsection 443(2). This provision sets out the circumstances in which the Commission must make a protected action ballot order. The Commission must not make a protected action ballot order in relation to a proposed enterprise agreement if the Commission is satisfied that the bargaining claims of an applicant:

- are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or
- would have a significantly adverse impact on productivity at the workplace.

5.4.6 The term "manifestly excessive" is not defined. The Explanatory Memorandum for the Bill says:

When considering whether the bargaining claims of an applicant are manifestly excessive, the FWC will retain

[16] Cf s 421(4)(a) *Workplace Relations Act, 1996 (Cth)*

discretion about the matters it takes into consideration. The phrase 'manifestly excessive' is intended to be directed at claims that are evidently or obviously out of range or above and beyond what is necessary, reasonable, proper or capable of being met by the employer, when compared to the conditions at the workplace and the industry in which the employer operates.[17]

5.4.7 Similarly, the criterion concerning the conditions at the workplace is to be broadly applied. The Explanatory Memorandum says:

The requirement for the FWC to assess the claims of an applicant having regard to the conditions at the workplace is intended to be interpreted broadly and encompasses both the terms and conditions of employment at the workplace, and other matters, such as the financial situation of the workplace or the relevant industry, or matters of logistics or operational capacity.[18]

5.4.8 Further,

Whether a claim will have a significant adverse impact on productivity will depend on the characteristics and capabilities of the workplace, which would be established on the facts and circumstances surrounding the protected action ballot application.[19]

5.4.9 Master Builders supports the changes to the FW Act that would be introduced by Item 4 of Schedule 1. The first requirement would discard the remnants of vastly exaggerated ambit claims which were a feature of the industrial relations system before it was largely based on the corporations power. Some level of an ambit claim may, however, be maintained because of the express limitation in the language of the phrase "manifestly excessive".

5.4.10 The second change returns the focus of negotiations to the workplace and enshrines the idea of the need to ensure productivity at the individual workplace as a linchpin of enterprise bargaining. It is also a requirement that partly addresses the problem of pattern bargaining and is welcomed.

[17] Clause 21 Explanatory Memorandum for the *Fair Work Amendment (Bargaining Processes) Bill 2014*

[18] Ibid

[19] Id at para 22

6 Conclusion

6.1 Master Builders fully supports the Bill. Ahead of the 2015 Productivity Commission inquiry into workplace relations, it will introduce changes to the system which will provide greater focus on individual workplace productivity, a matter that was intended to be at the heart of the FW Act.

6.2 Master Builders supports a further, immediate reform as set out in paragraph 5.4.4 of this submission, a reform that would strengthen the terms of s412 FW Act.

****

Attachment A

[redacted]

and

The Construction, Forestry, Mining & Energy, Union, Construction and General Division, Queensland Construction Workers Divisional Branch

and

Construction, Forestry, Mining & Energy Union Construction and General Division, Queensland Builders Labourers Divisional Branch

[redacted]

Union Collective Agreement

ARRANGEMENT

1 TITLE

This Agreement is known as the: [redacted] and CFMEU union collective agreement 2011- - 2015.

2 DATE OF OPERATION

This agreement remains in force until 31 March 2015. The Agreement will continue to apply beyond its expiration date until it is replaced by another agreement with, or which covers, the Construction, Forestry, Mining & Energy Union (CFMEU).Construction and General Division, Queensland Construction Workers Divisional Branch and the Construction, Forestry, Mining & Energy Union Construction and General Division, Queensland Builders' Labourers' Divisional Branch (BLF)

3 APPLICATION OF AGREEMENT

This Agreement applies to [redacted] hereinafter referred to as "the employer", the CFMEU signatory to this Agreement and all employees of the employer engaged in construction work and/or for whom classifications and rates of pay are provided by this agreement. This agreement only applies to:

a) work done in Queensland and work temporarily done outside Queensland by employees who are based in Queensland; and
b) work done in the Northern Territory and work temporarily done outside the Northern Territory by employees who are based in the Northern Territory.

4 PARTIES BOUND AND COVERED

This agreement is legally binding upon and covers the employer, its employees and the Construction, Forestry, Mining & Energy, Union, Construction and General Division, Queensland Construction Workers Divisional Branch (CFMEU) and the Construction, Forestry, Mining & Energy Union Construction and General Division, Queensland Builders' Labourers' Divisional Branch (BLF).

5 RELATIONSHIP TO AWARDS, AGREEMENTS, AND OTHER DOCUMENTS

This agreement is intended to be interpreted in conjunction with the following awards and orders, even if any of them ceases to exist:

- Building and Construction General On –Site Award 2010.
- National Building & Construction Industry Award 2000
- Queensland Industrial Relations Commission Order (No. B585 of 2003) Apprentices' and Trainees' Wages and Conditions (Excluding certain Queensland Government entities) 2003.
- Queensland Industrial Relations Commission Order (No. B1849 of 1997) Supply of tools to apprentices
- Mobile Crane Hiring Award 2010

Where this agreement is silent, the terms of the above awards and orders as amended from time to time apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the above awards and orders, or another term of this agreement, it is agreed that the higher wage outcome or other outcome more favourable to the employee will apply.

6 DEFINITIONS

6.1 "FWA" means Fair Work Australia

6.2 'QIRC' means the Queensland Industrial Relations Commission.

6.3 'All-in payments' are defined as an all inclusive hourly rate, piece work rate, meterage rate or 'contract' rate which is intended to include wages and/or allowances and/or conditions, such as annual leave, sick leave, overtime, etc.

6.4 "Apprentice" or Trainee means an Apprentice or Trainee within the meaning of the Vocational Education, Training and Employment Act 2000 ('VETE Act"). "Apprenticeship" and Traineeship has a corresponding meaning..

6.5 "BERT" is an acronym for the Building Employees Redundancy Trust ACN 82 010 917 281 (BERT Fund) as described in the Trust Deed creating the BERT Fund.

[redacted]

6.6 "BEWT" is an acronym for the Building Employees Welfare Trust. The "BEWT Fund" means the fund established pursuant to a deed between B.E.R.T Pty Limited and James Kristen Peterson. "Trustee of the BEWT Fund" means B.E.R.T Pty Limited or any trustee appointed under the BERT Redundancy Trust Deed.

6.6 "CBUS" is an acronym for the Construction & Building Industry Superannuation Pty Ltd. ABN 75 493 363 262

6.7 "BUSS(Q)" is an acronym for the Building Unions Superannuation Scheme (Queensland) Pty Ltd. ABN 85 571 332 201 (BUSSQ).

6.8 "CIPQ" means Construction Income Protection Queensland Ltd (ACN 110 841 962)

6.9 "Injury" shall have the same definition as the *Workers' Compensation and Rehabilitation Act 2003.*

6.10 "Overtime" means any time worked in excess of or outside of the ordinary working hours.

6.11 "Redundancy" means a situation where an employee ceases to be employed by the employer, other than for reasons of Serious and Wilful misconduct. "Redundant" has a corresponding meaning.

6.12 "Special Class Tradesperson" means a tradesperson who is engaged on work which requires the use of complex, high quality trade skills and experience which are not generally exercised in normal Construction work. For the purpose of this definition, complex and high quality trade skills and experience will be deemed to be acquired by the tradesperson:

a) Having had not less than 12 months on-the-job experience of such skilled work, and

b) Having, by satisfactory completion of a prescribed post trade course, or other approved course, or the achievement of knowledge and competency by other means including the on-the-job experience, as will enable the tradesperson to perform such work unsupervised where necessary and practical, to the required standard of expertise/skill.

6.13 "Union" means the Union set out in clause 4 of this Agreement.

6.14 "Union Delegate" means an employee elected by union members and endorsed by the relevant union to represent the industrial interests of union members employed by the Employer as required. All parties to this agreement shall be notified as soon as practicable after the election of a Union Delegate.

6.15 "Worker" means an employee of the employer.

6.16 "Kept Waiting for wages on pay day" means all such time spent waiting, wherever the waiting is done.

6.17 "AREOs" Authorised Representatives of Employee Organisations under the Workplace Health & Safety Act

7 GRIEVANCE AND DISPUTE SETTLING PROCEDURES

7.1 If a dispute arises about any matter under or in any way related to this agreement, the NES (including subsections 65(5) or 76(4) of the Fair Work Act), or any other work-related matter (including a dispute about whether a workplace right has been breached) the parties to the dispute will attempt to resolve the dispute at the workplace level. Where such discussions do not resolve the dispute the parties will attempt to resolve the dispute by further discussion with more senior levels of management.

7.2 A party may refer the dispute to Fair Work Australia (FWA) to settle the dispute where:

a) the dispute cannot be resolved at the workplace level; or

b) the dispute is not being progressed in a timely manner; or

c) there are aspects of the nature of the dispute which require the dispute to be dealt with urgently; or

d) the employer and the other party in dispute otherwise agree to refer the dispute.

7.3 FWA may deal with the dispute using all the procedures available to it under the Act and may attempt to settle the dispute by conciliation or mediation or, where the parties agree, a recommendation or expression of opinion by FWA. If the dispute remains unresolved, FWA may settle the dispute by arbitration.

7.4 A decision of FWA under this dispute resolution procedure will bind the parties.

7.5 Notwithstanding clause 4, either party may exercise a right of appeal against the decision to a Full Bench.

7.6 Parties to a dispute may appoint a person or organisation of their choosing to represent them in the dispute settlement process. In the absence of any express appointment to the contrary, union members shall be represented by their union at all stages of the dispute settlement process. The company agrees to engage with the union in good faith for the purposes of dispute resolution including by allowing the relevant union official to enter the workplace to assist with representing employees to deal with a dispute under the terms of this dispute resolution procedure.

The employer agrees to engage with the union in good faith for the purposes of dispute resolution including by allowing the employees access to a relevant union official in the workplace to assist with representing employees dealing with a dispute under the terms of this dispute resolution procedure.

8 PROCEDURE FOR DEALING WITH SAFETY ISSUES OR INCIDENTS

8.1 The employer will in addition to ensuring compliance with Australian Standards, implement the best achievable level of health and safety. Particular emphasis will be placed on the establishment of consultative mechanisms which will include:

- The election of Workplace Health and Safety Representatives who will represent employees in health and safety matters;
- an occupational health and safety committee

The resolution of the relevant issue must take into account any of the following factors that may be relevant:

- whether the hazard or risk can be isolated;
- the number and location of Employees affected by it;
- whether appropriate temporary measures are possible or desirable;
- whether environmental monitoring is desirable;
- the time that may elapse before the hazard or risk is permanently corrected;
- who is responsible for performing and overseeing the removal of the hazard or risk.

As soon possible after the resolution of an issue, details of the agreement must be brought to the attention of affected employees in an appropriate manner.

AREOs are not required to provide any information or particulars of any suspected contravention of safety law prior to conducting inspections or discussions on site.

Employees are not required to work in circumstances where the employee or a relevant AREO reasonably believes a safety law is being, or will be, contravened.

9 TOOL BOX MEETINGS

9.1 A tool box meeting will be held per site each month to facilitate and foster communication and consultation. Items to be discussed at each meeting may include: programming of site work, site issues, Workplace Health and Safety, job design, productivity issues, management policies, agreement compliance, wages and conditions, compliance with statutory obligations, any other relevant issue raised. Notice of the meeting will be given at least a week prior to the scheduled date.

10 CONTRACT OF EMPLOYMENT

10.1 At the point of engagement of each employee, the employer must inform the person in writing whether the engagement is on a permanent or casual basis, stating by whom the employee is employed, the job performed, the classification level, and the relevant rate of pay. Each new employee shall upon commencement also be provided with a copy of this agreement upon request.

10.2 The employer may direct an employee to carry out such duties as are reasonably within the limits of the employee's skill, competence and training consistent with the employee's classification provided that such duties are not designed to promote deskilling.

10.3 If an employee is absent from work for a period for which they have or will claim worker's compensation, the employee's contract of employment shall remain intact during the period of absence. The employer shall continue to make contributions (and where applicable, reports of service) on behalf of the employee to CBUS/BUSS (Q), BERT, BEWT, CIPQ and QLeave/NTBuild. The employee shall also continue to accrue all appropriate leave entitlements for the first twelve months of the employee's absence due to the Workers Compensation claim.

11 CASUAL EMPLOYMENT

11.1 A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Agreement except annual leave, personal leave, and payment for public holidays on which no work is performed. Provided further that a casual employee is entitled to unpaid bereavement and carer's leave.

11.2 Except on Saturdays and Sundays, on each occasion a casual employee is required to attend work, the employee shall be entitled to payment for a minimum of eight (8) hours work (with 0.8 of an hour on each of these days accruing toward an RDO). On Saturdays and Sundays, a casual employee is entitled to payment for a minimum of four (4) hours (with 0.8 of an hour on each of these days accruing toward an RDO), plus the relevant fares and travel allowance prescribed by clause 18.1.

11.3 A casual employee for working ordinary time shall be paid 125% of the hourly rate prescribed in Appendix 1 for the employee's classification.

11.4 A casual employee required to work overtime or weekend work shall be entitled to the relevant penalty rates prescribed in this Agreement:

a) where the relevant penalty rate is time and a half, the employee shall be paid 175% of the hourly rate prescribed by clause 18 for the employee's classification and;

b) where the relevant penalty rate is double time, the employee shall be paid 225% of the hourly rate prescribed by clause 18 for the employee's classification.

11.5 For the purposes of clarity, the applicable contributions to CBUS/BUSS (Q), BERT, CIPQ and BEWT must be made by employers in respect of casual employees. A casual employee shall also be entitled to receive penalty payments for overtime, work performed on weekends and work performed on public holidays.

11.6 Termination of all casual engagements shall require one hours notice on either side or the payment or forfeiture of one hour's pay, as the case may be. This clause will not reduce the entitlements of injured employees.

12 APPRENTICES / TRAINEES

12.1 Apprentices / Trainees shall be entitled to all of the applicable rates and conditions of employment prescribed by this Agreement.

12.2 Training arrangements for Apprentices / Trainees shall be as provided in the former orders of the Queensland Industrial Relations Commission.

12.3 Apprentices / Trainees shall be entitled to be paid the daily fares and travel allowance whilst attending training.

12.4 The employer shall be responsible for meeting all costs associated with Apprenticeship / Traineeship training, including any student registration, tuition fee or other course costs.

13 JOB SECURITY

13.1 The parties to this agreement will develop a policy to maximise the continuity of employment for permanent employees and to ensure that permanent employment opportunities are not eliminated or eroded.

14 TERMINATION

14.1 The employer shall provide to each terminated employee a written statement specifying the period of employment and the classification or type of work performed by the employee.

14.2 The employer shall pay each terminated employee all accrued entitlements and other wages owing within two business days of termination or the employee shall be entitled to claim payment for all time spent waiting for the wages up to a maximum of 8 hours pay per day (including Saturday and Sunday). This claim shall be regardless of whether or not the employee remains on the job).

14.3 The employer shall pay each dismissed employee for any public holiday that occurs in the period of annual leave that would have been payable had the employee commenced annual leave on the date of termination. Where the employee's leave balance would not include public holidays occurring within the 10 working days (excluding weekends) following termination, the employee shall receive payment for these days.

14.4 In cases where the employer is considering transferring or terminating the services of an elected Union Delegate or a Workplace Health and Safety Representative, a five day mandatory consultation period shall be

initiated by the employer prior to any final decision on transfer or termination being made. The affected employee will be immediately advised of the initiation of the consultation period and shall remain on the job during the consultation process. If the employer fails to comply with any of these requirements, the notice period that the employer must give to the affected employee shall be increased to 4 weeks.

15 REDUNDANCY

15.1 The employer will utilise the Building Employees Redundancy Trust (BERT) to meet all of the liabilities for redundancy payments and further to ensure that an amount equal to the credit balance of the employee's account in the BERT Fund is paid to the employee when the employee is entitled to that payment as described in the Trust Deed creating the BERT Fund.

15.2 The employer will contribute on behalf of each employee the following minimum weekly amount:

- $75.00 per employee effective first pay period January 2011
- $79.00 per employee effective first pay period January 2012
- $83.00 per employee effective first pay period January 2013
- $90.00 per employee effective first pay period January 2014
- $95.00 per employee effective first pay period January 2015

At the same time contributions are made to the BERT Fund, the employer must pay to the Trustee of the Building Employees Welfare Trust (BEWT) an amount equal to the following:

- $6.82 per employee effective first pay period effective January 2011
- $10.20 per employee effective first pay period effective January 2012
- $11.00 per employee effective first pay period effective January 2013
- $11.90 per employee effective first pay period effective January 2014
- $12.45 per employee effective first pay period effective January 2015

Apprentice contributions shall be calculated using the following percentage of the trade rate.

1st Stage	2nd Stage	3rd Stage	4th Stage
45%	55%	75%	90%

15.3 Contributions will continue to be paid on behalf of an employee during any absence on paid leave such as annual leave, long service leave (including leave paid for by Q-Leave or NTBuild), public holidays, sick leave and bereavement leave. The employer shall also be required to make contributions while an employee is absent from work and is claiming Workers Compensation for a maximum period of 12 months.

15.4 Where the employee's balance in the BERT Fund reaches $12000.00 or an amount that equals 10 weeks wages, the employee will have the option to continue to have contributions paid into BERT or redirected to CBUS/BUSS (Q). It is the employee's option only. Where an employee exercises (or has exercised) this option, his or her redundancy entitlement will be deemed met for all current and future entitlements arising from the current employment engagement.

