Master Builders Australia

Submission to Productivity Commission on the Draft Report –

Workplace Relations Framework

18 September 2015

MASTER BUILDERS AUSTRALIA

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1 Introduction

1.1 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.

1.2 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 Master Builders welcomes the opportunity to provide a response to a number of the key issues raised in the draft report of the Productivity Commission's (the Commission) Inquiry into the Workplace Relations Framework.

2.2 This response builds on our original submission dated 11 March 2015 (the Submission) in response to the Inquiry's five Issues Papers. We reference that submission in this response, particularly where it distinguishes the building and construction industry workplace relations system from the general system. This submission also follows on from the provision of a summary document of a number of major issues that was sent to the Commission on 8 September 2015, together with the oral submissions to the Commission on 11 September 2015. We thank the Commission for that opportunity.

2.3 In this submission Master Builders emphasises that the workplace relations system as it is manifested in the commercial sector of the building and construction industry in particular is distinct. It does not reflect the community norms that ideally underpin the system of workplace relations in a twenty first century economy. This submission articulates in a number of places in a number of ways how the building and construction industry should be treated

differently, a matter recognised by the Productivity Commission in other reports.

2.4 The submission also addresses the detail of a number of the Draft Recommendations and responds to the Commission's information requests.

3 The Building and Construction Industry is Different

3.1 Master Builders notes that at page 66 of the Draft Report, the Commission states that excluded from the inquiry are "institutional arrangements in the construction industry". As set out in the same place in the Draft Report, it is noted that these issues were dealt with in the Commission's inquiry into Public Infrastructure.[1] That report made it plain that the building and construction industry is "distinctive":

> *However, taken cumulatively, the construction industry — and especially its complex contracting arrangements — is distinctive. If nothing else, the features of the industry suggest that achieving a good quality IR environment is particularly important, and that the regulatory and institutional arrangements need to reflect this.*[2]

3.2 Master Builders submits that the findings about building and construction industry workplace relations from the Public Infrastructure Report cannot be ignored in the current context. They are cogent, relevant and throw light on the industry's workplace relations which are able to be characterised as dysfunctional in contrast with the finding in the Draft Report that the general system is not of that character: Overview, page 9 Draft Report.

3.3 Master Builders believes that, at the least, rather than merely excluding the findings from the Public Infrastructure Report, the relevant findings should illuminate the discussion in the final report and should be mentioned where they do not sit squarely with the recommendations in the Draft Report. In other words, whilst the Commission has said these sector specific arrangements are excluded from the current Inquiry, surely they should be noted as exceptions to findings and recommendations that do not line up with the prior outcomes from the Public Infrastructure Report?

[1] http://www.pc.gov.au/inquiries/completed/infrastructure

[2] Id at p518

3.4 Linked with the findings in the Public Infrastructure Report is the proposition that the more open, competitive, flexible and innovative an industry, the more business is encouraged and enabled to be more productive. The Productivity Commission has emphasised how important fundamental influences like regulatory and institutional frameworks are in facilitating productivity growth; how the industrial relations environment works to underpin aggregate economic performance.

3.5 In its May 2013 Productivity Update, the Productivity Commission makes this very point:

> *There are also fundamental influences such as resource endowments, demography, geography, institutional frameworks and culture which set the general 'environmental' conditions which can affect productivity, especially over the long term.*
>
> And
>
> *Formal and institutional 'rules of the game' influence the costs of coordinating production activities and conducting business. They can provide incentives for firms and individuals to raise productivity or, conversely, to engage in socially unproductive rent-seeking to obtain special treatment. Cultural factors refer broadly to the orientation of people toward change of the kind required to achieve further development.*[3]

3.6 The unacceptable workplace relations culture in the building and construction industry has been charted ad nauseum. The Cole Royal Commission into building and construction concluded that the conditions in the Australian building and construction industry were unlike those in other industries.[4] The findings of the Cole Royal Commission are now reverberating in the Heydon Royal Commission. These high order inquiries point to socially unproductive rent-seeking by building industry unions that distorts workplace relations in the building and construction industry. Divorcing the findings of the current inquiry from the realities of workplace relations in the building and construction industry does not sit well with Master Builders' stakeholders. There are a number of elements of the Draft Report that would need to be changed to affect the dynamics of workplace relations in the building and construction industry. We point those matters out in this submission but also

[3] http://www.pc.gov.au/research/recurring/productivity-update/2013/2013-pc-productivity-update2.pdf at page 10

[4] Royal Commissioner, the Honourable Terence Cole RFD QC, Final Report of the Royal Commission into the Building and Construction Industry, February 2003

reinforce the utility of the recommendations made in the Public Infrastructure Report that were set out at paragraph 4.1.7 of the Submission.

3.7 Indeed, the Commission in the Infrastructure Report found that workplace relations in the building and construction industry were in need of reform:

> *Multiple reviews have found criminal conduct and intimidation as a feature of certain projects, and this appears to be a continuing feature of the industry. As noted above, a Royal Commission is currently considering fresh allegations of unlawful conduct by employers and unions in the construction industry. Cases in the Federal Court and Federal Circuit Court have revealed industrial tactics designed to secure common and generous conditions across project sites and to unduly pressure employees to join unions. The nature of construction projects provides unions with significant leverage, which they sometimes abuse. Businesses are exposed to large delay penalties, and high costs if construction work is interrupted (such as during a concrete pour). Bargaining pressures have increased some project costs, particularly in the building construction segment of the industry (as revealed by the excessive pay and conditions in some projects).*[5]

3.8 As the Commission noted in the Public Infrastructure Report, the sector is far too important to the economy for reform not to be effected:

> *(A)ny inefficiencies in public infrastructure have major economy wide impacts. The expected demand for infrastructure construction services over the next few decades is high. The construction industry is a major input into many other industries — especially mining; electricity, gas and water; transport; communications services; and property and business services …. For example, Independent Economics found that a hypothetical IR-related improvement in labour productivity of around 10 per cent increased value added in the construction industry by around 2 per cent, but also increased value added in the mining industry and the electricity, gas, water and waste services industry by 1.2 per cent each.*[6]

3.9 The balance between employers and employee interests that is articulated at page 79 of the Draft Report has not been achieved in the building and construction industry. As was set out in Recommendation 13.2 of the Public Infrastructure Report a well empowered specialist regulator that enforces greater penalties than those imposed in the general workplace system is required in order to restore that balance in the building and construction industry. The normative values that the Commission isolates in a number of

[5] Above note 1 Report Vol 2 p 546

[6] Above note 1 Report Vol 2 p 517

areas of discussion in the Draft Report are absent in the building and construction industry. That point must be emphasised and we urge the Commission to reinforce the findings that it made in the Public Infrastructure Report.

3.10 Throughout this submission Master Builders remains cognizant of the principal rationale for reform in workplace relations in the building and construction industry: to have in place the same community values that are exhibited in other parts of society. This was made perfectly plain by Justice Logan recently where he remarked on the CFMEU's "outrageous disregard in the past and also in the present case of Australian industrial norms".[7] This statement comes hard on the heels of other judicial comments that are of the same ilk such of those of Justice Tracey as follows:

> *In seeking to achieve its desired outcomes the CFMEU had available to it lawful processes which it could have pursued. It chose, instead, to prosecute its objectives by means which it must have known or, at least, should have known, were unlawful. Not for the first time the CFMEU sought to impose its will by means of threats and coercion against employers. Its approach was one of entitlement: it was free, despite legal constraint, to deploy its considerable resources in order to achieve its industrial objectives. The concept of the rule of law was anathema to it.*[8]
>
> And
>
> *The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account.*[9]

3.11 The palpable decision by the CFMEU to flout the law and to step outside of community norms makes discussion of the relative bargaining strengths of the industrial parties in the traditional sense problematic for the building and construction industry. This is particularly the case in the context of the discussion of modern awards at page 417 of the Draft Report, a matter returned to below.

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[7] *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 at para 49

[8] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at para 103

[9] Id at para 106

Recommendation 1	**Master Builders recommends that the Commission references the differences between building and construction industry workplace relations and those in other industries at the outset of the final report.**

4 Wages under Pattern Agreements

4.1 Master Builders commends the Commission's analysis in Chapter 2 of the Draft Report relating to developments in the Australian labour market. We note, however, that the statement is made at page 122 of the Draft Report that "as the mining boom has abated, so have wages in the mining and construction industries." The Commission then cites Barrett[10] to indicate that new enterprise agreements in Western Australia (WA) have wage reductions of around 20%. Master Builders confirms that this accords with our experience in WA. However, in other States and Territories, the leverage of the CFMEU (and the outcome in that union's favour as a consequence of the union's tactics) in particular is contributing to very large wage increases in the building and construction industry without linked productivity.

4.2 The level of wages in the building and construction industry has continued to rise above productivity. This is evident in the detailed work undertaken by Deloitte Access Economics for MBAV. A summary is at Attachment A.

4.3 The proposition in paragraph 4.2 is especially evident in Queensland which has seen a large number of industry participants accept a four-year pay deal delivering 20 per cent in pay rises with zero productivity.[11] Master Builders notes that the tactics used by the CFMEU in particular mean that the immediate commercial pressures that the union can exert on the commercial members of Master Builders reverberates with the conclusion that they have acceded to wage increases as a means of avoiding commercial suicide. This was a matter pointed out in the Cole Royal Commission report and is a factor that remains a daily reality in jurisdictions like Queensland where the union has been able to maintain its rent seeking behaviour despite legal remedies being taken, legal actions that are in turn ignored.

[10] J Barrett AFR C*FMEU agrees to slash wages in WA* – full citation at page 944 of Draft report

[11] E Hannan IR minister blasts "pathetic" building industry over union deal 24 July 2015 http://www.afr.com/news/policy/industrial-relations/ir-minister-blasts-pathetic-building-industry-over-union-deal-20150724-gijug8#ixzz3ixPokCWa

4.4 As Commissioner Heydon has noted and as we pointed out in paragraph 4.1.2 of the Submission:

> *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.*[12]

4.5 We recommend that in the final report the fragment contained at page 122 referred to in paragraph 4.1 above be expanded so that the reality of higher wage increases without productivity benefits in the construction industry is set out and contextualised. This was certainly the case in the Public Infrastructure Report where it was said:

> *Other evidence also shows that wage increases in the construction industry have been significantly higher than most other industries in recent years (appendix G). They have also outpaced construction prices. In some jurisdictions, wages appear to have risen faster than labour productivity growth, which could reflect a shift in the bargaining strength of unions.*[13]

4.6 We also note the discussion at page 123-124 of the Draft Report about trends in real wages and labour productivity growth. We would suggest that the discussion would be enhanced by a sectoral breakdown of the data as currently appears in figure 2.25. We note that recent Commission research[14] shows relatively poor rates of growth in productivity in the building and construction industry.

4.7 According to the Commission, labour productivity in the building and construction industry contracted by 1 per cent in the 2013/14 financial year, in stark contrast to the 2.5 per cent growth rate for all market sector industries. At the same time, multi-factor productivity (with takes into account both labour and capital productivity) contracted by 0.7 per cent in the building and construction industry, compared to an all market sector average growth rate of 0.4 per cent. The strongest growth in labour productivity occurred in the information, media and telecommunications industry, up 13.9 per cent. Because of this sectoral variability we suggest that the trends shown in the

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

[13] Above note 1 p528

[14] Productivity Commission "PC Productivity Update" July 2015 esp at p11

relevant figure would be more useful if they were also to be disaggregated by sector.

4.8 We are seeing new levels of capitulation to demands for members to sign up to pattern agreements because the factors which mean the choice of business disruption and the likelihood of commercial failure is weighed against the ability to compete in the future. There are reports of many contractors, for example, signing up to the new CFMEU pattern agreement in Queensland and New South Wales. And we know that the CFMEU uses the adoption of the pattern agreement by others as a means to coerce employers to sign up to the terms of that pattern agreement, opposing any singular enterprise agreements. This matter is taken up further in the discussion of pattern bargaining at section 21.2 below.

Recommendation 2	**Master Builders recommends that the Commission alter its finding that wages have abated in the construction industry.**

5 Institutions – Fair Work Building and Construction

5.1 We note that at Box 3.1 at page 130 of the Draft Report, the Fair Work Building and Construction (FWBC) agency's role is set out. There is a comment that it has "special investigatory powers." We respectfully disagree. The powers it possesses are insufficient and are not able to be categorised as "special". They should be categorised as "limited" powers. The investigatory powers it currently possesses are severely truncated or constrained. The capacity of the FWBC to obtain information under powers of compulsion was recently confirmed by the Parliament through the *Construction Industry Amendment (Protecting Witnesses) Act* 2015[15] (Witnesses Act), notably the only workplace relations statute passed by the Parliament in its current term.

5.2 The Witnesses Act amends the *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) to extend the period during which the Director of the FWBC is able to apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice effecting the exercise of the mandatory information gathering referred to in the prior paragraph by a further

[15] https://comlaw.gov.au/Details/C2015A00045

two years. This power hence now sunsets in 2017, a power held by a number of other investigatory agencies such as the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO).

5.3 In the absence of the passage of the *Building and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Transitional Bill), (the legislation that would restore the Australian Building and Construction Commission (ABCC)) this change is necessary for the proper functioning of the FWBC. We note that the Productivity Bill and the Transitional Bill were defeated in the Senate on 17 August 2015.[16]

5.4 The FWBC lacks many of the powers of the ABCC, the latter agency's powers being "special" and tailored to the industry in contrast to those held by the FWBC. The FWBC lacks the ability to act as a properly empowered enforcement agency. This deficiency relates not only to the sunsetting of the power to obtain information under compulsion just discussed but also by inter alia the truncated role that the FWBC possesses because of the provisions of section 73 and 73A Fair Work (Building Industry) Act.[17] Essentially these provisions mean FWBC is unable to commence or continue litigation where the litigation on the same subject matter has been discontinued because the building industry parties settled their differences.

5.5 Indeed, the powers of the FWBC are considerably less than those wielded by the ABCC. The other most significant reductions and/or problematic areas (with the difficulties associated with the section 73 and 73A restrictions the primary problematic area) are:

- The maximum level of fines that may be imposed for proven breaches has been cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has narrowed, in that the Inspectorate enforces the flawed *Fair Work Act, 2009 (Cth)* (FW Act).

[16] *ABCC Bill Defeated* Workplace Express 17 August 2015

[17] Recently manifested in practice – see Joe Kelly "Union deal muzzles watchdog" *The Australian* 4 April 2015

- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.

- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the FWBC's authority.

5.6 Master Builders reiterates that in the Public Infrastructure Report in Recommendation 13.2 the Commission was of the view that government should "ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime." That is not the case with the limited and constrained powers possessed by FWBC. Master Builders urges the Commission to re-articulate this very important recommendation in the current inquiry.

5.7 Master Builders believes that excluding the considerations that were brought to bear in the Public Infrastructure Report in the current context would be to deny their cogency and application to suitably reform the building and construction industry, especially to revitalise the industry regulator.

Recommendation 3	**The Commission recommends the passage of a well empowered building and construction regulator as it did in the Public Infrastructure Report.**

6 Institutions – Fair Work Commission

6.1 Master Builders responds to the text of the Draft Report at page 142 by noting that the appointment process of the Fair Work Commission (FWC) has been compromised by a very poor decision made by the Gillard Government, discussed with Commission members on 11 September 2015.

6.2 The manner in which the current two Vice Presidential appointments were made brought the tribunal's standing and confidence of industry and the public to an unacceptable point. Master Builders notes that in a submission to the Senate Education, Employment and Workplace Relations Legislation Committee dated 14 November 2012[18], the Law Council of Australia criticised the manner in which the appointment process was expressed in the relevant

[18] http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2657%20-%20Fair%20Work%20Amendment%20Bill%202012.pdf

statute. It is instructive to note that the Vice Presidents that have been appointed by statute were given additional responsibilities and have a higher status than Deputy Presidents of the then Fair Work Australia. From that understanding the Law Council said the following:

> *Should the Government appoint the two individuals currently designated Vice President to the two statutory Vice President positions, then their status will not be reduced. However, if the two Deputy Presidents designated Vice Presidents are not so appointed, the effect of the Bill will be to reduce their status. Henceforth responsibilities that would have been capable of being delegated or given to them by nature of their senior status would instead be given to the new statutory Vice Presidents.*
>
> *This would have the tendency to reduce the independence of the Tribunal in that it will reduce the role and privileges associated with particular individuals.*
>
> *The Committee's concerns would not arise if those individuals currently designated Vice President are appointed to the new statutory Vice President positions, however given that applications are required for the positions, no such outcome could be regarded as certain even if intended.*

6.3 Master Builders points out the Law Council noted that what eventuated has the tendency to reduce the independence of the tribunal. We agree. When this issue is added to the proposition made by the Commission on page 151 of the Draft Report that "the ideal would be that parties coming to the FWC would be indifferent to who was assigned their case" we submit that reform of the FWC appointment process should occur, especially the fact that less reliance on those who are legally qualified should be a new feature. The separation of the functions associated with minimum wage fixing (albeit that the process is inextricably linked with the continuation of awards with which we disagree – see below) from other FWC functions is supported. Hence, we support Draft Recommendation 3.2 on page 157 of the Draft Report.

Recommendation 4	**That the appointment process of the FWC be reformed per Draft Recommendation 3.2.**

6.4 Master Builders supports the fixed five year term of appointments for FWC members. This will not reduce their independence; instead it would focus their attention on properly fulfilling their functions. The increased objectivity of the appointment process set out in Draft Recommendation 3.3 is also

supported. It follows on therefore that Draft Recommendation 3.4 at page 158 of the Draft Report is also supported so that there is less emphasis on the legal issues which currently create an adversarial culture and more emphasis on analytically solving a problem necessarily linked with organisational behaviour and human resource management.

6.5 In essence, the Commission has recommended that there should be two divisions within the FWC. The first would be a 'Minimum Standards Division' to deal with wage and award determinations; this would be comprised of experts in economics, social science and commerce. The other would be a 'Tribunal Division' responsible for the judicial function of the Commission, comprised of legal professionals as well as those from commercial dispute resolution backgrounds, Ombudsman offices and economists. This is an arrangement with which we agree.

6.6 We disagree with the Commission however where the notion of an appeals tribunal is discussed at page 158 of the Draft Report. The Commission seems to have, with respect, misconstrued the manner in which matters go to the Federal Court. Those matters are not strictly "appeals" and are tied up with expensive and tedious legal procedures.

6.7 The FW Act and its predecessor statutes do not contain a provision similar to that contained in s37 of the *Employment Tribunals Act 1996* (UK). That provision broadly allows appeals from the Appeal Tribunal in the English system on any question of law from any decision or order of the Appeal Tribunal to an appeal court so long as leave of the Appeal Tribunal or the relevant appeal court is obtained.

6.8 In Australia, courts may hear matters under the provisions of subsection 75(v) of the Constitution. This is the process known as "judicial review". It is different from what the "man in the street" might consider to be an appeals process.

6.9 Essentially, judicial review is concerned with jurisdiction not with the merits of a decision under challenge. What distinguishes judicial review from an appeal is that it is not enough to show that the tribunal made an error. It needs to be shown that the tribunal has made an error that goes to the very exercise of its powers. A high level of discretion vested in the FWC in a range of matters

makes it particularly difficult to challenge a Full Bench on the basis that the Full Bench has for example, failed to attribute sufficient weight to evidence that it has otherwise considered. As Creighton and Stewart say:

> *(W)hile a failure to consider relevant material may in certain cases amount to jurisdictional error, a decision cannot be attacked simply on the ground that the decision-maker has failed to attribute sufficient weight to evidence that it has otherwise considered.*[19]

6.10 Judicial review based on the writs of mandamus or prohibition or where an injunction is sought is expensive and limited in scope, as expressed in the prior paragraph. Errors of law should be able to be properly challenged in a court of record, as is practised in the UK system. The FWC will still maintain the function of dealing with matters that amount to legal interpretation of some magnitude e.g. if the Commission's recommendation about awards is accepted, the interpretation of modern awards and the expansion of the safety net or the interpretation of enterprise bargains. These are drenched in legal principle; certainly the law relating to unfair dismissal and general protections has become so drenched in law that it is commonplace for businesses, particularly small businesses, to turn to lawyers or industry associations like Master Builders which employs lawyers, when wishing to terminate the employment of an employee. There will be other areas of the law which the FWC will continue to handle. There should be a proper appeals mechanism, not the reliance on the clunky process of judicial review that permits errors to be made by tribunal members so long as they do not confound the jurisdictional basis of the law.

Recommendation 5	**That an appeal mechanism to a court of record be introduced in the workplace relations system.**

6.11 Master Builders' member associations have first-hand experience in relation to conciliation processes in the FWC. Some of the conciliators bring levels of sufficient fairness to the process whereas others do not. Accordingly, Master Builders supports Draft Recommendation 3.5 on page 159 of the Draft Report. We particularly support the commissioning of an independent performance review of the conciliation part of the FWC's operations. An evidence base

[19] B Creighton and A Stewart *Labour Law* 5th Edition, The Federation Press, p137 (footnotes omitted)

relating to proper processes and any departures from those processes would benefit all stakeholders.

Recommendation 6	**We recommend the commissioning of an independent performance review of the conciliation part of the FWC's operations.**

7 Institutions – Fair Work Ombudsman

7.1 Generally, Master Builders commends the Fair Work Ombudsman (FWO) for the manner in which it conducts that agency's operations. However, in the context of the discussion on pages 159 – 161 in respect of the enforcement role of unions, we do not agree that unions should continue to be vested with the right of enforcement. If unions have a sufficient case on the evidence then that case should be provided to the regulator to take the necessary enforcement action.

7.2 We note the Commission has recommended some limitations on the frequency of union entry for discussion purposes in order to reduce the use of entries for strategic purposes in a number of disputes. We comment on that matter in this submission: see section 25. Whilst that may require the FWO to expand its enforcement role, that is a matter which should be within its purview.

