Master Builders Australia

INDUSTRIAL RELATIONS POLICIES 2013: Essential Changes to the Fair Work Regime

MASTER BUILDERS AUSTRALIA

Master Builders Australia Limited
ABN 68 137 130 182
Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600
T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

CONTENTS

LIST OF RECOMMENDATIONS FOR INDUSTRIAL RELATIONS POLICIES 2013

Australian Building and Construction Commission (ABCC)		
Recommendation	1.	Para 1.2 & 3.6– Reinstate the Australian Building and Construction Commission (ABCC) and fully restore its powers
Recommendation	2.	Para 3.5 – Government to amend or remove s73 and s73A of the *Fair Work (Building Industry) Act 2012* (Cth) immediately to allow the FWBC to intervene and take appropriate action rather than be constrained where the industrial parties settle a matter
Recommendation	3.	Para 3.29 –Funding for the ABCC when reinstated should be increased from current funding of FWBC
Productivity: Get rid of strike before you talk		
Recommendation	4.	Para 5.1 – Immediate introduction of Recommendation 31 from the Fair Work Act Review Panel. In other words, protected industrial action should not be available before bargaining has commenced. Protected industrial action should only occur in support of claims made in bargaining.
Regulation of Independent Contractors Through Enterprise Agreements		
Recommendation	5.	Para 6.4 and 6.5 – A change in law to assist the free market operation of contractor arrangements to enhance industry productivity or at least remove restrictive practices should occur. Regulation of independent contractors via workplace agreements should be unlawful.
Transfer of Business		
Recommendation	6.	Para 7.9 – Reinstatement of sensible transmission of business rules
Unfair Dismissal and General Protections		
Recommendation	7.	Para 8.6.3 – Reintroduction of a true ‘exemption’ where a remedy for alleged unfair dismissal is unavailable where a small business employs fewer than 20 people
Recommendation	8.	Para 8.6.3 – The small business definition should not include related entities

Recommendation	9.	Para 8.7.1 – Re-instate the legislation that substantive and valid reasons for termination will be the primary test for fairness. Termination laws must place more emphasis on the employer's prerogative to manage their business.
Recommendation	10.	Para 8.7.6 – Correction of categorisation and labelling of a valid termination
Recommendation	11.	Para 8.8.5 – Laws defining a valid reason for redundancy should be confined to termination for reasons based on the operational requirements of the employer's business.
Recommendation	12.	Para 8.9.1 – Unfair dismissal claimants should bear the onus to demonstrate reasonable grounds for success prior to a matter going to conciliation.
Recommendation	13.	Para 8.10.1 – Adverse action provisions of the Fair Work Act abolished or 'sole or dominant reason' test reinstated
Recommendation	14.	Para 8.10.4 – Adverse action claims in relation to complaints be limited to those made to competent administrative authorities
Recommendation	15.	Para 8.11.2 – Reverse onus of proof provisions required in adverse action cases be amended to provide an exemption for small business employers
Recommendation	16.	Para 8.12.4 – Remove s347(b)(v) of the Fair Work Act *A person engages in industrial activity if the person:* *(b) does, or does not:* *(v) represent or advance the views, claims or interests of an industrial association;*
Recommendation	17.	Para 8.12.4 – The test for whether adverse action has occurred to require a comparison of whether the action taken against an employee would have also been taken against other employees in the same circumstances
Recommendation	18.	Para 8.12.4 – Section 360 of the Fair Work Act should be amended so that an employer will be held to have taken action for a particular reason only if it is the sole or dominant reason
Recommendation	19.	Para 8.12.4 – Adverse action applicants to show reasonable grounds for their application during conciliation conferences before the Fair Work Commission
Recommendation	20.	Para 8.12.4 – Access to interim injunction prior to proceeding to conciliation to be abolished

Recommendation	21.	Para 8.12.4 – The reverse onus of proof provisions to be amended to provide an exemption for small business employers
Greenfields Agreements		
Recommendation	22.	Para 9.4 – Penalties for demarcation disputes to be bolstered and non-union greenfields agreements to be introduced
Recommendation	23.	Para 9.5 – Prevailing community standards must be able to be addressed when approving a greenfields enterprise agreement
Individual Flexibility Agreements		
Recommendation	24.	Para 10.1.11 –Recommendation 10 and 11 of the Panel's report on individual flexibility agreements should be introduced into legislation immediately
Registered Organisations and their Regulation		
Recommendation	25.	Para 11.1 – Registered organisation to be properly accountable to members and not operated for particular individual's interests
Recommendation	26.	Para 11.3 – Amend the Fair Work (Registered Organisations) Act to ensure persons who hold an office and persons involved in the management or control of registered organisations must be fit and proper persons.
Recommendation	27.	Para 11.3 – Amend the Fair Work (Registered Organisations) Act to ensure that financial reports are lodged on time and in compliance with the provisions of the RO Act by clarifying circumstances where a report is non-compliant, and increasing the penalty for late filing and non-compliance.
Recommendation	28.	Para 11.3 – Amend the Fair Work (Registered Organisations) Act to deter malfeasance by creating new penalties for registered organisations, their officers and employees who do not act in good faith, or use their position or information, to directly or indirectly create a financial gain for themselves or someone else to the detriment of the registered organisation.

Recommendation	29.	Para 11.3 – Amend the Fair Work (Registered Organisations) Act to deter non-compliance with court orders by creating new penalties for registered organisations, their officers and employees who do not comply with an order of a court.
Industrial Action		
Recommendation	30.	Para 12 – Restore the laws which prevented the abuse by construction unions using safety stoppages as a device to advance industrial objectives
Recommendation	31.	Para 12.3.4 – Reverse the outcome of the JJ Richards case which allows the unions to sidestep good faith provisions
Recommendation	32.	Para 12.3.4 – The Fair Work Act to be amended to make it clear that parties must be acting in good faith in order to take protected industrial action
Recommendation	33.	Para 12.4.4 – A protected action ballot not be ordered unless the Fair Work Commission is satisfied that a party is not pattern bargaining
Recommendation	34.	Para 12.6.2 – An employer can and should be able to take industrial action against employees that does not necessarily involve a complete lockout
Right of entry		
Recommendation	35.	Para 13.1 – Right of Entry provisions be amended to allow recourse against union officials who intentionally fail to renew entry permits
Recommendation	36.	Para 13.2 – Application of real and substantial penalties against unions if they do not comply with strict right of entry laws
The Building Code 2013		
Recommendation	37.	Para 14.4 – Withdrawal of the Building Code 2013
Sham Contracting		
Recommendation	38.	Para 15.5 – No change to the current sham contracting laws
Recognition of Employer Payments - Superannuation		
Recommendation	39.	Para 16 – The legislation should require the Fair Work Commission to take account the increased superannuation guarantee levy when determining wage increases