15.5 Contributions to BERT must be made, at the minimum, on a monthly basis. Details of the employer's contribution for each month including when contribution was made and for how much, are to be shown on the employee's wage statement by the end of the second week of each subsequent month.

16 CLASSIFICATIONS

16.1 The classification levels for employees engaged under this agreement shall be read in accordance with clauses 5.1 & 5.2 of the Building Construction Industry Award State 2003, and the Mobile Crane Hiring Award 2010, unless specifically amended by the terms of this agreement. Classification levels, relativities, pay rates and other details are contained in Appendix 1, 1A, & 1B.

16.2 *Workplace Health and Safety Representative*

Where the employer employees elect a Safety Representative, he/she will be paid 5% more than his/her classification. This allowance is payable providing the Safety Representative gives an undertaking to receive accredited Safety Representative training as provided in this agreement. The payment shall be made for all purposes.

16.3 *Marker/Setter Out*

An employee performing the work of a marker/setter out (as defined) shall be paid 5% in addition to their existing classification. The payment shall be made for all purposes.

17 WAGES

17.1 Employees must be paid wages in accordance with Appendix 1 from the first full pay period after the dates specified. Those rates include the following increases:

2.5% from the 1st July 2011 plus;
2.5% from the 1st January 2012 plus;
5% from the 1st July 2012 plus;
5% from the 1st July 2013 plus;
5% from the 1st July 2014 plus;
5% from the 1st July 2015.

17.2 The wage rates detailed in Appendix 1 of this agreement are structured as follows:

The wage rates detailed in Appendix 1 also include the weekly hand tool allowance (where relevant).

The ordinary time hourly rate for all purposes shall be calculated by dividing the appropriate weekly rate by 36.

The wage rates for classifications CW 5 and above detailed in Appendix 1 do not contain the weekly hand tool allowance. Where this allowance is applicable, it must be paid in addition to the rates contained in Appendix 1.

17.3 Wages for apprentices shall be calculated by applying a fixed percentage to the rates of specific trades as provided by the applicable Award or Order. Provided however that the trade rate shall not include the hand tool or power tool allowances for the purpose of this calculation.

17.4 *Jump up*

Where employees are working on a site where a site specific major project agreement is in place and is more favourable to such employees than this agreement, the more favourable entitlement applies.

18 ALLOWANCES

In addition to the wage rates prescribed in this Agreement, employees shall be paid additional allowances as provided for by the Building Construction Industry Award -State. The rates for the various allowances shall be as provided for below and/or in Appendix 2 of this agreement.

The rates for all allowances shall be payable from the commencement of the first pay period after the dates specified.

18.1 *Fares and Travel Allowance*

All employees shall be entitled to receive the fares and travel allowance in accordance with clause 8.1 of the Building Construction Industry Award – State 2003. The rates to be paid shall be as follows:

a) *Daily Entitlement*

1/01/2011	1/01/2012	1/01/2013	1/01/2014	01/01/2015
$37.00	$39.00	$41.00	$43.00	$45.00

b) Apprentices shall receive the following percentage of the amount detailed above:

1st Stage	2nd Stage	3rd Stage	4th Stage
75%	85%	90%	95%

18.2 *Leading Hand*

A leading hand is an employee who is given by the employer, or the employer's agent, the responsibility of directing and/or supervising the work of one or more other persons. A person specifically appointed to be a leading hand, or a Workplace Health and Safety Officer or an Employee Representative will be paid the leading hand allowance appropriate for the number of persons in the employee's charge. Additionally, a leading hand

will be paid at the hourly rate of the highest classification supervised or the employee's own hourly rate, whichever is the highest.

18.3 *Living Away from Home Allowance*

Where an employee is engaged on distant work, the provision of reasonable board and lodgings will be supplied by the employer, at no cost to the employee.

Reasonable board and lodging means, a minimum of three adequate meals per day, and a single room (not shared) which is quiet with air conditioning/heating, suitable ventilation, comfortable and clean bedding, appropriate lighting and furnishings an ensuite with a toilet, shower and basin, both with running hot and cold water, a television and tea and coffee making facilities. All facilities must be clean and fully functioning.

18.4 *Power Tools*

Where an employee is specifically required to supply their own power tools (maximum of three commercial quality power tools plus a lead) by the employer, the employer will be responsible for all consumables and tagging and will replace all stolen tools if in an employer lock up. Where the employer requires the employee to lend a power tool to another employee, the employer is deemed to have taken ownership of the tool and will replace the tool with a new tool of the same brand and model or an agreed alternative. The employer will pay the rate per hour: as detailed in Appendix 2 of this agreement.

18.5 *Site Allowance*

A Site Allowance as detailed below will be paid as a flat amount for each hour worked and will remain unaltered for the duration of each project. At the commencement of any new project by the employer the employer will inform the relevant employees of the value of the project. Where there is a dispute with the value of the project, the Q-Leave declaration of the "total cost of work" will apply.

Value of project	Site allowance
$5-$15m	$1.50
$15-$50m	$2.00
$50-$100m	$2.50
$100-$200m	$3.50
$200-$300m	$4.50
$300-$400m	$5.00
$400-$500m	$5.50
$500m-$600m	$6.00
$600-$700M	$7.00
>$700m	$8.00

19 PRODUCTIVITY SCHEMES

19.1 Productivity Schemes will be prohibited unless written agreement has been reached with all parties to this Agreement.

19.2 An employee may, only by written agreement signed by the employee and the employer, be paid an all-in rate.

19.3 Where an all in hourly rate is paid, the minimum rate shall be no less than the sum of the appropriate hourly wage rate, the applicable Site Allowance, one eighth of the daily travel allowance and an additional 75% loading.

19.4 The resulting hourly rate shall be multiplied by the number of hours worked to determine the total wage figure.

19.5 All Employees, including those receiving an all-in rate, shall at all times be entitled to the benefit of employer contributions to CBUS/BUSS (Q), BERT, CIPQ and BEWT. No agreement may be made to cash out or make payment in lieu of these entitlements.

20 WAGE PAYMENT DETAILS

Particulars of details of payment to each employee must be included on the envelope including the payment or in a statement handed to the employee at the time payment is made and will contain the following information:

- Name of employing employer
- Name of employee
- Employee's classification
- Date of payment and period covered by wage statement
- Details of the number of ordinary hours worked
- Details of the number of overtime hours worked
- The ordinary hourly rate and the amount paid at that rate
- The overtime hourly rates and the amounts paid at those rates
- The gross wages paid
- The net wages paid
- Details of any deductions made from the wages
- Details of all accrued entitlements such as RDO's, personal leave, annual leave, etc
- Details of the employer CBUS/BUSS (Q) contribution, including when contribution was made and the amount Details of the employee CBUS/BUSS (Q) contribution, including when contribution was made and the amount
- Details of the employer BERT contribution, including when contribution was made and the amount
- Details of the employer CIPQ payment, including when contribution was made and the amount
- Details of the employees BEWT payment, including when contribution was made and the amount

21 SUPERANNUATION

21.1 All employees who are eligible members of the CFMEU, Construction and General Division, Queensland Construction Workers Divisional Branch shall be entitled to receive employer superannuation contributions and shall also co-contribute a minimum amount from their wages to CBUS (or where the employee so nominates, BUSS(Q)). CBUS shall be the default fund in the absence of a nominated Approved Superannuation Fund by the employee.

All employees who are eligible members of the CFMEU, Construction and General Division, Queensland Builders Labourers Divisional Branch shall be entitled to receive employer superannuation contributions and shall also co-contribute a minimum amount from their wages to BUSS(Q) (or where the employee so nominates, CBUS). BUSS(Q) shall be the default fund in the absence of a nominated Approved Superannuation Find by the employee.

21.2 The employer will contribute on behalf of each employee the following minimum weekly amount:

$166.00 per week effective first full pay period	January 2011
$174.00 per week effective first full pay period	January 2012
$182.00 per week effective first full pay period	January 2013
$191.00 per week effective first full pay period	January 2014
$200.00 per week effective first full pay period	January 2015

21.3 Every employee shall co-contribute by way of salary sacrifice the following minimum weekly amount:

$42.00 per week effective	1st January 2011
$45.00 per week effective	1st January 2012
$47.00 per week effective	1st January 2013
$49.00 per week effective	1st January 2014
$52.00 per week effective	1st January 2015

21.4 The contributions in 21.2 and 21.3 shall be in addition to all other entitlements prescribed by this agreement.

21.5 a) Contributions for apprentices shall be calculated at the following rates:

i) 9% of ordinary time earnings prior to 1 January 2013;
ii) 10% of ordinary time earnings from 1 January 2013 until 31 December 2013;
iii) 11% of ordinary time earnings from 1 January 2014 until 31 December 2014;
iv) 12% of ordinary time earnings from 1 January 2015.

b) Apprentices shall co-contribute by the way of salary sacrifice 3% of ordinary time earnings.

21.6 The employer will, on behalf of the employee, forward the above amounts directly to each employee's superannuation account at least once each calendar month.

21.7 Contributions will continue to be paid on behalf of an employee during any absence on paid leave such as annual leave, long service leave (including leave paid for by Q-Leave or NTBuild), public holidays, sick leave and bereavement leave. The employer shall also be required to make contributions while an employee is absent from work and is claiming Workers Compensation for a maximum period of 12 months.

21.8 Should it be established that the employer has failed to make payments as required; the employer shall be liable to make the appropriate contributions immediately upon being notified of the non-compliance. Further, the employer shall pay an additional 10% per annum (calculated on a pro-rata basis) to offset the interest that the contributions would have attracted in the relevant fund had they been paid on the due dates. The requirement for the employer to make retrospective payments shall not limit any common law action which may be available in relation to death, disablement or any similar cover existing within the terms of a relevant fund.

22 SALARY SACRIFICE ARRANGEMENTS

Employees covered by this Agreement will have access to salary sacrifice arrangements in addition to the compulsory arrangement detailed above. The requirements of any such arrangements shall ensure that:

a) Accessing a salary sacrifice arrangement is a voluntary decision to be made by the individual employee.

b) The employee wishing to enter into a salary sacrifice arrangement will be required to notify his/her employer in writing of the intention to do so and have sought expert advice in relation to entering into such an arrangement.

c) The employer shall meet the cost of implementing the administrative and payroll arrangements necessary for the introduction of salary sacrifice to the employees under the agreement.

d) The co-contribution of superannuation payments referred to herein shall be made by way of salary sacrifice arrangements.

23 INCOME PROTECTION AND PORTABLE UNUSED SICK LEAVE

23.1 The Employer will contribute the following amounts (including GST) per week to CIPQ in respect of each of its employees for, or on account of, the premium insuring income protection for each of those employees and CIPQ's costs:

a) from 1 July 2011 - $18.00;
b) from 1 July 2012 - $18.50;
c) from 1 July 2013 - $19.00;
d) from 1 July 2014 - $19.50;

23.2 If CIPQ decides that a higher weekly rate per employee must be paid or provided, the employer must pay that higher rate as and from the date CIPQ determines. Payment at the rate specified under this clause 23.2 from the date determined by CIPQ will satisfy the employer's obligations under 23.1

23.3 If an employer does not contribute to CIPQ an amount required under clause 23.1 in respect of each and every employee, the employer will pay an additional $1500 per week on top of what CIPQ policy and costs (ie medical expenses, claims management and rehabilitation expenses) are for a period of three years.

24 HOURS OF WORK

24.1 Except as provided elsewhere in this agreement, the ordinary working hours will be 36 per week (7.2 hours per day) worked between 6.00 a.m. and 6.00 p.m. Monday to Friday.

24.2 The maximum number of hours worked on site by any employee will be not more than 58 hours per week, which shall be taken to mean no more than 10 hours per day Monday to Friday and 8 hours Saturday. In certain circumstances, hours may be extended to perform works which are critical to the ongoing productivity of other workers on the project or where a critical work task is delayed due to unforeseen circumstances. However, it is agreed that Sunday work and hours in excess of the aforementioned will not be worked unless **written** agreement is reached between the parties. Whilst such agreement will not be unreasonably withheld, an appropriate consultative process must be implemented prior to agreement being sought.

24.3 If an employer is found to have breached the previous sub clause on more than 2 instances in any 28 day period, each employee required to work in excess of the maximum hours shall be paid double time for all hours worked on that day.

25 ROSTERED DAYS OFF

25.1 Ordinary working hours will be scheduled in a 10 day cycle, Monday to Friday inclusive, with 8 ordinary working hours worked for each of 9 days and with 0.8 of an hour on each of those days accruing toward the tenth day, which will be known as the rostered day off.

25.2 The maximum number of hours worked on site by any employee will be not more than 58 hours per week, which shall be taken to mean no more than 10 hours per day Monday to Friday and 8 hours Saturday. In certain circumstances, hours may be extended to perform works which are critical to the ongoing productivity of other workers on the project or where a critical work task is delayed due to unforeseen circumstances. However, it is agreed that Sunday work and hours in excess of the aforementioned will not be worked unless **written** agreement is reached between the parties. Whilst such agreement will not be unreasonably withheld, an appropriate consultative process must be implemented prior to agreement being sought.

25.3 Payment for rostered days off will include an entitlement to the daily fares and travel allowance.

25.4 Each day of paid leave taken and any public holiday occurring during any cycle will be regarded as a day worked for accrual purposes.

25.5 An employee who has not worked a complete cycle will receive *pro rata* accrued entitlements payable for the rostered day off.

25.6 Where an employer wants an employee or a number of employees to work on an RDO, the following process shall be followed:

a) The employer must consult with the worker at least 1 week prior to the scheduled RDO which is proposed to be worked;

b) Only those employees who agree to work will be required to work on the scheduled RDO;

c) The employer will notify the Unions who are party to this Agreement it proposes to vary the RDO – such notice shall be in writing and be issued as soon as is practicable but no later than five (5) days prior to the scheduled RDO.

In circumstances where the work to be performed is directly related to safety, and this has been affirmed by the site safety committee, the above approval process shall not apply.

25.7 No employee shall be pressured to work on a Rostered Day Off. The decision to work on a Rostered Day Off shall remain entirely at the employee's discretion.

25.8 Where the above process has not been followed, all work performed on the Rostered Day Off shall be paid for at Saturday rates of pay. All other entitlements relating to Saturday work shall also apply.

25.9 Where an Employee has insufficient accruals for an RDO, the Employer may offset any deficiency from the Employees annual leave entitlement.

25.10 Up to five (5) RDOs, other than those nominated in the Easter period may be accrued under normal industry flexibilities. Accrued RDOs will be taken in the calendar year they were due or be reconciled in the last pay period of the calendar year provided sufficient RDO hours are retained to cover the scheduled RDOs for January of the following year. Ordinary time rates of pay apply to accrued RDOs.

25.11 Where these flexible RDOs are not taken by the 31st May in the following year they shall attract a 17.5% loading similar to annual leave.

25.12 Additional RDOs may be substituted for an alternative date with no penalty rates applying provided the aforementioned process is followed. The alternative RDO will be taken not later than when the next scheduled RDO in the Calendar is due.

26 LEAVE

26.1 Permanent employees shall be entitled to paid personal leave when they are absent from work due to:

[redacted]

- personal illness or injury (sick leave); or
- for the purposes of caring for partners, children and/or other household or family members who are sick or in a personal emergency and require the employee's care and support (carer's leave); or
- bereavement on the death of a family or household member or close family relative (bereavement leave).

[redacted]

26.2 Personal leave shall accrue as follows:

- Three days in the first month and then one additional day at the beginning of each of the next nine calendar months will be available in the first year of employment;
- Twelve days at the beginning of the employees second and each subsequent year will commence on the anniversary of engagement.
- All unused personal leave is cumulative.

26.3 Parental Leave will be in accordance with the *Fair Work Act*.

26.4 All employees covered by this Agreement are entitled to long service leave on full pay under, subject to, and in accordance with, relevant legislation. Section 43 subsection (4) of the Queensland Industrial Relations Act 1999 does not apply to employees covered by this agreement.

26.5 Employees may take unpaid leave. Such leave will be subject to the employer's approval except for up to 5 days per year of unpaid leave, which may be taken by notice given at or before the commencement of such leave. Unpaid leave can be taken for less than a day.

26.6 An employee's entitlement to annual leave will be consistent with the National Employment Standards contained in the Fair Work Act 2009.

The employer will not unreasonably refuse a request for annual leave by an employee.

Annual leave will be paid for at the normal rate of pay that the employee was on immediately prior to taking the leave, plus a loading of 17.5%.

At the termination of employment, the employee will be paid out all outstanding annual leave entitlements, including the 17.5% loading. As per the National Employment Standards, the annual leave will be paid out as if the employee were taking leave, commencing from the end of the termination notice period. As such, any public holidays occurring during the period for which the annual leave entitlement applies, will be paid for in addition to the annual leave entitlement.

27 TRAINING AND RELATED MATTERS

27.1 Where possible training and skill development is to be carried out in normal working hours. It is agreed that no employees will suffer loss of pay as a result of participating in training required by the employer.

27.2 Any employees elected as a workplace health and safety representative will undertake a training course approved by the relevant State or Territory Government and provided by the employer within six weeks of being elected, at no cost to the employee.