7.3 We do not agree that unions should have the power to conduct investigations at workplaces as direct enforcers of the law. Certainly, unions should be able to lodge complaints both in respect of breaches of workplace law or work health and safety law. That is their legitimate role and function. However, abuse of right of entry is a matter we articulated in the Submission, particularly in section 6.4 and that abuse should not be permitted to continue under the guise of law enforcement.

Recommendation 7	**Unions should not be direct enforcers of workplace laws.**

8 National Employment Standards

8.1 The Commission has made four Draft Recommendations in the Draft Report in relation to the National Employment Standards (NES).

8.2 Draft Recommendation 4.1 suggests that the NES should be amended to give effect to section 115(3) of the FW Act, so that a public holiday 'swap option' could be incorporated into all modern awards, allowing for circumstances where employees and employers agree for an employee to take leave on an alternate day in substitution of a public holiday.

8.3 Master Builders supports amendments to all modern awards (if they are to be retained) that offer greater flexibility for employers to manage times of increased, or decreased, business activity. Therefore an arrangement that allows employees, by agreement with their employer, to 'swap' a public holiday for an alternate day off could assist in maintaining staff levels at busier times, while also providing employees with the opportunity to negotiate a day off at a time more suited to them and their families, without increased cost to the employer.

Recommendation 8	**Master Builders supports the implementation of Draft Recommendation 4.1 so that employers and employees can 'swap' a public holiday for an alternative day off.**

8.4 The Commission's Draft Report recommends that the 'swap option' apply only to permanent employees. The Draft Recommendation fails to acknowledge the issue discussed at paragraphs 5.3.2 – 5.3.10 of the Submission that there is a lack of clarity as to whether permanent employees on either unpaid or unauthorised leave should be entitled to public holiday entitlements.

8.5 In the Submission, Master Builders highlighted that employees who are on either unauthorised or unpaid leave (with the exception of community service leave) do not accrue paid annual or personal carer's leave as they are not providing a 'service' as defined under section 22 of the FW Act. Therefore, Master Builders recommended that payment for public holidays only be available to employees who are providing a 'service' as defined under section 22 of the FW Act.

8.6 Ambiguity, with regard to who may be eligible for public holiday entitlements, is likely to be confusing for employers and employees alike and lead to a greater incidence of litigation.

8.7 Master Builders supports Draft Recommendation 4.2 to amend the NES so that employers are not required to provide entitlements for any newly designated State and/or Territory public holidays. Public holidays can have a significantly detrimental effect on business which has been highlighted following the recent introduction of two new public holidays in Victoria for Easter Sunday and the eve of the AFL Grand Final. A regulatory impact statement prepared by PriceWaterhouseCoopers, estimated that the economic cost to the State, or loss of productivity as a result of the introduction of the two new holidays, is estimated between $717 million and $898 million per year.[20]

Recommendation 9	**Master Builders supports the proposed amendment to the NES so employers are not required to provide entitlements for any newly designated State/Territory public holidays.**

8.8 At paragraph 5.3.11 of the Submission, Master Builders made reference to the fact that sections 66 and 112 "carve out" State and Territory provisions where those laws are more beneficial to an employee and therefore override the NES. Master Builders continues to be concerned that, for the most part, the NES is able to be utilised by employers as a stand-alone reference in relation to the safety net. As an extension of Draft Recommendation 4.2 and as recommended in the Submission, Master Builders recommends that sections 66 and 112 of the FW Act also be repealed to remove confusion to employers and to better effect the simpler safety net provided for in the NES.

Recommendation 10	**Master Builders recommends that sections 66 and 112 of the FW Act be repealed.**

8.9 In the Submission at paragraph 5.3.12, Master Builders also highlighted the issue of inconsistency between the NES and State and Territory legislation in

[20] PriceWaterhouseCoopers 'Regulatory Impact Statement on proposed new public holidays in Victoria' July 2015 http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0006/1117428/Public_holidays_RIS_final_report_30_June_2015.pdf

relation to whether employees were entitled to accrue annual leave whilst receiving worker's compensation payments. This issue has since been considered in *Anglican Care v NSW Nurses' and Midwives Association*[21]. In that case the Court interpreted section 130 of the FW Act narrowly to mean that an employee is entitled to accrue annual leave or personal/carers leave under the NES unless the particular State, Territory or Commonwealth workers' compensation law expressly states that such leave does not accrue.

8.10 Master Builders supports Part 3, Item 5 of Schedule 1 of the *Fair Work Amendment Bill 2014* that seeks to repeal section 130(2) and would ensure that employees do not accrue annual leave while absent from work and receiving workers' compensation payments. Master Builders considers this amendment to be fair and important in reducing the costs and the regulatory burden upon employers by acknowledging that employees should not be able to accrue annual leave while not in active service.

Recommendation 11	**Employees should not accrue annual leave whilst absent from work and receiving workers' compensation.**

8.11 With regard to Draft Recommendation 4.3, Master Builders does not consider that a review of the paid annual leave entitlements under the NES is necessary. Compared with other countries, 20 days is generous. In the event that such a review takes place, Master Builders supports the recommendation, in principle, that it be a collective review in conjunction with the State and Territories to ensure that any amendments are applied consistently across the jurisdictions; and that any potential extension to annual leave entitlements should only be offered in exchange for other employee benefits. Master Builders supports a provision for the cashing out of annual leave in accordance with the terms currently proposed under the FWC's four-yearly modern review – annual leave.

Recommendation 12	**No changes should occur to annual leave entitlements in the NES.**

[21] [2015] FCAFC 81

8.12 Master Builders notes that no reference has been made within the Draft Report in response to Master Builders' recommendation following paragraph 5.3.1 of the Submission in relation to averaging of hours. Master Builders continues to advocate that weekly hours under the NES be able to be averaged over 52 weeks as opposed to the 26 weeks (for award/agreement free employees) now in place. As raised in the Submission, averaging of hours provides greater flexibility for employers and employees to achieve productive work outcomes, particularly in industries where work flow can fluctuate.

8.13 Finally, in response to the Commission's request for information at page 197 of the Draft Report on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements, Master Builders is not of the view that such an initiative is warranted within the building and construction industry. The administrative burden imposed by such a regime would outweigh any benefits that it might offer and its implementation would likely be problematic to our members given that it would represent a cost without an adequate benefit.

Recommendation 13	**The administrative burden of giving casuals the right to exchange part of their loading for additional entitlements outweighs any benefits of the proposal.**

9 Paid Long-Service Leave

9.1 Paid long-service leave (LSL) does not currently feature in the NES and is instead determined by State and Territory legislation.[22] Master Builders acknowledges that the lack of uniformity in this area of the law can pose a challenge to employers who operate across the jurisdictions. The distinctiveness and operational complexity of LSL in the building and construction industry, however, would be difficult to encompass within any uniform arrangement under the NES.

9.2 In addition to individual State and Territory legislation that prescribe requirements and benefits in relation to LSL, each jurisdiction has specific

[22] See - *Long Service Leave Act 1955* (NSW), *Long Service Leave Act 1992* (VIC), *Industrial Relations Act 1999* (QLD), *Long Service Leave Act 1958* (WA), *Long Service Leave Act 1987* (SA), *Long Service Leave Act 1976* (TAS), *Long Service Leave Act 1976* (ACT), *Long Service Leave Act 1981* (NT).

legislation that provides unique arrangements for the building and construction industry as illustrated in Table 1. In the building and construction industry employees are effectively rewarded for industry service rather than for loyal service to one employer.

Table 1 – Building and Construction Industry Portable LSL legislation

State/Territory	Key Legislation
NSW	*Building and Construction Industry Long Service Payments Act 1986* (NSW) *Building and Construction Industry Long Service Payments Regulation* 2011 (NSW)
ACT	*Long Service Leave (Portable Schemes) Act* 2009
QLD	*Building and Construction Industry (Portable Long Service Leave) Act 1991* (QLD) *Building and Construction Industry (Portable Long Service Leave) Regulation 2013* (QLD)
VIC	*Construction Industry Long Service Leave Act 1997* (VIC)
SA	*Construction Industry Long Service Leave Act 1987* (SA) *Construction Industry Long Service Leave Regulations 2003* (SA)
WA	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA) *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA)
TAS	*Construction Industry (Long Service) Act 1997* (TAS)
NT	*Construction Industry Long Service Leave and Benefits Act 2005* (NT) *Construction Industry Long Service Leave and Benefits Regulations 2014* (NT)

9.3 Each State and Territory portable LSL statute refers to the establishment of a Long Service Leave Authority (Authority).[23] The Authority undertakes a number of functions including the administration of LSL benefit schemes and payment of benefits to eligible workers, as well as keeping employers and workers' registers for those covered under the relevant portable LSL legislation.

9.4 There are, however, a number of inconsistences across State and Territory portable LSL legislation. It could be argued that the inconsistencies in the legislation have arisen following pressure for their establishment from individual unions. The Cole Royal Commission found that the confused legislative drafting resulted in employers, sometimes unwittingly, making

[23] For example see – QLeave (QLD) - https://www.qleave.qld.gov.au/, Long Service Corporation (NSW) - http://www.longservice.nsw.gov.au/bci/the-scheme,

underpayments to LSL Authorities as a result of a lack of understanding of workers' legal rights.[24]

9.5 Each State and Territory statute differs in its definition of 'eligible worker', with some jurisdictions including contractors, sub-contractors and workers employed through labour hire arrangements as eligible under a portable LSL scheme.[25] In Queensland, for example, under section 3A(1) of the *Building and Construction Industry (Portable Long Service Leave) Act 1991* (QLD), an eligible worker is defined as an individual who –

> *(a) under a contract of service is engaged to perform work in the building and construction industry for the majority of the person's ordinary hours of work; or*
>
> *(b) under a contract, whether or not the contract is a contract of service, or at piecework rates, is engaged to perform work in the building and construction industry, for labour only or substantially for labour only, for the majority of the person's ordinary hours of work; or*
>
> *(c) under a contract, whether or not the contract is a contract of service, performs work in the building and construction industry for the majority of the person's ordinary hours of work, unless—*
>
> > *(i) the individual—*
> >
> > *(A) is paid to achieve a stated result or outcome; and*
> >
> > *(B) has to supply all, or substantially all, of the plant and equipment or tools of trade needed to perform the work; and*
> >
> > *(C) is, or would be, liable for the cost of fixing a fault with the work performed; or*
> >
> > *(ii) a personal services business determination is in effect for the individual performing the work under the Income Tax Assessment Act 1997 (Cth), section 87-60.*

[24] Above note 4, Volume 12, page 94

[25] See - section 3 *Building and Construction Industry Long Service Payments Act 1986* (NSW), section 9 *Long Service Leave (Portable Schemes) Act* 2009, section 3A *Building and Construction Industry (Portable Long Service Leave) Act 1991* (QLD), section 14A *Construction Industry Long Service Leave Act 1997* (VIC), section 5 *Construction Industry Long Service Leave Act 1987* (SA), section 3(1) *Construction Industry Portable Paid Long Service Leave Act 1985* (WA), section 3 *Construction Industry (Long Service) Act 1997* (TAS), section 6 *Construction Industry Long Service Leave and Benefits Act 2005* (NT).

9.6 In comparison, section 3(1) of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) states that an employee means –

> *(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or*
>
> *(b) an apprentice*

9.7 The differences under the relevant portable LSL legislation are such that in Western Australia, only those employed under a contract *of* service are defined as eligible workers, and in the remaining jurisdictions generally those employed under a contract *for* services can also benefit from portable LSL schemes. This is an important distinction as there are different obligations for employers depending on whether a worker is deemed an employee or classified as an independent contractor.[26]

9.8 In addition to the differences across the jurisdictions with regard to which workers are eligible to benefit from portable LSL schemes, there are also key differences under standard LSL legislation as to when an eligible worker can redeem an entitlement. For example, under the *Long Service Leave Act 1976* (ACT) eligible workers receive 1/5 of a month's leave for each year of employment, which can be taken after 7 years of service.[27] Alternatively, in the other States and Territories, workers are only eligible to benefit from LSL entitlements after 10 years of service and the amount of paid LSL can vary from 13 weeks then 1.3 weeks for each subsequent year in South Australia to 2 months, with then 1 month for each subsequent 5 years of service, in NSW.[28]

9.9 Although the differences in eligibility and entitlement criteria between various statutes can be quite subtle, the disparity causes confusion for employees or head contractors, who are responsible for remitting benefits for eligible workers who sometimes work on multiple projects and across various jurisdictions.

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[26] Differentiating who is an employee and who is not is sometimes difficult. The Courts have held that a 'multi factor' which involves examining different aspects of the employment relationship such as the degree and nature of control the employer has over the worker, is needed in order to make such a determination. See *Stevens v Bodribb Sawmilling Co. Pty* (1986) 160 CLR 16, *Hollis v Vabu* (2001) 207 CLR 21.

[27] Sections 3, 4 of the *Long Service Leave Act 1976* (ACT).

[28] See section 5 of the *Long Service Leave Act 1987* (SA), Section 4 of the *Long Service Leave Act 1955* (NSW).

9.10 As stated by the Commission in the Draft Report at page 178, LSL provides an incentive for some workers to maintain their position with one employer and to discourage immobility. These criteria do not generally apply in the building and construction industry through the building unions' concerted push to make "loyalty" to the industry the only criterion.

9.11 Master Builders notes the Commission's query at page 176 of the Draft Report with regard to the effectiveness of portable LSL schemes. Master Builders does not currently have access to data that illustrates the amount of LSL redeemed by workers and whether or not such schemes are valued enough to justify the administration and costs involved in implementing them.

9.12 The 'alternative design', however proposed by the Commission at page 178 of the Draft Report could address the complexities of employment arrangements that are unique to the building and construction industry. Grandfathering of the current LSL schemes for the building and construction industry makes sense. The replacement scheme that would be erected in its place would need to either recognise the traditional onus of LSL and/or establish uniformity in the building and construction industry.

9.13 In the event that a uniform model for LSL is drafted or an amendment to the NES to include a reference to LSL is proposed, Master Builders submits that the building and construction industry should be carved out in acknowledgment of the differences in the operation of LSL compared to other industries. However, we support uniformity and measures which decrease employer's costs. Accordingly, uniformity via the least cost State and Territory model should be proposed by the Commission with current entitlements "grandfathered".

Recommendation 14	**That the current building and construction portable long service leave schemes be grandfathered and a new scheme established that reflects the current least cost model in operation.**

10 Unfair Dismissal – Emphasis on Small Business

10.1 Master Builders notes that the work of the Commission shows that the average total cost of an unfair dismissal case going to the FWC is currently around $13,500 (page 213 of the Draft Report). We note that the Commission

considers this likely to be an under-estimate of the true cost of the unfair dismissal system because it fails to take into account the costs to business of employees who are not dismissed despite poor performance as well as the processes used by the business to attempt to avoid unfair dismissal cases in the first place. We endorse those comments. We also note the study by Harding cited on page 217 of the Draft Report that unfair dismissal laws reduced employment of workers on average by about 0.46% corresponding to over 40,000 jobs Australia-wide at the time the study was undertaken ie in 2002. We believe this estimate to be conservative given the passage of time that has occurred and the increase in the number of unfair dismissal claims since 2002.

10.2 We note that from page 222 of the Draft Report there is a discussion about particular concerns around arrangements for small business. In the Submission, we focussed on this aspect of the unfair dismissal laws as well. The building and construction industry is an industry comprising in large part small businesses. We note that the Productivity Commission, in this context, has, at page 232 of the Draft Report, sought further information and views on possible changes to lodgement fees for unfair dismissal claims.

10.3 Master Builders believes that a larger fee payable on lodgement would tend to weed out those persons who are seeking “go away money” to some extent but not completely. Average “go away” money payments that Master Builders member associations confront in assisting members on average far exceed the $480 per unfair dismissal application fee which applies in the United Kingdom (cited at page 231 of the Draft Report). The issue of a higher further fee for cases going to arbitration seems appropriate.

10.4 Accordingly, we would suggest that the fees that apply in the UK are a guide which should be adopted in Australia so that a lodgement fee of $500 per unfair dismissal application should be considered. That recommendation also links with the observation of the Commission that there is the absence of an effective filter at the front end of the unfair dismissal claims process. This combined with the tendency at conciliation for parties to be actively pressed to achieve a financial settlement are good grounds for increasing the fee on lodgement.

Recommendation 15	**That the lodgement fee for unfair dismissal applications should be increased to $500.**

10.5 Master Builders agrees with Draft Recommendation 5.1 that the FWC should have greater discretion to consider unfair dismissal applications on the papers prior to commencement of conciliation. It is important to the integrity of the system that an effective upfront filter applies to the unfair dismissal claims process.

Recommendation 16	**That the FWC should have greater discretion to deal with unfair dismissal applications on the papers.**

10.6 Whilst prima facie there is also value in introducing a more merit focused conciliation process, Master Builders' experience with similar systems in the past is that conciliators will rarely go beyond a 'neutral' view as to the merits wherever there are 'contested facts'. Without a meaningful recalibration of the termination laws so that objectively demonstrable, substantive and valid reasons for termination are the primary test for fairness, it is hard to see how merit focused conciliation could be effective in practice. For these reasons, Master Builders currently believes the upfront filter approach is to be preferred.

10.7 Master Builders strongly supports the recommendation that the FW Act be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal.

Recommendation 17	**That procedural errors alone should not lead to a finding of unfair dismissal.**

10.8 To the extent Recommendation 17 is encapsulated in Draft Recommendation 5.2 it is supported. However, Master Builders notes that the Commission recommendation as currently drafted does not fully reflect this intent. Specifically, whilst identifying two valid reasons for termination (i.e. persistent underperformance and serious misconduct), it neglects to cover two other substantive and valid reasons for termination, namely persistent misconduct and genuine lack of work. Master Builders therefore recommends that the first

dot point of Draft Recommendation 5.2 be expanded to include other valid reasons for termination.

10.9 Master Builders' preference remains for small business to be exempted from the unfair dismissal laws as articulated in the Submission. This is because of the particular difficulty small business has in dealing with complex industrial relations requirements and Master Builders' concern to stimulate employment, particularly youth employment.

10.10 We note that the discussion on page 236 of the Draft Report indicates the Commission view that "there are grounds for retaining some special unfair dismissal arrangements for small business." Yet the notion of an exemption is dismissed by the Commission. The Commission indicates its acceptance of the "delayed exposure" of small business to unfair dismissal laws compared with a blanket exemption which stakeholders, inclusive of Master Builders, have proposed. The rationale for favouring a delayed exposure regime over an exemption is tenuous. The Draft Report considers that this delayed exposure is the preferred method of recognising the situation of small business because it "balances" the interests of employees with the resource constraints of small business – page 237 of the Draft Report. However, the presence of this balance is presumed rather than being related to any of the other empirical data or employment effects isolated in the prior discussion. Master Builders recommends that this aspect of the Draft Report be re-considered in the final recommendations.

10.11 The proposition in the last paragraph is underlined having regard to the discussion of what is supposed to be a fillip for small business: the Small Business Fair Dismissal Code. Master Builders' experience accords with the finding in the Draft Report that there are too many risks in relying on the Code with the defects outlined in the extract from Amendola (page 239 of the Draft Report) reflecting member associations' experience. But Draft Recommendation 5.4, whilst being sensible in recommending the removal of the Code, does not do other than indicate in the broadest terms that the other reforms proposed "are likely to be sufficient in meeting small business needs in this area" (page 240 Draft Report). How the Commission makes that assessment having regard to the purported intended effect of the Code which is subject to detailed analysis is unclear. The basis for that assessment seems absent. The discussion appears to Master Builders to point

categorically to the need for a small business exemption. There is nothing in the more generalised reform proposal, for example, that would ameliorate what the Commission identifies at page 239 as the necessity for small business to obtain legal advice if terminating someone's employment. That Commission observation reinforces the costs and unacceptable burden placed on small business by the unfair dismissal laws which Draft Recommendation 5.4 does not address.

Recommendation 18	**That small business be exempted from the unfair dismissal laws.**

10.12 Master Builders questions Draft Recommendation 5.3 that the emphasis on reinstatement as the primary goal of the unfair dismissal provisions be removed. We understand that there is little merit in retaining, as a policy or legislative objective, something that is simply not attainable in practice. However, Master Builders believes that such a change in emphasis, further underscores the need to recalibrate unfair dismissal laws to focus on the objective validity of a termination, as opposed to its subjective harshness. Removing the primacy of reinstatement may otherwise be seen as legitimising the current 'go away money' practice, which allows speculative claims to be made on tenuous procedural grounds by individuals with no interest in reinstatement.

Recommendation 19	**That reinstatement should be the primary remedy for unfair dismissal.**

11 The General Protections

11.1 In the Submission Master Builders devoted considerable space to arguing that this area of the law is crying out for reform – Recommendations 19-24 inclusive in the Submission encapsulated those reform proposals.

11.2 The space devoted to the general protections law in the Submission underlines the Master Builders' members concern in respect of this aspect of workplace law. At page 251 of the Draft Report the survey undertaken by the Australian Human Resources Institute is mentioned. That survey, according to the Draft Report, evidenced "far greater concern" about the general

protections law than in respect of other areas of employment protections. The remark is then made by the Commission that "such surveys may not be representative of all businesses." Master Builders would suggest the opposite. We submit that, on the basis of member association experience, this area of the law is of predominant concern.

11.3 Master Builders notes the interim assessment of the Commission at pages 258-259 of the Draft Report. The list of problems associated with the general protections law is agreed. The Commission isolates that there are problems associated with uncertainty about the application, the compliance costs that are entailed, unintended behavioural responses by employers and employees and the processes by which the disputes are resolved. In addition, we agree with the stakeholders who pointed to the problems associated with the combination of broad protections, multiple reasons and the reverse onus of proof and the overlap with other parts of the FW Act and other laws. Whilst the Commission believes these to be "matters largely of design", they do point to the need for reform.