1 INTRODUCTION

1.1 Workplace relations are never an end in themselves. Structuring of the system of workplace relations is designed with particular aims in mind. Master Builders supports the system creating a safety net of minimum conditions. Where the safety net intends to create fair conditions but instead locks in outmoded regulation (as is evident from the terms of the *Building and Construction General On-Site Award 2010*) or detracts from the productivity performance of industry, industrial relations reform becomes vital. Reform also becomes vital where lawlessness undermines the task of building Australia's infrastructure.

1.2 In the building and construction industry adherence to the rule of law is a factor that directly affects labour market risk and hence productivity; this is why it is Master Builders' main policy priority to have re-established the Australian Building and Construction Commission (ABCC), as a watchdog that assists in the independent application of the rule of law in the building and construction industry. The rule of law must be observed.

1.3 As Singleton from the Cato Institute has observed:

> *(L)aw in our society serves an essential practical function - that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.*[1]

1.4 Lack of certainty caused by unlawful industrial action drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and effective net present values of projects lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system that seeks an unjustified economic rent, then governments are obliged to act. This action protects the community by ensuring that the cost of infrastructure including schools and hospitals is not inflated by this factor. Industrial relations law should not only provide fairness but assist to ensure that the legal certainty attributed to agreements is not undermined by unlawful industrial action.

[1] S Singleton, *Capital Markets: The Rule of Law and Regulatory Reform* http://d1lj51l9p3qzy9.cloudfront.net/handle/10207/bitstreams/5823.pdf accessed 29 May 2013.

2 FUNDAMENTAL PRINCIPLES

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

- Respect for and adherence to the rule of law must guide workplace relations in the industry.
- Independent contractors' legislation that preserves and enhances the subcontracting system must be maintained and strengthened.
- A workplace bargaining system in which employers and employees may freely enter into appropriate and lawful workplace agreements underpinned by simple safety net conditions must be maintained.
- There should be only one industry Award that is not overly prescriptive; the need for a dual safety net of statutory conditions as well as 122 modern awards is questioned. One fair safety net of minimum conditions should suffice.
- The workplace relations system should focus on cooperative relations between employees and employers. It should emphasise the resolution of any disputes at the workplace level without the need for external party involvement.

3 PRODUCTIVITY AND RESTORATION OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION (ABCC)

3.1 Industrial relations reform should be on-going to meet Australia's economic needs. Sound economic policy requires productivity based reform that includes assessment of the utility of current labour market policy and regulation. Where productivity would be positively affected by change to the workplace relations system, that change should be embraced. In this context whilst there is some speculation that there is little or no economy-wide evidence that changes to the industrial relations system have affected labour market outcomes or macro-

economic performance,[2] the same cannot be said for the building and construction industry. Productivity enhancing industrial relations reforms have been repealed. Those reforms also reinforced respect for and adherence to the rule of law. The reforms should be reinstated.

3.2 Following the passage of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act), which created the ABCC from 1 October 2005, the building and construction industry enjoyed a period of significantly improved industrial relations and increased productivity in which industrial relations was not the predominant and negative influence that it had been in the past and which it increasingly threatens to become again in the current environment. This change benefited all parties in the industry, including workers. Equally importantly, it benefited the Australian economy and the community with a $6.3 billion per annum pay-off as later discussed. These benefits are easily reversed. The climate has changed and industrial relations in the sector has again turned ugly. This occurred in 2012 following the repeal of the BCII Act and the outbreak of unlawful behaviour epitomised in the appalling events surrounding the Grocon blockade in Melbourne during August and September 2012.

3.3 The militant and unlawful behaviour displayed by the CFMEU, we believe, is part of a concerted national campaign to exploit the weaknesses in the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act), which renders the new Inspectorate powerless to intervene where proceedings are already on foot or where proceedings have been commenced by an interested party. Last minute amendments to the law which replaced the BCII Act mean that the new agency is unable to commence or continue litigation where the litigation on the same subject matter had been discontinued because the building industry parties settled their differences. The powers of the new Inspectorate are considerably less than those wielded by the ABCC. The other most significant reductions 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.

[2] E.g. J Borland "Industrial Relations Reform: Chasing a pot of gold at the end of the rainbow? 19 March 2012.

- 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 Inspectorate's authority.

3.4 The power to compel witnesses to give evidence has been retained, but this is now hedged about with so many safeguards, including the ever-present threat of being "switched off,[3] that its effectiveness as a tool of information gathering is substantially reduced. On top of this, the confidentiality requirements have been watered down, making it less likely that witnesses will have the confidence to come forward to the Inspectorate for fear of retribution.

3.5 Master Builders believes the only way to curb the unacceptable behaviour which has emerged since the repeal of the BCII Act is to strengthen the provisions in the FWBI Act to fully restore the powers of the Inspectorate. As an immediate matter, we request the Government to amend or remove s73 and s73A of the FWBI Act which would, at the least, allow the FWBC to intervene and to take appropriate action rather than be constrained where the industrial parties settle a matter. These provisions are major constraints on the powers of the Inspectorate, constraints which have no appropriate policy rationale.

3.6 We also request that the current penalties be increased and reinstated to the levels of the former BCII Act. At the time of its repeal that would have been from $33,000 to $110,000 for corporations and for individuals from $6,600 to $22,000. Since the end of December 2012 the penalty unit rate has increased so that the figure of $33,000 as a maximum under the *Fair Work Act 2009* (Cth) (FW Act) is now $51,000 for corporations and $10,200 for individuals. This is still well below the levels which applied under the BCII Act (where, if in force, the penalties would have similarly increased) and which provided a much stronger deterrent to unlawful industrial action than is reflected in the current law.