27.3 The employer will implement a policy where all employees will have their current skills assessed against those required in the nationally recognised formal training package relevant to their work. Where any skill deficiencies are identified through the assessment process, the necessary training will be provided to attain the relevant nationally recognised formal qualification.

28 OCCUPATIONAL HEALTH AND SAFETY MATTERS, EQUIPMENT, TOOLS AND AMENITIES

28.1 The following clothing will be supplied to all employees (after 1 month of commencement) and will be replaced on a fair wear and tear basis. Employees when working on site are required to wear all footwear and clothing supplied. The issue will be:

- 1 pair of safety boots (if the employee buys such boots, the employer will reimburse the employee up to $100.00 upon producing of a purchase receipt.
- 5 sets of shirts and shorts/trousers, overalls or bib and brace overalls; or any combination as agreed.
- 1 high visibility winter jacket.

All of the above mentioned items will be replaced on a fair wear and tear basis. Where an employee has not sought replacement of any of the above mentioned items on a fair wear and tear basis within twelve months from the date of issue, then that employee will be entitled to a re-issue of the items at the completion of that twelve months.

All items will comply with the relevant Australian Standards. The clothing selected will need to be breathable, be light weight, UV stable, have a high visibility quality, and have the maximum UPF rating.
No agreement to pay cash in lieu of supply of clothing/footwear is permitted.

When the employer requires an employee to wear spectacles with toughened glass lenses the employer will pay the cost of the toughening process.

28.2 The employer's Fatigue and Impairment Policy is contained in Appendix 4. The employer shall not implement any regime for testing drug or alcohol consumption by employees until an appropriate policy for such testing has been developed and agreed by the parties to this agreement.

28.4 Stand-By Drivers and Crane Crews

28.4.1 The crane crew for each crane must consist of the following:

(i) A crane driver
(ii) A dogman/stand-by driver
(iii) A dogman

28.4.2 Notwithstanding the above, any site with more than one crane crew shall provide a stand-by driver in accordance with the following scale:

2 cranes – 1 stand-by driver
3 cranes – 2 stand-by driver
4 cranes – 3 stand-by driver
5 cranes – 4 stand-by driver
6 cranes or more to be negotiated

28.4.3 For short term absences by a driver or dogman/stand-by driver of 3 days or less, a replacement driver or dogman/stand-by driver will not be required. The dogman/ Stand-by driver will be paid at the same rate as the driver for all hours worked.

29 TIME AND WAGES RECORDS

All Time and Wages records will contain at minimum the following details:

- The employer name
- The employees name
- The employees date of birth
- the date when the employee became a employee of the company
- if appropriate, the date when the employee ceased employment with the company
- The employees classification
- The employees ordinary rate of pay
- The employees tax file number
- The employees CBUS/BUSS (Q) number
- The employees BERT number
- The employees QLeave number
- The employees CIPQ number
- Daily details of work including
  - Daily start time and finish time
  - Time lunch and crib breaks taken
  - Total ordinary hours worked and resulting wage
  - Total time and a half hours worked and resulting wage
  - Total double time hours worked and resulting wage
- Details of allowances paid
- Details and payment for RDO's, Personal and annual leave, public holidays
- Details of deductions
- Details of additions
- Total gross allowances paid per week and year to date
- Total gross wages paid per week and year to date
- Tax deducted from wages per week and year to date
- Net wages per week and year to date
- RDO's, sick and annual leave accrued per week and year to date
- CBUS/BUSS (Q), BERT, BEWT, and CIPQ paid per week and year to date

30 UNION DELEGATES' RIGHTS

30.1 A union delegate shall have the right to:

a) be treated fairly and to perform their role as union delegate without any discrimination in their employment;

b) formal recognition by the employer that endorsed union delegates speak on behalf of union members in the workplace;

c) bargain collectively on behalf of those they represent;

d) consultation, and access to reasonable information about the workplace and the business;

e) paid time off work to represent the interests of members to the employer and industrial tribunals;

f) reasonable paid time during normal working hours to consult with union members;

g) reasonable paid time off to participate in the operation of the union;

h) reasonable paid time off to attend accredited union education;

i) address new employees about the benefits of union membership at the time that they enter employment;

j) reasonable access to stationery and other administrative facilities including telephone, facsimile, photocopying, internet and e-mail facilities, a filing cabinet, a table and chairs, air-conditioning/heating and a private lockable area for the purpose of carrying out work as a delegate and consulting with workplace colleagues and the union;

k) place union information on a noticeboard in a prominent location in the workplace;

l) take reasonable leave to work with the union.

31 UNION TRAINING LEAVE

31.1 An employee appointed or elected as Union Delegate shall, upon application in writing to the employer, be granted up to five days paid leave each calendar year to attend relevant Union Delegate courses. Such courses shall be designed and structured with the objective of promoting good industrial relations within the building and construction industry.

Consultation may take place between the parties in the furtherance of this objective.

31.2 The application for leave shall be given to the employer in advance of the date of commencement of the course. The application for leave shall contain the following details:

a) The name of the employee seeking the leave;

b) The period of time for which the leave is sought (including course dates and the daily commencing and finishing times); and

c) A general description of the content and structure of the course and the location where the course is to be conducted.

31.3 The Employer shall advise the employee within seven clear working days (Monday to Friday) of receiving the application as to whether or not the application for leave has been approved.

31.4 The time of taking leave shall be arranged so as to minimize any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave when an eligible employee is otherwise entitled.

31.5 The employer shall not be liable for any additional expenses associated with an *employee*'s attendance at a course other than the payment of ordinary time earnings for such absence. For the purpose of this clause ordinary time earnings shall be defined as the relevant agreement classification rate including, shift work loadings where relevant plus Site Allowance where applicable.

31.6 Leave rights granted in accordance with this clause will not result in additional payment for alternative time off to the extent that the course attended coincides with an employee's RDO or with any concessional leave.

31.7 An employee on request by the Employer shall provide proof of their attendance at any course within 7 days. If an employee fails to provide such proof, the employer may deduct any amount already paid for attendance from the next week's pay or from any other moneys due to the employee.

31.8 Where an employee is sick during a period when leave pursuant to this clause has been granted proof of attendance at the course is not required for that period and the employee shall receive payment if entitled under the provisions of the relevant award clause.

31.9 Leave of absence granted pursuant to this clause shall count as service for all purposes of this Agreement.

32 UNION RIGHTS PROMOTING REPRESENTATION OF MEMBERS

32.1 The employer shall establish policies and procedures so that all reasonable steps are taken to encourage employees, to become financial members of the relevant branch of the Union, subject to relevant legislation.

32.2 Any employer representative who discourages an employee from becoming a financial member of the aforementioned unions breaches both the intent of this agreement and the Act.

32.3 The employer must invite the Union to attend every employer induction for new employees and to address employees.

32.4 A standing invitation exists for any representative of the Union covered by this agreement to enter any place where employer employees or representatives are for purposes including, but not limited to, dispute resolution or consultation meetings but not for purposes for which a Right of Entry exists under Part 3-4 of the Fair Work Act.

32.5 The employer will allow the Union to promote membership of the Union.

32.6 Where practicable, the employer will provide a Union noticeboard at every workplace. The display of material upon the Union noticeboard will be under the control of the Union.

32.7 The employer will provide any information to the Union about employees that the Union requires.

32.8 The employer will provide information about the Union to an employee that the Union requires.

32.9 The Union may hold meetings of no more than two hours paid time with the employees on a site. The Union must give at least 48 hours notice of such meetings to the project manager. The frequency of these meetings shall be reasonable.

32.10 Upon request by the employee (s), the employer will deduct Union dues from an employee's weekly wages and remit such amount to the Union by EFT within 2 days of the deduction.

33 CONSULTATION

33.1 Where the employer is seriously considering, and prior to the taking of any definite decision on, the introduction of major workplace changes that are likely to have a significant effect on employees, the employer must notify and consult with the employees and their union/s or other representative/s.

33.2 The employer must recognise the union (or other representative) and consult in good faith in relation to such proposed changes, including by allowing employees access to a relevant union official in the workplace to assist employees in the consultations relating to the proposed workplace changes.

The obligation to notify and consult includes providing all relevant details to the employees and their union/representative in writing about:

a) the nature of the changes, any proposed timing of the changes and the expected likely effect on employees; and
b) any measures the employer is proposing to take to avert or mitigate any adverse effects of such changes on employees; and
c) any other matters related to the changes which may affect the employees.

33.3 In this clause major workplace changes that is likely to have a significant effect on employees includes:

a) termination of employment
b) changes to composition, operation or size of the workforce or the skills required of employees
c) elimination or diminution of job opportunities (including promotion/tenure)
d) alteration of hours of work
e) retraining, relocation or restructuring
f) changes to the legal or operational structure of the employer or business, including changes to business ownership or control.

34 FLEXIBILITY

34.1 Where the employer wants to enter into a variation agreement it must provide a written proposal to the employee. Where the employee's understanding of written English is limited, the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

34.2 The employer must ensure that any variation agreement is genuinely agreed to by the employer and the employee and that the terms of the variation agreement:

a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and
b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and
c) result in the employee being better off overall than the employee would be if no arrangement (variation agreement) was made.

34.3 The employer must also ensure that any such variation agreement is:

a) in writing (including details of the terms that will be varied, how the variation agreement will vary the effect of the Enterprise Agreement terms, how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement, and the day on which the arrangement commences)
b) includes the name of the employer and employee
c) signed by the parties, and if the employee is under 18, by a parent or guardian of the employee
d) provided to the employee within 14 days after it is agreed to
e) able to be terminated by either party giving written notice of not more than 28 days, or at any time by both parties agreeing in writing.

34.4 Where any of the requirements of this clause 34 are not met, the variation agreement is of no effect.

34.5 Upon request the employer must provide copies of all flexibility agreements made under this clause to the Union/employee representative.

35 EMPLOYMENT SECURITY, STAFFING LEVELS, MODE OF RECRUITMENT AND REPLACEMENT LABOUR

35.1 The employer recognises that in certain circumstances the use of contractors and labour hire may affect the job security of employees covered by this agreement.

The use of contractors and use of supplementary labour hire requirements in this clause shall not apply to projects currently under construction before the signing of this agreement.

The application of these requirements shall recognise geographical and commercial circumstances that may result in a competitive disadvantage to the employer and its capacity to secure the project. In these circumstances the Employer and the Union(s) agree to vary these requirements on a project by project basis. Negotiations are to be conducted in good faith and agreement will not be unreasonably withheld.

35.2 *Use of Contractors*

If the employer wishes to engage contractors and their employees to perform work in the classifications covered by this agreement, the employer must first consult in good faith with potentially affected employees and their union. Consultation will occur prior to the engagement of sub-contractors for the construction works.

If, after consultation, the employer decides to engage bona fide contractors, these contractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under this agreement performing the same work. The use of sham sub-contracting arrangements is a breach of this agreement.

35.3 *Supplementary Labour Hire*

Where there is need for supplementary labour to meet temporary/peak work requirements, such labour may be accessed from bona fide businesses, including sub-contractors and labour hire companies, following consultation with the Employer Consultative Committee and/or union(s) party to this agreement. The employer shall ensure that any workers engaged by such businesses and performing work described in the classifications of this agreement shall receive wages, allowances and conditions not less than those contained in this agreement.

Supplementary labour is defined as temporary "top up" labour designed to meet short situations such as absences due to sick leave, annual leave, and short time work peaks. The employer undertakes not to use supplementary labour in any position on site for a period of more than six weeks. Any departure from this maximum period shall require the consent of the Union(s).

36 COMPLIANCE WITH THIS CERTIFIED AGREEMENT

Step 1 Complaints, queries and concerns regarding entitlements paid in relation to the appropriate legal industrial instrument shall be raised and resolved in accordance with the current custom and practice. Duly authorised industrial personnel shall be provided access to time and wage records in accordance with all legal requirements.

Step 2 If the Union suspects significant breaches of the EBA and requests the production of an audit certificate in the approved form (Appendix 5A), the employer must provide such certificate.

Step 3 Where further evidence exists of continuing non-compliance or significant breaches by the employer, the Union may further request an independent audit report detailing all entitlements be provided by an auditor with a practice certificate from the Institute of Chartered Accountants or registered CPA. The auditor shall be approved by the unions and all costs of the audit payable by the employer.

The employer will comply with the following conditions in preparing the independent audit report:

a) engage an auditor who holds a current public practice certificate of the Institute of Chartered Accountants in Australia or CPA Australia;
b) ensure that the audit include advice as set out in appendix 5B;
c) request that the work performed in the audit be in accordance with Australian Auditing Standard 802 "The Audit Report on Financial Information Other than a General Purpose Financial Report" and Auditing Guidance Standard 1044 "Audit Reports on the Information Provided other than in a Financial Report"; and
d) the independent audit report will include an audit certificate signed by the auditor, which will include advice as set out on appendix 5B.

Failure to comply with the requirements of this clause, or the submission of a false or misleading audit certificate, may result in a union party to this agreement requiring a full audit of the employer's time and wages records and all other records required to ensure compliance with this agreement. The full audit will be conducted by an auditor who is approved by the union and who is independent from the employer's business.

Should the employer dispute the Union's entitlement to request an audit under this clause, the parties will attempt to resolve the dispute in accordance with clause 7 of this Agreement.

37 COMPLIANCE WITH STATUTORY REQUIREMENTS

The Employer shall adhere to the requirements of all Acts of Parliament of the Commonwealth and the relevant State or Territory and therefore comply with the requirements of all those ordinances, regulations, by-laws, orders and proclamations made or issued under any Act.

38 ALL-IN PAYMENTS (CALCULATION OF DEFAULT RATE)

All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and/or allowances and/or conditions, such as annual leave, sick leave, etc.

It is agreed that where a breach of this clause is made, the calculation for back pay shall be calculated on the basis of the hourly rate contained in this Certified Agreement plus the site allowance (if applicable), plus the multi-storey allowance and an additional 75% loading to cover entitlements other than CBUS/BUSS (Q), BERT, CIPQ and BEWT. Any difference between the hourly rate paid to the employee, plus CBUS/BUSS (Q), BERT, CIPQ and BEWT shall form the settlement for the breach of this clause.

This clause shall not be applied to prevent the employer subletting specialised work outside of the normal scope of work which the employer performs. The parties to this agreement shall be notified when specialist sub-contractors are to be engaged.

39 POSTING OF AGREEMENT AND NOTICES

A true copy of this agreement shall be exhibited in a conspicuous and convenient place on the premises of the employer and on every employee's worksite so as to be easily read by employees.

40 SEVERABILITY

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

APPENDIX 1

CONSTRUCTION WORKERS CLASSIFICATIONS
RATES OF PAY

				1/01/2011	1/07/2011	1/01/2012	1/07/2012	1/07/2013	1/07/2014	1/07/2015
CW8	**Supervisor**		**wk**	$1,314.90	$1,347.96	$1,381.66	$1,450.74	$1,523.28	$1,599.44	$1,679.41
			hr	$36.53	$37.44	$38.38	$40.30	$42.31	$44.43	$46.65
CW7	**Tower Crane Operator, Special Class Tradesperson, Dogger-Crane Hand (Fixed cranes)**		**wk**	$1,262.30	$1,293.71	$1,326.06	$1,392.36	$1,461.98	$1,535.08	$1,611.83
			hr	$35.06	$35.94	$36.83	$38.68	$40.61	$42.64	$44.77
CW6	**Trainer**		**wk**	$1,209.71	$1,239.84	$1,270.84	$1,334.38	$1,401.10	$1,471.15	$1,544.71
			hr	$33.60	$34.44	$35.30	$37.07	$38.92	$40.87	$42.91
CW5	**Special Class Trades, Refractory Bricklayer, Carver**		**wk**	$1,157.11	$1,185.97	$1,215.62	$1,276.40	$1,340.22	$1,407.23	$1,477.59
			hr	$32.14	$32.94	$33.77	$35.46	$37.23	$39.09	$41.04
CW4	**Signwriter**		**wk**	$1,123.60	$1,151.65	$1,180.44	$1,239.46	$1,301.44	$1,366.51	$1,434.83
			hr	$31.21	$31.99	$32.79	$34.43	$36.15	$37.96	$39.86
CW4	**Marker Setter Out, Letter Cutter, WHSO**		**wk**	$1,162.44	$1,191.50	$1,221.29	$1,282.35	$1,346.47	$1,413.79	$1,484.48
			hr	$32.29	$33.10	$33.92	$35.62	$37.40	$39.27	$41.24
CW3	**Carpenters/Joiners, Stone-mason**		**wk**	$1,109.88	$1,137.63	$1,166.07	$1,224.37	$1,285.59	$1,349.87	$1,417.36
			hr	$30.83	$31.60	$32.39	$34.01	$35.71	$37.50	$39.37
CW3	**Floorlayers, Plasterers, Tilers, Tuck-pointers**		**wk**	$1,101.96	$1,129.51	$1,157.75	$1,215.63	$1,276.42	$1,340.24	$1,407.25
			hr	$30.61	$31.38	$32.16	$33.77	$35.46	$37.23	$39.09
CW3	**Bricklayers, Water-proofers**		**wk**	$1,095.12	$1,122.50	$1,150.56	$1,208.09	$1,268.49	$1,331.92	$1,398.51
			hr	$30.42	$31.18	$31.96	$33.56	$35.24	$37.00	$38.85
CW3	**Slater, Ridge or Roof Fixer, Roof Tiler**		**wk**	$1,085.04	$1,112.17	$1,139.97	$1,196.97	$1,256.82	$1,319.66	$1,385.64
			hr	$30.14	$30.89	$31.67	$33.25	$34.91	$36.66	$38.49
CW3	**Painters, Glaziers**		**wk**	$1,071.00	$1,097.78	$1,125.22	$1,181.48	$1,240.55	$1,302.58	$1,367.71
			hr	$29.75	$30.49	$31.26	$32.82	$34.46	$36.18	$37.99
	Apprentices Stage 4	*90%*	*wk*	$946.73	$970.47	$994.73	$1,044.47	$1,096.69	$1,151.53	$1,209.10
			hr	$26.30	$26.96	$27.63	$29.01	$30.46	$31.99	$33.59
	Apprentices Stage 3	*75%*	*wk*	$788.94	$808.85	$829.07	$870.52	$914.05	$959.75	$1,007.74
			hr	$21.92	$22.47	$23.03	$24.18	$25.39	$26.66	$27.99
	Apprentices Stage 2	*55%*	*wk*	$578.56	$592.98	$607.81	$638.20	$670.11	$703.61	$738.79
			hr	$16.07	$16.47	$16.88	$17.73	$18.61	$19.54	$20.52
	Apprentices Stage 1	*45%*	*wk*	$485.28	$497.52	$509.76	$535.32	$561.96	$590.04	$619.56
			hr	$13.48	$13.82	$14.16	$14.87	$15.61	$16.39	$17.21