11.4 However, on page 259 the Commission characterises the changes needed as follows: "some limited further reform of the general protections is needed to restore greater balance between the needs of employers and employees and to strengthen the ex-ante filters around such cases." We believe that the stronger following statement is preferred, that is, that reforms are needed "both to the architecture of protections, as well as the arrangements concerning their practical implementation." Broad reforms of that complexion are very much supported but, as discussed below, as proposed by the Commission do not go far enough.

11.5 Master Builders notes the discussion at page 259-260 of the Draft Report relating to reinstating the sole or dominant reason/purpose test. This is argued for in the Submission at paragraph 7.2.10 et seq. The Commission's view is that the *Barclay's* case "has provided guidance, particularly for employers, on the operation of the test." The discussion in the Submission shows that that is not the case; there is general disagreement on how *Barclay*

should be applied particularly as it attributes the relevant motivation to the actor in assessing whether adverse action has occurred.[29]

11.6 The majority in the High Court applied *Barclay* strictly; the majority found that section 346 of the FW Act does not direct the court to enquire whether the adverse action is able to 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; a focus on the reasons in the mind of the decision-maker. If the court accepts the evidence about those reasons as well as evidence that protected attributes or activities played no part in the decision-maker's decision then the reverse onus should be satisfied. This brings the focus of adverse action issues back to the consideration of the conscious reasons of the decision-maker and does not require analysis of unconscious or subconscious reasons.

11.7 In practice this aspect of the law requires an analysis from external legal advisers and requires consideration ex-post facto. Again, in practice, there should always be a contemporaneous written record of the reasons that the action was taken. In the absence of those contemporaneous records and with the reverse onus of proof, many businesses, particularly small businesses, are in a position of difficulty when applying the test in *Barclay*.

11.8 The High Court's majority ruling does not of itself rewrite the difficult statutory provisions; they are not discernible to the average business owner without legal guidance. Accordingly, we reject the argument made by the Commission that a return to a test based on a sole or dominant reason is not required. Whilst the comment is made by the Commission that the "sole or dominant" test was "too high a hurdle" for claimants, the balance has moved so far in favour of those making a claim that this area of the law is now ripe for those seeking "go away" money and some law firms as a matter of course in practice make a demand under the general protections law when representing a dismissed employee.

Recommendation 20 That the "sole or dominant test" be reinstated.

[29] See Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd [2015] FCAFC 76 (3 June 2015) for a judgment that re-opens the debate about the application of the general protection laws.

11.9 The discussion on the reverse onus in the Draft Report, similarly, does not provide a basis for appropriate reform in this area of the law. Without the contemporaneous record mentioned in paragraph 11.7, it is especially difficult for, in particular, small businesses to make the case as to a "proper" purpose in undertaking the action which evokes the claim under the law. The Commission has mentioned the use of this area of the law where there is, for example, the restructuring of a business that is not motivated by an "undermining" of employee terms and conditions of employment. However, the proceedings which are brought require the employer to prove motivation and this is necessarily difficult where more than one reason is able to be attributed to the particular action taken.

11.10 A closer examination of the Commission's discussion of Part 3-1, Division 7 at page 249 of the Draft Report in relation to multiple reasons serves to underscore this point:

> *... This means that, in proving that an employer took adverse action, for example, an employee needs to demonstrate that, amongst the reasons which the employer had for taking such action (and they can be numerous), only one was a proscribed reason…*

11.11 The reality is that the employee is not required to 'prove' or 'demonstrate' that the employer had a proscribed reason for taking adverse action. The current test only requires that adverse action has occurred (e.g. the employee has been terminated) and that the employee had a protected attribute (e.g. a workplace right). The onus is then on the employer to prove that amongst the potentially multiple reasons which the employer had for take the action, none were proscribed.

11.12 The employer's ability to discharge this onus is further complicated by the unclear definition of what constitutes a workplace right – and therefore whether any of the actions were in fact proscribed. Whilst *Barclay* may have addressed, at least to some extent, the issue of adverse action in the context of engaging in industrial activities – the issue of workplace rights remains largely untested.[30]

11.13 Accordingly, whilst Master Builders commends the Commission for recognising the need to both modify the meaning and application of a

[30] Ibid

workplace right, and to ensure that complaints be made in good faith, in regard to the former, Draft Recommendation 6.2 does not achieve this end.

11.14 Concerns with the definition of workplace rights under section 341 are not addressed by remediation of section 341(c) alone. For example, when one examines the breadth of section 341(a) in combination with section 340(1)(a)(i), any terminated employee arguably has grounds for making a general protections claim – as all employees have workplace rights.

11.15 In specific regard to section 341(c), Master Builders would submit that a clearer definition should be provided about how a complaint or inquiry applies where directly related to the employment relationship – and should simply disqualify application where there is no direct relationship.

11.16 Accordingly, section 341 should be more narrowly and prescriptively drafted. Master Builders reiterates its view that 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.

Recommendation 21	**That employees should only be protected from adverse action when filing a formal inquiry or complaint with a competent administrative authority that is directly in relation to his or her employment.**

11.17 Further, in regard to small business, Master Builders reiterates its view that the reverse onus is unreasonable and should therefore be removed for small business employers.

Recommendation 22	**That the reverse onus be removed for small business.**

11.18 In respect of the content of Draft Recommendation 6.3, we believe that the Commission should be commended. These recommendations are fully supported, particularly the screening process for ensuring that complaints are made in good faith. Similarly, placing a cap on the compensation available will assist to reform this area of the law and deter speculative claims. Master Builders, in addition, agrees that too little information about general protection claims (discussed at pages 264-265 Draft Report) is available. We agree with

the Draft Recommendation 6.5 so that greater levels of information, especially about the nature and extent of such claims, would assist the law reform process and the watching brief suggested to be maintained – Draft Report page 265.

Recommendation 23 That Draft Recommendations 6.3–6.5 should be implemented.

12 Anti-Bullying

12.1 Master Builders reiterates its submission that it is questionable a separate anti-bullying jurisdiction under the FW Act is required. At the same time, we also agree with the comment at page 277 of the Draft Report that it makes good business sense for organisations to prevent and stop workplace bullying. Master Builders does not support bullying behaviour in any form. However, we agree with the comments made on page 280 of the Draft Report by another employer association that bullying conduct invokes the jurisdiction of two regulators and is an example of unnecessary duplication and red tape. Workplace bullying is a health and safety issue.

12.2 Despite the comment in the Draft Report that the FWC has "made considerable efforts to implement effective and evidence-based processes for dealing with cases" (page 280) that is beside the point. The FWC is not a WHS regulator and its members do not have proven expertise in that discipline.

12.3 The Commission has not reached any firm conclusions on anti-bullying law reform. The post-implementation review of the new laws that is mentioned on page 283 of the Draft Report should be made public. There should be further investigation of the costs and benefits of the new laws. There needs to be more study of the multiple causes of action and those which are or are not invoked when bullying is detected and the perpetrators sought to be punished. We suggest that the Commission seeks from Government the results of the post-implementation review of the law so that a more definitive conclusion is able to be reached in the final report.

13 Minimum Wages

13.1 Master Builders commends the Commission for the detailed analysis in Chapter 8 of the Draft Report. However, the analysis identifies the main difference in Australian minimum wages from other jurisdictions whilst making too little of this unique factor in its conclusions and Draft Recommendation 8.1 on page 334. The element to which we refer is recognised, for example, at page 288 of the Draft Report. There the Commission notes that the FWC makes annual adjustments to the rates of pay specified in modern awards. These rates of pay, as noted, start at equal to or above the minimum wage set as a floor. The point is that there is not just a minimum wage but an extended, complex matrix of minimum wages.

13.2 The rationale for this extensive system of wage levels, some of which are linked to antediluvian occupations, is not justified and is returned to in our analysis of Chapter 12 of the Draft Report. However in the context of Chapter 8, this factor is then indicated to not link to independent contractors, working business operators and unpaid family members whose wages are posited as "entirely market-determined" (page 288). That proposition is not the case in Master Builders' experience, especially having regard to the discussion at section 8.4 of the Submission which details the matter of the regulation of independent contractors via enterprise agreements. That trend is a matter shown to have plagued the industry since the enactment of the FW Act. The likelihood of a trade worker in business being paid less than the particular minimum modern award rate is negligible and market rates are set against the background of the award minima, in our experience.

13.3 We also refer to the discussion on page 328 of the Draft Report. We agree with the proposition that there is a rationale for retention of minimum wages but complemented by "measures that lift the incomes of people in low income households" which have the potentiality to do so without attracting the risks to employment associated with higher minimum wages. We agree. However, there should also be a specific statutory requirement placed on the FWC to recognise these measures when setting the minimum wage. Accordingly, we submit that that matter should form a Commission recommendation.

Recommendation 24	**That the FWC should be required to take into account measures that lift the incomes of those in low income thresholds when the FWC sets minimum wages.**

13.4 We endorse Draft Recommendation 8.1.

Recommendation 25	**That Draft Recommendation 8.1 be implemented.**

14 Variations from Uniform Minimum Wages – Juniors

14.1 Master Builders reiterates the proposition made in section 5 of the Submission that there are no minimum rates for juniors set out in the *Building and Construction General On-Site Award 2010* (On-Site Award) other than in respect of junior apprentices. This matter was also discussed at length on 11 September 2015. As is recognised at page 352 of the Draft Report juniors generally can be expected to be less skilled, qualified and competent than adult workers. There is no recognition of this fact reflected in the On-Site Award wages and hence when confronted with employing an adult or a young person the employer's preference is more likely to be to employ an adult. As the discussion at page 353 shows, junior pay rates are able to positively affect people's long-term job prospects. We note that on page 354 the Commission says: "To the extent that junior pay rates increase the number of juniors who are able to secure employment, they may serve to increase those people's employment prospects in later years." We agree.

14.2 At section 9.2 of the Draft Report, the Commission argues for "retention" of discounted wages for young workers. In the case of the building and construction industry where junior rates existed prior to 2010 they were discontinued as part of the modern award exercise. In the final report we submit that more should be said about ensuring that each significant industry (and building and construction clearly has that characteristic) should have junior wage rates prescribed, either in a modern award or, in Master Builders' view, as part of the system that replaces modern awards.

14.3 We note that the Commission on page 359 of the Draft Report has sought further information about whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or

some combination of these criteria. From Master Builders' perspective a universal junior rate based in part on the assumption that junior employees will not have the same life skills as adult workers (eg in interactions with other people, emotional maturity) should be recommended and introduced in the building and construction industry.

Recommendation 26	**That a universal junior rate should form part of minimum wages.**

15 Variations from Uniform Minimum Wages – Apprentices and Trainees

15.1 Master Builders has recently comprehensively examined the best way to restructure the apprenticeship system. At Attachment B is the Master Builders' publication entitled "Towards 2020; Policy for Australian Apprenticeship Reforms."

15.2 Master Builders draw the Commission's attention to page 6 of Attachment B which states:

> *The workplace relations system does not currently complement the Australian Apprenticeship system and has created potential barriers to the apprenticeship system being able to deliver maximum productivity benefits. For example, the inclusion of competency based wage progression into modern awards contemporaneously with large wage increases not based on additional work value has negatively impacted on employer's decisions to take on apprentices. This affects students undertaking VET in school programmes who may find themselves unable to find employment or an apprenticeship due to the increased cost of their wages as opposed to a student without any formal recognition of their skills.*

15.3 In addition to the disconnect between the workplace relations system and the training system mentioned in the extract, there is an additional problem. Whilst the Award changes that have been made to, for example, the On-Site Award in respect to apprentices mandate competency based wage progression, no "markers" or points within the relevant training packages which would denote that sufficient competencies have been acquired to move to the next wage progression stage have been developed. This absence means that the apprentice's training plan must reflect that progression and,

where that progression is not denoted in the specific training plan, the risk of disputes is increased.

15.4 We refer to the discussion on adult apprentices at pages 368-370 of the Draft Report. We note the statistics in respect of the decline in adult apprenticeships set out at page 370. We are disappointed that no firm conclusions about the impacts of the wage rate increases are able to be drawn. Master Builders believes that, as expressed elsewhere in this submission, the negative aspects of the workplace relations system are compounded by its lack of integration with the apprentice wages system. The difficulty with adult apprentice wages highlights that submission.

15.5 Master Builders was disappointed that following a decision of the Full Bench of the then Fair Work Australia[31], adult apprentices now receive a minimum adult rate of pay in accordance with the On-Site Award. As a consequence, adult apprentice pay rates do not increase based on the stage at which the apprentice is currently employed. Table 2 sets out the Award rate per hour for an adult apprentice in the trade categories relevant under the Award.

15.6 By way of comparison, Table 3 shows the progression of junior apprentices from the first stage to the fourth stage comparing the rates for those who did not complete Year 12 with those who completed Year 12. These rates much better reflect the nature of progression for apprentices and reflect the training nature of the engagement.

Table 2 – Adult Apprentice Wage Rates from 1 July 2015

Modern Award Classification	**Modern Award Rate Per Hour $**
First Stage	
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	19.91
Plasterer	19.77
Bricklayer	19.68
Roof Tiler	19.53
Painter	19.31
Engineering Tradesperson	19.53
Landscaper	19.12

[31] [2012] FWAFB 3210

Second Stage	
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	19.91
Plasterer	19.77
Bricklayer	19.68
Roof Tiler	19.53
Painter	19.31
Engineering Tradesperson	19.53
Landscaper	19.12
Third Stage	
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	19.91
Plasterer	19.77
Bricklayer	19.68
Roof Tiler	19.53
Painter	19.31
Engineering Tradesperson	19.53
Landscaper	19.12
Fourth Stage	
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	19.91
Plasterer	19.77
Bricklayer	19.68
Roof Tiler	19.53
Painter	19.31
Engineering Tradesperson	19.53
Landscaper	19.12

Table 3 – Junior Apprentice Wage Rates from 1 July 2015

Modern Award Classification	**DID NOT COMPLETE YEAR 12 Modern Award Rate Per Hour $**	**COMPLETED YEAR 12 Modern Award Rate Per Hour $**
First Stage		
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	11.70	12.72
Plasterer	11.56	12.58
Bricklayer	11.47	12.49
Roof Tiler	11.32	12.34
Painter	11.10	12.12
Engineering Tradesperson	11.32	12.34
Landscaper	10.91	11.93
Second Stage		
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	13.73	14.75
Plasterer	13.60	14.61
Bricklayer	13.51	14.52

Roof Tiler	13.36	14.37
Painter	13.13	14.15
Engineering Trades	13.36	14.37
Landscaper	12.94	13.96
Third Stage		
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	16.78	16.78
Plasterer	16.65	16.65
Bricklayer	16.55	16.55
Roof Tiler	16.41	16.41
Painter	16.18	16.18
Engineering Tradesperson	16.41	16.41
Landscaper	15.99	15.99
Fourth Stage		
Carpenter Joiner, Joiner, Shopfitter, Stonemason, Prefab Tradesperson	19.83	19.83
Plasterer	19.70	19.70
Bricklayer	19.60	19.60
Roof Tiler	19.46	19.46
Painter	19.23	19.23
Engineering Trades	19.46	19.46
Landscaper	19.04	19.04

15.7 The setting of the adult apprentice rate was attended with some ambiguity. Adult apprentices are engaged under clause 19.8 of the On-Site Award. That clause is as follows:

> ***19.8 Adult apprenticeship***
>
> ***(a)*** ***(i)*** *Where a person was employed by an employer immediately prior to becoming an adult apprentice with that employer, such person will not suffer a reduction in the ordinary time hourly rate of pay by virtue of entering into the contract of training.*
>
> ***(ii)*** *Provided that for employees engaged in the general building and construction, and civil construction, sectors the provision in 19.8(a)(i) above shall only apply to employees who have been employed by the employer for at least six months as a full-time weekly or daily hire employee, or twelve months as a part-time or regular and systematic casual employee immediately prior to commencing the apprenticeship.*
>
> ***(b)*** *For the purpose of fixing a rate of pay only, the adult apprentice will continue to receive the ordinary time hourly rate of pay that is applicable to the classification or class of work specified in clause 19.1, and in which the adult apprentice was engaged immediately prior to entering into the contract of training.*

> ***(c)*** *Subject to clauses 19.8(a) and 19.8(b), the rate of pay of an adult apprentice will be the ordinary time hourly rate prescribed for the lowest paid classification in clause 19.1 or the ordinary time hourly rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater.*

15.8 Under subclause 19.8(c), an adult apprentice must be paid 'the rate prescribed for the lowest paid classification in clause 19.1, or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater.' The lowest paid classification under clause 19.1 is for a Construction Worker/Engineering Construction Worker (CW/ECW1) (level a). On the first reading, subclause 19.8(c) appears to be ambiguous, as it is unclear whether the CW/ECW1 (level a) rate should include the allowances indicated at subclause 19.3(b) (which are generally payable to non-apprenticed weekly hire employees under subclause 19.1(b) of the Award).

15.9 Master Builders brought litigation in 2011 to clarify this perceived ambiguity and sought to vary subclause 19.8(c) to restrict the reference to the rate prescribed for the lowest paid classification in clause 19.1 to subclause 19.1(a). The matter came before SDP Watson who delivered his decision on 4 January 2012[32] and declined to vary clause 19.8 as he was not satisfied that there was any ambiguity or uncertainty in the clause.

15.10 Master Builders appealed this decision on the ground that SDP Watson erred in his decision not to vary clause 19.8. The appeal was heard before a Full Bench of the then Fair Work Australia on 29 March 2012.[33] The Full Bench handed down its decision on 25 May 2012 agreeing with SDP Watson's reasoning and finding that clause 19.8 was not uncertain or ambiguous. An objective reading of clause 19.8, according to the reasoning of the Full Bench, indicates that subclause 19.8(c) refers to clause 19.1 as a whole – meaning that allowance-inclusive rates under subclause 19.3(b) should be compared to the junior apprentice rate in clause 19.7, when working out an adult apprentice's rate of pay. Employers must pay the allowance-inclusive weekly hire rates in clause 19.3, as these rates will always be higher than the junior apprentice rates in clause 19.7.

[32] [2012] FWA 62

[33] [2012] FWAFB 3210

15.11 Against logic, this means that first year adult apprentices receive the same minimum rate of pay as final year adult apprentices. The award system has failed the adult apprentices and those who employ them. Master Builders would ask the Commission to revisit this vital area of the Draft Report and to make recommendations about regularising the minimum rate of pay for adult apprentices across all sectors.

Recommendation 27	**That the Commission should recommend an across-award method of calculating adult apprentice rates of pay.**

15.12 Master Builders notes that the primary recommendation of the Commission in Draft Recommendation 9.2 is for a broad review of the apprenticeship system. Whilst we understand that such a review would enable the consideration of the competency pay progression recently introduced, there is a pressing need for reform. It would be a tragedy for eager young people (including those formally defined as adult apprentices) to continue to miss out on the necessary skills formation because of the gaps between the formal training system and the workplace relations system. We tentatively support the review called for but would suggest to the Commission that some interim reforms such as regularising the calculation of adult apprentice wages across the award system, should be recommended.

15.13 It is noted that the decision of the FWC[34] which brought into effect higher apprentice wages across-the-board did not link the increase in apprentice wages that was ordered with the notion of work value. This was, in essence, because of a statutory lacuna.[35] That in itself should prompt a review of apprentice wages having regard to their work value as against the costs of training.

Recommendation 28	**Master Builders supports a formal review of apprentice wage setting.**

[34] [2013] FWCFB 5411

[35] Id at para 105 – not described as such but evident from the discussion of the exclusion of s 135 of the FW Act from the criteria before the FWC

16 Measures to Complement Minimum Wages – Earned Income Tax Credits

16.1 Master Builders commends the Commission for the discussion on earned income tax credits (EITC). As noted by the Commission, the effects of the EITC scheme depend greatly on its design and the manner in which it is implemented. In addition, the way in which it impacts with the tax and transfer system more generally is critical. Master Builders is clear in its view that the introduction of any EITC scheme should be coupled with a statutorily invoked restraint on the FWC in granting minimum wages. Accordingly, Master Builders expresses the view that further assessment of the merits and design of an EITC in the Australian context is required but that such a scheme should only be presaged on a statutory amendment which clearly constrains the role of the FWC in minimum wages once the exact measure of the trade-off can be calculated.

16.2 We note that the Commission has indicated that any initiative to introduce an EITC should consider wage subsidies as an alternative. The same qualification as the introduction of a wage subsidy should be hand-in-hand with the requirement that the FWC take that into account in setting minimum wages and that there be a statutory directive in that regard.

Recommendation 29	**That any EITC scheme introduced should be accompanied by a statutory directive to the FWC to take that matter into account when setting minimum wages.**

17 Role of Awards

17.1 As part of the input to the inquiry, Master Builders provided the Commission with a copy of the fifth edition of the Master Builders' Modern Award Manual regarding the On-Site Award. We have since updated the Manual and we provided the Commission with two copies of the sixth edition of that Manual on 11 September 2015.

17.2 Master Builders notes that the discussion in Chapter 11 features extracts from an exemplar award published in draft. The simplicity of the exemplar award when compared with the On-Site Award is marked. We note that the On-Site Award is unlikely to be considered until early to mid-2016 in the 2014 review

process and the defective instrument continues to reduce the industry's efficiency and also continues to divert resources away from other critical matters as there remain a very large number of problematic areas in the On-Site Award.

17.3 As the Commission notes on page 401 of the Draft Report "history matters". In the building and construction industry the "catch up" in flexibility noted at the top of page 402 of the Draft Report is completely absent. Master Builders maintains its position with regard to the abolition of awards, labelled a "radical change" by the Commission. Change of that magnitude is needed for reasons that we will revisit.