3.7 To underline the benefits brought about by the work of the ABCC and to reinforce our call for the re-introduction of an agency that has substantial powers and which operates at the least in the same manner as the ABCC, Master Builders commissioned a report in 2012 about the productivity benefits of the ABCC and its

[3] See *Fair Work (Building Industry) Act 2012* (Cth) s39.

work. The research underlines Master Builders' policy that labour productivity in the sector must be an essential part of the effort to increase industry level productivity. At the core of that effort must be the restoration of the ABCC's powers and the related laws. Enhancing productivity is at the heart of Master Builders' advocacy in calling for the restoration of the powers of the ABCC.

3.8 The 2012 Report was one of a series. In 2007, Econtech Pty Ltd (now trading as Independent Economics) was commissioned by the ABCC to prepare a report on building and construction industry productivity. The 2007 Econtech Report estimated the effects of improved workplace practices on productivity in the building and construction industry, and the flow-on effects to the wider economy.

3.9 The first stage of the 2007 Report analysed the contribution of improved workplace practices and other factors in driving building and construction industry productivity. The contribution to productivity was analysed for improved workplace practices associated with the following:

- the ABCC;
- its predecessor, the Building Industry Taskforce (the Taskforce); and
- industrial relations reforms in the years to 2006.

The second stage of the 2007 Report took the estimated gain in productivity from improved workplace practices and estimated its economy-wide impacts using a Computable General Equilibrium (CGE) model.

3.10 The 2012 Report was the fourth update of the 2007 Report on building and construction industry productivity. Since the initial report in 2007, the analysis was updated in 2008, 2009 and 2010. Each report incorporated up-to-date information on building and construction industry productivity from the Australian Bureau of Statistics (ABS), the Productivity Commission, quantity surveyor data, case studies and other related research. Importantly, the data analysed for each update continues to support the findings of the 2007 Report; that there has been a productivity outperformance in the building and construction industry compared to other sectors of the economy and its historical productivity performance prior to the implementation of improved workplace practices.

3.11 An analysis of the various indicators of building and construction industry productivity suggests that productivity in the building and construction industry has

outperformed productivity in the wider economy. Following the identification of this productivity outperformance, the contribution of improved workplace practices to the productivity outperformance in the building and construction industry is examined in the 2012 Report. Three types of productivity indicators are assessed.

3.12 Each of the productivity indicators shows that improved workplace practices have been responsible for a part of the building and construction industry's outperformance. The analysis supporting this conclusion is now outlined:

- ABS data shows that, from 2002 to 2010 building and construction industry labour productivity outperformed by 12.4 per cent.

- The Productivity Commission's analysis of ABS data found that multifactor productivity in the building and construction industry was no higher in 2000-01 than 20 years earlier.[4] In contrast, more recent ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 14.5 per cent in the nine years to 2010-11.

- Research on total factor productivity shows that productivity in the building and construction industry grew by 13.2 per cent between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002.

- While these productivity indicators are not directly comparable, they all indicate that the timing of improvements in the building and construction industry coincides with the timing of improved workplace practices; the Taskforce (the predecessor of the ABCC) was established in late 2002 and, as set out at paragraph 3.2, the ABCC was established in late 2005.

- Data to January 2012 shows that the cost penalty for completing the same tasks in the same region for commercial construction compared to domestic construction continued to shrink. The narrowing in the cost gap coincides with improved workplace practices in commercial construction. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap in the 2012 Report, is conservatively estimated at 11.8 per cent between 2004 and 2012.

[4] Productivity Commission, *Productivity Estimates to 2005-06*, December 2006.

3.13 We also note that case studies undertaken as part of the original 2007 Econtech Report found that improved workplace practices have led to better management of resources in the building and construction industry. This, in turn, has boosted productivity.

3.14 All of this evidence confirms that there has been significant gain in building and construction industry productivity and that improved workplace practices have contributed to productivity outperformance. The data sources indicate that significant productivity gains in building and construction industry productivity developed from 2002-03 onwards. This supports the interpretation that it was the activities of the Taskforce (from 2002) and the ABCC (from 2005) that have made a major difference.

3.15 Thus, the productivity and cost difference data suggest that effective monitoring and enforcement of the general industrial relations reforms and those that relate specifically to the building and construction sector were necessary before the reforms could lead to labour productivity improvements. As such, it is considered that separate attribution of labour productivity improvements to the ABCC and industrial relations reforms is not possible, because they both need to operate together to be effective.

3.16 Other data shows that building and construction industry productivity has outperformed other sectors of the economy as a result of improved workplace practices. In the 2012 Report the estimated gain ranges between 10 and 14.5 per cent, depending on the measure and the source of information that is used. Notably, the productivity outperformance of the building and construction industry was shown as strengthened. Based on data available to July 2010, the 2010 Report estimated the gain in building and construction industry productivity to be between 7.7 per cent and 14.8 per cent.