APPENDIX 1 cont

				1/01/2011	1/07/2011	1/01/2012	1/01/2013	1/01/2013	1/01/2014	1/01/2015
	Rigger, Dogman, employees with certificates (even if employee job mentioned in lower		*wk*	$1,053.36	$1,079.69	$1,106.69	$1,162.02	$1,220.12	$1,281.13	$1,345.18
CW3	classifications)	*100%*	*hr*	$29.26	$29.99	$30.74	$32.28	$33.89	$35.59	$37.37
	Scaffolder, Powder Monkey, Hoist & Winch Driver, Foundation Shaftsman, Steelfixer (including Tack Welder), Concrete		*wk*	$1,011.24	$1,036.52	$1,062.43	$1,115.56	$1,171.33	$1,229.90	$1,291.40
CW2	Finisher	*96%*	*hr*	$28.09	$28.79	$29.51	$30.99	$32.54	$34.16	$35.87
	Skilled Labourer, Formwork Labourer and		*wk*	$973.44	$997.78	$1,022.72	$1,073.86	$1,127.55	$1,183.93	$1,243.12
CW1	Others	*92.40%*	*hr*	$27.04	$27.72	$28.41	$29.83	$31.32	$32.89	$34.53

APPENDIX 1A

MOBILE CRANE CLASSIFICATIONS
RATES OF PAY

Mobile Cranes		1/01/2011	1/07/2011	1/01/2012	1/07/2012	1/07/2013	1/07/2014	1/07/2015
Up to 20 Tonnes	wk	$1,074.24	$1,101.10	$1,128.62	$1,185.05	$1,244.31	$1,306.52	$1,371.85
	hr	$29.84	$30.59	$31.35	$32.92	$34.56	$36.29	$38.11
Over 20 Tonnes & up to 40 Tonnes	wk	$1,087.92	$1,115.12	$1,143.00	$1,200.15	$1,260.15	$1,323.16	$1,389.32
	hr	$30.22	$30.98	$31.75	$33.34	$35.00	$36.75	$38.59
Over 40 Tonnes & up to 80 Tonnes	wk	$1,153.80	$1,182.65	$1,212.21	$1,272.82	$1,336.46	$1,403.29	$1,473.45
	hr	$32.05	$32.85	$33.67	$35.36	$37.12	$38.98	$40.93
Over 80 Tonnes & up to 100 Tonnes	wk	$1,194.84	$1,224.71	$1,255.33	$1,318.10	$1,384.00	$1,453.20	$1,525.86
	hr	$33.19	$34.02	$34.87	$36.61	$38.44	$40.37	$42.38
Special Purpose Cranes	wk	$1,153.80	$1,182.65	$1,212.21	$1,272.82	$1,336.46	$1,403.29	$1,473.45
	hr	$32.05	$32.85	$33.67	$35.36	$37.12	$38.98	$40.93

Mobile Hydraulic Platforms (Boom Length)		1/01/2011	1/07/2011	1/01/2012	1/07/2012	1/07/2013	1/07/2014	1/07/2015
Trainee (as defined)	wk	$1,022.76	$1,048.33	$1,074.54	$1,128.26	$1,184.68	$1,243.91	$1,306.11
	hr	$28.41	$29.12	$29.85	$31.34	$32.91	$34.55	$36.28
Up to & including 11 meters (including trainee)	wk	$1,027.80	$1,053.50	$1,079.83	$1,133.82	$1,190.52	$1,250.04	$1,312.54
	hr	$28.55	$29.26	$30.00	$31.50	$33.07	$34.72	$36.46
Over 11 meters & up to 17 meters	wk	$1,074.60	$1,101.47	$1,129.00	$1,185.45	$1,244.72	$1,306.96	$1,372.31
	hr	$29.85	$30.60	$31.36	$32.93	$34.58	$36.30	$38.12
Over 17 meters & up to 23 meters	wk	$1,105.20	$1,132.83	$1,161.15	$1,219.21	$1,280.17	$1,344.18	$1,411.39
	hr	$30.70	$31.47	$32.25	$33.87	$35.56	$37.34	$39.21
Over 23 meters & up to 28 meters	wk	$1,141.20	$1,169.73	$1,198.97	$1,258.92	$1,321.87	$1,387.96	$1,457.36
	hr	$31.70	$32.49	$33.30	$34.97	$36.72	$38.55	$40.48
Unit equipped with underbridge unit	wk	$1,141.20	$1,169.73	$1,198.97	$1,258.92	$1,321.87	$1,387.96	$1,457.36
	hr	$31.70	$32.49	$33.30	$34.97	$36.72	$38.55	$40.48
Rigger, Dogman	wk	$1,074.96	$1,101.83	$1,129.38	$1,185.85	$1,245.14	$1,307.40	$1,372.77
	hr	$29.86	$30.61	$31.37	$32.94	$34.59	$36.32	$38.13

APPENDIX 1B

EARTH MOVERS ON BUILDING SITES
RATES OF PAY

Classification			1/01/2011	1/07/2011	1/01/2012	1/07/2012	1/07/2013	1/07/2014	1/07/2015
CW3	Bobcat, Pile Driver	wk	$1,033.92	$1,059.77	$1,086.26	$1,140.58	$1,197.60	$1,257.48	$1,320.36
		hr	$28.72	$29.44	$30.17	$31.68	$33.27	$34.93	$36.68
CW4	Backhoe,Drott, VibratingRoller, Front Mini Excavator	wk	$1,067.40	$1,094.09	$1,121.44	$1,177.51	$1,236.38	$1,298.20	$1,363.11
		hr	$29.65	$30.39	$31.15	$32.71	$34.34	$36.06	$37.86
CW5	Bulldozer, Scraper Excavator, Grader,Front end loader over 2.25mtrs	wk	$1,112.76	$1,140.58	$1,169.09	$1,227.55	$1,288.93	$1,353.37	$1,421.04
		hr	$30.91	$31.68	$32.47	$34.10	$35.80	$37.59	$39.47
CW6	Final Trim Grader	wk	$1,154.52	$1,183.38	$1,212.97	$1,273.62	$1,337.30	$1,404.16	$1,474.37
		hr	$32.07	$32.87	$33.69	$35.38	$37.15	$39.00	$40.95

APPENDIX 2

Allowances

ALLOWANCE TITLE	01/01/2011	1/07/2011	1/01/2012	1/01/2013	1/01/2014	01/01/2015
Acid work	$1.71	$1.75	$1.84	$1.93	$2.03	$2.13
Asbestos	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Asbestos eradication	$2.10	$2.15	$2.26	$2.37	$2.49	$2.62
Bagging	$0.59	$0.60	$0.63	$0.67	$0.70	$0.74
Bitumen	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
laying or lifting other than standard bricks Over 5kg but under 9kg	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Over 9kg but under 18kg	$1.17	$1.20	$1.26	$1.32	$1.39	$1.46
18kg and over	$1.63	$1.67	$1.75	$1.84	$1.93	$2.03
Certificate allowance	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Cleaning down brickwork	$0.60	$0.62	$0.65	$0.68	$0.71	$0.75
Cold work	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Computing quantities	$4.67	$4.79	$5.03	$5.28	$5.54	$5.82
Confined spaces	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Cutting tiles	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Dirty work	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Dry polishing of tiles	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Explosive power tools	$1.53	$1.57	$1.65	$1.73	$1.82	$1.91
First-aid attendant (minimum qualification) per day	$2.74	$2.81	$2.95	$3.10	$3.25	$3.41
Higher first aid cert. per day	$4.33	$4.44	$4.66	$4.89	$5.14	$5.39
Furnace work	$1.70	$1.74	$1.83	$1.92	$2.02	$2.12
Higher work - Painting trades	$0.60	$0.62	$0.65	$0.68	$0.71	$0.75
Hot work between 46-54 Degrees Celsius	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Exceeding 54 degrees	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Insulation	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Laser user and allowance per day	$2.68	$2.75	$2.88	$3.03	$3.18	$3.34
Living away return trip allowance	$36.81	$37.73	$39.62	$41.60	$43.68	$45.86
Return trip transport worker/tools	$21.83	$22.38	$23.49	$24.67	$25.90	$27.20
Leading hand not more than 1	$0.50	$0.51	$0.54	$0.57	$0.59	$0.62
Leading hand 2 and not more than 5	$1.09	$1.12	$1.17	$1.23	$1.29	$1.36
Leading hand 6 and not more than 10	$1.39	$1.42	$1.50	$1.57	$1.65	$1.73
Leading hand more than 10	$1.85	$1.90	$1.99	$2.09	$2.20	$2.30
Meal allowance	$13.43	$13.77	$14.45	$15.18	$15.94	$16.73
Multi-storey: commencement to 15th floor	$0.53	$0.54	$0.57	$0.60	$0.63	$0.66
Multi-storey: 16th to 30th	$0.63	$0.65	$0.68	$0.71	$0.75	$0.78
Multi-storey: 31st to 45th	$0.95	$0.97	$1.02	$1.07	$1.13	$1.18
Multi-storey: 46th to 60th	$1.23	$1.26	$1.32	$1.39	$1.46	$1.53
Multi-storey: 61st and onwards	$1.55	$1.59	$1.67	$1.75	$1.84	$1.93
Plaster or composition spray	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Power Tools	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Roof repairs	$0.59	$0.60	$0.63	$0.67	$0.70	$0.74
Roof repairs over 15 metres eaves pitch over 35 degrees	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Roof repairs over 15 metres eaves pitch over 40 degrees	$1.16	$1.19	$1.25	$1.31	$1.38	$1.45
Second hand timber per day	$2.54	$2.60	$2.73	$2.87	$3.01	$3.16
Slushing	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Spray application - Painters	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Swing scaffold first 4 hours 0-15 storeys	$4.67	$4.79	$5.03	$5.28	$5.54	$5.82
Swing scaffold after 4 hours 0-15 storeys	$0.98	$1.00	$1.05	$1.11	$1.16	$1.22
Swing scaffold first 4 hours 16-30 storeys	$6.02	$6.17	$6.48	$6.80	$7.14	$7.50
Swing scaffold *after* 4 hours 16-30 storeys	$1.27	$1.30	$1.37	$1.44	$1.51	$1.58
Swing scaffold first 4 hours 31-45 storeys	$7.12	$7.30	$7.66	$8.05	$8.45	$8.87

Swing scaffold *after* 4 hours 31-45 storeys	$1.50	$1.54	$1.61	$1.70	$1.78	$1.87
Swing scaffold first 4 hours 46-60 storeys	$11.66	$11.95	$12.55	$13.18	$13.84	$14.53
Swing scaffold *after* 4 hours 46-60 storeys	$2.45	$2.51	$2.64	$2.77	$2.91	$3.05
Swing scaffold first 4 hours greater than 60 storeys	$14.87	$15.24	$16.00	$16.80	$17.64	$18.53
Swing scaffold *after* 4 hours greater than 60 storeys	$3.12	$3.20	$3.36	$3.53	$3.70	$3.89
Tool allowance per hour:						
Artificial stoneworker, Stonemason, Carpenter and/or Joiner, Carver, Letter cutter, Marble and Slate worker, Marker and Setter Out, Plumber, Special Class Tradesperson	$1.61	$1.65	$1.73	$1.82	$1.91	$2.01
Caster, Fixer, Floor layer specialist, Plaster, Tiler	$1.39	$1.42	$1.50	$1.57	$1.65	$1.73
Bricklayer, Waterproofer	$1.20	$1.23	$1.29	$1.36	$1.42	$1.50
Rigger / Scaffolder	$0.67	$0.69	$0.72	$0.76	$0.79	$0.83
Concreter / Steelfixer	$0.59	$0.60	$0.63	$0.67	$0.70	$0.74
Roof Tilers, Slate Ridge, or Roof Fixer	$0.92	$0.94	$0.99	$1.04	$1.09	$1.15
Scaffolder, Rigger, Steelfixer, Concreter	$0.43	$0.44	$0.46	$0.49	$0.51	$0.54
Painter, Glazier, Licensed Drainer, Signwriter	$0.53	$0.54	$0.57	$0.60	$0.63	$0.66
Formwork Labourer	$0.28	$0.29	$0.30	$0.32	$0.33	$0.35
Towers allowance	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Toxic substances working in close proximity	$0.82	$0.84	$0.88	$0.93	$0.97	$1.02
Toxic substances (working with)	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Underground allowance per week	$13.88	$14.23	$14.94	$15.69	$16.47	$17.29
Underground allowance per day or shift or part thereof	$2.79	$2.86	$3.00	$3.15	$3.31	$3.48
Wet concrete or compo per day	$0.59	$0.60	$0.63	$0.67	$0.70	$0.74
Wet work	$0.65	$0.67	$0.70	$0.73	$0.77	$0.81
Travelling outside radial areas	$0.53	$0.54	$0.57	$0.60	$0.63	$0.66
Transfers during working hours	$0.95	$0.97	$1.02	$1.07	$1.13	$1.18
Compensation for tools	$1,728.79	$1,772.01	$1,860.61	$1,953.64	$2,051.32	$2,153.89

APPENDIX 3

CFMEU

2011 EBA RDO Calendar

CFMEU

JANUARY

S	M	T	W	T	F	S
						1
2	3		5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	
23			26	27	28	29
30	31					

FEBRUARY

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20		22	23	24	25	26
27	28					

MARCH

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20		22	23	24	25	26
27	28	29	30	31		

APRIL

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	
24	25					30

MAY

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15		17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

JUNE

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	
12	13		15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

JULY

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10		12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

AUGUST

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14			17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

SEPTEMBER

S	M	T	W	T	F	S
				1	2	3
4		6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

OCTOBER

S	M	T	W	T	F	S
						1
2		4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

NOVEMBER

S	M	T	W	T	F	S
			2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

DECEMBER

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21			24
25	26	27				31

EBA RDO

Public Holidays

Weekends

CONSTRUCTION AND GENERAL

2012 RDO CALENDAR

BLF UNION

January						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

February						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29			

March						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

April						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
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15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

May						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

July						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

August						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

September						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

October						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

November						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

December						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

School Holidays

Public Holidays

Industry RDO's

EBA RDO'S

CONSTRUCTION AND GENERAL

2013 RDO CALENDAR

BLF UNION

January						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

February						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

March						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

April						
S	M	T	W	T	F	S
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14	15	16	17	18	19	20
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28	29	30				

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29	30	31				

School Holidays
Public Holidays
Industry RDO's
EBA RDO'S

CONSTRUCTION AND GENERAL

2014 RDO CALENDAR

BLF UNION

January						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
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August						
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September						
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October						
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November						
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December						
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21	22	23	24	25	26	27
28	29	30	31			

School Holidays

Public Holidays

Industry RDO's

EBA RDO'S

2015 RDO Calendar

This Calendar will be developed and agreed a year before they are due and earlier if the statutory public holidays and the school terms are declared by the relevant State or Territory Government.

APPENDIX 4

Workplace Impairment Policy

Purpose

The health, wellbeing and safety of employees are of paramount importance to the employer, employees and their Unions. This policy is part of a broad based occupational health and safety program to secure the highest level of health and safety at the workplace.

The policy focuses on impairment and the elimination of any risks that may cause impairment in the workplace. The policy recognises that there are a range of factors that can contribute to the impairment of people at work, including:

i. Stress

ii. Fatigue

iii. Chemicals

iv. Heat

v. Noise

vi. Alcohol and other legal drugs

vii. Illegal drugs

viii. Illness and injury

This policy shall be read in conjunction with other company policies concerning health and safety, particularly in relation to fatigue management, risk management and safe systems of work.

This policy outlines the principles that will be used by {employer} in reducing the risk of impairment at work. The purpose of this policy is to ensure that workers are not impaired whilst working. The policy does not seek to impose limitations or value judgements on employees when outside of the workplace.