17.4 The Commission at page 411 indicates that "despite their detail, modern awards are much simpler, and provide more room for enterprise level flexibility that their earlier incarnations". That position does not hold for the On-Site Award. It remains in large part a restructured, reshuffled *National Building and Construction Industry Award 2000*. Of that award, the Cole Royal Commission said:

> *To set out the allowances and rates in the NBCIA is to make a compelling case for their simplification. The provisions in the NBCIA specifying the multitude of allowances and rates payable in various circumstances are detailed and intricate, and the amounts properly to be paid to employees vary constantly depending upon the specific activity carried out and the length of time during which it is carried out. In these circumstances, it is no wonder that there is frequent disagreement about the precise amount payable to workers, and that allegations of underpayment or non-payment of entitlements are made so frequently in the building and construction industry.*
>
> *It is doubtful whether many workers covered by the NBCIA would have a comprehensive understanding of their rights and entitlements. For employers, ensuring that their workers covered by the NBCIA are paid the precise amount to which they are entitled is a major exercise. The complexity of the allowances and rates in the Award therefore serves neither workers nor employers.*[36]

17.5 The statement of the Cole Royal Commission in 2003 goes to the fundamental defectiveness of the On-Site Award's predecessor and hence the On-Site Award as its bastard child. That poor standard of instrument, a

[36] Above note 4, Volume Eight, page 50

dysfunctional instrument, should not be down-played by pointing to one fairly benign historical anomaly, as the Commission does in Box 11.2 on page 412.

17.6 Master Builders agrees with the stakeholders mentioned on page 416 of the Draft Report: the award modernisation process failed, especially for the building and construction industry. And we can sympathise with those stakeholders who express exhausted exasperation with the modern review process currently in train. It is too little, too late and for the building and construction industry starts with a poor instrument which does not properly fulfil its function.

17.7 The Commission at page 417 of the Draft Report has argued that awards play an important role as safety net instruments by "rectifying" an important feature of workplace relations: "some of the imbalance of bargaining power that can exist in employee-employer relationships." Yet this proposition does not deal with the need for the safety net to be established other than in the form of long, incomprehensible, outdated documents such as the On-Site Award. The proposition only stands up as an indication that the safety net *in whatever form* should recognise this disparity.

17.8 But for the building and construction industry the alleged power disparity is more manifest in the coercive behaviour of unions rather than tethered in the traditional conception of an imbalance in power between employers and employees. The Cole Royal Commission assessed the commercial vulnerability of the industry. Throughout that watershed report there was a detailed isolation of the source of union coercive power. It was established that head contractors and subcontractors are subject to severe cost penalties for delayed completion. Industrial action causes immediate loss from standing charges and overheads, and potential loss from liquidated damages. These losses put pressure upon head contractors and subcontractors to give in to industrial demands. If the short term cost of the demands is less than the actual and prospective loss on the specific project, the usual result is that the demand is met. That is because of the short term project profitability focus in the industry which is highly competitive. The dynamics of relations between employees and employers are hence subsumed into this different conception of power at construction sites.

17.9 The Cole Royal Commission said:

> *It means that quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. Those with longer-term objectives know that those with a short-term focus are vulnerable to delay and cost. There is thus an inequality of bargaining power, when conflict occurs. Sometimes unlawful or inappropriate conduct occurs for the sole reason of exploiting or reinforcing that power.*[37]

17.10 Master Builders notes the discussion of the question as to whether awards have increased the wages received by workers at page 418 of the Draft Report. The discussion indicates that the "link between awards and earnings has become weaker" since awards have shifted from setting wages to setting a safety net. But their role remains critical through the linkage mentioned in the discussion but also because modern award wage levels comprise a critical component of the better off overall test (BOOT).

17.11 From this discussion, the Commission moves to the central question of whether the role of awards as a binding safety net is justified. At page 419 of the Draft Report the Commission sets out that "the role of awards is to ensure that all employees in Australia receive reasonable wages and conditions for their work, and to counter the poor bargaining power of vulnerable employees." This proposition is not about awards – it is about the role of a safety net. That is the difference; nothing in the discussion of the historical development of awards indicates that in the form currently encountered are awards the optimal means by which a safety net should be constructed, especially where the instrument which encapsulates that safety net is of such poor regulatory quality.

17.12 Master Builders agrees with the statement of the Commission at page 424 of the Draft Report that "the lingering presence" of the history of the development of awards "makes it unlikely that awards closely reflect the type of regulatory settings that could be designed for today's economic environment." Absolutely - awards are not easily accessible to those who need to use them; their language is poor and in the building and construction industry the instrument (per the Cole Royal Commission comments set out above) makes compliance extraordinarily difficult. Master Builders agrees

[37] Above note 4 *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, Vol 1, February 2003, p 11.

that replacing awards would come with trauma especially for those in the IR club. But if the NES needed to be expanded to accommodate a revised safety net, so be it. We contend that this is not a "radical" suggestion – awards are now, after all, statutory instruments and the NES is part of the principal statute.

Recommendation 30 **Master Builders recommends that Awards should be abolished.**

17.13 Master Builders notes that at page 425 of the Draft Report, the Commission says that the current system does not "appear to be producing highly adverse outcomes." It does for the building and construction industry. Workplace relations in the building and construction industry is a mess. The problems are compounded because the statutory safety net instrument fails the test of a good regulatory instrument:

- it is inaccessible – without the Master Builders' Modern Award Manual even industry professionals would be stumped;
- it is poorly drafted: take a look at clause 31.3 where a simple matter like frequency of payment of wages is immersed in legal gobbledegook;
- needs to have lengthy explanations attached to its history to understand the current conception: the inclement weather clause, clause 23, fits into this category, as does the clause about RDOs, clause 33;
- follows outmoded methods of construction (e.g. clause 22.3 (e) about "slushing");
- improperly regulates work health and safety; and
- contains errors even after being in existence for more than 5 years (e.g. in clause 33.1(a)(ii) there remains a reference to the nominated industry rostered day off when that concept no longer informs the award elsewhere or is a feature of the industry's workplace relations).

17.14 The Cole Royal Commission and the interim report of the Heydon Royal Commission resonate with the fact that workplace relations in the building and construction industry produces "highly adverse outcomes." The findings of

the Public Infrastructure Report showed that in summary the industry's workplace relations "has long been seen as problematic, with greater than average levels of disputes, concerns about excessive union control of work sites, unlawful conduct and expedient deals between head contractors and unions to buy IR peace."[38]

17.15 The position of Master Builders set out at page 425 of the Draft Report is maintained. The sun setting process recommended by Master Builders could then be put in place alongside the more decentralised system called for by ACCI, also summarised at page 425. Having said that, we now comment on what the Commission has labelled as the "repair" of awards. We do so on the basis that the building and construction industry principal award, in particular, is an instrument that needs urgent and extensive remediation merely to make it comprehensible.

18 Repairing Awards

18.1 Master Builders notes that three conclusions have been reached by the Commission about how improvements in the framework and processes used by the FWC to assess wages, conditions and entitlements that appear in modern awards could be reformed. We note that at page 428 of the Draft Report the Commission has indicated that there is a "suggestion" that awards include undesirable features. That is certainly the case with the On-Site Award, as is obvious from the prior discussion in section 17 of this submission. The Commission rightly recognises that these undesirable features are not a requirement by law but rather an outcome of precedent and decision making by the FWC. We note that the Commission has indicated that through the newly created Minimum Standards Division (MSD), the FWC should adopt a more systematic evidence-based approach to address the deficiencies in awards.

18.2 Master Builders notes that the Commission indicates in the context of current award reviews that the fact that a party does not present detailed robust evidence does not mean a problem does not exist or is not worth examining. The Commission's observation has currency for Master Builders as most, if not all, members are reluctant to appear before the FWC. Such an

[38] Above note 1 at p495

appearance will often promote reprisals from the union. Reliance on independent research, and even witnesses being required under compulsion to provide evidence, would assist with the award review process.

18.3 How appeals from the decisions of the MSD would be determined and whether or not it would be a Full Bench process were individual members of the FWC to make the relevant changes to awards as part of the MSD is at large. How the determinations of the new division would be treated at law is unclear.

18.4 We note that at page 431 of the Draft Report, the Commission says that "scientific methodologies can provide the metrics and processes for assessing the consequences of different minimum wage and award review decisions, and can ensure that decisions are, as much as possible, informed, transparent, logical, substantiated and consistent." This does not mean that they would be unable to be appealed in a legal sense despite the attributes which attend their preparation. Accordingly, no matter the rigorous research approach, it is imagined that there would need to be some sort of appeal mechanism which underlines the need for change as argued earlier in this submission.

18.5 We note that the Commission at page 433 of the Draft Report has indicated that the current four yearly review of modern awards appears to be an expensive exercise requiring extensive investment from interested parties. Master Builders' experience accords with this view. The current review appears to be likely to exceed the two years set out at page 433. The Draft Report then goes on to articulate what it labels as three levels of problem. First, "small issues" that intermittently arise that need fixing; second, issues that are relatively straightforward and uncontroversial but important and third, more complex but critical issues. This elaborate process underlines Master Builders' push for simplicity in the sunsetting of awards and the transition of awards to an expanded statutory safety net.

18.6 It is noted that the MSD, in the conception of the Commission, would develop policy options for addressing issues. Surely the notion of policy in respect of modern awards must come from sovereign governments? The current proposal begs the question of what policy should be introduced and a tribunal, even newly constituted with more experts and operating under a more

objective system, must be guided by policy which is set by government. Thus in respect of Draft Recommendation 12.1 at page 436 of the Draft Report, we would agree with the recommendation but would also indicate that streamlining of the modern awards objective in order to eliminate some of the contradictory elements of that objective would appear sensible and would need to mesh with government policy and the establishment of a safety net: see 18.8 below.

Recommendation 31	**Master Builders recommends that streamlining of the modern awards objective should occur.**

18.7 We note that the Commission has indicated that reference to the complexity of awards in submissions to the inquiry have been more common than comments about how modern awards have improved the workplace relations environment. Master Builders is obviously, from the discussion in section 17 of this submission, of the view that the building and construction industry awards are overly complex and are failing the industry. Master Builders notes that the tools that the Commission speaks of at page 438-439 of the Draft Report are more guides to the award content than actual award provisions. At present, there is a major gap between the simplicity of some of the explanations provided about awards (using the example of our own manual) and the actual provisions of the award. Whilst the three suggestions made by the Commission are useful, those comments do not go to addressing the fundamental difficulties that we have outlined in this submission.

18.8 Master Builders notes that on page 439 of the Draft Report the Commission indicates that "it should not be assumed the employer and employee interests are always at odds." If only that were the case in the building and construction industry. Whilst there is a great deal of co-operation at the individual firm level, when matters are elevated to the FWC stage, it is in an adversarial climate where employer and employee interests come to be defined as even more stark than exists at the everyday level. In this context, a relevant proposition at page 440 of the Draft Report reframes the modern award objective. That reframing underlines the point Master Builders made about the modern awards objective needing to be recalibrated through government policy in paragraph 18.6 above. Where the Commission says that the objective of the new assessments it proposes "would be to ensure

that awards provide an adequate safety net for employees at least cost to employers," this has redefined the modern award's objective. Hence, we would suggest that the formal recommendation from the Commission be that the modern awards objective be subsumed into that notion.

18.9 We cannot, however, agree with Draft Recommendation 12.2. Changing wage relativities should not be undertaken unless, in current terms they are based on work value (see the discussion of apprentice wages above) and not in isolation from other proceedings or determinations. The criteria by which these wage changes (and it is unlikely that there would ever be a decrease in minimum wages given the history that attends this area) would be permitted is unclear from the Commission's discussion. It would be a mistake to permit minimum wage adjustments that were other than categorically linked to productivity. The award standard setting process is not the place where that element of adjustment should occur.

18.10 We note the elements of consideration that the Commission has brought to bear in finding at page 451 of the Draft Report that the FWC should take a more forensic approach to unemployment and business risks for different groups of awards "and be open to decreases (or slower increases) in wage rates" if this is likely to preserve jobs. The Commission indicates that this re-framing would "potentially" require changes to the modern awards objective.

18.11 In Master Builders' view the need to change the modern awards objective is clear given the inherent contradictions that currently exist in the modern awards objectives, with the FWC currently indicating in many decisions that implementing the objective is a "balancing act." For example:

> *No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award. There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*[39]

[39] Para 32 and 33 [2014] FWCFB 1788

18.12 Master Builders disagrees with the Commission in its assessment of allowances. At page 452 of the Draft Report the Commission says: "The complex and inconsistent treatment of allowances is not an anomalous feature of awards." Having regard to the fact that there are a multiplicity of allowances and matters which are historical relics, the anomalies in the On-Site Award are palpable. We refer to the comment made by the Cole Royal Commission extracted above at paragraph 17.4. Those words ring even truer in the context of a purported "modern" award. We refer in particular to the clumsy attempt to use allowances to influence WHS. The updated modern award manual gives the Commission ample examples of this issue. The creation of an MSD to better examine awards is a second best solution to the problems posed by the awards: they should be abolished and, over time sunsetted, with new conditions absorbed into the statutory safety net.

19 Penalty Rates for Long Hours and Night Work

19.1 Master Builders notes that the issue of penalty rates is emblematic for a number of Australian workers and their potential abolition has been used as a scare mongering tactic by some politicians. Indeed the entire process now underway has attracted political comment. The Victorian government for example announced that "one in six Victorian workers will be worse off under the Abbott Government's planned assault on the minimum wage".[40] This assertion is based on the fact that the Commission, in one of the Issues Papers[41] released for the inquiry, asks questions about the way in which the minimum wage is set and discusses the relationship between the current minimum wage and the tax transfer system. Given the amount of effort that will be put into a major inquiry of this kind, it is disappointing, but not surprising, that any subject area should be pre-judged, should be examined solely through a political prism. The penalty rates issue is clearly in that category. [42]

19.2 Master Builders notes that the Commission's research shows that the construction industry has the highest level of weekly hours of overtime of all industries – figure 13.5 on page 470 of the Draft Report. Without more

[40] The Hon Natalie Hutchins Minister for Industrial Relations, Victoria media release 3 February 2015 "One in Six Workers to Suffer Under Minimum Wage Plans".

[41] http://www.pc.gov.au/inquiries/current/workplace-relations/issues see Issues Paper 2

[42] http://www.actu.org.au/actu-media/media-releases/2014/its-on-unions-ready-to-fight-for-penalty-rates

research in this area, we cannot at this time inform the Commission of why this is the case other than that most construction projects are completed on tight time deadlines and the workforce is often asked to assist to meet those time deadlines through the working of regular overtime. The Commission talks about shift work and the established premiums for shift and night work. In this context, some of the most complex provisions under the On-Site Award are those regulating shift workers, under clause 34.[43]

19.3 These complications in part arise because clause 34 provides for dual regimes, with clause 34.1 regulating shift workers in the general building and construction and metal and engineering construction sectors, and clause 34.2 covering shift workers in the civil construction sector. This reflects the terms of the NBCIA[44] and the pre-modern *AWU Construction and Maintenance Award 2002*,[45] from which clauses 34.1 and 34.2 of the On-Site Award are respectively derived.[46] This division was criticised by the AIRC during the drafting of the On-Site Award, when it invited "further input from interested parties… directed to simplification of the provisions and, to the greatest extent possible, some degree of commonality of shift provisions".[47]

19.4 Master Builders made a number of suggestions to the then Fair Work Australia during the 2012 modern award review for the simplification of the shift provisions of the On-Site Award. However, the changes that eventuated have compounded rather than simplified the terms of clause 34. The On-Site Award again breathes confusion for readers.

19.5 The relevant provision is based upon clause 30.1 of the NBCIA. From 15 July 2013 shifts are defined by when they commence; Master Builders' application in that regard was only partly successful.[48] Master Builders pointed out to the FWC that to define shifts by the time of commencement rather than the finish of shifts, creates an anomaly. Master Builders contended that there is no accommodation of the hours between 11.00pm and 4.30am within the night

[43] These uncertainties were summarised by Master Builders in a submission provided to the FWO in 2011: *Submission to the Fair Work Ombudsman – Shift worker provisions under the Building and Construction General On-Site Award 2010* (Master Builders, 20 May 2011).

[44] Clause 30.

[45] Clause 28.

[46] *Re Award Modernisation* [2009 AIRCFB 50; (2009) 180 IR 124, at para 44.

[47] *Re Award Modernisation* [2009 AIRCFB 50; (2009) 180 IR 124, at para 44.

[48] [2013] FWC 4576 at paras 262-270.

shift. The manner of the change made by FWC inadvertently alters the effect of shift definitions and misconstrued the intent of the application.[49]

19.6 The FWC considered Master Builders' request to clarify the changes made to the definition of shifts.[50] Master Builders' proposed that there be an early morning shift defined by reference to a shift starting at 11.00pm and before 4.30am, in order to accommodate the absence of a shift pattern dealing with work at that time.

19.7 The FWC rejected Master Builders' application saying:

> *The shifts which previously could end during the period 11.00 pm to 4.30 am, reformulated to starting times, are shifts commencing between 3.00 pm and 8.30 pm and are accommodated within the reformulated shiftwork definition. The effect of the relevant variation was simply to alter the identification of shifts from the finishing time to the commencement time. The application to vary on the basis of an anomaly must be rejected.*
>
> *The absence of shift arrangements in respect of shifts commencing between 11.00pm and 4.30am within shift arrangements is common to clause 34.1 as it appears in the On-site Award when made in 2010 and after the variation arising from the 15 July 2013 decision. It did not arise from the variation and is not an anomaly created by the decision or consequent determination.*[51]

19.8 Despite those comments, the FWC noted that there was an absence in arrangements for shifts starting at 11.00pm and before 4.30am but considered that there was no evidence to support the need for an early morning shift as Master Builders had sought. The matter will be taken up in the 2014 Modern Award Review.

Recommendation 32	**Master Builders recommends that the Commission should recommend a regularisation of shift times and penalties across all awards.**

[49] See [2013] FWC 6347 at paras 11-12.

[50] [2013] FWC 7478.

[51] [2013] FWC 7478 at paras 30 and 31.

20 Regulated Weekend Penalty Rates for Selected Consumer Services

20.1 At page 528 of the Draft Report the Commission notes that the FW Act's modern awards objective has an extensive list of considerations that the FWC must weigh up when making its decisions, as we have indicated earlier in this submission. In this context, our submission about having the modern award objective more focussed is underlined in the same place where the Commission indicates its surprise that "there is no overarching requirement that awards increase the overall wellbeing of the Australian community." They don't, especially in the building and construction industry. If that is the intent of the Commission, it reinforces Master Builders' submission that awards should be phased out because how that broad objective could be achieved would raise a great deal of contention.

20.2 We also support the Commission's call for legislative amendment at page 529 of the Draft Report. As noted by the Commission, the wording of the FW Act in s 134(1)(da) may contribute to ambiguity by stipulating the '*need* to provide additional remuneration'. The Commission notes that "it would be unfortunate if this required the wider adoption of weekend penalty rates even in circumstances where the context of other industries did not require that." Legislative amendment appears necessary to achieve this clarity and Master Builders would support that change.

Recommendation 33	**Master Builders recommends that s134(1)(da) of the FW Act should be repealed.**

20.3 In relation to the ability for the safety net to contain a provision relating to time off in lieu of overtime, we note that the FWC has handed down a decision[52] in this matter. In the decision the Full Bench expressed general support for TOIL arrangements:

> *Our provisional view is that the variation of modern awards to incorporate the model term is necessary to ensure that each modern award provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant), and would also be consistent with the object of the Act. This is so because of the various safeguards provided within the term itself and because it facilitates the making of mutually*

[52] 4 yearly review of modern awards – Common Issue – Award Flexibility [2015] FWCFB 4466

> *beneficial arrangements between an employer and employee. As mentioned earlier, we accept that flexible working arrangements, such as TOIL, may encourage greater workforce participation, particularly by workers with caring responsibilities. We also accept that increasing workforce participation can result in increased economic output productivity. The available evidence also supports a general finding that regardless of the industry employees work in, the most important aspect of determining employee satisfaction with their current job is the flexibility to balance work and non-work commitments.*[53]

20.4 However, in contrast to the general principle outlined in the prior paragraph, at paragraph 307 of the decision the Full Bench states that:

> *Given the unusual arbitral history and the particular features of the industry covered by the two construction awards (including the operation of daily hire) we think the most expeditious course is to deal with any application to insert a TOIL provision in these awards during the award stage rather than in the settlement of any orders which may arise from our further consideration of the provisional modern term.*

20.5 Here again the building and construction industry has been treated differently and the narrow and rigid conditions of the safety net, wrapped around by history, remain. This matter will be taken up in the award specific building and construction industry proceedings.

21 Enterprise Bargaining

21.1 Agreement Making

21.1.1 Master Builders notes Draft Recommendation 15.1. We do not believe that vesting the FWC with greater discretion would be an appropriate solution as proposed in the Draft Recommendation. It appears that whilst acknowledging the problems with the FWC exercising its discretion (at page 553 of the Draft Report), the solution put forward by the Commission is to give the FWC more discretion around approval where substantive issues are in play. We agree with the restructuring of the FWC and at the same time for greater scrutiny of agreements and better application of the law to their terms so that non-permitted and unlawful matters are excluded – see discussion below.

[53] Id at paras 279 and 280

Recommendation 34	**Master Builders recommends that the FWC should not be provided with greater discretion in the manner proposed in Draft Recommendation 15.1.**

21.1.2 Greater discretion where minor procedural matters are at issue is supported. The current pedantry around notice of employee representational rights is not warranted. It focuses on process not outcomes, making procedure the king not the servant. Whilst these documents are required in order to trigger the bargaining process how they are stapled together should not be of concern: this is mentioned at page 552 Draft Report.