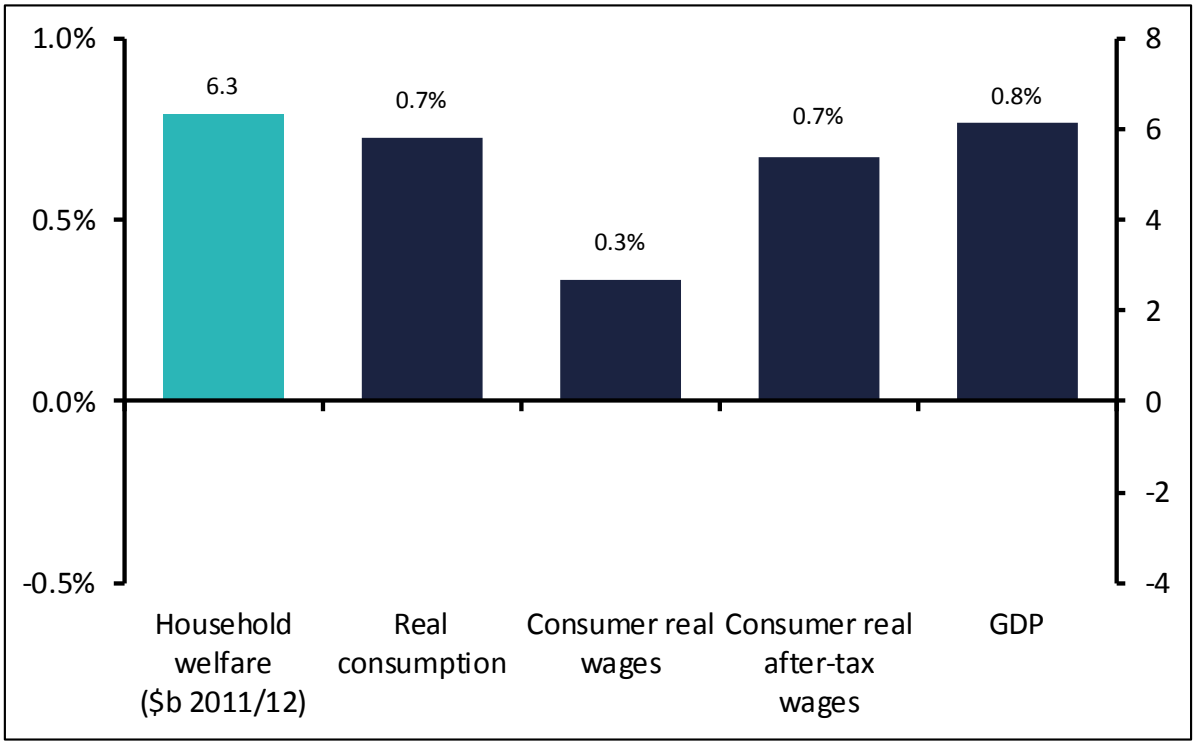
3.17 Earlier reports found that the data continued to support an estimated gain in building and construction industry labour productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent. While not all of the productivity measures are strictly comparable, and the magnitude of the estimated gain varies across measures, the data analysed in the 2012 Report generally shows some strengthening of the productivity outperformance of the building and construction industry.

3.18 In the 2012 Report the independent CGE model of the Australian economy was used to estimate the long-term economy-wide impact of improved workplace practices. The following two scenarios were developed through model simulations:

- a "Baseline Scenario", which is a snapshot of the Australian economy without improved workplace practices; and
- an "Improved Workplace Practices Scenario", which is a snapshot of the Australian economy with improved workplace practices.

3.19 The results of both scenarios were analysed and the long-run impact of improved workplace practices on key economic aggregates were estimated as the difference between the results of the Improved Workplace Practices (alternative) and Baseline scenarios. The results of this analysis are summarised in Diagram A.

Diagram A: National macro-economic effects of improved workplace practices (deviations from baseline)



Source: the Independent CGE model estimates

Note: The results refer to permanent effects on the levels, not growth rates, of indicators relative to what they otherwise would be. For example, the Improved Workplace Practices Scenario shows a gain of 0.8% in the level of GDP relative to what it would otherwise be, and not its annual growth rate.

3.20 The modelling results suggest that the improvements in labour productivity outlined in the Improved Workplace Practices Scenario have lowered construction costs, relative to what they would otherwise be. This in turn reduces costs across the economy, as both the private and government sectors are significant users of commercial building or engineering construction.

3.21 In the private sector, the cost savings to industry from lower costs for buildings and engineering construction flows through to households in the form of lower consumer prices. This is reflected in the gain of 0.3 per cent in consumer real wages seen in Diagram A.

3.22 In the government sector, the budget saving from the lower cost of public investment in schools, hospitals, roads and other infrastructure is assumed to be passed on to households in the form of a cut in personal income tax. This boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis, to 0.7 per cent on a post-tax basis, as seen in Diagram A. This gain in consumer real after-tax wages is reflected in higher living standards. Hence, Diagram A shows that, due to improved workplace practices, consumers **are better off by $6.3 billion on an annual basis, in 2011/12 dollars.**

3.23 The findings of the 2012 Report are consistent with the original 2007 Econtech Report and earlier updates and continue to support the argument that improved workplace practices in the building and construction industry is in the public interest and should be considered when assessing Government actions as a factor that affects the industry's productivity.

3.24 The Improved Workplace Practices Scenario confirms that higher productivity in the building and construction industry lowers its costs, leading to lower prices for new construction. This stimulates demand for new construction, leading to a significant permanent gain in construction activity of 1.5 per cent. This comprises a gain of 1.2 per cent for residential construction, 1.9 per cent for non-residential building construction, 1.6 per cent for engineering construction and 1.6 per cent for construction trade services. Here engineering construction and non-residential building construction are separately identified, whereas in the original 2007 Econtech Report, and earlier updates, they were combined in a broader non-residential construction sector. The gain in non-residential building and engineering construction underpins a long term lift in buildings and structures investment of 2.4 per cent.

3.25 At the same time, the reforms cause some shifting of jobs away from construction and towards other industries compared to the situation in the absence of the reforms. Higher labour productivity reduces labour demand in construction and this effect is only partly offset by an increase in labour demand from higher construction activity. Overall, employment in construction is estimated to be 4.7 per cent lower than in the Baseline. However, this loss in employment in construction is offset by gains in employment in other industries. Further, this loss is relative to a Baseline Scenario without reform and does not mean that there is a fall in construction employment from one year to the next. Indeed, construction employment grew strongly during the improved workplace practices process but has fallen since the commissioning of the 2012 Report. This reallocation of employment means a more efficient allocation of labour between industries, underpinning the permanent gains to consumers from improved workplace practices.

3.26 Accordingly, Master Builders' policy is that it is vital for the Government to restore the powers and underpinning laws that the ABCC applied. Master Builders strongly advocates that the building and construction industry specific laws be reinstated because their application is important for the proper conduct of industrial relations in the industry and in order for the productivity gains charted in the Independent Economics research to continue.

3.27 Master Builders submits that it is imperative that the ABCC (when reinstated) or the FWBC, which as discussed earlier, superseded the ABCC but with fewer powers, continue the work of enforcing workplace relations law. Current or increased levels of funding should be applied. The Government's promises about the retention of a 'strong cop on the beat' must be implemented by reinstating the ABCC and its underpinning laws as a means to advance much needed productivity. In order to do that work the agency needs at least current levels of funding.