The policy outlines the processes that will be established to assist all personnel including Supervisory Staff and Managers to correctly implement the policy so that the standard of health and safety in the workplace is enhanced. All provisions within this document must be read in context of its stated purpose, as outlined by this clause.

This policy has been compiled in a manner that is non-punitive and supportive of employees. This policy shall not be used in a discriminatory manner. The *Anti-Discrimination Act* makes it illegal to treat a worker with an impairment less favourably than other workers. The privacy of employees will be upheld throughout the processes contained within this policy.

The approach to OHS is one of identifying, assessing and controlling all workplace hazards, using the hierarchy of control, and then reviewing these controls to ensure ongoing improvements. The focus of this policy is on the OHS risks associated with impairment.

Implementation & Review

This policy has been developed in consultation and agreement with the employer, employees and the CFMEUQ and BLFQ. Any proposed review or variation of this policy will be subject to meaningful consultation with each of the above parties and endorsed by a valid majority of employees to be covered by the policy.

Scope

This policy will apply to all employees (including managers and supervisors), contractors and labour hire staff. The policy applies to these groups at all times when they are engaged in company business, whether on or off site and when driving company vehicles.

Objectives

The objectives of this policy are as follows:

i. To provide a safe and healthy working environment for all persons.

ii. To work collaboratively in the implementation and co-ordination of this policy with employees and their elected representatives to achieve the objectives of this policy.

iii. To eliminate and control risks which may lead to impairment affecting health and safety in the workplace.

iv. To ensure that there is a mechanism for managing impairment at work that is transparent, objective and in accordance with the purpose of this policy.

v. To ensure that all persons are provided with adequate information and education on the health and safety issues surrounding impairment, and on the operation of this policy.

vi. To ensure that employees have access to rehabilitation support and counselling of their choice on a voluntary basis that is independent, professional and confidential, without jeopardising their employment.

vii. To ensure confidentiality of information concerning the application of this policy to a worker is maintained.

Definitions

For the purposes of this policy:

Preliminary Impairment Assessor
A person who has been trained to perform a Preliminary Impairment Assessment. In the context of this policy, such a person must be an elected health and safety representative and/or union delegate or supervisor nominated by the company.

Drug
Any substance that may temporarily or permanently impair a person's normal mental or physical faculties, and can be a prescription, over the counter medication or other legal or illegal drug.

Employee
A person employed directly by the company on either a full time, part time or casual basis.

Employee assistance program ("EAP")
An agreed independent, professional and confidential service that aims to provide employees with assistance when affected by personal or job related problems.

Elected representative
Any OHS representative, union delegate or official or officer of the union.

Contractor
Any company and its employees or an individual that has a contract for services with the company.

Impairment
Any loss or abnormality of a person's physiological, cognitive, or psychological ability, or anatomical structure or function, whether permanent or temporary. Impairment can be associated with a range of factors.

Labour Hire Employee
Any worker who is employed through an agency rather than directly by the company.

Medical Practitioner
A qualified medical practitioner, including General Practitioners, Psychologists or Specialist Doctors. Employees shall have the right to choose their own medical practitioner.

Preliminary Impairment Assessment ("PIA")
An assessment that is non-intrusive and observation based, conducted in accordance the Preliminary Impairment Assessment Training Program.

PIA Team
Shall consist of two PIAs, at least one of whom must be an employee elected representative.

[redacted]

Reasonable Belief
Based on observation (including by sight, hearing, smell and , with permission, touch) of the alleged impaired person's behaviour, including alertness and bodily co-ordination physical condition .

Responsibilities

The employer shall:

i. Provide a work environment that is safe and without risks to health and safety

ii. Provide information and training about the policy to all existing employees, contractors and labour hire staff and to all new staff at the point of induction

iii. Ensure that this policy is implemented fairly and equitably across all sections of the workforce

iv. Provide suitable alternative duties for employees who may be temporarily restricted from performing their normal duties due to impairment.

The employees shall:

i. Co-operate reasonably with the employer in the implementation of this policy.

ii. If they reasonably believe that any person on the site may be a health and safety risk to themselves or others, inform a Preliminary Impairment Assessor of this belief.

iii. Not consume or be under the influence of, alcohol or other drugs while working, (without permission where it is entirely safe EG Roof Party during paid time)

iv. Ensure that employees do not work if they believe that they may be impaired.

v. Consult their doctor or pharmacist about possible side effects of medication prescribed or bought

vi. Inform a Preliminary Impairment Assessor if they have been made aware by their treating doctor or pharmacist of possible impairment as a side effect of medication, or if they feel impaired by medication.

Implementation of the Policy

The company shall engage an agreed training provider to:

i. Run impairment awareness information sessions for all employees (including supervisors and managers), contractors and labour hire workers. Such awareness information sessions shall on run on a regular basis.

ii. Develop an impairment awareness component for the induction package for new employees, contractors, labour hire and visitors to this site.

iii. Provide the additional supplementary training required to enable the Preliminary Impairment Assessors to conduct a Preliminary Impairment Assessment (PIA).

The company shall ensure that all Preliminary Impairment Assessors:

i. Receive the supplementary training in addition to the information, education and training provided to the rest of the workforce.

ii. Have adequate resources (EG a room and, if necessary, transport thereto) to be able to meet the objectives of this policy.

iii. Be able to refer people who have sought assistance to the company's EAP

The policy shall be implemented once the above has been completed with the assistance of the agreed training provider.

Impairment Factors

The following factors may cause impairment. These general definitions are for guidance under this policy, and are not exhaustive. It is also recognised that there may be similarities in the physical and mental effects of exposure and therefore the symptoms that may be observed to some of these factors.

Stress

Is the reaction that people have when confronted with physical, mental or emotional activities/issues/demands with which they are unable to cope. Its effects may include loss of concentration, memory, and comprehension. It can lead to inappropriate behaviours or substance use. When people are exposed to chronic, prolonged stress at work, they may experience any of a range of physical and psychological symptoms which can severely affect quality of life. These include: cardiovascular disease; asthma; digestive disorders such as peptic ulcers and irritable bowel syndrome; psoriasis; sexual problems; depression; and alcohol and drug use.

Fatigue

Can result from excessive physical or mental activity, lack of sufficient sleep or regular and adequate rest periods. The level of fatigue experienced will depend on the workload imposed by a job, the length of shift, previous hours and days worked, and the time of day or night. Signs of fatigue can be similar to impairment from alcohol or drug use. Its effects may include lack of concentration, disorientation and lack of physical co-ordination.

Chemical

Inappropriate, excessive or accidental exposure to industrial chemicals may cause a range of physiological effects, which impair a person and may cause serious illness. Many industrial chemicals, particularly solvents are known to have effects similar to fatigue or alcohol, including dizziness, inability to concentrate, perceptual and mood changes - all of which can be an impairment risk.

Heat

Working in hot conditions can result in a number of adverse health effects - ranging from discomfort to serious illness, which are generally grouped together as heat stress. Workers in a variety of occupations may be exposed to heat stress.

Noise

Not only is occupational noise a hazard, in terms of hearing loss - noise is a significant impairment hazard. Obviously, excessive noise in the work environment prevents everyone from hearing what is happening around them, which could include instructions and / or warnings. Exposure to noise is also a significant cause of stress.

PIA Conducted by a Preliminary Impairment Assessor

1) Where there is a reasonable belief that a person is impaired then a PIA may be conducted by the PIA team. The PIA is non-intrusive and observation based. At any stage during this process an employee is entitled to seek representation from the Union of their choosing.

2) If it is the view of the PIA team that the person is impaired, they should be encouraged to voluntarily leave the workplace. If the worker agrees the employer will be informed of the incident and will provide appropriate assistance to the person to ensure their safe return home. The person will be paid as per normal for the duration of their shift.

3) If the person refuses to voluntarily leave the workplace, management is informed and may direct the worker to leave the workplace. If an OHS Representative is of the opinion that there is occurring or about to occur any activity which involves or will involve an immediate risk to the health or safety of any person, the OHS representative may remove workers until the matters which gave or will give rise to the risk are remedied.

4) The employer will provide appropriate assistance to the person to ensure their safe return home. The person will be paid as per normal for the duration of their shift.

5) In the event of a PIA Team deadlock, where the appropriate people assessing are unable to reach an agreement, they shall involve a third trained PIA person. If this assessment is of a site worker, the third person shall be an elected representative

PRELIMINARY INVESTIGATION – CAUSE OF IMPAIRMENT

Directly after an impaired worker leaves a workplace, the PIA Team shall conduct a preliminary investigation into the factors causing the impairment. the PIA Team must determine the cause/s of the impairment. (EG: chemical, fatigue) A written report of the investigation and determination shall be sent to the OHS Committee and the impaired worker. . In the event that the affected employee's conduct is identified as a cause of impairment such employee shall be provided with procedural fairness throughout this process, and provided the full opportunity to present evidence to defend themselves. An affected person shall have the right at any stage to seek advice and be represented by the Union of their choice.

COUNSELLING AND DISCIPLINE PROCESSES

Where a preliminary investigation has found that the cause of impairment is related to alcohol or other drugs, the following procedure shall apply. If the impairment was caused by prescription or over-the-counter medication, as prescribed by a medical practitioner or in accordance with the manufacturer's recommended dosages, this clause shall not apply.

Counselling and Disciplinary Process

A first assessment will not attract a written warning, however, where a similar assessment occurs within 12 months a first written warning may be issued. A written warning may be issued at all subsequent interviews. Where an employee accumulates three written warnings within twelve months, termination of employment may occur. Each written warning must be lodged immediately with the relevant union of coverage. Each written warning expires 12 months after it is issued and cannot be used for disciplinary purposes thereafter.

Transportation home

Once an employee is assessed as being impaired the employee is not permitted to work thereafter on that day. The company will, in those circumstances, pay all reasonable transportation costs incurred for the employee to be transported directly home.

Access to accrued sick leave, annual leave and long service leave

Any employee who is assessed as being impaired shall be permitted to access accrued personal leave entitlements for the period of time in which they are deemed unfit for duty.

Workers Rights

Workers have a right to:

i. work in a workplace free from risks to health and safety.

ii. access their union representative in relation to his/her rights in respect of the assessment prior to being subjected to the assessment.

iii. have their privacy maintained at all time during an assessment, including, having confidentiality maintained with respect to their personal information, and undergoing an assessment without others knowing.

iv. have access to an employee representative throughout any stage of this policy.

v. access the EAP and/or a rehabilitation program at any time.

vi. receive adequate information and training regarding this policy and the relevant legislation.

vii. Access any special leave entitlements whilst undergoing treatment or rehabilitation.

Employee Assistance and Rehabilitation

Employees shall be provided with assistance and rehabilitation services in a non-discriminatory and supportive manner by the employer. The privacy of employees accessing the EAP and/or rehabilitation will be maintained and respected at all times.

The employer must refer an employee to counselling or treatment upon the recommendation of a PIA Team arising from a preliminary investigation report concerning impairment.

i. Employees will be able to self-refer, or be referred by a medical practitioner, to counselling or treatment through consultation with the Preliminary Impairment Assessor without an impairment incident having taken place.
ii. The person shall be permitted to attend counselling or treatment during work time with no loss of pay.

iii. The employer shall meet the costs of the counselling and treatment.
iv. No employee will be dismissed or disadvantaged while undergoing counselling or treatment

It is further recognised that rehabilitation with respect to substance abuse issues is a health problem and requires professional and specialist intervention. Workers will be offered a choice of 3 providers of such services from a list agreed between the company and the CFMEUQ and the BLFQ.

All counselling will be provided on a confidential basis. The employer will not have access to either the files or records relating to counselling.

Dispute resolution

Any disputes relating to the application and/or implementation of the policy or actions arising from this policy shall be dealt with in accordance with dispute resolution procedures contained in State OHS legislation and regulation or within {agreement title and clause number}. The employer recognises the right of employees to be represented throughout any dispute by a CFMEUQ, including an Officer or Official of the Union.

Privacy

Privacy of employees subject to this policy shall be upheld at all times. A breach of privacy shall be regarded as a major breach of company policy, and shall be dealt with accordingly. All persons involved in the application of this policy, shall at all times:

i. Ensure that information concerning PIA assessments and/or access to the EAP or rehabilitation will kept in secure places and only used for the purposes outlined in this policy.

ii. Only persons with a role as defined by this policy, shall have access to an worker's files, including but not limited to– PIA assessments and reports, file notes, EAP referrals, written warnings, medical certificates.

iii. Discussions in relation to individual cases shall be limited to relevant parties, and in accordance with the purposes of this policy.

APPENDIX 5A

AUDIT CERTIFICATE

COMPANY NAME:.....

ABN NUMBER:.....

ADDRESS:

PRINCIPAL NAME:.....

PRINCIPAL TITLE:.....

WORKCOVER POLICY NUMBER:.....

Number of Personnel:	☐		**Overtime 1½**	☐		**Overtime 2x**	☐
Base Hourly Rate:	☐		**Fares & Travel:**	☐			
CBUS:	**Yes**	☐		**No**	☐		
BERT:	**Yes**	☐		**No**	☐		
BEWT:	**Yes**	☐		**No**	☐		
CIPQ:	**Yes**	☐		**No**	☐		
RDO Accrual:	**Yes**	☐		**No**	☐		
Annual Leave:	**Yes**	☐		**No**	☐		
Sick Leave:	**Yes**	☐		**No**	☐		
PLSL:	**Yes**	☐		**No**	☐		
Group Tax:	**Yes**	☐		**No**	☐		

***STATUTORY DECLARATION BY PRINCIPAL:** I hereby state that the Company has paid all of its entitlements and legal obligations in accordance with the appropriate industrial instrument.*

.....
PRINCIPAL

AUTHORISED BY C.P.A. / INSTITUTE OF CHARTERED ACCOUNTANTS

COMPANY NAME:.....

NAME OF ACCOUNTANT:.....

REGISTRATION DETAILS:.....

***AUTHORISATION STATEMENT:** I have examined the time and wages records and hereby certify that they are in accordance with the appropriate industrial instrument.*

.....
CERTIFIED PRACTICING ACCOUNTANT

APPENDIX 5B

AUDIT CERTIFICATE

To (*insert employer name*)

Scope

We have been provided with a copy of, and have read, the (*insert name of this Enterprise Agreement).*

We have audited the Time and Wages records and all other records of (*insert employer name*) , for the years ending / / , which records we believe were necessary to be audited in order to determine whether (*insert employer name*) has complied with its certified agreement.

The Managing Director/Owner of (*insert employer name*) was responsible for providing all records required to undertake the audit.

We have conducted an independent audit of the records in order to express an opinion on whether (*insert employer name*) has complied with its certified agreement. We disclaim any assumption of responsibility for any reliance on this report to any person other than to the parties bound by the (*insert name of this Enterprise Agreement)* or for any purpose other than that for which it was prepared.

Our audit has been undertaken for the purpose detailed in clause XX of the (*insert name of this Enterprise Agreement)* and has been conducted in accordance with Australian Auditing Standards.

Our procedures included (insert procedure utilised).

These procedures have been undertaken to form an opinion whether, in all material respects,. has complied with its certified agreement.

Audit Opinion

In our opinion (*insert employer name*) has complied with its certified agreement, for the year ending / / .

Or

In our opinion (*insert employer name*) has not complied with its certified agreement, for the year ended / / . All areas of non-compliance with the certified agreement are listed in attachment A to this certificate.

Date:..... Firm:.....

Address:..... Partner:.....

APPENDIX 6

NEW ENTRANT TRAINEESHIPS

1. APPLICATION

This Appendix will apply to persons who are undertaking a Traineeship Scheme.

2. RELATIONSHIP WITH THE AGREEMENT

This Appendix will be read wholly in conjunction with this Agreement. Where this Appendix is silent on rates of pay and other matters pertaining to the employment relationship, other provisions of this Agreement apply. Where there is conflict between this Appendix and other provisions of this Agreement, the Appendix applies.

3. ENGAGEMENT OF TRAINEES

The employer is encouraged, and will make its best endeavours, to engage one Trainee for every 10 other employees it employs.

4. TRAINING CONDITIONS

The Trainee will attend an approved Training course or training program prescribed in the Training Agreement. A Traineeship will not commence until the relevant Training Agreement, made in accordance with a Traineeship Scheme, has been signed by the Employer and the Trainee and lodged for registration with the State Training Council. The Employer will ensure that the Trainee is permitted to attend the training course or program provided for in the Training Agreement and will ensure that the Trainee receives the appropriate on-the-job training.

5. EMPLOYMENT CONDITIONS

A Trainee will be engaged on a full-time basis for a maximum period of time as specified in the Training Agreement after which time they will be employed as a full-time employee if work is available. Where the employment of a Trainee by the Employer is continued after the completion of the Traineeship period, such Traineeship period will be counted as service for the purposes of the Certified Agreement. Trainees will be paid when attending courses during ordinary hours.

The employer will supply each Trainee with tools of trade of no less value at retail prices than as prescribed in Appendix 5. The retail value will increase in line with the increases to wages and allowances. The tools must be supplied no later than the completion of the Trainee's probation period. A list of tools to be supplied is detailed in Appendix 5. All tools of trade will become and remains the property of the Trainee and are to be available and used in performing work as required by the employer. The employer will keep a record of the dates upon which requisite tools of trade have been supplied, together with details of the description, type, retails value, and actual supplied cost of such tools of trade. All other tools and equipment required by the Trainee to perform their work will be provided by the employer and will remain the property of the employer.