21.2 Pattern Bargaining

21.2.1 We refer to the discussion about pattern bargaining that commences on page 569 of the Draft Report. As was evident from the Submission, pattern bargaining is an important subject for the building and construction industry. Pattern bargaining has been a blight on the building and construction industry, a drag on productivity and detracts from value-for-money in government and private procurement. 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."[54]

21.2.2 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, which is that unions force parties to sign up to pattern agreements (with a 'sign up or else' culture). This is one of the many areas crying out for reform in the building and construction industry.

21.2.3 The FW Act does not contain a requirement that a party must satisfy the FWC that it is not engaged in pattern bargaining before applying for a protected action ballot.[55] This, combined with the absence of

[54] Above note 4 Final Report of the Royal Commission into the Building and Construction Industry Vol 1 p28

[55] 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

any constraints relating to good faith bargaining applying to situations where pattern bargains are in play, has permitted the re-establishment of 'take it or else' agreement making. 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. Importantly, the *John Holland*[56] case found that a party can still be genuinely trying to reach agreement even if it is pattern bargaining. This effectively neuters any attempt to police pattern bargaining, except in extreme cases.

21.2.4 The discussion of this matter at 562-563 of the Draft Report conflates the issue of the use of template agreements with the problematic nature of pattern bargaining that is the albatross of the building and construction industry. The problem appears to lie with how a pattern agreement is defined. A template is the starting point for a mutual bargain. A pattern agreement is one which underlines the "sign up or else" conduct of the building unions. The solution lies in what is proposed and discussed on page 562 of the Draft Report. As a first preference, Master Builders stands by the proposal that the genuinely trying to reach agreement exemption against pattern bargaining should be removed: see page 562 Draft Report.

Recommendation 35	**Master Builders recommends that the genuinely trying to reach agreement exemption against pattern bargaining should be removed.**

21.2.5 Pattern bargaining is based on the assumption that all enterprises are capable of bearing the same labour costs and that "regularisation" of the market through the union's manipulation (as has been evident from the Heydon Royal Commission focus on the practices of the CFMEU in the ACT) then flows. The anti-competitive nature of these practices has generated an inquiry into the matter by the ACCC.[57] This step, of itself, lends credence to Commissioner Harris' comment/question on 11 September 2015

[56] Ibid

[57] www.accc.gov.au/media-release/alleged-cartel-conduct-in-the-canberra-construction-industry

relating to the greater involvement of the ACCC where pattern bargaining occurs. This practice is at the edge of what is within the 'workplace relations' exemption for involvement of the ACCC – discussed further in section 31 of this submission.

21.2.6 Coloured by that experience, Master Builders' response to the information request at page 563 of the Draft Report is to require that those proposing the pattern must demonstrate that they are not applying undue influence or coercive conduct prior to having the ability to apply for a protected action ballot and/or as a pre-condition to having an agreement approved. There should also be a requirement to demonstrate that during the course of the negotiations there had been considerations beyond "the established market rate" that is referred to at page 562 of the Draft Report.

21.2.7 The wage rate in a pattern agreement is not a market rate. It is the rate the union imposes. If a union wants an industry agreement rather than a tailored enterprise agreement then protected industrial action should not be available. This will be an appropriate restraint on the conduct of those negotiating enterprise agreements, a restraint that links with the ideas of good faith bargaining.

Recommendation 36	**Master Builders recommends that protected industrial action where a pattern agreement is proposed should not be available.**

21.3 Non-Permitted Matters

21.3.1 Master Builders commends the Commission for the discussion on non-permitted matters but we do not agree with the conclusion reached at page 565 of the Draft Report. Non-permitted matters should not appear in enterprise agreements. They should be excluded as are unlawful terms. This process need not be administratively burdensome if the obligation is placed on the parties to only include matters permitted under the *Electrolux* case. Further, the ridiculous extension of the law contained in section 172(1)(b) relating to a so-called relationship between an employer and a union should be abolished to create greater certainty in this area and to displace the privileged position of unions.

21.3.2 The uncertainty surrounding the nature and extent of obligations encompassed by this new test are far in excess of those generated by the *Electrolux* test. Although Clause 676 of the EM for the Fair Work Bill provides a list of permitted matters, there does not seem to be a discernible test as to the nature of the "relationship" mentioned in s172(1)(b). In other words, there is little or no basis for labelling the interactions between an employer and a relevant union as a "relationship" in a formal sense; any contract is not between the employer and a union but between employees and the union or unions of which they are a member. As stated elsewhere in this submission, the union role is representational; unions are the agents of their members.

21.3.3 The administrative burden argument set out by the Commission at page 565 of the Draft Report is over drawn. The damage that non-permitted clauses being in agreements causes far outweighs this burden. Examples in the building and construction industry are of clauses which purport to require payment of accident pay for injuries or illness unrelated to work[58], "jump up" clauses that purport to bind subcontractor employers to match payments expressed in other enterprise agreements and the so-called "standing invitation" clause re right of entry.

21.3.4 Master Builders agrees with the terms of Draft Recommendation 15.2. It seems odd that individual flexibility clauses are mandated but that they are then able to be restricted by other means. In practice in the building and construction industry the CFMEU pattern agreements restrict the use of IFAs as a matter of course. Clauses to this effect are at Attachment C.

21.4 Greenfields Agreements

21.4.1 Draft Recommendation 15.3 is commended. This is exactly the sort of reform that will benefit the building and construction industry and provide the certainty of labour costs that underpins investment decisions. Having agreements in place for five years or during the life of a greenfields project is warranted for the necessary certainty. However, the reform of pattern bargaining should be a priority so

[58] *Australian Maritime Officers Union v Sydney Ferries Corporation* [2009] FCAFC 145

that unacceptable pattern agreements are not in place for even longer periods.

Recommendation 37	**Master Builders recommends that Draft Recommendation 15.3 should be implemented.**

21.4.2 We refer to the Draft Finding 15.1 on page 573 of the Draft Report. This Finding proposes against imposing statutory requirements for discussions about productivity as part of the bargaining process. Instead, it proffers 'better management' as a solution.

21.4.3 This draft finding seems far removed from the reality of the building and construction industry. We note for example a finding from the Commission's labour market research report "Work Arrangements on Large Capital City Building Projects[59]" as follows:

> *Industry/trade level negotiations over actual rather than minimum conditions (that is, industry and pattern agreements) restrict the ability of firms to negotiate their own work arrangements. This reduced flexibility limits the ability of firms to compete for employees or projects on the basis of different work arrangements. It may also reduce the capacity for firms to respond efficiently to changes in their competitive environment. Furthermore, where wage increases are negotiated at an industry/trade level without corresponding productivity improvements, unit labour costs will increase.[60]*

21.4.4 Better management in the building and construction industry can only follow from better regulation because of the actions of unions to force builders out of business where their demands are not met. The choice of survival in the market generally is made because not complying with the union's demands often means commercial suicide.

21.4.5 Evidence before the Heydon Royal Commission shows, for example, that unions have the capability to exclude members from the marketplace and hence from getting work in the industry. This problem is endemic in the industry, with the Royal Commission noting the exclusionary practices in Victoria, Queensland and the ACT in particular. The allegations that are currently being explored

[59] http://www.pc.gov.au/research/completed/large-building-projects/buildingprojects.pdf

[60] Id at page 51

in respect of Grocon and Boral in Victoria[61] highlight the arguments in this paragraph. The FWBC has many actions currently before the courts regarding coercive practices. All of these matters were covered in detail by the Cole Royal Commission. The draft finding does not apply to the building and construction industry.

21.5 BOOT Test

21.5.1 We refer to Draft Recommendation 15.4. We agree that there is a need to reform the BOOT test. We agree that a line by line test is not appropriate. We submit that clarity in the law would be preferred to an administrative solution as set out at page 576 of the Draft Report.

21.5.2 The test of no disadvantage is more manageable rather than one which shows that a person is better off overall. "Equal to or better" is a sufficient protection for employees and has a greater level of certainty than the current BOOT test. The new no disadvantage test should be clearly linked to classes of employees and should operate as a global test. Where provisions of the proposed agreement were clearly less than or different from an award (noting Master Builders' earlier view that they should be abolished) then the applicant should be required to show how other elements of the agreement compensated for these matters. Whilst we do not want there to be a solution that is based in matters of administration, there should be worked examples published by the FWC which show how the off-setting provisions were judged to be sufficient and a library of clauses for each industry compiled where there are innovative offsets utilised. This would assist to address the difficulties with consistency discussed in the Draft Report.

Recommendation 38	**Master Builders recommends that the BOOT test should be replaced with a revised no disadvantage test.**

[61] See for example "Boral CFMEU Litigation Could Set Costs and Damages Record for IR Law" Workplace Express, 25 August 2015

21.6 Default Representation of Unions

21.6.1 The issue of default representation in bargaining is problematic and skewed in favour of unions. Currently, non-union members are discriminated against because of the preferenced status of unions. Individuals must be given a choice as to who their bargaining representative should be. As a primary position, there should be no default but rather the appointment of a bargaining representative should be an active step. In practice there will likely be many employees who would be satisfied to nominate their work colleagues or actively choose a union.

Recommendation 39	**Master Builders recommends that default representation should be replaced with an *active* requirement for a bargaining representative to be appointed.**

21.6.2 In Draft Recommendation 15.5 a percentage figure is used as a means of indicating that a bargaining representative should be elected. That 5% figure is not applied to unions. If a percentage figure is used, this should apply equally to union nominees.

21.6.3 Whilst the Commission at page 578 Draft Report notes that "self-interested action by unions will inevitably occur" this should not be the premise on which the law is founded. In industries like construction, union membership is often not a voluntary step. For example, in the building and construction industry unions often require employers to pay a blanket fee for all employees and to effectively cut out the individual choice that employees should be able to exercise: this was evident from material presented to the Heydon Royal Commission, particularly in respect of the ACT.[62] For all these reasons, we oppose Draft Recommendation 15.5.

21.7 Greenfields Agreements

21.7.1 Master Builders notes the discussion on greenfields agreements. This is an area of the law that is crying out for reform. We note that

[62] In a tape recording played before the Heydon Royal Commission on 4 September 2015 in Sydney (http://www.tradeunionroyalcommission.gov.au/Hearings/Pages/Hearings/2015/4-September-2015-Public-hearing.aspx) in the presence of ACT CFMEU Assistant Secretary Jason O'Mara, organiser Johnny Lomax tells a contractor that, if he doesn't pay for union memberships, the union will 'deliver some action' to ensure that the contractor 'won't be doing any work on commercial sites.'

the Master Builders' preferred reform, at page 582 of the Draft Report, is dismissed as a Commission conclusion reached "on balance." The solution remains Master Builders' first preference as unions tend to disrupt the greenfields process, with the Commission recognising the "excessive bargaining power" they currently possess: page 583 Draft Report. As indicated at page 582 the critical factor in the making of these agreements is the presence of a no disadvantage test not the presence of a union.

Recommendation 40	**Master Builders recommends that employer greenfields agreements be reintroduced.**

21.7.2 The Draft Recommendation 15.6 is hence a second preference reform but one that is supported on that basis.

21.7.3 We do not support Draft Recommendation 15.7. The need for certainty in the making of greenfields agreements is paramount. The three points that underpin the Draft Recommendation would not deliver certainty. Arbitration of any kind is not appropriate as investors will not submit to an imposed outcome when considering labour costs as part of an investment proposal. A greenfields agreement should not last for only 12 months but for the life of the project as elsewhere recommended by the Commission in Draft Recommendation 15.3. For all of these reasons, we do not support this Draft Recommendation.

22 Individual Arrangements

22.1 We note Draft Recommendation 16.1. We agree that the period during which IFAs cannot be terminated should be of a greater period than 13 weeks. The period of their operation at one year does not appear to be directly substantiated in the Draft Report's discussion. This extended period is welcomed but the agreement should be able to be open ended in a temporal sense. There would be utility in linking the development of IFAs with the concept of Individual Employment Agreements in New Zealand. More analysis of those agreements would be useful in the final report.

22.2 Draft Recommendation 16.2 is agreed. The test discussed aligns with the Master Builders' support expressed above for the replacement of the BOOT with a new no disadvantage test. We would welcome additional guidance from the FWO. Similarly, with respect to Draft Recommendation 16.3 we support the provision of additional information as proposed. This should only be to raise awareness not to set a basis for the no disadvantage test.

23 The Enterprise Contract

23.1 In Chapter 17 of the Draft Report the Commission discusses the introduction of a new enterprise agreement to be known as an enterprise contract. This arrangement would permit employers to vary an award for a class of employees or for a group of particular employees without having to negotiate with each party individually or to form an enterprise agreement. At page 627 of the Draft Report the Commission has an information request that inter alia asks if the proposed instrument would be a "suitable addition to the current suite of employment arrangements." Cynically, it might be said that this "hybrid" has been proposed so that political backlash against individual agreements is averted.

23.2 Master Builders notes that a useful element of the proposal is that employers would be able to offer an enterprise contract to prospective employees as a condition of employment. The enterprise contract would be accompanied by a number of safeguards including the following:

- Existing employees would be able to choose whether to sign on or stay on their existing employment contracts: accepted as appropriate.
- The enterprise contract would meet the award wages and conditions and employees should not be worse off under an enterprise contract compared with the award: this safeguard may or may not be appropriate dependent on the nature of the test used to assess this issue.
- The enterprise contract would be lodged with the Fair Work Commission but would not require approval: accepted as appropriate.
- The employer would be required to provide this arrangement in writing to its employees: accepted as appropriate.

- Employees could exit the arrangement after one year and return to the award or any other agreed contract: this would be too disruptive for building and construction industry projects where the certainty of conditions throughout the term of the project are required.

- The enterprise contract would have an expiry date: this element is somewhat negated by the prior safeguard.

23.3 As the Commission has recommended the retention of awards, they should become more facilitative. They should be much more user friendly. If this were to be the case (and individual facilitation were permitted under awards) the need for the new instrument would be lessened. Rather than the template provisions proposed in this context, it would be a better use of resources to have template facilitation provisions that populated restructured awards.

Recommendation 41	**Master Builders recommends that if awards are retained, their increased facilitation should negate the need for enterprise contracts.**

23.4 In the absence of the fundamental restructuring of awards just touched on, the instrument may prove useful. The notion of a template seems to, in part, defeat the object of better tailoring the instrument to the needs of the enterprise and the employees covered. Accordingly, the notion of having the FWC having the task of making these templates is opposed: look at the mess that attends modern awards as has been illustrated in this submission.

23.5 Further the statutory nature of these instruments raises the question of whether protected industrial action might be lawfully permitted during the term of an enterprise contract. It should not be permitted if an enterprise contract is in place. The instrument appears to be classification specific or in some yet to be defined way confined to a "group" (see page 620 Draft Report). This matter should be clarified in the final report. Could the instrument in one or more forms, for example, cover all employees of an enterprise thus displacing enterprise agreements?

23.6 In summary Master Builders has some hesitations about this new instrument whilst commending the Commission's intent. Clarification of the matters raised in this part of the submission would be useful when the final report is

published. The derivations of the proposal appear to be from the Commission's consideration of New Zealand statutory arrangements. Ideally, it would be a better fit to take up these arrangements in Australia. The quasi-collective nature of the proposed instrument means that it has not connected with the efficiencies that the New Zealand model appears to have generated (see Box 17.1 page 622 Draft Report).

24 Public Sector Bargaining

24.1 We make no comment on Chapter 18.

25 Industrial Disputes and Right of Entry

25.1 Protected Action

25.1.1 Master Builders would support Draft Recommendation 19.1. The limitation of industrial action to a period from when bargaining has commenced reinforces the need for positive markers in the statute indicating the commencement of bargaining.

Recommendation 42	**Master Builders recommends that a limitation on industrial action to a period from when bargaining commences should be introduced.**

25.1.2 We note the Commission's request for input on making protected action ballot orders simpler. The changes proposed at page 680 of the Draft Report are not supported as they potentially undermine the certainty that employers need in order to respond with business scheduling and the like. The extension of the period of 30 days would also provide employers with an uncertain time frame for the taking of industrial action to their detriment. Open ended, non-defined industrial action alters the power balance heavily in favour of those proposing the action i.e. it has the capacity to cause more damage to employers than industrial action of a specific type within a defined time frame.

25.2 Significant Harm

25.2.1 The bar for FWC intervention based on the definition of "significant harm" to the bargaining participants or a third party is, as mentioned

at page 688 of the Draft Report, set too high. Master Builders would favour the test proffered by the CCIWA which is "unreasonable economic harm or ...a serious adverse impact on the employer or other affected party." This test steps outside of the bounds of what would normally be the consequences flowing from industrial action. In other words, the harm should be "unreasonable" or have "serious adverse impact". These tests would still require the FWC to exercise a discretion but at a level more commensurate with the community's expectations.

25.3 Industrial Action Generally

25.3.1 We agree with Draft Recommendations 19.2, 19.3 and 19.4 as sensible changes to the law. They will prevent the abuse of protected industrial action.

25.3.2 We do not support Draft Recommendation 19.5. First, it would authorise strike pay. Secondly, the risk of paying employees for a short duration strike may occur because of the threat of further strike action.

25.3.3 We support the proposal at page 694 of the Draft Report that a minimum 4 hour pay deduction should be in place. The Commission in dismissing this proposal indicates that this would discourage graduated, less disruptive forms of industrial action. That conclusion sits oddly with the proposition that minor time stoppages cause disproportionate hardship to the employer at minimal cost to the employees. The minimum pay deduction sends the message that industrial action is a serious and potentially highly disruptive step.

25.3.4 Employer industrial action should be permitted generally. There should be the full suite of tactics available to employers as there are to employees and the unions. Good management practices would generally militate against the use of such pre-emptive tactics. The current arrangements, about which the Commission seeks feedback at page 698 of the Draft Report, are presaged on the idea that the employer always holds the power in the particular relationship, a matter that we have sought to show is not a valid assumption in the commercial sector of the building and construction industry.

25.3.5 Employers should be permitted to institute overtime bans or reduced hours without the triggering of the adverse action provisions so long as enterprise bargaining has commenced and a notification has been issued to the affected employees.

25.3.6 Master Builders agrees that penalties for industrial action should be increased and we therefore support Draft Recommendation 19.6. For the building and construction industry these should be at least three times the current levels.

Recommendation 43	**Master Builders recommends that penalties for industrial action should be increased and, for the building and construction industry, at least threefold.**

25.4 Right of Entry

25.4.1 As mentioned at paragraph 7.2 of this submission, right of entry is not used in the building and construction industry as a legitimate device. It is abused. We set this out at section 8.6 of the Submission. The experience of the building and construction industry is contrary to the proposition at page 702 of the Draft Report that the right of entry is generally not exercised for disruptive purposes.

25.4.2 Draft Recommendation 19.7 is supported whilst not tackling issues with right of entry head on. Obtaining evidence about the matters set out is often difficult. Quantifying the "impact on an employer's operations" for example could be costly and onerous. Master Builders would prefer that the onus be place on union officials to act properly and that their duties are treated more seriously and are better regulated, as discussed below in the discussion on Draft Recommendation 19.8.

25.4.3 Draft Recommendation 19.8 is supported in its intention. Unions that are spruiking for members are often disruptive and their access to discuss what is invariably about joining the union (in Master Builders' experience) should be restricted. The limitation that the Commission has proposed is a good start. The entry for discussion purpose, whether there are members present or not, should be

restricted as its abuse in practice is frequent: see the evidence at section 8.6 of the Submission.

25.4.4 We reiterate that fundamental reform of this area of the law is required and that the building and construction industry suffers from abuse of the rule of law as outlined earlier in this submission.

Recommendation 44	**Master Builders recommends that more fundamental reform of right of entry laws to stop abuses should be introduced.**

26 Alternative Forms of Employment

26.1 Sham Contracting

26.1.1 Master Builders believes that the issue of sham contracting is not as predominant as a number of submitters to the Commission have indicated. This proposition is evident from the most recent compliance audit undertaken by the FWO in July 2015.[63]

26.1.2 At page 16 of the FWO audit report the following is said:

> *Given the historically high reliance on contracting arrangements and concerns of sham-contracting and misclassification within the industry, the contracting arrangements for 90 businesses within the sample of 700 employers were assessed.*
>
> *Of the 90 contracting arrangements assessed, no prima-facie evidence of sham-contracting arrangements was found. Rather it was found that:*
>
> - *Genuine invoices were being issued from one company to another (not from a company to an individual) and were usually based upon a quote to complete a job/task, with no reference to hours or days of work; and*
> - *Where invoices were issued, they were for tasks outside the scope of the principal contractors skill-set (i.e. a builder invoices an electrical company to complete electrical work).*

26.1.3 Master Builders opposes sham contracting. Sham contracting makes it more difficult for Master Builders' members who comply with the law to compete. Those members are disadvantaged directly by having to compete against competitors whose costs are

[63] *National Building and Construction Industry Campaign 2014/15* Fair Work Ombudsman July 2015

illegitimately reduced. In addition, they are adversely affected as taxpayers, where all taxpayers must pay increased taxes because of the "leakage" from the system via the black economy and mechanisms that are constructed to defeat the law.

26.1.4 Master Builders has long sought the full effects of the law to be visited on those who operate illegitimately and has, on many occasions, assisted the Australian Taxation Office (ATO) with policies which assist with the process of strengthening the taxation system to stifle the activities of those who deliberately misrepresent the nature of the employment relationship, as proscribed by the FW Act.

26.1.5 We note that at page 721 of the Draft Report the Commission has referred to "misclassification" as sham contracting. That is not the definition which should be adopted. Master Builders prefers to use a definition of sham contracting that is directly related to the matters proscribed by the FW Act in sections 357 to 359. Hence, a sham contract arrangement arises where an employer **deliberately** treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. This is different to misclassification which may arise from having a poor understanding of the law or through inadvertence.