4 CHANGES TO THE FAIR WORK ACT TO ASSIST PRODUCTIVITY: AN OVERVIEW

4.1 Separately, Master Builders advocates changes to the FW Act, which FWBC now enforces. Enterprise bargaining is stated to be 'the heart of the workplace relations system'[5] introduced by the FW Act. However, based on the experience of building industry employers it has failed to properly balance the interests of employers

[5] Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at r186.

against those of employees and unions. At the centrepiece of the FW Act's enterprise agreement regime are the principles of 'good faith bargaining'. Yet it is clear that protected industrial action is able to be taken prior to discussions for an enterprise agreement having taken place. This 'strike before you talk' position is clearly at odds with the intention of enacting 'clear, tough rules'[6] about industrial action under the FW Act and significantly undermines the Government's intended good faith bargaining regime and hampers productivity by providing an industrial weapon to militant unions such as those which operate in the building and construction industry.

4.2 Master Builders is also concerned about the scope of permitted content in enterprise agreements. This subject area affects the ability of employers under the FW Act to appropriately regulate business-to-business contracts between an employer and independent contractors, as these relations are able to be adversely affected by unions under terms set out in pattern union enterprise agreements. This not only represents a reversal of the Government's prior policy undertakings, of distinguishing commercial and industrial arrangements, but significantly impedes productivity within the building and construction industry, where the use of specialist contract labour is essential to the viability of construction projects.

4.3 These trends represent significant alterations in the balance between employers, employees and unions. For this reason, we now focus on these two areas to illustrate the need for urgent reform of the workplace laws to restore balance. However, Master Builders, following the publication of the report of the Fair Work Act Review Panel (the Panel) has set out in a submission to the Minister for Employment and Workplace Relations, the Hon Bill Shorten, a substantial list of needed changes to the FW Act. Rather than reiterating the points made in that submission, we first focus on the two specific areas to illustrate how the FW Act is hampering productivity in the building and construction industry. A range of other reforms are also required to enhance productivity.

[6] Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at r315.

5 PRODUCTIVITY: GET RID OF STRIKE BEFORE YOU TALK

5.1 Many of the pattern agreements which are being rolled out across the country on a "sign-up or else" basis by militant unions contain provisions which adversely affect the efficient operation of building sites Now is the time to make changes to the bargaining laws. The Panel recognised that "strike first, talk later" bargaining rules are misguided. Recommendation 31 from the Panel was as follows:

> *The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.*

5.2 Master Builders supports the immediate introduction of this Recommendation. The Recommendation arises from the vexed outcome for employers in *JJ Richards & Sons & Anor Pty Ltd v Fair Work Australia & Anor*.[7] This case determined that although it was the Government's intention in the scheme of the FW Act that bargaining should only occur after majority support for bargaining had been determined, the way in which the FW Act had been interpreted meant that this intention was not carried through into the legislative provisions. Fundamentally, protected industrial action should not be available before bargaining has commenced. Protected industrial action should only occur in support of claims made in bargaining. Legislating this recommendation will ensure that, at least in this part of the legislation, it is operating as intended. In effect, without reversal of this case, protected industrial action is not a last resort option in the path of sanctioned bargaining processes. Instead it is just one of several options that are able to be selected by unions as part of the "sign up or else" tactics that are used by militant unions in the building and construction industry.

[7] [2012] FCAFC 53 20 April 2012

6 REGULATION OF INDEPENDENT CONTRACTORS THROUGH ENTERPRISE AGREEMENTS

6.1 Agreement clauses which restrict the use of contractors and labour hire are having a negative effect on the industry, particularly its costs. The handing down of the decision in *Australian Industry Group v Fair Work Australia*[8] on 14 August 2012 reinforced Master Builders' call for urgent consideration by Government of amendments to the FW Act in this area of the law. This position was further underlined by the puzzling conclusions of the Panel in this context. The Panel indicated, at page 159 of the Report, that the very large volume of costly litigation relating to whether or not particular clauses that regulate contractors are matters which pertain to the employment relationship is "largely … a return to agreement-content rules that developed over more than a century."

6.2 Master Builders believes that the Panel was out of touch with the adverse effect that this aspect of the law is having on day-to-day industrial relations practices in the industry, practices which have developed because of the changes brought about by the FW Act. Master Builders notes that inter alia there is a new test in s172(1)(b) of the FW Act which talks about matters being permitted if pertaining to the relationship between an employer and a union covered by the agreement. This is a completely new test and one which we believe is inappropriate as there is no formal relationship between an employer and a union representing the employees. Unions have a representative role rather than a direct relationship with employers. The Panel did not consider this matter, merely asserting that the new test addresses "some uncertainties that would otherwise exist as to the outer reach of matters pertaining, and are an appropriate balance between the freedom of employers and the legitimate rights of employees to be represented in the workplace."[9] It is unclear from this statement and from the surrounding text how this balance can be said to exist. Testing of the "outer limits" (a misnomer) of contractor regulation is proving costly, time consuming and damaging to productivity.

6.3 We continue to believe that litigation about regulation of contractors which is currently being played out before the Fair Work Commission (FWC) and the courts is a drain on the system and takes away from clarity. This has been the case now for a number of years.

[8] [2012] FCAFC 108.

[9] Fair Work Act Review Panel Final Report http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx at page 159.

6.4 Master Builders' position is that regulation of independent contractors through enterprise agreements should be treated as an unlawful term per s194 of the FW Act. This position would ensure that costly litigation about this issue and the effective regulation of contractor terms and conditions by unions via this inappropriate mechanism were outlawed. In the building and construction industry in particular, this step would have no adverse effects on job security as the provision that is pushed by unions is effectively a measure to ensure that competitive wages and conditions cannot be introduced; job security is the guise under which unions become the gatekeepers of terms and conditions on site.