5. TRAINEE WAGES

Persons undertaking a Traineeship will receive either the following rates or remain at their existing level, whichever is the greater:

Trainee wages								
Level	Rela-tivity	*Hr* / *Wk*	*Jul-11*	*1-Jan-12*	*1-Jul-12*	*1-Jul-13*	*1-Jul-14*	*1-Jul-15*
New entrant	82%	*Hr*	$24.60	$25.21	$26.47	$27.80	$29.19	$30.65
		Wk	$885.60	$907.56	$952.92	$1,000.80	$1,050.84	$1,103.40
CW1 (b)	88%	*Hr*	$26.40	$27.06	$28.41	$29.83	$31.32	$32.89
		Wk	$950.40	$974.16	$1,022.76	$1,073.88	$1,127.52	$1,184.04
CW1	92.40%	*Hr*	$27.72	$28.41	$29.83	$31.32	$32.89	$34.53
		Wk	$997.92	$1,022.76	$1,073.88	$1,127.52	$1,184.04	$1,243.08
CW2	96%	*Hr*	$28.80	$29.52	$30.99	$32.54	$34.17	$35.88
		Wk	$1,036.80	$1,062.72	$1,115.64	$1,171.44	$1,230.12	$1,291.68
CW3	100%	*Hr*	$30.00	$30.75	$32.28	$33.90	$35.59	$37.37
		Wk	$1,080.00	$1,107.00	$1,162.08	$1,220.40	$1,281.24	$1,345.32

APPENDIX 7

ENDORSEMENT OF THE AGREEMENT

The signatures below testify to the fact that the agreement has been properly made a[redacted]k company and union levels.

Signed for and on behalf of [redacted]

Address for person authorised to sign the agreement [redacted]

Explanation of persons authority to sign the agreement [redacted]

In the presence of [redacted]

Signed for and on behalf of the **Construction, Forestry, Mining & Energy, Union, Construction and General Division, Queensland Construction Workers Divisional Branch** [redacted]

Address for persons authorised to sign the agreement

Explanation of persons authority to sign the agreement [redacted]

agreemen[redacted]

In the presence of .....
(Sign Name)

[redacted]
(Print Name)

[redacted]

Signed for and on behalf of the Construction, Forestry, Mining & Energy, Union, Construction and General Division, Queensland Builders Labourers Divisional Branch }

[redacted]

Address for persons authorised to sign the agreement

Explanation of persons authority to sign the agreement

In the presence of }

[redacted]

(Print Name)

[redacted]

JLT

Tailored Solutions for Construction and Allied Workers

BUILT PLUS 24/7 Group Personal Accident Sickness Insurance

JLT LEADING THE WAY ON INCOME PROTECTION

The JLT (CSI) Discretionary Trust is specifically designed for the affiliated members of the CFMEU and offers a unique and innovative alternative to traditional insurance cover. The discretionary trust has been fully endorsed by the CFMEU, and provides you with competitive, cost effective weekly benefits. All backed by our dedicated Customer Service and Claims Teams.

KEY FEATURES AND BENEFITS	COVER COMPARISON CHECKLIST	
	JLT	OTHERS
→ Injury & Sickness - 365 days. Worldwide. 24/7 Protection	✓	?
→ Broad Coverage - providing protection beyond the scope of normal insurance	✓	?
→ Maximum Benefit Period - 104 weeks (other than psychological illness where maximum weekly benefit period is 26 weeks)	✓	?
→ Waiting Period - 28 days	✓	?
→ Flexible Cover - three levels available	✓	?
→ Funeral Expenses (following death as a result of injury) - up to $10,000	✓	?
→ Crisis Illness benefit - 13 weeks advance payment of income considered	✓	?
→ Cover for All Disclosed Employees - up to age 70 (Injury & Sickness)	✓	?

TYPE OF COVER	LEVEL OF COVER	COST PER WEEK
Gold	85% of gross weekly basic wage up to $2,000 plus 9.25% super guaranteed to a maximum of $185.00 per week. Gold Cover includes Workers' Compensation top up	$23.50
Silver	100% of gross weekly basic wage up to $1,000 plus 9.25% of super guaranteed to a maximum of $92.50 per week.	$19.00
Bronze	100% of gross weekly basic wage up to $700 plus 9.25% super guaranteed to a maximum of $64.75 per week.	$16.00

For further details and a competitive quote contact:

CFMEU

Steve Gilder
T: (08) 8418 0231 **M:** 0409 248 879 **E:** Steve.gilder@jlta.com.au
For Claims assistance call: 1800 640 009

THE JLT (CSI) DISCRETIONARY TRUST ARRANGEMENT
Acceptance Form

Before completing this Acceptance Form, be sure to read Sections 1, 2, 3 and 4 of our PDS. Our PDS will help a Potential Member decide whether to become a Member of the JDT Arrangement.

This Acceptance Form relates to both the Scheme Cover and Insurance Cover components of the JDT Arrangement.

Date of Trust Deed: 30th April 2012 **Fund Period:** 31st May 2013 **to** 31st May 2014

PLEASE NOTE You are not a member of this JDT Arrangement until we receive your **Membership Contribution** and completed **Acceptance form**

Employer ..... **ABN** .....

Address .....

.....

Contact Name ..... **PH** .....

E-mail ..... **Fax** .....

TOTAL CONTRIBUTION (Incl. GST)	Gold	Silver	Bronze
Breakdown of Contribution			
Aggregate Contribution* This is the proportion of the Total Membership Contribution payable by a Member to meet claims and costs attributable to claims management	48.58%	53.05%	50.74%
Administration Contribution** This is the proportion of the Total Membership Contribution payable by a Member which represents the administrative fees of the JDT Arrangement	7.33%	9.17%	11.00%
Insurance Cover Contribution. This is the proportion of the Total Membership Contribution payable by a Member which represents the premium paid to the Insurer for the Insurance Cover	18.49%	12.44%	11.20%
Insurance Cover premium stamp duty (GST Exempt)	2.03%	1.37%	1.24%
Jardine Lloyd Thompson Pty Ltd (the Broker's) Broking Fee	5.77%	3.89%	3.50%
Creative Safety Initiatives Trust (the Promoter's) Fee. This is an administrative fee paid for the distribution, contribution collection and other related services provided by the Promoter.	8.89%	11.11%	13.34%
GST Payable	8.91%	8.97%	8.98%

**Includes Claims Management Service Fee $500.00 per claim*

*** The Administration Contribution can be broken down as follows based on budgeted estimations:*

- *Actuary fees- 2%*
- *Legal costs- 2%*
- *Audit fees- 7%*
- *Scheme Manager's (JGS's) Fees- 89%*

Please complete and return this Acceptance Form with your payment and retain a copy for your records.

Declaration (In addition to the duty to disclose certain information to the Insurer and the Trustee)

a) I have read the PDS and agree to be bound by the Rules. I am aware that the withdrawal from the JDT Arrangement as a Member does not entitle the Member to a refund of the Total Membership Contribution in full or in part, other than any applicable return Membership Contribution in respect of the unexpired portion of the Insurance Cover.

b) I agree to receive the PDS, FSG and annual report for this product online at www.jlta.com.au/csi or I have obtained a hard copy of the PDS and FSG

c) Privacy Act implications: Upon joining the JDT Arrangement you, as a Member, acknowledge that, as part of the financial reports, the Trustee will be declaring Members' detailed Claims data to all Members and service providers performing specific tasks on behalf of the Trust.

LEVEL OF COVER (PLEASE TICK)

☐ Gold - 85% cover up to $2,000 plus 9% super per week

☐ Silver - 100% cover up to $1,000 plus 9% super per week

☐ Bronze - 100% cover up to $700 plus 9% super per week

Signature ..... Date .....

PLEASE TURN THE PAGE TO COMPLETE ALL DETAILS

Attachment B

THE IMPACT OF THE NEW ANTI-BULLYING LAWS ON THE BUILDING AND CONSTRUCTION INDUSTRY

A paper for the Workplace Bullying Conference

21 May 2014 Melbourne

Richard Calver, National Director
Industrial Relations and Legal Counsel
Master Builders Australia Ltd

Introduction

The General Manager of the Fair Work Commission (FWC) estimated that there would be 3,500 bullying applications each year made to the FWC.[1] That would mean each quarter the FWC was expected to process 875 applications. In a moment of fervour, I predicted that this would be an underestimation stating that the jurisdiction would be clogged up by "an inordinate number of complaints".[2]

The first quarterly report of the FWC in relation to its anti-bullying jurisdiction was released on 23 April 2014.[3] It showed that 151 applications had been received in the first quarter 2014. This would put the total expected for the year at around 600.

The quarterly report shows that 56 of the 151 applications have been resolved by way of withdrawal of application or settlement. A further 8 of the 151 applications have been resolved by way of final decision with 7 of the applications being dismissed and only 1 application being granted with an associated order. Only four applications derived from the building and construction industry.

The explanation for this low level, when compared with the prior estimates, could be dismissed by reverting to a quotation from Oscar Wilde: "Experience is the name everyone gives to their mistakes".[4] But that label would indicate a lack of confidence in the FWC General Manager and, importantly, in my own judgement and so another

[1] "FWC Prepares for 3500 bullying applications" Workplace Express 7 June 2013.

[2] RM Calver "The Fair Work Commission's Anti-Bullying Jurisdiction" Australian Construction Law News Issue 151 July/August 2013 46 at p49. Further, in my defence, the number of complaints made as opposed to applications lodged is not collected by the FWC.

[3] See https://www.fwc.gov.au/documents/documents/quarterlyreports/AB-Q3-FYR13-14.pdf

[4] See http://www.just-one-liners.com/problems-failure/2393

explanation should be sought. In my view there is a one word answer to the question of lack of uptake: money.[5]

In this paper, I underline that the FWC does not have the capacity to make an anti-bullying order that involves money[6] whilst discussing the effect to date of the new jurisdiction on the building and construction industry, including some further discussion about the low level of applications.

Economic Characteristics of the building and construction industry

The building and construction industry is a vital contributor to the national economy. One million dollars of extra demand for output of the construction industry results in total benefits to the economy of close to $3 million. One million dollars of extra demand results in 5 direct jobs and 14 in total.[7]

Employment in the building and construction industry totalled 1,021,900 in November 2013, or almost nine per cent of total employment,[8] and the industry is responsible for over 8% of the economy's output: see Figure 1 below.

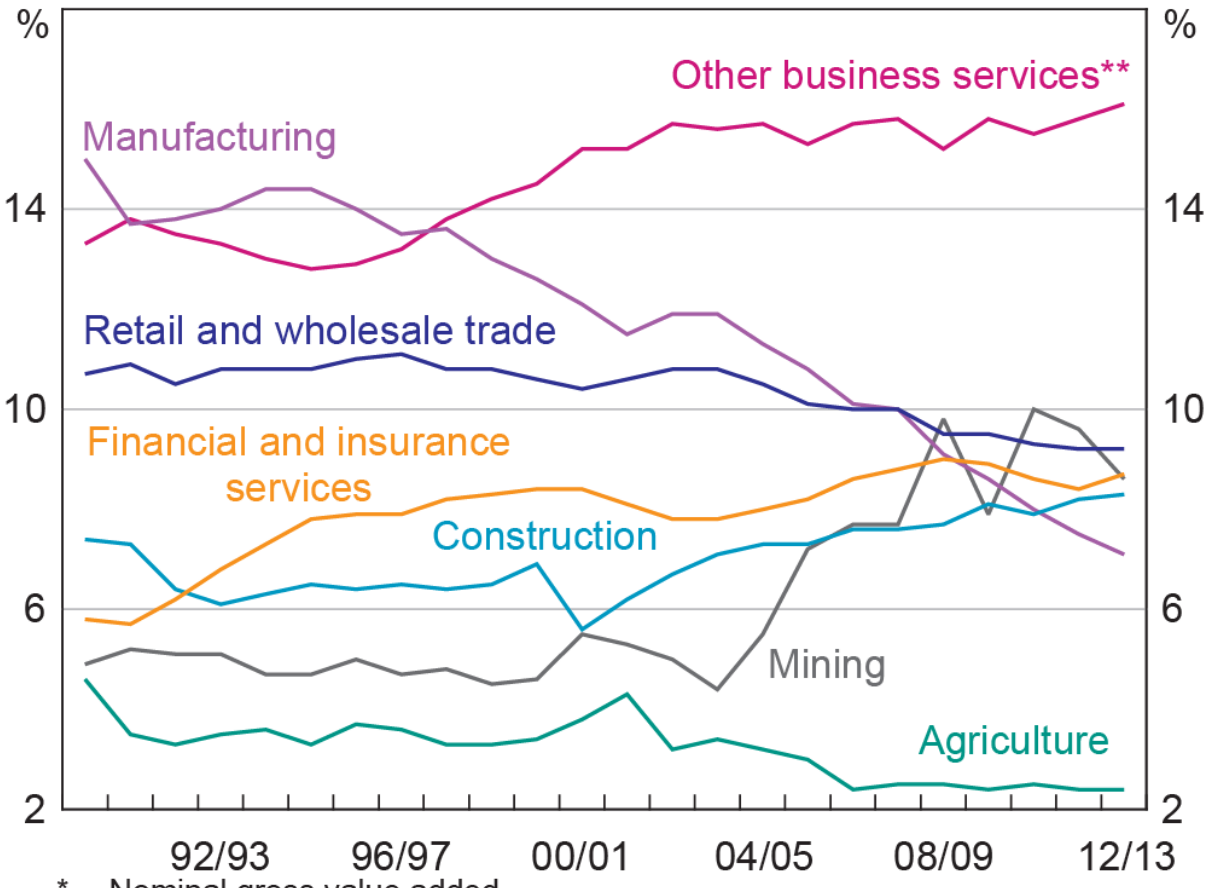
Compared with other industries, the construction workforce remains overwhelmingly male at 88 per cent, with over 99 per cent of construction trade workers being male with the manifestation of a "macho" culture, often evident in all the wrong ways in a case I later explore. The building and construction industry also has an unusually

[5] Noting both that invoking the anti-bullying laws does not prevent contemporaneous action in relation to adverse action, see note 2 above at p50 for a discussion of their use.
[6] S789FF(1) *Fair Work Act, 2009* (Cth) prevents the FWC from making an order requiring payment of a pecuniary amount.
[7] Master Builders' Chief Economist Mr Peter Jones, estimate April 2014.
[8] Australian Bureau of Statistics, *Labour Force: Detailed, Quarterly (6291.0.55.003)*, November 2013.

high proportion of full-time workers at 86 per cent, compared with 70 per cent for the overall Australian workforce.

According to the Department of Employment, despite some short-term uncertainty in the engineering and commercial construction sectors, "construction industry employment is projected to grow by 83,500 (or 8.0 per cent) over the five years to November 2018…against the backdrop of a strong rise in building approvals during 2013 and historically low interest rates which are likely to support growth into the period ahead."[9]

Figure 1: Industry Share of Output*



* Nominal gross value added

** Includes: information media and telecommunications; rental, hiring and real estate services; professional, scientific and technical services; administrative and support services

Source: ABS

[9] Department of Education, Employment and Workplace Relations, *Industry Employment Projections Report*, 2014, p. 2.

In addition, the building and construction industry relies heavily on independent contractors. There are an estimated 1 million independent contractors operating in the Australian economy with around one third working in the building and construction industry.[10] There are a number of identified[11] reasons for the prevalence of independent contracting in the building and construction industry as follows:

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

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

- fluctuations in employment mean workers enter from other industries during periods of high labour demand.[12]

The building and construction industry is cyclical and demand for both employees and contractors varies, as indicated in the last two dot points. The medium term outlook, however, is sound with signs of a rebound from the GFC evident.[13] The industry is unique in the characterisation of its industrial relations, an issue central to the targeted behaviour encapsulated in the new anti-bullying laws.

---

[10] See Appendix C Forms of Work in Australia Productivity Commission April 2013 - http://www.pc.gov.au/__data/assets/pdf_file/0020/122870/forms-of-work.pdf

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

[12] Id at para 4.23

[13] Master Builders 2014 National Survey

Relevant Cultural Characteristics

The Cole Royal Commission[14] comprehensively documented the workplace relations problems of the industry. It found that unacceptable and unlawful behaviours of unions in the commercial sector were a systemic problem. The findings of the Royal Commission were supported by the work of the Interim Building Industry Taskforce which became the Building Industry Taskforce (the Taskforce) and then by the work of the Australian Building and Construction Commission (ABCC). Both taskforces published reports that documented the unacceptable face of the building and construction industry.[15] In addition, the ABCC which was abolished and replaced by the Fair Work Building and Construction agency from 1 June 2012, published five reports on its compliance activities,[16] as well as a number of other reports that highlighted the need for continuing action to curb unacceptable behaviour. These reports also documented clearly the important role that the ABCC played in changing the industry's culture and in deterring unlawful industrial action.

Master Builders supports the current Bills before Parliament[17] which would reintroduce the ABCC on the basis that there was a correlation between the ABCC's activities and the improvements in the culture and

[14] Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry,* February 2003, www.royalcombci.gov.au, accessed 30 April 2014.