26.1.6 Master Builders stresses that a sham arrangement is a deliberate act by those who seek to act illegitimately. This appears to have been accepted by the Commission in the Public Infrastructure Report where the following definition is used:

> *Sham contracting 'involves misrepresenting or disguising an employment relationship as one involving a principal and contractor under a contract for services', which is unlawful under the Fair Work Act 2009 (Cth)*[64]

26.1.7 Employers should not suffer from the difficulties in certain circumstances of making the relevant distinction between employee and independent contractor.[65] They should, however, suffer harsh consequences when they deliberately flout the law. Further the

[64] Above note 1 p508

[65] See Footnote 26 above where this difficulty is discussed.

Commission should not rely on the issue of a limited number of prosecutions. If there were to be no prosecution under the sham contracting provisions but a finding is adverse to an employer in that employees had been misclassified, the consequences at law can still be substantial and detrimental. An employer may well need to repay monies or find cash that otherwise would not be due and payable. It is therefore misplaced to underestimate the disruption that a finding that a contractor thought legitimate is in fact an employee. That finding could have major adverse cash flow implications for small businesses.

26.1.8 An employer can be liable for a breach of the terms of the modern award or other provisions which would attract substantial civil liability.[66] There are a range of other serious consequences that can flow from a breach of a number of statutes including taxation laws, superannuation, long service leave and workers compensation laws. The current law is adequate to deal with those who take deliberate action and enter into a sham with knowledge. There is no need to change the law.

Recommendation 45	**The current law relating to sham contracting is appropriate and should not be changed.**

26.2 Independent Contracting

26.2.1 Independent contracting is not employment. It is not an alternative form of employment. It should be treated differently in the final report and given a separate chapter. We make the point about the prevalence of the independent contracting relationship in the building and construction industry at section 8.3 of the Submission.

26.2.2 As was indicated on 11 September 2015, we strongly support Draft Recommendation 20.1. We outlined the arguments in favour of this recommendation at section 8.4 of the Submission.

[66] See sections 45 and 539 *Fair Work Act*

Recommendation 46	**Master Builders strongly supports Draft Recommendation 20.1 that "Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth)."**

27 Migrant Workers

27.1 Draft Recommendation 21.1 is agreed. Master Builders opposes those who would exploit migrant workers.

28 Transfer of Business

28.1 Australia's laws should not be complex to the point of being unable to be understood even by lawyers. The transfer of business provisions suffer from this defect. They are overly complex and unduly technical.

28.2 In this context, we support Draft Recommendation 22.1 as sensible. Employee instigated transfers should not invoke the transfer of business provisions as a matter of common sense.

28.3 At section 8.5 of the Submission we argued for fundamental change in this area of the law. We would invite the Commission to propose a separate review of this area of the law. The aim should be for the statute to better reflect what is actually a transfer of business, and to re-write the law so it is accessible.

Recommendation 47	**Master Builders recommends that a separate review of transfer of business rules should be conducted.**

29 International Obligations

29.1 In Master Builders' experience Australia has an exemplary record in this context. However, we note that, for example, where ratifying civil based legal system treaties can have a far reaching effect on Australian law as is the case with unfair dismissal laws. Creighton and Stewart remark, for example:

> *The new laws were based squarely on ILO Convention 158 on Termination of Employment – indeed, in places the wording was*

> *almost identical. This reflected the Commonwealth's extreme caution in establishing a constitutional foundation through the external affairs power. By using that power, it was possible for the legislation to apply to all employees, regardless of whether they were covered by federal awards. However, certain categories of worker – those employed for a fixed term or specific task, probationers and short-term casuals – were excluded from protection.*[67]

29.2 It is preferred that domestic laws take their own course rather than be based too closely on international instruments.

29.3 Australia's domestic laws appropriately satisfy our international obligations whilst taking into account local conditions.

30 Interactions Between Competition Policy and the Workplace Relations Framework

30.1 Master Builders supports the FWBC being vested with a shared jurisdiction to investigate and enforce secondary boycott prohibitions in the building and construction industry but only as an interim measure until the return of the ABCC.

30.2 Master Builders' general concern is that unions should face responsibility for market sharing arrangements that are anti-competitive. Competition laws must capture cartel arrangements enforced by those who do not compete in the market but which have an interest (directly or indirectly) in the outcomes that result from manipulation of the market.

30.3 Master Builders notes that Recommendation 36 of the Harper Review of Competition Policy was as follows:

> *The prohibitions on secondary boycotts in sections 45D 45DE of the CCA should be maintained and effectively enforced.*
>
> *The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.*
>
> *The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.*

[67] Creighton & Stewart, *Labour Law Fifth Edition*, 2010 at p629

30.4 Master Builders has pointed out to Government that 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 and for there to be greater reform to the provisions.

30.5 Master Builders believes that the Review Panel's recommendation that increased vigour be applied in the pursuit of secondary boycott cases should stand as an interim measure. We submit that following a 12 month period, informed by the increased availability of data about actions taken in this area compared with complaints made, Government will be able to assess whether the required increase in vigour has become manifest. If not, further reform should be immediately contemplated, reform of the kind proposed above ie that the new ABCC or the FWBC be vested with concurrent jurisdiction for secondary boycotts.

30.6 Recommendation 37 of the Harper Review is as follows:

> *Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.*
>
> *Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.*
>
> *These recommendations are reflected in the model provisions in Appendix A.*
>
> *The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.*
>
> *The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.*

30.7 Master Builders fully supports this Recommendation. There is a need to stop anti-competitive conduct that would otherwise be proscribed by these provisions. The current law is that s 45E does not operate to impede the scope of enterprise agreement making under the FW Act. This is first because

a single-enterprise agreement under the FW Act is not recognised as being made with an organisation of employees; secondly, an enterprise agreement is not considered to be a qualifying 'contract, arrangement or understanding' for the purposes of the provision.[68]

30.8 The lack of penetration of these provisions to enterprise agreements has led to some very confusing but highly constraining laws relating to regulation of independent contractors via enterprise agreements. In short, the law has constrained the engagement of contractors at market rates – instead they must be provided with the same terms and conditions as employees even though that might be inappropriate for the length or nature of engagement of those contractors. Master Builders has already indicated its support of the reform to this matter in supporting Draft Recommendation 20.1.

30.9 Independent contractors in the building and construction industry may be viewed as providing supplementary and specialist labour in a way which makes construction projects viable, thereby supporting jobs, rather than threatening them which is the rationale for those who support the current law; hence our argument earlier that their labour not be considered as "alternative employment". Clauses which restrict the engagement of contractors raise costs and undermine this necessary function of contract labour. They also deny the usual flexibility that is required to respond to the dynamic issues associated with the use of contractors in the building and construction industry, additional labour that is often called on to meet time deadlines so that, for example, liquidated damages are not applied by the principal. These are factors that we have pressed in all of our arguments and submissions over a number of years.

30.10 There are a number of opponents to the proposed reforms. Their arguments are along the lines set out in the quotation which follows. Clearly, there would not be, as asserted, an increase in red tape by the proposed reform of contractor regulation. It would not re-frame the balance towards employers, also asserted. It would have the opposite effect:

> *There have been suggestions that s 45E should be expanded to cover single-enterprise agreements and limit the capacity of employers and their employees freely to agree to protect the employment security of relevant workers by requiring independent*

[68] *Australian Industry Group v Fair Work Australia [2012] FCAFC 108*

> *contractors or labour hire workers to be paid equivalent rates to directly employed workers. This approach would undermine the degree of latitude permitted to employers and their employees with respect to the matters over which they wish to bargain and, not coincidentally, it would have the flow-on effect of artificially strengthening the position of employers at the bargaining table. Such an approach would increase red tape and complexity within the system and decrease the extent to which parties are able to strike the best bargain for the particular circumstances of that enterprise. It would also strengthen the employer's ability to circumvent an agreed enterprise bargain by utilising labour hire and contractor labour at a cost below that agreed with their employees.*[69]

30.11 Currently, unions are creating monopolies or exclusive arrangements to the detriment of competition: we stress that these are matters that relate to the commercial market. This argument certainly applies to the ability of building and construction firms to freely engage independent contractors. That is a central consideration in the way that our members use specialist labour and a practice which is inappropriately undermined by the workplace laws, again as acknowledged by the Commission via Recommendation 20.1.

30.12 We emphasise the unnecessary and anti-competitive intrusion into product markets currently permitted under the law. Master Builders has, for example, previously provided Government with information about the requirement set out in the CFMEU pattern agreement promoted in the Australian Capital Territory. It requires monies to be placed with a company, ABN 69 009 098 864,[70] which uses a Built-Plus policy relating to income protection. We understand that the CFMEU receives a commission for moneys paid in respect of Built-Plus policies: the "promoter" Creative Safety Initiatives (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*

[69] Submission to the Productivity Commission workplace relations reference by Stewart et al entitled "Labour Regulation: Is There a Case for Major Reform?" http://www.pc.gov.au/__data/assets/pdf_file/0006/187917/sub0118-workplace-relations.pdf at p22

[70] ABN for Jardine Lloyd Thompson P/L

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.

30.13 The importance of the Harper recommendation set out at paragraph 30.6 above cannot be underestimated. Its implementation would have a very useful and overdue effect on practices which are anti-competitive but which are currently unassailable because of the provisions of workplace law. The Commission should support its implementation.

31 Compliance Costs

31.1 Compliance with the On-Site Award is burdensome, as is evident from the discussion throughout this submission. There have been no formal studies on the cost of compliance but the comments of the Cole Royal Commission at paragraph 17.4 of this submission underline that compliance is very difficult and costly for employers.

31.2 The Commission has not, as part of the Draft Report, undertaken work on the compliance costs of awards yet has recommended their retention. At the least the MSD should be recommended to be specifically charged with reducing the compliance burden imposed by modern awards. The best solution would be their abolition.

Recommendation 48	**Master Builders recommends that the FWC should commission a study on the compliance costs of modern awards, by sector.**

31.3 The comparison of unions with small business in relation to compliance costs is misconceived. Members of unions should fund their representational activities, as should members of employer groups. Unions are not unsophisticated organisations. They are not akin to small business. The

measurement of the cost burden on unions is misplaced – what are the increased costs for employees who unions represent should be the critical question. Why is the information request made by the Commission on page 796 of the Draft Report only about unions?

32 Impacts

32.1 More fundamental reform than that proposed would benefit Australia. More fundamental reform is definitely required in the building and construction industry. That reform is obvious and the weight of evidence from the Heydon Royal Commission (that in many ways mirrors the evidence provided to the Cole Royal Commission) should be acted on. The Commission in the current context should give more weight to these findings, especially the finding of systemic disregard for workplace and related laws. Corruption is a major barrier to economic growth; union corruption has been exposed to be rife in the commercial construction industry.

32.2 As the Commission noted in the Public Infrastructure Report, the sector is far too important to the economy for reform not to be effected:

> *(A)ny inefficiencies in public infrastructure have major economy wide impacts. The expected demand for infrastructure construction services over the next few decades is high. The construction industry is a major input into many other industries — especially mining; electricity, gas and water; transport; communications services; and property and business services …. For example, Independent Economics found that a hypothetical IR-related improvement in labour productivity of around 10 per cent increased value added in the construction industry by around 2 per cent, but also increased value added in the mining industry and the electricity, gas, water and waste services industry by 1.2 per cent each.*[71]

33 Conclusion

33.1 Master Builders thanks the Commission for the opportunity to speak to a number of the matters raised in this submission when giving oral evidence on 11 September 2015.

33.2 We look forward to the release of the final report.

****

[71] Public Infrastructure Report Vol 2 p 517

Fact Pack

KEY ISSUES

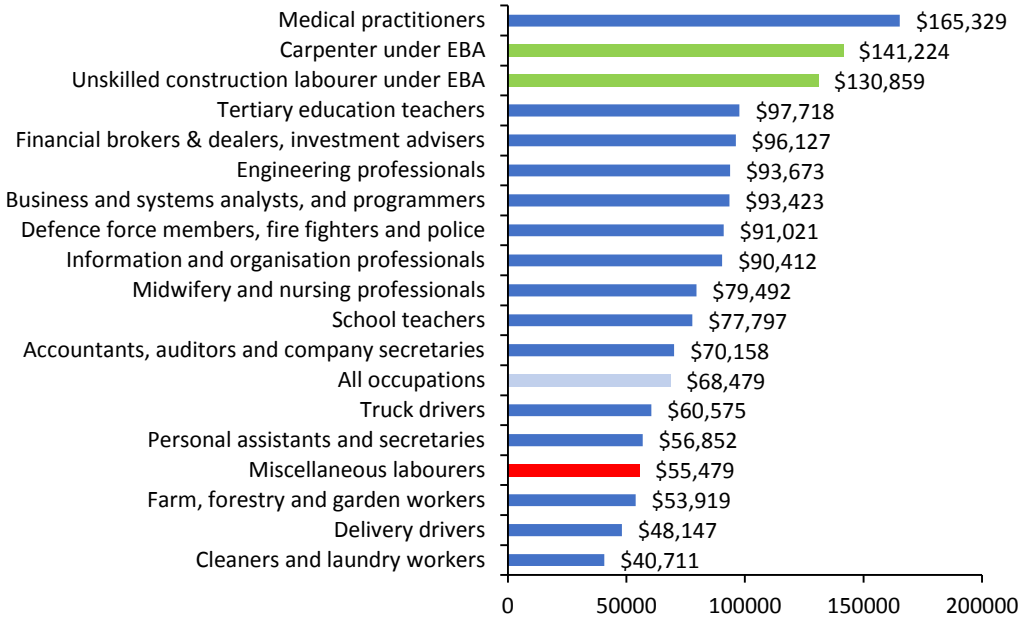
DELOITTE ACCESS ECONOMICS REPORT: *VICTORIAN CONSTRUCTION – LABOUR COSTS AND PRODUCTIVITY*

1. EBA WAGES

a. EBA wages higher than comparable jobs across the State

- Both carpenters and entry level labourers earn far more per hour than do nurses, defence force members, fire fighters, police or teachers.

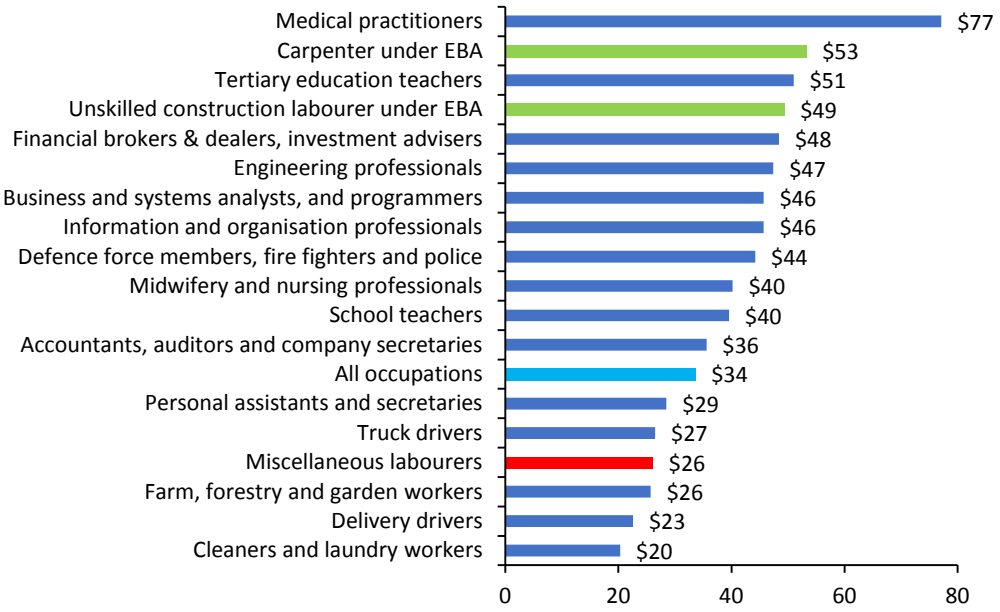
Av annual earnings of full-time non-managerial employees by occupation in Victoria, 2012



Source: Deloitte report, Chart 3.10, Page 26

Notes: Earnings for carpenters and unskilled labourers under the EBA are calculated for a 51 hour work week. Due to unavailability of data, the earnings for Defence force members, fire fighters and police shown is for male employees only, while earnings for all other occupations is for all employees. Earnings are based on regular wages and salaries in cash (including amounts salary sacrificed where it is the choice of the employee), and so exclude superannuation. The annualised earnings for carpenters and unskilled labourers shown here are lower than shown earlier in Chart 3.4 due to a number of exclusions including superannuation, and other on costs and allowances including redundancy, income protection, portable sick leave, Coinvest, training levy, first aid allowance and away from home allowance. Weekly earnings have been annualised by multiplying by 52.

Av hourly earnings of full-time non-managerial employees by occupation in Victoria, 2012



Source: Deloitte report, Chart 3.11, Page 27

Notes: Hourly earnings for carpenters and unskilled labourers under the EBA are calculated for a 51 hour work week. Due to unavailability of data the earnings for defence force members, fire fighters and police shown is for male employees only, while earnings for all other occupations is for all employees. Earnings are based on regular wages and salaries in cash (including amounts salary sacrificed where it is the choice of the employee), and so exclude superannuation.

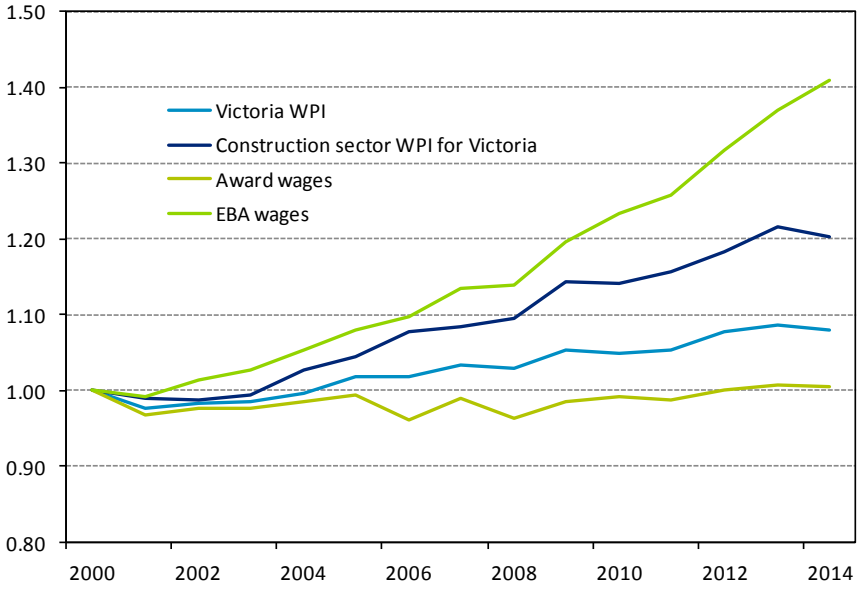
- EBA labourers get $49 an hour compared to $26 an hour for other miscellaneous labourers – that is a $23 per hour or an 88% increase on the miscellaneous labourer rate

- EBA Carpenters and entry level labourers earn $53 and $49 per hour respectively – a 56% and 44% increase above the average wage of $34 per hour in Victoria for non-managerial employees

b. Wage growth under EBAs outstripping the market

- Construction EBA wages have grown by some **27.6%** more than the WPI for the Victorian construction sector since 2000

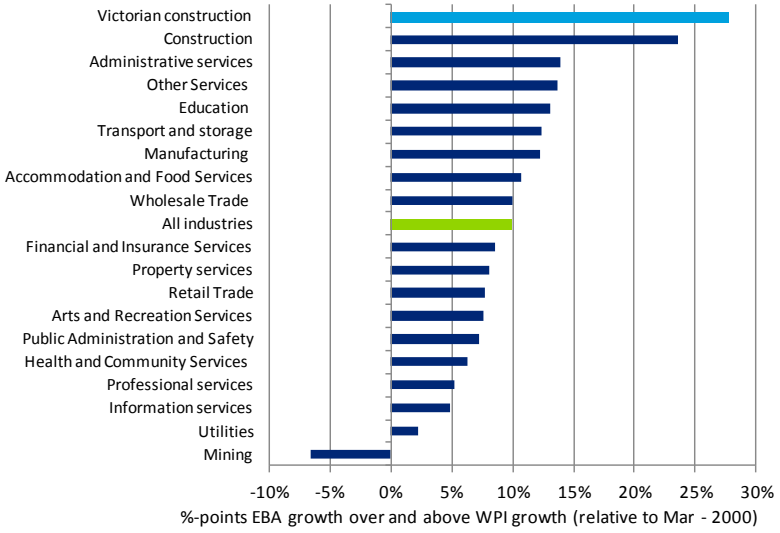
CPI-adjusted wage outcomes for Victorian construction EBAs, Victorian construction WPI, Victorian all industries WPI and Victorian construction awards



Source: Deloitte report, Chart 3.17, Page 34

- Construction EBA wages have even far outpaced the growth in EBA wages in other sectors

The national EBA wage 'gap' across industries

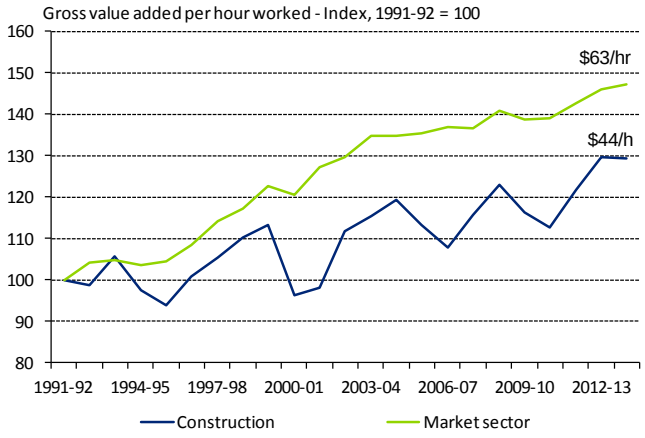


Source: Deloitte report, Chart 3.15, Page 32

c. Excessive EBA wage growth not justified by productivity increases

- **EBA real unit labour costs have grown by 2.4% more than productivity and price increases** – that's 2.4% more than can be justified by productivity and price increases
- In the Victorian construction sector, productivity growth has been lower than productivity growth across Australia
- In Victoria, productivity growth in the Victorian construction industry has been lower than productivity growth across the state

Labour productivity in the construction and market sectors, Victoria



Source: Deloitte report, Chart 5.3, Page 55

- **EBA construction wages have grown by 5.2% per year** for the CFMEU industry EBA. Construction prices have increased by **1.8% per year** and **labour productivity** has only increased by **1% per year**. This means, EBA construction wages have grown **by 2.4%** more than is justified by productivity and price increases.

d. Excessive EBA wage growth results in lost jobs

- EBA wage increases have cost Victorians around **1,550 jobs** in the construction industry in the 14 years from 2000 to 2014

e. Excessive EBA wage growth results in lost social infrastructure and standards of living for Victorians

- Higher labour costs eventually mean higher construction costs for buildings such as offices, hotels, schools, shops and hospitals, and also place upward pressure on the Victorian government's infrastructure budget.