6.5 The FW Act's "backdoor" method of regulation of contractors is a highly unsatisfactory position and wrongly provides legality to a provision that, if sought in general commercial arrangements, would fall foul of trade practices legislation. The union clause commonly promoted by the CFMEU and other unions clearly restricts the operation of the free market. Indeed if clauses along the lines of those now appearing in scores of pattern agreements are acted upon by employers, it may be that companies will be exposed to breaches of the *Competition and Consumer Act 2010* (Cth). It is possible that in seeking subcontractors to meet the requirements of their particular agreements, a principal contractor could exhibit behaviour which would expose them to breach that legislation.

6.6 In addition, the provisions that protect employees from exploitation set out at Part 5.8A of the *Corporations Act 2001* (Cth) appear to be lost in the publicity which is generated about alleged outsourcing with the intent of depriving employees of their entitlements. The Corporations Act already contains adequate laws to deal with agreements and transactions that are entered into with the intention of depriving employees of their entitlements. A change to the law in this area as proposed by Master Builders would assist the free market operation of contractor arrangements and thereby enhance industry productivity or, at the least, remove restrictive practices.

7 TRANSFER OF BUSINESS

7.1 Transfer of Business rules under the FW Act are dense and difficult to apply. This particular part of the legislation has proved disappointing as it overturned the long established and well understood laws regarding transmission of business and was not contained in the Labor Party's *Forward With Fairness* policy framework which formed the policy basis of the legislation when first formulated. The pre-existing

laws operated on the simple premise that a person could not transfer a business and thereby avoid their industrial obligations.

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

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

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

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

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

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

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

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

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

8 UNFAIR DISMISSAL AND GENERAL PROTECTIONS

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

8.2 These are significant issues which must be taken into account in a review of Australia's unfair dismissal laws. In particular, the FW Act has failed to provide fundamental protection for small business employers, with the legislative balance clearly favouring employees. The lack of such protection is damaging Australia's resilience in the face of the uncertainty and instability in local and international economies.

8.3 This imbalance is not unique to Australia, which along with approximately 35 other countries is a signatory to the ILO Convention "'Termination of Employment

Convention" (1982) No 152. In recent years, employers and some government representatives to ILO have expressed concerns at the operation of the convention, including its low penetration globally, which has disadvantaged the original signatories. Australia is one of only 35 of 183 member states in the ILO which have signed up to the Convention since its inception. Many developed and developing economies, including most Asia-Pacific nations, do not endorse the Convention.[10]

8.4 Employer experts from among the original signatories to the Convention, (especially Europe), now challenge the efficacy of the Convention in the provision of job security. The insights of these experts are worth examining, particularly as they apply equally to Australia. The Convention was based on the premise that one aspect of worker protection, namely termination of employment, could be regulated in isolation, without taking into account the broader picture, and particularly the impact of protective regulation on other socio-economic objectives. The Convention did not take into account changing priorities, such as the achievement of high employment rates and inclusive labour markets, and it has posed a potential barrier to the achievement of other ILO objectives.[11] Such is the disenchantment with the convention that the Employer experts have called on the ILO to refrain from promoting the Convention, and called for its repeal.[12]

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

8.6 **The Small Business Exemption**

8.6.1 The "unfair dismissal" exemption standards for small business are facilitated by Article 6 of the ILO Convention. In Australia this has

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

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

[12] Ibid at page 26.

translated into three different unfair dismissal exemption policies over the past 30 years, since the first standard termination law was established. This exemption applied as follows:

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

8.6.2 Clearly, the current Australian small business exemption is unlike earlier versions, both which gave a complete exemption by eliminating any unfair dismissal remedy under the relevant legislation for any employees of the small business. The difference is very significant as the current exemption law still exposes the small business to the high standards of procedural and substantive requirements. After the first 12 months of service of an employee, a dismissal by a small business employer can be challenged on both substantive fairness and procedural grounds. The consequences can be long mediation and FWC procedures with uncertain outcomes, especially with regard to compensation. The dismissal might be declared invalid by the FWC and create uncertainties, particularly if reinstatement is ordered. This is unreasonable. The additional costs and resources expended by a typical small business to introduce advanced employee management systems and to contest potential claims of unfair dismissal have been acknowledged by every government since 1982. Notwithstanding this prior consideration the current termination laws are the least supportive of small business in 30 years.

8.6.3 Master Builders supports the reintroduction of a true 'exemption', where a remedy for alleged unfair dismissal is unavailable to employees of small business. The exemption should be set at a threshold of a business employing fewer than 20 people. Further, the small business definition (for identifying the number of employees) should not include related entities. Related entities are often operationally and financially distinct. It does not

follow that an employer will have sufficient resources to justify being described as other than a small business simply because they are related to other organisations which, in the aggregate, employ 20 or more people.

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

8.7 Valid reason test should prevail

8.7.1 The termination laws must be recalibrated, so as to place more emphasis on the employer's prerogative to manage their business. This can be achieved by reinstating in legislation that substantive and valid reasons for termination will be the primary test for fairness.

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

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

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

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

8.7.6 The ILO Convention does not use the term 'unfair dismissal'. However, the term appears throughout the language of Australian industrial law and business. As a result, it is confusing to law-abiding employers that a termination made for a valid reason is described and tested thereafter as being an 'unfair dismissal." This categorisation and labelling of a valid termination is neither benign nor incidental and needs to be corrected. The phrase "termination of employment", should be used to describe what is now outlined in Part 3-2 of the FW Act.

8.8 Redundancy

8.8.1 Laws defining a valid reason for redundancy should be confined to termination for reasons based on the operational requirements of the employer's business. This is consistent with the ILO standard and preserves the employer's prerogative to manage the business, to respond to market changes, to restructure and otherwise aim for best practices.

8.8.2 The existing requirement, first introduced in the FW Act via section 389, effectively deems that a termination for operational reasons is not valid and therefore unfair if the employer did not offer the employee redeployment in the employer's business, or associated entity. This is despite the primary definition indicating the termination is valid as the job the employee was performing is no longer required due to operational requirements. The primary test, which was introduced in the Termination Change and

Redundancy test case[13] is manifestly adequate to establish the termination is for operational reasons. The courts are now well ahead of and will not abide a sham or device on the employer's part to disguise an ordinary termination as a redundancy.