[15] Commonwealth of Australia, Interim Building Taskforce, *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce,* March 2004 and Commonwealth of Australia, Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce,* September 2005.

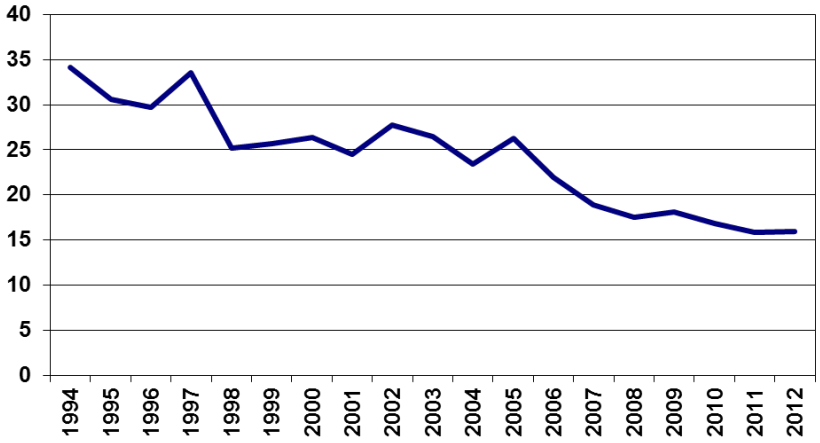
[16] *Compliance Powers by the ABCC for the period 1 October 2005 to 31 March 2008; Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 August 2007; Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 December 2006; and Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 June 2006.*

[17] The *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*

productivity of the industry.[18] Despite the impression of the industry being heavily unionised, current unionisation is at just under 16 per cent – see Figure 2. The marked influence of unions in the industry comes from their sway in the commercial sector where recently the CFMEU black ban on Boral has shown the powerful effect of the unions on the commercial success or otherwise of industry participants. In responding to the CFMEU's black bans the Boral Chief Executive has said:

> *These are cowards and bullies and they've been allowed to do this for a long time. At some stage, business needs to say this is enough.*[19]

Figure 2: Unionisation Rate – Construction Industry



The September 2005 Taskforce Report[20] highlighted the rationale for specific building industry workplace reform that had been so comprehensively documented by the Cole Royal Commission and which still reverberates today especially in the context of the quoted words from Mr Kane. It found that the industry norm was to disregard the *Workplace Relations Act 1996* (Cth) (WRA) and adhere instead to "the law of the jungle". The Taskforce and the ABCC reported that incidences

[18] For example as outlined in the *Discussion Paper for the Proposed Building and Construction Division of Fair Work Australia,* pp 16-17.
[19] M Dunckley and J Kehoe *Straight Shooter*, Boss Financial Review Volume 15 May 2014 26 at p27
[20] Above note 15

of inappropriate industrial pressure, sometimes involving violent and thuggish behaviour, contributed to the lawless culture that has plagued the industry for decades. These behaviours were only too palpable in the Myer Emporium dispute that was headline news in August 2012, a dispute which epitomises the trends articulated in the lead up to the establishment of the ABCC in October 2005 and which apply equally in the lead up to a resurrected ABCC.

It is from these general characteristics of the industry and in particular its industrial relations culture, that I now move to the specifics of the Myer Emporium dispute (which were emulated in a recent waterfront dispute) to illustrate one aspect of the problem of bullying that is accentuated by the culture evident in the commercial sector but where the anti-bullying laws are likely to have little effect.

Conduct during the Myer Emporium Dispute and at the Waterfront

Workplace bullying is not only directed at workers by other workers. Workers can be bullied in the workplace by 'other people' such as customers, and, particularly in the building and construction industry, by union officials.[21]

A blatant example of workplace bullying directed at workers by a trade union occurred during the Myer Emporium dispute. A leaflet then published depicts pictures of workers and their names, together with demeaning descriptions, together with the slogan 'get rid of these scabs out of our industry'. The leaflet had the intention of applying pressure on those workers to support the CFMEU blockade and to no longer attend

[21] For examples of workplace bullying initiated by trade unions see: http://www.dailytelegraph.com.au/teachers-say-unions-are-bullying-them-into-strike-action/story-e6freuy9-1226390087044; http://www.afr.com/p/national/shorten_slams_union_scab_leaflet_9EVao6lWT5PIgp7cgw8idK; http://www.fwbc.gov.au/fwbc-launches-grocon-proceedings-0

for work. This leaflet was widely distributed and displayed repeatedly around worksites during the well-documented dispute between the CFMEU and Grocon in 2012.[22] I have blurred the faces and blacked out the names of the workers in the slide I use to illustrate this despicable behaviour.

The publication of such a document where risks to those identified were made very real by the violence that attached to this dispute also reinforces the action that employers should take in these circumstances articulated by Safe Work Australia (SWA) in the "Guide for Preventing and Responding to Workplace Bullying"[23] as follows and which has been emphasised in industry training discussed below:

> *Where there is a risk of workplace bullying by other people, for example clients, the following control measures may be considered:*
>
> - *Communicate the expected standard of behaviour through a code of conduct or in contracts and agreements*
> - *Empower workers to refuse or suspend service if other people fail to comply with the expected standard of behaviour*
> - *Provide support to workers who are exposed to unreasonable behaviour*
> - *Implement control measures to eliminate or minimise the risk of workplace violence.*[24]

In this context, a very recent case[25] shows that dissemination of publications where workers are depicted as scabs, and were publicly

[22] Not the least of which was the judgment of Justice Cavanough in *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* (No 2) [2014] VSC 134 (31 March 2014)

[23] *Guide for Preventing and Responding to Workplace Bullying I November 2013* Safe Work Australia

[24] Id page 10

vilified, amounts to adverse action by both the official who published the material and by the relevant union. In this recent decision, the union was the Maritime Union of Australia (MUA).[26] This case has not yet established the quantum of any compensation payable in the circumstances but it should be clear that the judge, Siopis J, has called for submissions on that point as a result of his finding of a breach of the adverse action provisions of the FW Act.

The example of the bullying experienced in unacceptable behaviours of this kind, the personal vilification and humiliation of a group of workers, throws light on two issues which are pertinent to explaining the limited direct effect of the bullying laws in the building and construction industry, at least to date. As I mentioned earlier, the first relates to the issue of a jurisdiction where no monetary compensation can be made per s789FF(1) FW Act. This contrasts with any compensation that may be payable in the context of the case against the MUA where, as I indicated, the judge has sought submissions about the quantum of compensation to be awarded.

The second issue relates to s789FF(1)(b)(ii). Pursuant to this provision for the Commission to be able to make orders to stop bullying, it must be satisfied not only that a worker has been bullied at work by an individual or a group of individuals, but also that there is a risk that the worker will continue to be bullied at work by that individual or group of individuals. The incidents which are highlighted in the two cases I have mentioned are unlikely to involve ongoing bullying behaviour of the kind complained of; i.e. what was present is the label of 'scab' being applied from a single

[25] *Fair Work Ombudsman v Maritime Union of Australia [2014] FCA 440 (6 May 2014)*
[26] Reported in Workplace Express 7 May 2014 *MUA scab poster, extreme, offensive, cruel and abusive*

incident where workers exercise their rights not to take the industrial action urged by the relevant union.

Bullying must be systematic

One incident does not constitute bullying. Although there is no single universally accepted definition, it is generally agreed that bullying is systematic and interpersonal behaviour which may cause severe social and psychological problems in the target.[27] The term 'bullying' is sometimes utilised to describe a pattern of repeated harassing or abusive behaviour by an individual or a group that is designed to intimidate, offend, degrade or humiliate an individual or group.[28] These descriptions of bullying point to two key components – the behaviour is systematic and there is an imbalance of power between the perpetrator and victim. This imbalance is more often psychological and physical as opposed to hierarchically-based. In other words, workers can bully other workers; subordinates can bully supervisors, and the other way around. This has been recognised in the anti-bullying laws by the remedy. That is a worker (as to which definition see below) is empowered to make an application for an order to stop bullying, by defining the term "bullied at work" to require the individual or group of individuals to "repeatedly behave unreasonably" towards the complainant worker per s789FD(1)(b).

As expressed earlier, workplace bullying usually occurs between individuals who work together in the same organisation but in the building and construction industry bullying behaviour is also exhibited by

[27] Einarsen S, Hoel H, Zapf D and Cooper CL (eds) *Bullying and emotional abuse in the workplace: international perspectives in research and practice* (2003)

[28] Loggins A, English J and Ballard A *Workplace bullies: how employers can detect and prevent workplace bullying before it escalates into violence* (2012) ACC Docket, at 100

third parties such as union officials. The perpetrator displays behaviour described above, i.e. that person acts towards the other person in such a way as to cause the target harm or disadvantage through actual behaviour or the perceived threat of harm, behaviour that is repeated. This harmful behaviour would be workplace bullying if it occurs on a regular and sustained basis and is not limited to a single or isolated act, albeit one incident may indicate a culture where bullying could occur.

A case[29] involving a WHS prosecution involving behaviour that was intended to be a 'practical joke' but that went horribly wrong shows how a single incident may trigger other remedies but is not 'repeated' behaviour. The incident was motivated by the fact that the worker assaulted was due to get married the next day and the 'egging' of him was by way of 'celebration'.

Four workers grabbed a fellow worker as he got out of his truck at the worksite, hit him in the groin and tied him to a piece of steel mesh. His clothes were cut off with a knife and eggs were thrown at him. The chief perpetrator then grabbed a jerry can and poured fuel on the ground near the victim, who was still bound, and lit the fuel. The flames were about knee-high. The victim then fell to the ground and sustained partial thickness burns to his legs, which required debridement and skin grafts. He also suffered psychological injuries. Two of the four workers were fined $2,000 and $1,800 respectively, with the other two being placed on a 12-month good-behaviour bond. Extraordinary but not bullying.

[29] *Inspector Estreich v Zaccardelli & Ors* [2012] NSWIRComm 47 (31 May 2012)

Worker – Extended Definition

Earlier I alluded to the fact that there are a large number of independent contractors who operate in the building and construction industry. Part of the overestimation of the number of complaints, which I referred to in the introduction to this paper, was because the term 'worker' who is being bullied at work is defined very widely. Pursuant to s789FC FW Act 'worker' is defined as having the same meaning as in the *Work Health and Safety Act 2011*. Under that Act a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, trainee and a student gaining work experience or a volunteer. Part of the 'floodgates' issue was that with the large number of subcontractors and contractors in the building and construction industry, it was anticipated that they would bring complaints or applications to the FWC. To date this factor has not manifested itself as contributing markedly to the numbers shown in the first quarterly report that I referred to earlier in this paper. It showed that most applicants, that is 133 of the 151, were employees. Only four were contractors or subcontractors. The report does not disclose the industry in which the contractors or subcontractors worked.

Training – a Major Effect

Despite the low level of applications received, what the new law has done is to refocus the building and construction industry's attention on not permitting the sort of culture that led to the so-called workplace 'prank' that I referred to earlier from occurring. Training by Master Builders associations on the new laws and the ways to prevent bullying has been held in all States and Territories. In Victoria, the matter of

training has been taken further. Launched by the Master Builders Association of Victoria in late 2013, an awareness and prevention of bullying course has been designed with construction site managers and foremen in mind. It uses simulation training utilising props and actors to educate on the issue of workplace bullying in the construction industry. This is a very practical means by which industry participants can demonstrate their knowledge and ability to identify and deal with bullying in an environment which is as real as is possible to simulate.[30] It is hoped that the take-up of this training can act to stop bullying culture.

Conclusion

Many other remedies than that prescribed under the FW Act are available to a worker when bullied.[31] Most of those have financial consequences attached to them which are not available in the Fair Work jurisdiction. This factor, together with the issue that familiarity with the law, appears to be not yet fully evident, despite the training courses I mentioned, has meant that the full impact of the law is yet to be felt. However, in increasing awareness of bullying and in requiring members to address issues of culture which might engender bullying conduct, Master Builders believes that the new laws have had a lasting effect on the building and construction industry.

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[30] Marion Lopez *Simulated bullying,* The Contractor March 2014 at page 45

[31] These include WHS Laws, workers' compensation, anti-discrimination, adverse action and the criminal law.

Attachment C

THE FAIR WORK COMMISSION'S ANTI-BULLYING JURISDICTION

A presentation to MBANSW Employment Relations Policy Committee

21 August 2013

Richard Calver, National Director
Industrial Relations and Legal Counsel
Master Builders Australia Ltd

Introduction

The *Fair Work Amendment Act, 2013* (Cth) (Amendment Act) will fundamentally change Australia's workplace relations system. From 1 January 2014,[1] a new remedy against bullying will be available to Australian workers. Workers who reasonably believe they have been bullied at work will be given the right to apply directly to the Fair Work Commission (FWC) for an order that the bullying stop.

This paper outlines the new anti-bullying provisions. It does not catalogue all of the other remedies currently available to deter bullying,[2] although some are mentioned in the course of providing an outline of the changes introduced by the Amendment Act. This paper also sets out Master Builders' proposal to modify the law as introduced,[3] including a proposal that has been supported by the Coalition and which forms part of the Coalition's policy on workplace relations.[4] Changes made to workplace laws by the Amendment Act other than in respect of bullying are not discussed.

Why the New Laws?

There is no doubt that bullying in the workplace is a serious issue. Master Builders' policy is to steadfastly oppose bullying. As Master Builders said in the June 2012 submission[5] made to the House Standing Committee on Education and Employment Inquiry into Workplace Bullying:

> *Workplace bullying is of concern not only for the building and construction industry, but for all Australian workplaces. It can have serious health and psychological consequences for victims. Workplace*

[1] Whilst the Fair Work Amendment Bill 2013 (Amendment Bill) passed the Parliament on 27 June 2013 and received Royal Assent on 28 June 2013, Schedule 3 does not come into effect until 1 January 2014. This paper does not discuss other changes introduced by the statute.

[2] A number of areas of the law currently deal with bullying including workplace health and safety, workers' compensation, anti-discrimination laws, potentially the general protections provisions of the *Fair Work Act, 2009 (Cth)* (FW Act) and the criminal law. The only State to introduce bullying behaviour into the criminal code is Victoria. see: *Crimes Amendment (Bullying) Act* 2011 (Vic).

[3] See Master Builders' submission to the Senate Education Employment and Workplace Relations Committee dated 15 April 2013 in relation to the Committee's inquiry on the Amendment Bill entitled "Inquiry into the Fair Work Amendment Bill 2013" discussed infra

[4] See Coalition Policy document 'The Coalition's Policy to Improve the Fair Work Laws' at page 8 (accessed 5 August 2013)

[5] Master Builders submission is available as submission 105 at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/bullying/subs.htm (accessed 5 August 2013)

> *bullying can also pose significant financial and legal implications for employers.*[6]

Bullying is, however, not something which is able to be pinned down with precision. This point has been made in the Regulation Impact Statement prepared by Safe Work Australia[7] in the context of a proposed WHS code of practice targeted at anti-bullying:

> *Feedback from stakeholders indicates workplace bullying cannot be dealt with in a one-size-fits-all approach and no single set of control measures can be used in all circumstances. Requiring a specific set of control measures in regulations would remove sometimes necessary flexibility for businesses to effectively manage workplace bullying. This may lead to businesses not being prepared to implement the change meaning costs and prevalence may not reduce…*
>
> *The extent of different views on defining bullying and managing risks and continuing research in this area all indicate there is not yet a standardised body of knowledge around the approaches to identifying and dealing with this issue. This supports the need for a more flexible approach than regulation at this point in time.*[8]

Yet in the context of workplace relations law, we have been given a 'one-size-fits-all' approach around an inflexible approach to regulation. This approach derived from a series of announcements made by the Gillard Government in February 2013:

> *In February, Ms Gillard signalled at the Australian Workers' Union national conference that industrial relations would be central to Labor's political strategy and revolve, in part, around a raft of changes to the Fair Work Act – since passed by parliament – and protecting jobs.*[9]

So, it was in the context of this renewed Labor emphasis on workplace rights that on 12 February 2013 the then Minister for Employment and Workplace Relations (now Minister for Education and Workplace Relations) the Hon Bill Shorten announced[10] that the Government would amend the *Fair Work Act 2009* (Cth) (FW Act) to allow an employee who has suffered bullying at work a right to seek assistance through the

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[6] Ibid at para 2.2

[7] "Consultation Regulatory Impact Statement for the Draft Model Code of Practice: Preventing and Responding to Workplace Bullying." 12 June 2013 (accessed 5 August 2013)

[8] Ibid at p17

[9] J Massola "Labor emphasises IR differences" *Australian Financial Review* 5 August 2013 p11

[10] 12 February 2013 Ministerial media release "Government Puts Workplace Bullies on Notice" http://ministers.deewr.gov.au/shorten/government-puts-workplace-bullies-notice (accessed 5 August 2013)

Fair Work Commission (FWC). This was despite the fact that Safe Work Australia's anti-bullying Code of Practice[11] was and remains under development and despite the universal dismay from Master Builders and other employer groups that the move was likely to cause confusion. This confusion would arise particularly from adding a specific federal jurisdiction to receive complaints as this step potentially allows forum shopping and adds another layer of complexity for business and enforcement agencies.[12]

Having said that, the Government was able to justify the introduction of the legislation because of the recommendations presented by the House Standing Committee on Education and Employment, contained in a report entitled "Workplace Bullying: We just want it to stop."[13] The report was dated October 2012 but was tabled on 26 November 2012. The Standing Committee not only called for the establishment of the remedy founded in the Amendment Act but it called for a new single national advisory service to help workers and employers identify what is and what is not bullying behaviour; to clarify the extent to which workplace bullying is dealt with by workplace health and safety legislation versus anti-discrimination law, industrial relations instruments, workers' compensation schemes and the criminal law and to provide a range of options for resolving the problem.[14] This multi-faceted approach is preferable to the introduction of the current regime as a stand-alone reform. Indeed, it is Master Builders' policy that a new agency or an existing agency, such as the Fair Work Ombudsman, should screen all complaints before they proceed to legal remedy so that crucial and sensitive issues are not played out before the Fair Work Commission, a matter to which I will return in this paper.