- In turn, these costs to **private businesses and to taxpayers** fall in part on Victorian families.
- In this way, the broader public also help fund large wage rises seen in the construction industry.

Costs of important buildings

- Higher labour costs eventually mean higher construction costs for buildings such as offices, hotels, schools, shops and hospitals.

The impact of higher labour costs on building costs in Melbourne ($/m2)

	Initial cost[1]		Increased cost due to higher labour cost[2]		Difference	
Building	Low	High	Low	High	Low	High
Office buildings – 25 to 40 storeys – prestige CBD	3200	3600	3288	3699	88	99
Hotels – multi-storey – 4 star	3450	4050	3545	4162	95	112
Aged care – single storey facility	1750	2375	1798	2441	48	66
Private hospitals – low rise – 45-60m2 GFA/Bed	2600	3050	2672	3134	72	84
Private hospitals – low rise – 55-80m2 GFA/Bed with Major Operating Theatre	2900	3500	2980	3597	80	97
Department store	1925	2325	1978	2389	53	64
Supermarket	1215	1800	1249	1850	34	50
Multi-storey units – 20 to 40 storeys – units 60-70 m2	3000	3500	3083	3597	83	97

Source: Riders Digest 2014, Deloitte Access Economics

[1] Total building cost per gross floor area ($/m2) as at the fourth quarter of 2013 shown in the Melbourne edition of the Riders Digest 2014.

Source: Deloitte report, Table 4.2, Page 48

Public construction costs to the community

- If these EBA wage increases were to continue at the same levels over the **next four years**, lost **public construction** of around **$737 million** would occur– this equates to around **40 new** schools **OR 6 new** hospitals[1].

[1] ***Assumptions per report page 49 Deloitte report***: Secondary School = approx $20m, Hospital = approx $120m

2. EBA WORKING ARRANGEMENTS

- The use of **flexible working arrangements**, such as the option to work variable hours or having choice around the timing of rostered days off, has been widely acknowledged as having the potential to **lower costs and raise productivity**.
- Flexibility is also important to workers who have different preferences depending on their home and other commitments.

a. Victoria's EBA has historically demonstrated inflexible working arrangements

- Victoria's RDO system and working arrangements have been inflexible compared to other states
- RDOs are days on which workers don't have to work.
- Currently Victorian EBA construction industry employees receive 26 RDOs
- In practice, it is very difficult to shift RDOs from their pre-fixed calendar, with unfortunate outcomes for delivery of projects.

b. Lack of flexibility can act to the detriment of workers

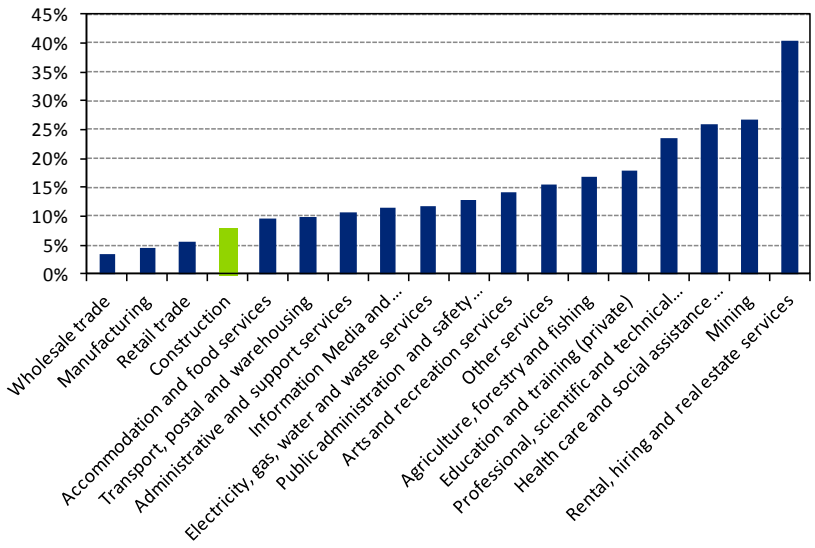
- While it should be possible to work varied hours under the EBA, in practice the industry standard is likely to limit the ability of workers to do so.
- The standard industry EBA also severely restricts the ability to engage employees on a part time basis.
- These restrictions create a number of difficulties, not least of which:
    - in an industry with an ageing workforce, is the inability for older employees to gradually reduce their hours and transition to retirement;
    - in an industry dominated by males, there is less ability to accommodate females who may desire more flexible arrangements
- The Easter and Christmas/New Year shutdowns according to the agreed calendar force all employees to take several days of annual leave during this time in addition to scheduled RDOs and public holidays.

3. CONSTRUCTION COMPANIES

a. Profit margins low in the construction industry

- The construction industry in Australia has one of the lowest profit margins

Operating profit margin by industry, Australia, 2012-13



Source: Deloitte report, Chart 6.1, Page 59

- Nationally profit margins have been falling in all sectors of the construction industry in recent years.

- Victoria's profit margins were lower than the national average in 2011-12.

b. Return on assets low in the construction industry

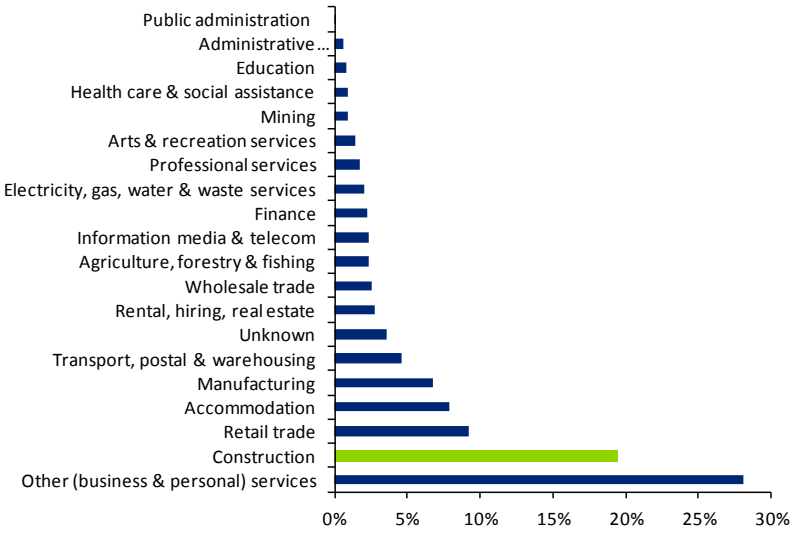
- For non-residential construction firms in Victoria, not only are profit margins thin, but **return on assets is also extremely low** – at just **2.5% in 2011-12 and 3.6% in 2012-13**.

- **Risk-free investments** such as Australian Government 10 year bonds currently yield around 3.5% per annum and a one year term deposit with an Australian bank currently pays around 3.3% per annum.

- Despite profit margins being seen for the construction industry as a whole in 2012-2013, around **30% of all firms** in the building and construction sector **made a loss** in 2012-13.

- The construction industry is over-represented among firms entering external administration in Victoria. Almost a fifth of all external administrations in Victoria in 2013-14 were accounted for by firms in the construction industry.

Share of all companies entering external administration by industry in 2013-14, Victoria



Source: Deloitte report, Chart 6.6, Page 65

MASTER BUILDERS
AUSTRALIA

Towards 2020

Policy for Australian Apprenticeship Reforms



Image: Theory - Bricklaying students - from a report to the Twenty First Convention of the Federated Master Builders Association of Australia, 10 November 1927

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CONTENTS

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1 Key Points

'100,000 apprentices in training by 2020'

The benchmarks for Master Builders Australia's *Policy for Australian Apprenticeship Reforms* outcomes are:

- 80% of the construction workforce holding a post-school qualification (currently 60%). Commencements reaching 30,000 per annum, up by 66% on current commencements of 18,000
- 100,000 apprentices in training, up by 132% on current apprentices in training of 43,100
- Quality training outcomes with pre-apprenticeship and apprenticeship programmes delivering site-ready and productive apprentices to an appropriate level determined by industry
- Introduction of a national building and construction skills passport
- A review of training packages to deliver the qualifications and skill sets that meet modern employer requirements.

Master Builders Australia's *Policy for Australian Apprenticeship Reforms* sets out a pathway to achieve a productive and sustainable construction workforce that meets the needs of employers. The policy objectives are:

- A national apprenticeship system that meets the needs of employers
- New trade apprenticeships, qualifications and skill sets that recognise emerging job roles and tasks
- Increased enrolments and completions in apprenticeships
- Improved literacy, numeracy and job readiness of apprentices
- Policy settings that support multiple pathways into building and construction jobs.

Australia's future productivity and competitiveness depend on a highly skilled and trained workforce. The National Training System performs an undeniable public good in providing a supply of necessary and valued skills for the nation and a pathway for satisfying careers for many Australians.

The construction industry is in a situation of record workforce participation but experiencing a decline in accredited training outcomes. The industry needs more apprentices to meet predicted workforce growth over the coming decade.

The National Training System will be required to deliver qualifications and skill sets that match changes in job roles, employer needs and in construction techniques. Apprenticeship and pre-apprenticeship programmes must lift productivity and improve safety in the workplace.

The National Training System will require Industrial Awards that facilitate apprenticeship outcomes within a competitive business environment and support apprenticeship completions.

Apprentices must develop skills and attributes such as job readiness, safety awareness, time management, teamwork and literacy and numeracy from their training.

Master Builders Australia's *Policy for Australian Apprenticeship Reforms* will ensure Australia has a highly skilled and capable workforce to meet the needs of a competitive construction industry.

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2 Introduction

The construction industry is one of the key growth sectors of the economy with average real growth of around three per cent per annum expected. This growth risks being constrained by shortages of labour, including in semi-skilled, skilled, para-professional and managerial roles.

Master Builders predicts that the construction industry will require an additional 300,000 people over the next decade, a 30 percent increase on the current workforce of 1,033,000 people.

This policy paper concentrates on the issues impacting on the supply of skilled labour, which in the construction industry are tradespeople trained through the apprenticeship system.

The industry's challenge is to meet the rising demand for a skilled workforce against a background of decreasing apprentices in accredited training, high drop-out training rates, an ageing demographic and a yearly exit rate of existing workers at approximately 30,000.

The construction industry has experienced a 23 per cent drop in the number of apprentices in training, from 56,000 to 43,100 since 2010. In addition, the apprenticeship commencement rate has decreased by 18.8 percent since 2010, from 22,100 to 18,000 commencements in the past five years (Apprentices and Trainees 2014, June Quarter Report, NCVER).

The nature of construction jobs is changing due to the introduction of new technologies and pre-fabrication. This is leading to altered work practices which no longer guarantee that traditional career paths will generate the mix of skills needed to meet the future demands of the industry.

Employers have reported that apprentice quality is the number one issue impacting on their businesses. Employers report that there is a lack of awareness of construction career opportunities amongst teachers, parents and students; apprentice candidates lack "soft skills" such as communication, time management and life skills; and apprentice candidates do not possess the necessary literacy and numeracy skills to successfully complete an apprenticeship.

'apprentice quality is the number one issue'

New thinking and approaches are required for skills development and attainment suitable for the construction industry.

3 About Master Builders

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.

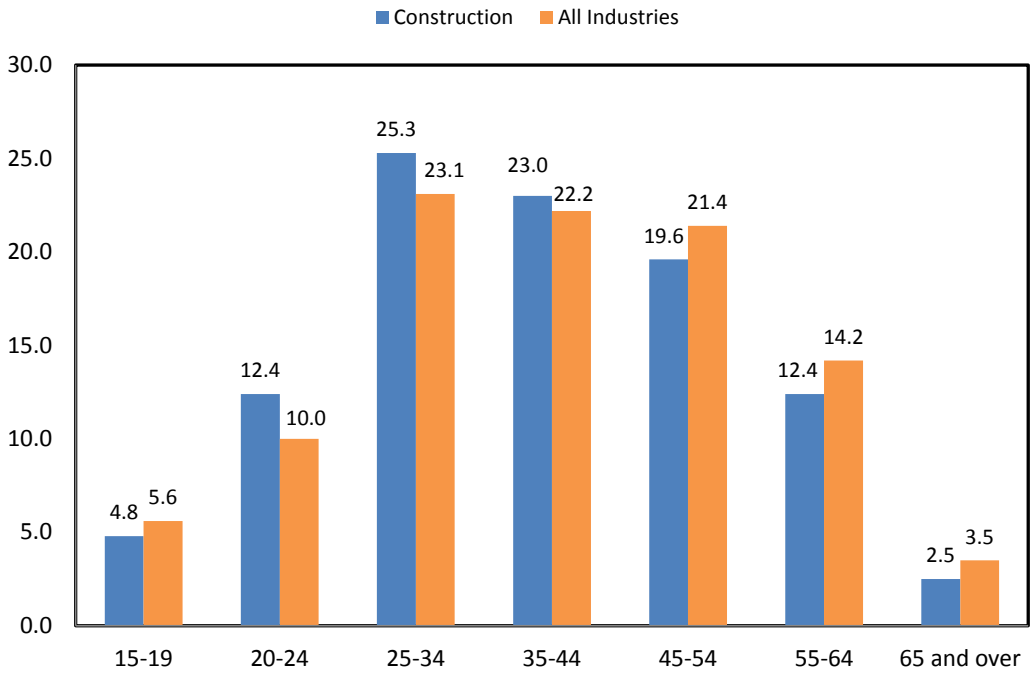
The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter.

Construction Industry Facts....At a Glance

'construction is a major driver of the Australian economy'

- Construction accounts for close to 8% of GDP
- Value-added $120 billion to the economy, or 8% of total economic output in 2014
- Cumulative work over next decade valued at $2.8 trillion
- Employs 9% of Australian workers, or 1,033,000 people
- 86% of workforce are full time workers
- Largest employer of young full-time workers aged 15 to 24, some 154,600 Australians (Figure 1)
- 99% of construction trade workers are male
- 27% are business owners/self-employed
- Third strongest industry sector employment growth in the past decade

Figure 1: Employed persons by age, February 2014 (% share of employment)



4 The Need for Change

'builders hiring intentions highest since pre-GFC'

Master Builders Australia's *National Survey of Building and Construction* (January, 2015) shows that industry's confidence and profitability are increasing and housing construction activity is forecast to see dwelling starts exceed 200,000 in 2015-16. The survey also shows that builders hiring intentions rose strongly in the December quarter 2014 to pre-GFC levels with employers' intentions to put on more apprentices lifting to the highest level in seven years. This will have positive flow-on effects for young Australians seeking to enter into an apprenticeship. However, to be successful, there needs to be changes to the National Training System.

Of the workers in construction, 44,225 are what statisticians term Construction Trade Apprentices, which includes carpenters, plumbers, bricklayers, tilers and a number of other trades. This is down from 56,447 in December 2010. It should be noted that the number of other apprentices working in the construction industry is higher at 76,384, as there are significant numbers of apprentices in electrical and metalworking trades in the industry.

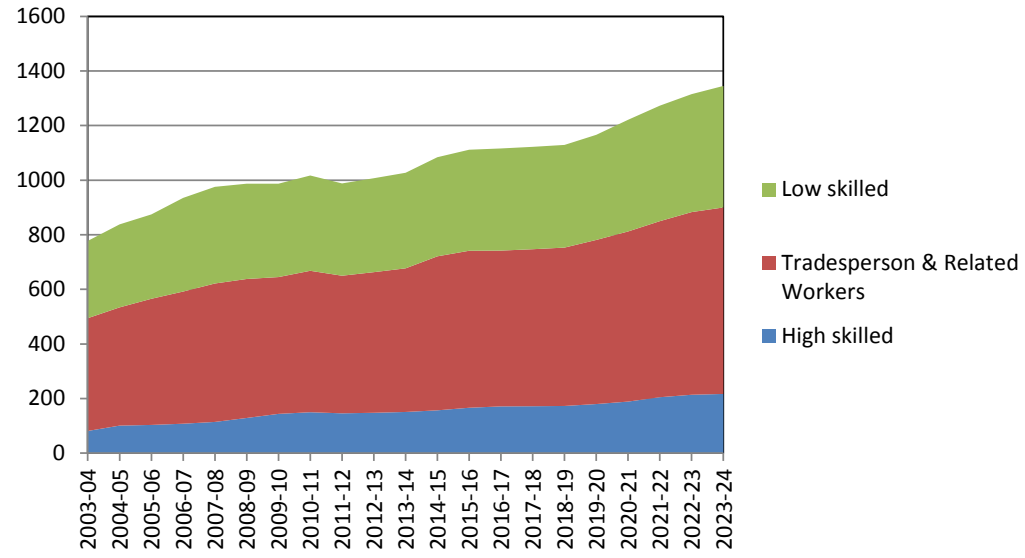
Figure 2 shows Master Builders' expected growth in the construction workforce by occupation type to 2023-2024. According to these projections, high-skilled managerial and professional positions in the industry will grow at an average of 3.7 per cent per annum over the next decade, with trade positions growing at a rate of 2.7 per cent per annum and lower skilled positions at a rate of 2.4 per cent per annum.

Table 1 provides a non-exhaustive list of roles for which there is an expected growth in industry demand over the coming decade.

Construction Apprenticeship Facts....At a Glance

- Workforce projected to grow by more than 300,000 over the next decade to 1.3 million Australians (Figure 2)
- Annual exit rate of approximately 30,000 workers
- Ageing workforce, with a median age of 38 years
- 40% of workforce do not hold any post-school qualifications
- 23% drop in the number of apprentices in training from 56,000 to 43,100 since 2010
- 19% decrease in apprentice commencements from 22,100 to 18,000 since 2010

Figure 2: Projected construction employment demand to 2023/24 (thousands)



Source: ABS Labour Force Series, Master Builders Australia projections

Table 1: Current and expanding job roles by indicative skill level

Professional	Project Managers
	Engineers
Paraprofessional	Site Managers
	Estimators
	OHS Managers
	Skilled Office Workers (e.g. contracts, sales, human resources)
Skilled Trade	Carpenters (including formworkers, and first/second fix carpenters)
	Bricklayers and Blocklayers
	Plumbers (including fire services)
	Electricians
	Wall and Floor Tilers
	Steelfixers (including structural steel and steel roofing)
	Concreters
	Painters
	Glaziers (including structural glazing)
	Drywall Plasterers (including flushers and finishers)
Semi-Skilled	Mobile Plant Operators (e.g. grader drivers)
	Crane Drivers, Doggers and Riggers
	Concrete Placers
	Transport Drivers

'apprentice training is a shared responsibility'

The construction industry views skills development of apprentices as a shared responsibility between employers, governments, and the apprentices themselves. Industry focussed RTOs and GTOs play a significant role in the training of apprentices due to the project nature of work in the construction industry.

Industry's view is the current training system suffers from administrative confusion as governance structures, responsibilities and custodianship of the system remain unclear to many users.

The system has been captured by public (TAFEs) and private RTOs who are able to influence the system for their own benefit. State jurisdictions, through the implementation of different education and training priorities and funding models, have added complexities to the system. We are in a situation where jurisdictions can hold up the endorsement of national qualifications that have demonstrated support from industry.

Further, in the above-mentioned skilled and semi-skilled areas, the national training system has not kept up pace with the growth or the changes in work practices in these areas. There is a lack of formal qualifications and skill sets to recognise workers' skills, in particular for crane drivers, doggers and riggers. Students are enrolling in full qualifications and only completing the units of competency to meet licencing requirements, or to be competent in one aspect of a job role. There is a need for qualifications and skill sets that enable industry to recognise the skills of its entire workforce. Compounding the problem is the differences in the jurisdictions to funding skill sets.

The workplace relations system does not currently complement the Australian Apprenticeship system and has created potential barriers to the apprenticeship system being able to deliver maximum productivity benefits. For example, the inclusion of competency based wage progression into modern awards contemporaneously with large wage increases not based on additional work value has negatively impacted on employers' decisions to take on apprentices. This affects students undertaking VET in school programmes who may find themselves unable to find employment or an apprenticeship due to the increased cost of their wages as opposed to a student without any formal recognition of their skills.

Master Builders believes that the apprenticeship system should support those employers that invest in skills development through Australian Apprenticeships to achieve business productivity outcomes that will benefit the Australian economy over the long term.

5 The Plan

The construction industry is one of the key growth sectors of the economy with the workforce to grow by a projected 300,000 people over the next decade. Trade based positions are projected to grow by an average rate of 2.4 per cent per annum. To meet this projected growth, new thinking and approaches will be needed for the National Training System. The construction industry will need to work in partnership with governments, education providers and the community to ensure the National Training System meets the needs of its clients.