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

> *If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative (such as the making or varying of a policy which employees are required to observe) was laid down in Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales 7 (XPT case).*[14]

8.8.4 A recent case[15] in the building and construction industry demonstrates the alteration of the operational valid reason by the addition of the redeployment criterion. It also highlights the dilemma employers in the building and construction sector face in making a judgement about whether to offer redeployment to a redundant employee when its short term workforce is more efficiently sourced from areas close to the 'available' work. In the relevant case, the tribunal member awarded compensation to a redundant worker because the company failed to offer redeployment. In his decision the member noted:

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

[13] 1984 Print F6230.

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

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

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

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

8.9 Early intervention and informal processes

8.9.1 Unfair dismissal claimants should bear the onus of demonstrating reasonable grounds for success prior to a matter going to conciliation. Those that do not present such prospects should be disallowed on the papers. This combined with strict enforcement of deadlines and the ability for jurisdictional matters to be determined on the papers, would enable the FWC to deal with legitimate claims quickly. This in turn would significantly increase the likelihood of reinstatement as an outcome, and avoid unwarranted costs, both public and private.

8.10 Adverse Action

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

8.10.2 There has been a significant widening of both "workplace rights" and "lawful industrial activities" under the FW Act compared to earlier federal workplace relations laws. Master Builders considers that the adverse action provisions of the FW Act provide an unnecessary layer of additional and excessive remedies to employees, who are already protected from unlawful or unfair termination and discrimination under other laws.

8.10.3 The reverse onus of proof and the removal of the "sole or dominant reason" exemption raise significant issues for employers. Add to this uncapped compensation available in adverse action remedies, as well as

none of the unfair dismissal jurisdictional exemptions, the employee's preference towards bringing adverse action claims in the Federal Court rather than unfair dismissal applications in the FWC is obvious. This trend significantly compromises the positive policy outcomes in having a workplace relations tribunal with an emphasis on being 'quick, informal and avoid[ing] unnecessary technicalities'.

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

8.11 Small Business exemption

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

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

8.12 The Barclay case

8.12.1 The High Court decision in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (*Barclay*)[16] serves to demonstrate why Master Builders' policy on general protections is sound and defensible.

[16] [2012] HCA 42.

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

> *If adverse action is taken by an employer in response to conduct of a union, it is impossible for that employer to dissociate or divorce from that conduct its reasons for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee.*[17]

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

8.12.4 This can be achieved through the following:

- section 347(b)(v) of the FW Act should be removed, as it unfairly protects union members from legitimate disciplinary action in relation to their behaviour as employees;
- the test for whether adverse action has occurred should require a comparison of whether the action taken against the employee concerned would have also been taken against other employees in the same circumstances;
- section 360 should be amended so that an employer will be held to have taken action for a particular reason only if it is the sole or dominant reason;
- adverse action applicants must show reasonable grounds for their application during conciliation conferences before the FWC;

[17] Id at para 74.

- access to an interim injunction prior to proceeding to conciliation should be abolished; and

- the reverse onus of proof provision required in adverse action cases should be amended to provide an exemption for small business employers.

9 GREENFIELDS AGREEMENTS

9.1 The FW Act provides for the creation of a 'greenfields agreement' where a genuine new enterprise, project or undertaking is to be established, and none of the employees who will work on the project have been engaged.[18] The current drafting of the FW Act reflects several of Master Builders' recommendations about greenfields agreements, such as the removal of the requirement to notify all relevant unions when negotiating such an agreement[19] and amendments allowing for their execution without requiring the consent of every union with potential coverage over the prospective employees.[20] Those changes to the original Bill were designed to ensure that greenfields agreement negotiations focussed on the genuine needs of a particular enterprise and its future employees, rather than to provide a platform for the rival interests of various unions (often via costly demarcation disputes).

9.2 Nevertheless, it is clear that the FW Act continues to be unduly permissive in relation to demarcation disputes (which most often occur in the context of bargaining for new construction projects) as the decision in *Alfred v Construction, Forestry, Mining and Energy Union*[21] demonstrated. Such cases highlight just one of the dangers of imbalanced enterprise bargaining provisions, in which unions are given mandatory rights to negotiate. One of the fundamental (and in Master Builders' view misguided) presumptions of the FW Act is that union participation in bargaining is necessarily beneficial to employees. While non-greenfields agreements obviously

[18] FW Act s172(2)(b) and s172(3)(b).

[19] Under the (now removed) proposed section 175 of the FW Bill.

[20] FW Act s12, definition of 'relevant employee organisation'; s182(3).

[21] [2011] FCA 556 (unreported, Tracey J, 2 June 2011). As detailed in the judgment, in that dispute, when one of the subcontractors who was suffering significant economic loss as a result of the industrial conflict asked how long it would continue, they were told by a union organiser: 'It's a CFMEU site. It will go on for as long as we say it will go on' (at para 34).

require the involvement of employees (who can either reject a union agreement and/or appoint non-union bargaining representatives),[22] greenfields agreements by their nature exclude these possibilities, given that no employees can have been employed at the time of bargaining and that the agreement cannot be made without the participation of a relevant union with coverage over the prospective employees.[23]

9.3 There are real concerns about the level of power in practice granted to relevant unions under the FW Act greenfields process. In marginal ways, it may be true that union agreements benefit employees, but Master Builders' experience is that non-union enterprise agreements in the building and construction industry largely match the terms and conditions of union agreements. In the building and construction industry they provide for much greater flexibility to employees (given that they are not 'pattern' agreements). However, greenfields agreements cannot be executed without the signature of at least one relevant union[24] (which is often a default choice by virtue of the prospect of demarcation disputes). Unions wield power over not only the terms and conditions on new projects, but even over unrelated negotiations for non-greenfields agreements (by demanding 'side-deals' prior to the execution of the greenfields agreement in question).

9.4 Master Builders reiterates its calls for penalties for demarcation disputes to be bolstered via the revival of the ABCC and for non-union (employer) greenfields agreements to be reintroduced, as were previously available under s330 Workplace Relations Act. Employer greenfields agreements in the building and construction industry typically included generous terms and conditions, consistent with those paid on similar projects. They also required unions to adopt a more reasonable approach in greenfields agreement negotiations. Importantly, under the FW Act, such employer greenfields agreements would not be able to be detrimental to employees in relation to the safety net (under the NES and modern awards) as the employer would need to comply with the 'better off overall test'.[25]

[22] FW Act s176(1)(b); s176(1)(c); s178 and s178A.