The actual recommendation founding the Minister's announcement, which did not have bipartisan support, was recommendation 23 as follows:

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[11] Code of Practice: Preventing and Responding to workplace Bullying Safe Work Australia (accessed 8 August 2013)

[12] Master Builders media release 12 February 2013 "Builders Express Caution over new Bullying Provisions" (accessed 5 August 2013)

[13] House Standing Committee on Education and Employment "Workplace Bullying we just want it to stop" http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ee/bullying/report.htm (accessed 5 August 2013)

[14] Ibid see recommendation 2 and recommendation 11 in particular.

> *The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek penalties through an adjudicative process.*

The Committee did not actually recommend that the FWC be vested with the adjudicative process that the Minister alluded to, although that is a necessary implication from its report. The Committee actually stated that a process for resolving workplace bullying issues:

> *…[S]hould adhere to the same principles and practices of effective dispute resolution that Fair Work Australia* (now the Fair Work Commission) *already utilises and promotes for facilitating the resolution of a grievance or dispute between the parties by reaching an agreement through conciliation or mediation. However, if agreement cannot be reached an individual should have access to an adjudicative process that provides decisions on cases in a quick manner, with limited costs incurred by the parties such as that which the Committee understands is provided by Fair Work Australia.*[15]

Clearly from this extract the process was intended to be two-staged. Before I discuss that issue, an examination of the core elements of the new laws will assist to frame Master Builders' urgent call for a change so that the two-stage approach outlined in the relevant extract is achieved but, as will be seen, is achieved by different means.

The Substance of the New Laws

Bullied at Work

The Amendment Act introduces a new Part 6-4B to the FW Act comprising sections 789FA to 789FL. Section 789FC states that a "worker who reasonably believes that he or she has been bullied at work" may apply to the FWC for an order that the bullying stop. The term "bullied at work" is defined in s789FD(1). That provision says a worker (an important term that I will return to below) is bullied at work if an individual or a group of individuals repeatedly behaves unreasonably towards the worker or a group of workers of which the worker is a member and that behaviour creates a risk to health and safety.

[15] House Standing Committee report above note 13 at para 6.126.

The definition is extraordinarily broad. It needs to be considered in the context of research on the nature of bullying, particularly in the light of the knowledge, discussed earlier, that it is a phenomenon or hazard which evades a single set of control measures.

Although there is no single universally accepted definition, it can at least be agreed that bullying is systematic and interpersonal behaviour which may cause severe social and psychological problems in the target.[16] The term bullying is sometimes utilised to describe a pattern of repeated harassing or abusive behaviour by an individual or a group that is designed to intimidate, offend, degrade or humiliate an individual or group.[17] These descriptions of bullying point to two key components – the behaviour is systematic and there is an imbalance of power between the perpetrator and victim. This imbalance is more often psychological and physical as opposed to hierarchically-based. In other words, workers can bully other workers; subordinates can bully supervisors, and the other way around.[18] The House Standing Committee noted that there are three elements to bullying, elements which have been incorporated in the statutory definition. They have been specifically referred to in the Explanatory Memorandum to the Bill: "the behaviour has to be repeated, unreasonable and cause a risk to health and safety."[19]

From just the discussion of the definition, it seems plain that bullying is not solely a workplace relations issue and sits better in the construct of health and safety laws. This point is relevant to the terms of s789FD(1). It requires the FWC member to assess whether the relevant behaviour creates a risk to health and safety. FWC members, I respectfully suggest, are not expert in assessing complex behavioural and psychosocial hazards. Hence, at the very least having an independent agency which first assesses the claim bearing those issues in mind, would be a necessary reform. In addition, the use of a jurisdiction which is essentially adversarial[20] is not

[16] Einarsen S, Hoel H, Zapf D and Cooper CL (eds) *Bullying and emotional abuse in the workplace: international perspectives in research and practice* (2003).

[17] Loggins A, English J and Ballard A *Workplace bullies: how employers can detect and prevent workplace bullying before it escalates into violence* (2012) ACC Docket, at 100.

[18] Einarsen et al *Bullying and emotional abuse,* above n 15.

[19] Revised Explanatory Memorandum to the *Fair Work Amendment Bill 2013* at para 108.

[20] See in particular *FWA is 'micro-managing' IR, say Former Registrar* Workplace Express 15 June 2012 where Doug Williams, former Registrar is reported to have said: "Fair Work Australia has become a "micro-manager"

an ideal choice as a jurisdiction for anti-bullying remedies and this again highlights the problematic issue of the Government having 'cherry-picked' one of a series of inter-related recommendations to found the new laws and to vest authority in the FWC.

It should also be noted that lodging an application does not preclude taking action in other jurisdictions. By way of example, s789FH states that s115 of the *Work Health and Safety Act 2011* (WHS Act) and corresponding WHS laws do not apply in relation to an application for an order to stop bullying. This means that a worker is still able to access remedies under the WHS Act where they have made an application to the FWC to stop bullying because s115 would ordinarily proscribe that action.

Who is Covered?

The anti-bullying measures in the Amendment Act principally derive their constitutional authority from the corporations power. Hence, compliance with the provisions extends to all companies and other organisations which are 'constitutionally covered', including the Commonwealth and its agencies. Not for profit organisations are also captured.

The 'worker' definition extends the class of those who may make a complaint beyond the category of an employee. The definition of a worker is wide. Captured are employees, contractors or subcontractors and their employees, an in-placed labour hire worker, an apprentice or trainee, a student on work experience, a volunteer and there is even scope for other classes of 'worker' to be prescribed in regulations. The wide definition accords with the definition within the harmonised work health and safety laws,[21] a matter specifically referred to at s789FC(2).

The definition is especially important for building and construction industry participants because of the extent of subcontractor engagement in the industry. As

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of industrial relations, abandoning the tribunal's world leadership in independent conciliation and arbitration and its involvement in "seminal" disputes."

[21] Section 7 Model *Work Health and Safety Act* 2011 revised draft 23 June 2011 (accessed 8 August 2013)

Hampson and Kwok[22] have noted, up to 90% of the work on a building site is undertaken by subcontractors. The definition of worker thus establishes a new remedy for subcontractors of which many industry participants will be unaware, given the context of the changes to the law, i.e. the law being expressed in a workplace relations statute. It can be seen, in addition, from the breadth of the definition that it could encompass actions by managers to discipline staff. We would hope that this sort of action would be captured by the underlying notion that the behaviour which is repeated and unreasonable is measured against an objective test, as acknowledged in the Revised Explanatory Memorandum,[23] but there is a specific exception for management action.

Reasonable Management Action

One example of the distinction between the application of an objective rather than a subjective standard is disciplinary management practices which a disgruntled employee might perceive as bullying behaviour but when examined against an objective standard does not constitute bullying. This is the case because the employer is seeking the employee to act in a prescribed manner that is determined as normative behaviour within that organisation. Performance management, including management of workers who are not performing at the standard expected, is not bullying. This is recognised in the Amendment Act. Section 789FD(2) states that the principal obligation does not apply "to reasonable management action carried out in a reasonable manner." This provision is commended. However, it is likely to be the subject of argument and contest in the FWC.

Litigation is apprehended because the accusation of bullying in the context of management action will need to be refuted by the employer. This refutation will be confounded by the murky nature of the law. For example, the draft Safe Work Australia Code referred to earlier[24] currently says:

> *There are times where persons conducting a business or undertaking may take reasonable management action to effectively direct and control the*

[22] K Hampson and T Kwok, "Strategic Alliances in Building Construction: A Tender Evaluation Tool for the Public Sector" *Journal of Construction Procurement* Vol 3, No 1, (1997) p28

[23] Above note 19 at para 109

[24] Above note 11

> *way work is carried out. It is reasonable for managers and supervisors to allocate work and to give fair and reasonable feedback on a worker's performance. These actions are usually not considered to be bullying if they are carried out in a reasonable manner, taking the particular circumstances into account.*[25]

This extract shows that it is contemplated that each circumstance in which the management action is carried out should be examined. We have also indicated to Safe Work Australia, that the phrase "there are times where" is inappropriate because reasonable management action should not be temporally limited. But it can be seen from the general terms of this extract that the practical manifestation of the circumstantial nature of its expression will clog up a jurisdiction that could be anticipated to receive an inordinate number of complaints in any event. As Master Builders pointed out to the Senate Committee which was considering the Fair Work Amendment Bill:[26]

> *Following the Café Vamp OHS prosecution in Victoria in 2010 the volume of claims of bullying from workers to WorkSafe Victoria rose to more than 6,000 complaints in a year. WorkSafe Victoria quickly realised that many of the complaints were from workers who were not happy with their employment position, actions of their employer (e.g. counselling, discipline) or did not get on with their co-workers.*[27]

Indeed, FWC general manager Bernadette O'Neill is reported to have told the Senate Education, Employment and Workplace Relations Committee that in the order of 3,500 applications would be lodged per year under the provisions, although she noted that an accurate prediction was difficult for what was described as a "unique" jurisdiction.[28]

To improve the work environment the focus needs to be on targeting the perpetrators of workplace bullying (inclusive of unions) in order to change a dysfunctional culture, not on the employer who exercises legitimate managerial prerogative in attempting

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[25] Ibid p7

[26] Senate Education, Employment and Workplace Relations Committee inquiry on the *Fair Work Amendment Bill 2013* See submission 4 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/completed_inquiries/2010-13/fair_work_2013/submissions.htm

[27] Ibid at para 5.10.1 (footnote omitted)

[28] *FWC prepares for 3500 bullying applications* Workplace Express 7 June 2013

to improve staff performance. The new law targets the employer when it may be a number of other parties in the workplace who are exhibiting the bullying behaviour.[29]

Systems Required

Because an employer has the main responsibility for the bullying behaviour, the work health and safety law contemplates that systems will be put in place to provide feedback on conduct and to educate the workforce about what is or is not acceptable conduct. It is clear that a person conducting a business or undertaking has a duty of care under the harmonised WHS legislation to ensure the health and safety of workers (in the expanded sense) while the workers are at work in the business or undertaking.[30] The Safe Work Australia draft code of practice envisages that a control measure which should be introduced is the development of a code of conduct or bullying policy.[31]

As part of that management focus, an employer should develop procedures to respond to reports of bullying "in a confidential, reasonable and timely manner."[32] This latter criterion has recently been reinforced in the context of bullying allegations made in an unfair dismissal case.[33] Employers should act in a timely manner when dealing with bullying allegations. In short, employers must before 1 January 2014 implement and train workers about a bullying policy[34] that affects their workplace(s). If a policy is already in place, we suggest that it should be updated bearing in mind the Amendment Act.

The Remedy

As expressed earlier, a worker who reasonably believes that he or she has been bullied at work may make an application under s789FC. There are no precursors to lodgement; the only criterion is that a reasonable belief is held. It would be sensible

[29] See R Nickless "Employers fear rise in 'reverse bullying'" *Australian Financial Review* 12 June 2013.
[30] Section 19 model *Work Health and Safety Act 2011*
[31] Above note 11 at p11
[32] Ibid
[33] *Harris v Workpac Pty Ltd* [2013] FWC 411 (430 July 2013)
[34] Master Builders has a pro forma policy in its Human Resources Manual published by MBANSW and other member associations.

for, at the least, a complaint or a copy of the application to respectively have been made or provided to the employer. Neither of these steps are prerequisites.

S789FE requires the FWC to "start to deal with" an application within 14 days after the application is made. The statutory note to this provision then provides examples of what the FWC might do:

> *For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.*[35]

So, potentially, an employer may not hear of the complaint until a hearing is convened. That is far from ideal.

S789FF provides broad powers to make an order once the FWC is satisfied that the worker has been bullied at work by an individual or group of individuals and there is a risk that the worker will continue to be bullied. The Explanatory Memorandum gives examples of the orders the FWC may make are:

- the individual or group of individuals stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer's workplace bullying policy.[36]

It should be clear, however, that section 789FF(1) does not permit the FWC to make an order requiring payment of a pecuniary amount. But although the ordering of a payment of money is proscribed, this will not prevent the payment of money by way of settlement of claims. Just as in other proceedings, employers often look at the cost of the proceedings or the cost of a potential order and make a monetary

[35] *Fair Work Amendment Act 2013* see note s789FE(1)
[36] Above note 19 at 121

settlement that is less than the costs assessed for the hearing of the matter and/or its expected outcome. Employers often pay what is known as "go away" money.[37]

There is a facility for the FWC to take into account other proceedings that might have been instituted in respected of the same conduct. The FWC can take into account any factor it considers relevant when considering the terms of the order per s789FF(2). But it must have regard to:

- any final or interim outcomes of an investigation into the matter that is being undertaken by another person or body;
- any procedures available to the worker to resolve grievances or disputes; or
- any final or interim outcomes arising from any procedures available to the worker for resolving grievances or disputes.[38]

The consideration of the listed factors may assist where a worker has also lodged an adverse action claim or threatens to do so. Employers should be aware that the making of a bullying complaint to the FWC will likely be the exercise of a 'workplace right' by an employee for the purposes of the adverse action provisions of the FW Act,[39] although that matter will need to be squarely determined by the FWC in the future. The interplay between these two issues has not been addressed in the Amendment Act and it therefore appears possible for an employee to bring both an adverse action application and bullying application at the same time; at the least the FWC should administratively determine to hear the matters concurrently.

The problematic nature of the FWC hearings and the evidence that might be lead in relevant proceedings is also confounded by the fact that the consequence of a breach of WHS legislation is a criminal sanction. Employers will need to be careful

[37] For a discussion of the circumstance of the payment of "go away" money in the context of the former Australian Industrial Relations Commission see T MacDermott and J Riley *ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances* (2012) 38(2) Monash University Law Review 82 at 85

[38] Above note 19 at 122

[39] S 342 F W Act sets out the meaning of adverse action

about the status of evidence that is adduced in anti-bullying proceedings because it, in turn, could be used to underpin a WHS prosecution.[40]

With that proposition in mind, the interaction between the agencies that have responsibility for the various facets of anti-bullying remedies is not defined in the Amendment Act save to permit a contemporaneous prosecution of rights under the harmonised WHS Acts and the Amendment Act, as discussed earlier. It will be vital for industry to be informed of how these matters are dealt with in practice, particularly the practical aspects of inter-agency collaboration, and the subject will need greater attention as the commencement date for the Amendment Act draws closer.

The Master Builders' Reform Proposal

In order that this jurisdiction is not overwhelmed by complaints, that is applications, Master Builders has proposed to Government[41] that each complaint be screened and workers provided with advice about the nature of the notion of bullying before an application to the FWC may proceed. Workers should, at that point, be given a referral to an agency that is best able to deal with their grievance. We have recommended that this task could be undertaken by the Fair Work Ombudsman or another agency but that some form of screening or early intervention would assist all parties in the workplace. As mentioned earlier in this paper, the Coalition has incorporated such a process in its election policy document for the election to be held in just a few days as follows:

> *The Coalition will support Labor's proposed changes to address workplace bullying but only if it is clear that a worker has first sought help and impartial advice from an independent regulatory agency, and further, the changes are expanded to include the conduct of union officials towards workers and employers.*[42]

[40] This point is developed in the ACCI submission to the relevant Senate Committee see above note 26 submission number 48 (accessed 12 August 2013)

[41] See above note 26

[42] Above note 4 at p8

Conclusion

As can be seen from the discussion in this paper, the added cost of introducing a stand-alone cause of action for bullying is a burden on industry, particularly if it is used by disgruntled employees as a measure to garner “go away” money rather than to address what all parties view as unacceptable bullying conduct. Employers are hit with the consequences of non-compliance at both the State and Territory level with WHS and the related requirement to document performance and conduct discussions and decisions in the context of the Act, potentially with evidence lead before the FWC contributing to a potential criminal prosecution. These discussions and decisions will apply to a much broader range of individuals than employees in the traditional sense and in the building and construction industry will apply to a large number of subcontractors. Employers will also be required to properly document and address all complaints, particularly where they comprise bullying, even as a small component, where they are made by both employees and non-employees.

The cost impact of having multiple compliance regimes that is under WHS laws, anti-discrimination laws, workers’ compensation and criminal laws in a range of jurisdictions will add to the confusion that the new laws have brought about. Master Builders believes that the reform relating to a pre-screening process described in this paper is vital to ameliorate some of these consequences. However, it is obvious that a further examination of the law should be undertaken in the light of the need to better co-ordinate the various legal remedies, that a multi-faceted approach if required should be better dealt with so that there is not a multiplicity of actions available.

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