The Master Builders Plan for an Australian Apprenticeship System that meets the needs of the building and construction industry covers three core areas:

1. Training our existing and future workforce
2. Quality vocational training structures
3. Attracting our future workforce.

The Plan....At a Glance

Training our existing and future workforce

- Harmonise the National Training System to ensure national consistency in funding, construction pathways and apprenticeships and cease jurisdictions' ability to hold up national training package accreditation that has demonstrated support from industry
- Review the National Training System with the aim to dismantle its current complexities and rebuild a system that is nationally focussed, transparent to employers with clear funding models
- Introduce a building and construction passport to recognise competencies and support labour mobility
- Introduce a construction industry and school partnership programme that will support quality vocation and vocational outcomes in schools led by industry
- Introduce a non-accredited vocation course in partner schools
- Support mentoring programmes that have demonstrated evidence of increasing apprentice completions
- Support early intervention language, literacy and numeracy programmes that support apprentice completions

Quality vocational training structures

- Establish RTO and GTO networks to facilitate industry and RTO/GTO engagement to minimise duplication
- Ensure industry is at the centre of the development of training packages, qualifications and skill sets
- Include the construction industry as a priority industry in the *Industry Skills Fund*
- Review employer incentives that support apprenticeships

Attracting our future workforce

- Establish a school engagement programme to improve teacher and student understanding of the construction industry and the pathways into careers
- Provide teacher professional development and teaching materials that assist in the teaching and learning of construction in schools
- Develop engaging career information that focus on the skills and attitudes to be successful in the construction workplace.

6 Training our Existing and Future Workforce

6.1 Harmonisation of the National Training System

The inconsistency of the National Training System between state and territories is a significant issue for the construction industry.

The problem of inconsistency has been recognised by the Commonwealth. Master Builders congratulates the Australian Government on the work that has been undertaken with states and territories to establish nationally consistent positions on eligibility and requirements for apprenticeships to date to promote quality of outcomes and simplify engagement with the system but more still needs to be done.

'strong need to review the National Training system in its entirety'

There is a strong need to review the National Training System in its entirety with the aim to dismantle its current complexities and rebuild a system that is nationally focussed, transparent to employers with clear and consistent funding models.

The harmonisation of apprenticeship pathways and funding of qualifications is a micro-economic reform that is required to provide national consistency in the implementation of apprenticeship reform. This reform is necessary to reduce barriers to apprentice labour mobility and to reduce costs for business.

The National Training System must become:

- Nationally focussed with greater collaboration between the Commonwealth and states and territories to meet the needs of industry and the economy including improved implementation, consistency in funding, and outcomes across jurisdictions
- Leading edge in the design and development of national training packages that are flexible to meet the needs of industry and provide clear guidance to RTOs on the training and skills outcomes sought by industry. They must also clearly codify the skills and knowledge that a worker needs to perform a task or job
- Responsive to the ever changing needs of industry to compete within a globally competitive economy
- Flexible to develop new skill sets, qualifications, trades and apprenticeships that are required due to disruptive factors in the economy, for example new technologies, more efficient practices
- Trustworthy so that industry has confidence that VET sector graduates hold the necessary skills, attributes and knowledge to work safely and productively in the workplace
- Efficient in delivering services to industry within an increasingly fiscally constrained environment at Commonwealth and state/territory levels.

'the National Training System must be responsive to the ever changing needs of the industry'

It is important that the development and endorsement processes of national qualifications be simplified and not be held up by jurisdictions where draft qualifications have the clear support of industry nationally.

With the establishment of the Australian Industry and Skills Committee to oversee VET governance, Master Builders is concerned that the significant state and territory representation on the Committee could potentially lead to blockages in the National Training System.

Master Builders seeks a dedicated construction representative on this important committee who can represent the views of an industry that employs over 1 million

Australians. In addition, a national roundtable should be held to examine and drive consistency in VET policy.

6.2 Passport of Competencies and Skill Sets

Australia's training system is currently heavily focussed on the completion of full qualifications, despite the fact that the completion rate for all publicly funded VET qualifications is only 36%. A result of this is that in many trades the proportion of workers holding formal qualifications is actually dropping over time. Table 2 shows the current proportion of workers in various trades without at least a Certificate III qualification, based on unpublished data obtained from the ABS.

Table 2: Construction Workers without minimum Cert III qualifications

Occupation	Workers	% with < C3
3411 Electricians	67,117	20.7
3341 Plumbers	57,933	23.5
3121 Architectural, Building and Surveying Technicians	28,218	25.2
3312 Carpenters and Joiners	80,221	25.4
3311 Bricklayers and Stonemasons	20,536	37.4
3322 Painting Trades Workers	35,758	39.6
3334 Wall and Floor Tilers	13,712	41.5
3622 Gardeners	15,671	45.9
3332 Plasterers	24,435	50.4
8217 Structural Steel Construction Workers	12,580	61.8
8211 Building and Plumbing Labourers	30,553	68.1
8212 Concreters	22,734	68.4

Source: ABS 2011 Census

Many of these workers, with the support of their employers, would wish to obtain some level of formal certification to provide confidence in their current work.

Master Builders recommends that part-qualifications, or skill sets, which may be appropriate to undertake a particular job role in the industry, should be recognised as a viable pathway to a job. Skill sets should not be seen as the end to training, but the "building blocks" to gain a full qualification over time where it is supported by the worker and employer.

'skill sets should be recognised as a viable pathway to jobs'

Master Builders recommends the introduction of a 'skills passport' for the building and construction industry where skill sets and individual units of competency can be undertaken and tracked in stages as a person's skills needs develop over time.

The 'passport' would allow for improved safety and quality outcomes and enable employers to quickly access workers' existing skills. The introduction of the Unique Student Identifier will be beneficial in helping employers and workers track their competencies.

Master Builders recommends that a "starter" skill set, which could contain units of competency in workplace health and safety, workplace communication and using hand tools be developed and made available to all new workers and VET in school students. This would have long-term health and safety and productivity benefits.

Other more advanced skill sets could be developed and include residential bricklaying, tiling, formwork, shop-fitting, estimating, water-proofing and concreting.

An additional benefit to the introduction of skill sets is to enable workers to gain skills in various components of work that may sit outside a qualification but that is important to undertake a job role and to upskill in areas where new technology has changed building techniques and practices.

By combining a series of units of competency and skill sets within the passport, students and workers could obtain a full qualification over time. The passport would be a mechanism to support workers life-long learning.

In order to achieve this aim, the funding of skill sets and individual units of competency would need to be agreed on a national basis as currently there are different funding guidelines in each jurisdiction.

6.3 Industry and School Partnerships

The number one issue identified by NSW Master Builders in their 2014 survey of members was quality apprentices. Quality apprentices with the right skills and attitudes are a real and pressing issue for the construction industry and are continually raised in discussions on a national basis by members.

Master Builders recommends that a national approach be implemented to drive industry and school partnerships that support students to establish pathways into construction jobs from year 10 onwards. These partnerships should be formalised with schools through the development of contracts and memoranda of understanding, which clearly outline the roles of industry, government and schools. The benefit of these formal partnerships is for industry and schools to work together to ensure quality vocational education is delivered in schools that meets the needs of local industry.

'industry & school partnerships to establish pathways into jobs'

School industry partnerships would be closed models, only open to selected public and private schools that have the capacity to deliver appropriate formal and non-formal training agreed by industry. This partnership should include all-girls schools to support young women who want to follow a non-traditional pathway into a trade.

Each jurisdiction should have a state-wide committee to drive the partnerships with membership drawn from the Departments of Education and Training and Catholic and Independent school authorities as well as senior representatives drawn from various sectors of the construction industry.

Funding should be made available to provide opportunities for students in these schools to participate in programmes, which may include:

- school-based apprenticeships
- pre-apprenticeship and vocation programmes
- Try-a-Trade programmes
- construction industry school camps to bring students with common interests together
- teacher professional development
- trade maths classes
- small business skills training.

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6.4 School Vocation Course

With the establishment of a formal industry and school partnership programme, there is a need to develop a national school vocation programme that can be rolled out in partnership schools.

The aim of the programme will be to provide students with quality training that will improve their job readiness and to have national consistency in the training programme delivered in the partner schools. The development of the programme would be led by industry and would include the development of skills in workplace safety, communications, using hand tools and basic building and construction techniques, and support the building of knowledge required to perform well of the construction industry including trade maths and business skills.

The school vocation course would offer the ability for students to undertake both accredited and non-accredited training and obtain a white card to enable them to work onsite. On completing this vocation course and on joining the workforce, students would have the opportunity to have their prior learning recognised by an RTO which would establish a pathway into an apprenticeship.

6.5 Mentoring

The research is clear that many individuals do not complete their apprenticeship due to poor experiences in the workplace, not feeling supported and lack a person to whom they can turn for advice.

The employment relationship between the apprentice and the employer, as well as the quality of the training provided, is critical to the successful completion of an apprenticeship. Support mechanisms for both the apprentice and the employer, such as mentoring, pastoral care and quality training provision are required. A shared investment by both government and industry is essential to build these support mechanisms into the system.

There is strong evidence in the construction industry that mentoring programmes that have been developed and implemented to support apprentices have strong results in increasing the completion rates of apprenticeships. An independent evaluation of the Master Builders' Construction Apprenticeship Mentoring Scheme (CAMS), which has signed up 1,000 apprentices into mentoring and provided general advice to over 5,000 apprentices, found 84% of CAMS apprentices and 80% of CAMS mentors agreed or strongly agreed that mentoring programmes made a difference to apprentice completions.

Master Builders recommends that any future mentoring programmes are industry centred and led. In the construction industry, it is clear that industry led programmes have great success in supporting young people to complete their apprenticeships.

6.6 Language, Literacy and Numeracy Programmes

Many Australians that are attracted to working in the construction trades have a history of poor language, literacy and numeracy (LLN) skills. Employers have reported that poor language, literacy and numeracy skills in their apprentices have been a barrier to students completing their apprenticeship.

Master Builders recommends that early LLN intervention strategies are required for students who wish to follow an apprenticeship pathway into building and construction. These early intervention strategies should be implemented into targeted schools, particularly into schools that are participants in the industry and school partnership model and offer the Master Builders vocation course.

'LLN are a barrier to young people completing their apprenticeship'

Industry also requires LLN programmes that support the current workforce to improve their skills which will enable them to be productive on the worksite. Many workers miss out on promotions and following a pathway into higher paid jobs due to poor LLN skills.

LLN programmes should be delivered in the workplace where possible using real-life examples. However, it necessary to be mindful of the stigma that poor LLN skills carry and to not subject workers to feeling like second rate employees.

7 Quality Vocational Training Structures

7.1 RTO and GTO Networks

There is a history of mixed student quality outcomes from training from both public and private providers. RTOs report that it is difficult to engage with industry and employers. The increasing requirements for RTOs to engage with industry on training and assessment increase this pressure on both areas.

Employers report that they are focussed on their businesses and do not have time to deal with numerous RTOs delivering construction courses.

GTOs play an important role in the construction industry due to the project nature of work. GTOs have a strong history of supporting employers through the training of apprentices and in supporting them to complete their qualifications.

Master Builders recommends that communities of practice be established of RTOs and GTOs (both public and private) that deliver construction qualifications and apprenticeship services to industry. These networks would be led by industry and would meet on a six-monthly basis in major population centres with agendas driven by industry representatives.

'RTO networks provide real-time advice from industry'

The networks would provide a one-stop-shop to bring all key players together in a region at one point in time to discuss industry intelligence, skill shortages, apprentice quality of learning and skills, training package implementation, course development and delivery and assessment. The Networks would provide real-time advice from industry and would discussion to improve quality outcomes from training and to increase apprenticeship completion rates.

The benefit of this model is to allow industry to take leadership on the implementation of apprenticeships at a grassroots level. The localised RTO/GTO networks would enable industry to have a greater say in the development of the future of their workforce.

For RTOs and GTOs, the benefits of this model include avoiding duplication of services, course and resource development and enables greater sharing of teaching and learning practices.

The model has proved highly successful in the meat processing industry through the leadership provided by the National Meat Industry Training Advisory Council (MINTRAC).

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7.2 Industry-owned Qualification and Competency Development

Master Builders supports the Australian Government's review into *Industry Engagement in Training Packages: Towards a Contestable Model*. The centrality of industry in training package design, development, implementation and review is the cornerstone of the National Training System.

As VET is essentially an economic strategy to develop a skilled workforce to enable Australia to compete globally, the Government must remain committed to supporting their continual development and review to ensure they are meeting the needs of industry.

The construction industry has traditionally been a significant user of the national Vocational Education and Training system.

Training packages are an essential component of the national VET system. In fact, they are one of the few truly national components of the system. Master Builders recommends that training packages:

- Be informed by real time intelligence that identifies the changing nature of industry, work practices and disruptive events including technological change and its resulting impact on required skills and knowledge
- Specify the knowledge and skills required to perform effectively in the workplace as determined by industry
- Provide clear guidance to RTOs on the skills and knowledge students are expected to acquire; and inform course design and assessment practices to ensure consistent outcomes across VET
- Be responsive to changing industry requirements including ensuring licensing requirements for specific occupations are considered in training package development and continually updated as needed
- Reflect that many occupations operate across industries with common competencies. Training packages must support the mobility of labour to meet ever changing workforce needs of industry;Remain national in their focus ensuring that RTOs deliver consistent training outcomes across the nation.

Given the public benefits from a well regulated training system, there is a strong case that funding to develop training packages be maintained at current levels with a focus on greater synergies and the reduction of red tape in their development and approval processes.

'funding should be maintained to develop training packages'

Master Builders recommends that the final structure adopted by Government to enhance industry engagement in training package development must be:

- Flexible to cater to the diverse needs of industry and place industry at the centre of decision making
- Responsive to the changing skill and workforce needs of industry
- Sustainable with appropriate public funding to support industry engagement, intelligence gathering and the development of industry-centred qualifications
- Robust to enable the model to provide qualifications across the Commonwealth and jurisdictions and survive changes of governments
- Accountable to industry and not let jurisdictions hold up qualification approval if the support of industry is evident

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- Reviewed to ensure the model is able to continually respond to the needs of industry and the skills and knowledge it requires to be competitive in a global marketplace.

7.3 Industry Skills Fund

Master Builders Australia recommends that the Commonwealth Government maintain its investment in post-secondary education, particularly in skills training and development. At a time when the proportion of skilled jobs is increasing, the number of core Commonwealth and State funded training places has been static for many years and real funding per contact hour has fallen in most jurisdictions.

Master Builders recommends the construction industry be included as a priority industry in the Industry Skills Fund to recognise that some 60,000 new entrants will be required each year to meet the projected employment growth of 300,000 over the next decade, and to replace some 30,000 workers who leave the industry each year through attrition.

Master Builders also recommends that courses that may have a licencing outcome on completion be eligible for funding as these jobs contribute to economic growth.

7.4 Employer Incentives

The basic employer incentive for taking on and retaining apprentices has been static at around $4,000 for many years, which represents a tiny fraction of the net cost of on-the-job training, administration and wages. Employer incentive payments are even more an imperative against the background of increasing wages and conditions being imposed as a consequence of industrial relations decisions that came into effect on 1 January 2014.

In the short term, limited and tightly targeted financial assistance to employers is a policy response supported by Master Builders to dealing with construction's looming skills shortage. Assistance could have the following key elements:

- Rephasing the standard employer incentive ($1,500 at six months and $2,500 at completion) to $1,500 at six months, $1,500 at 18 months and $1,000 at completion, in recognition that apprentices who make it through to third year are more likely to complete their studies
- As the payment has been static for many years, a 15% increase over the next three years should be considered to support employers to ultimately lift apprenticeships
- Reintroducing a 'Kickstart Bonus' of $3,350 on top of the standard employer incentive for construction trades in demand to support employers to take on apprentices.

8 Attracting Our Future Workforce

8.1 Engaging Teachers and Students

Australian apprenticeship, especially traditional trades are an undervalued career choice and often described in negative terms in schools. For example, they are often perceived as physically demanding, unsafe and poorly paid. Australian apprentices are often viewed as being from a lower socio-economic background and without the capabilities to enter into a university pathway to employment.

'traditional trades are an undervalued career choice'

Master Builders recommends that there should be a strategy to lift the status of apprenticeships as representing a pathway towards a satisfying career amongst teachers and students.

Industry must engage with teachers and students to develop their understanding of the construction industry, in particular the key attributes employers are seeking from future apprentices and the jobs and pathways available that lead to long-term employment outcomes.

There should also be strategies to increase involvement by males and females in non-traditional gender occupations through targeting career counsellors, parents, the community, students and employers.

Master Builders recommends a programme be established that engages teachers and students directly in schools to support their understanding of the industry and the personal requirements to be successful in a job such as the right attitudes to safety, time management, commitment to work and equal opportunities for both male and females.

The programme should also engage with Indigenous Australians to discuss the opportunities for a career in the industry.

8.2 Teacher Professional Development and Teaching Materials

It is clear from surveys of employers that students leaving school do not hold the required skills to be productive in the workplace. In particular, students' ability to apply maths, science and technology skills is limited.

Master Builders recommends that teaching materials be developed to support teachers to teach maths, science and technology using the construction industry as a context for learning. These materials should be based on the national curriculum for years 5 through 10. The benefit of such materials is to support teachers to provide students with real-life practical examples used in industry.

A professional development programme for teachers and trainee teachers should be implemented to support the implementation of these materials into schools, and to build teachers' confidence in the teaching of math and science, particularly in the primary years.

8.3 Career Information

There is a lack of understanding amongst both school students and teachers of the knowledge and skills required to perform successfully in the building and construction workplace.

Short, sharp and focussed career materials should be developed to support teachers to gain an improved understanding of the attributes, skills and knowledge required by young people to perform successfully in the workplace. Materials may include printed career information and an online app.

9 Measuring Success

By 2020, Master Builders Australia's *Policy for Australian Apprenticeship Reforms* will have been successful if:

- 80% of the building and construction workforce holds a post-school qualification (currently 60%)
- Apprenticeship commencements reach 30,000 per annum, up by 66% on current commencements of 18,000
- 100,000 apprentices are in training, up by 132% on current apprentices in training at 43,100
- A national building and construction skills passport has been implemented
- Skill sets are accepted as a viable pathway into a job and are funded in all jurisdictions
- The construction training package includes skill sets at certificate II and III levels
- New trade apprenticeships, qualifications and skill sets recognise emerging job roles and tasks
- Employers report improved job readiness of apprentices with demonstrable productivity benefits to the economy
- Policy settings that support a national vocational education and training system with transparent and consistent funding models have been implemented.

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Victorian CFMEU Building Industry EBA 2011-2015 Flexibility Provision:

7. ***FLEXIBILITY***

a) The company may agree with an individual employee covered by this agreement to vary clauses of this agreement from time to time to meet the genuine needs of the company and employee.

b) Where the company wants to enter into a variation agreement with an individual employee, it must provide a written proposal to the employee. Where the employee's understanding in written English is limited, the company must take measures, including translation into an appropriate language, to ensure that the employee understands the proposal.

c) Provided, however, that the company must ensure that any variation agreement is genuinely agreed to by the company and the employee and that it results in the employee being better off overall than they would have been without the agreement.

d) The company must also ensure that any such variation agreement is:

(i) In writing (including details of the terms that will be varied, how the arrangement will vary the effect of the 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);
(ii) Signed by the parties (i.e. the company and employee), and if the employee is under 18, by a parent or guardian of the employee;
(iii) Provided to the employee within 14 days after it is agreed to;
(iv) Able to be terminated by either party given written notice of not more than 28 days, or at any time by both parties agreeing in writing.

e) Upon written request by the employee, the company will provide a copy of the flexibility arrangement made under this clause to the union/employee representative.

f) Clauses of the agreement that are subject to flexibility arrangements are:
(i) Clause 40;
(ii) Clause 41;
(iii) Clause 42; and
(iv) Clause 48

g) The company must ensure that the terms of the flexibility arrangement:

a. are about permitted matters under section 172 of the Fair Work Act 2009; and
b. will not exclude any provision of the National Employment Standards, and

c. are not unlawful terms under section 194 of the Fair Work Act 2009; and

d. result in the employee being better off overall than the employee would be if no arrangement was made.

Please note:

The clauses referenced at 7(f) are as follows:

Clause 40 - Parental Leave

Clause 41 - Compassionate Leave

Clause 42 - Jury Service

Clause 48 - Tool Storage

Victorian CFMEU Shopfitting Manufacturing EBA 2011-2014

9. FLEXIBILITY

a) The company may agree with an individual employee covered by this agreement to vary clauses of this agreement from time to time to meet the genuine needs of the company and employee.

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

c) Provided, however, that the company must ensure that any variation agreement is genuinely agreed to by the company and the employee and that it results in the employee being better off overall than they would have been without the agreement.

d) The company must also ensure that such variation agreement is:

(i) In writing (including details of the terms that will be varied, how the arrangement will vary the effects of the 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);

(ii) Signed by the parties, and if the employee is under 18, by a parent or guardian of the employee;

(iii) Provided to the employee within 14 days after it is agreed to;

(iv) 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.

e) Upon request, the company must provide copies of all flexibility arrangements made under this clause to the union/employee representative.

f) Clauses of the agreement that are subject to flexibility arrangements are: (i) Clause 22

g) The company must ensure that the terms of the individual flexibility arrangement:

(i) are about permitted matters under section 172 of the Fair Work Act 2009; and

(ii) are not unlawful terms under section 194 of the Fair Work Act 2009; and

(iii) result in the employee being better off overall than the employee would have been if no arrangement was made.

Please note:

The clauses referenced at 9(f) are as follows:

Clause 22 – Protective Clothing and Boots