[23] FW Act s172(2)(b); s172(3)(b) & s182(3).

[24] FW Act s182(3).

[25] FW Act s193(3).

9.5 The current exclusion of employer greenfields agreements under the FW Act grants unions an entrenched right to demand extravagant terms and conditions. Although greenfields agreements are subject to a 'public interest test',[26] this is focussed on the needs of the employees to be covered by the agreement,[27] to the exclusion of the views of affected third parties. The weakness of this test was demonstrated in the failed appeal against the decision to approve the *Victorian Desalination Project Greenfields Agreement 2009*,[28] brought by two persons local to where the desalination plant was being built, on the basis that the conditions under the agreement would distort the local market. The appeal was rejected on the basis that these parties did not have standing.[29] Whilst technically correct, the impact of decisions of this type is to skew local market conditions to such an extent as to place inordinate wage pressures on other industries within the region. The impact on productivity ought to be plain to see. It is for these reasons that Master Builders considers that prevailing community standards must be able to be addressed when approving a greenfields enterprise agreement.

9.6 A further concern is the current practice of the principal construction union imposing a so-called "Greenfield Agreement" on builders with no employees on a site where development work has already commenced. This practice is adopted by unions for the sole purpose of getting access to non-union subcontract labour. Essentially the aim is to capture and bind these contractors to terms and conditions of non-existent notional employees of the builder. This step may be achieved via the regulation of independent contractors through enterprise agreements discussed in section 6 of this document. Relevant unions act to insist on a greenfields agreement being in place (on a "sign up or else" basis) despite the builder having no intention of employing construction workers, as the business model relies upon the work being done by legitimate contractors.

[26] FW Act s187(5)(b).

[27] Supplementary Explanatory Memorandum, Fair Work Bill 2008 (Cth), states that: 'In assessing the public interest, it would be expected that FWA would take into account the objects of the Act, and the need to ensure that the interests of the employees who are to be employed under the agreement are appropriately represented (clause 118).

[28] [2010] FWAA 85.

[29] Under s604 of the FW Act: *Schinkel v Thiess Degrémont Joint Venture and Ors* [2010] FWAFB 2279.

9.7 This growing practice, which has a profound impact on project building costs, falls foul of the public interest test because it seeks to protect the job security of non-existent employees. Further, it stands to reason that it cannot be said to 'pertain' to the employer/employee relationship[30] because the builder has no employees currently, nor does the builder intend to employ workers in the future. Whilst provisions of the kind sought in this context might be legally challenged that step is often beyond builders and sub-contractors when confronted by union officials on building sites who insist on the greenfields agreement being put in place under the threat of industrial disruption.

10 INDIVIDUAL FLEXIBILITY AGREEMENTS

10.1 Forward with Fairness – Policy Implementation Plan

10.1.1 In the lead up to the 2007 federal election the Labor Party issued its "Forward with Fairness" policy document, which amongst other things, included provisions dealing with flexibility in the workplace. The policy sets out that "Labor will ensure there is genuine flexibility for both employers and employees in these new arrangements."

10.1.2 In reinforcing that it was said in "Chapter 4 Flexibility in Collective Agreements of the Policy":

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

10.1.3 Regrettably, experience on the content of flexibility clauses in union enterprise agreements since the inception of Modern Awards from 1 January 2010 shows anything but genuine workplace based flexibility.

10.1.4 This Fair Work Review Panel when considering the issue of Individual Flexibility Agreements (IFAs) at page 108 of its Report referred to a 2011 Fair Work Australia survey which indicated only 6% of the employers

[30] FW Act s172(1)

surveyed had used IFAs. The survey is instructive of the lack of penetration of IFAs in the labour market. Disappointingly, the Report ignored the lack of genuine flexibility of IFAs that form part of enterprise agreements, especially those with unions as a named party.

10.1.5 The Report contained 5 Recommendations on proposed changes to the IFA provisions, Recommendations 9 to 13 are as follows:

10.1.6 Recommendations 9, 12 and 13 highlight the shortcomings of the current IFA provisions and why so few employers have taken these up as evidenced by the FWA 2011 survey. Recommendation 9 identifies the very limited nature of what can be included in an IFA. Recommendation 12 finds the existing ability to terminate an IFA by a party providing 28 days written notice to terminate it as being simply unattractive to employers as it provides no certainty under a contractual arrangement. Recommendation 13 makes IFAs of little real value for employers who need certainty in employment arrangements from the outset of employment.

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

> *12.1 The Employer may agree with an Employee covered by this Agreement to vary the following clauses of this Agreement to meet the genuine needs of the Employer and Employees:*
>
> *(a) Clause 51.6 Compassionate Leave*
>
> *(b) Clause 52 Parental Leave*
>
> *(c) Clause 54 Jury Service*
>
> *(d) Clause 59 Clothing Issue & Safety Footwear & Equipment*

10.1.8 Many other union enterprise agreements are littered with similar meaningless so-called flexibility clauses which offer no genuine benefits to either the employer or employee.

10.1.9 Despite the obvious lack of genuine benefit to either an employer or employee contained within such a meaningless IFA, these clauses continue to be approved by the FWC which the then Deputy Leader of the Opposition in 2007 set out in the Forward with Fairness Policy that "The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure: the clause provides for genuinely agreed individual flexibilities."

10.1.10 Master Builders' submission to the Fair Work Act Review Panel was that the content of what can be included in IFAs ought be expanded and that the Office of the FWO undertake assessments of IFAs on their meeting the better off overall test under the current legislation. Master Builders accepts Recommendation 10 of the Report on the basis it is coupled with Recommendation 11.

10.1.11 Recommendation 9 reflects in part what Master Builders has called for but, a closer examination of Recommendation 9 shows it seeks to limit the inclusion of non-monetary benefits to "insignificant" amounts thereby making it so fettered for employers and employees it has little value. Master Builders reaffirms its original submission to the Review of the Panel that genuine flexibility must be facilitated under workplace relations law.

11 REGISTERED ORGANISATIONS AND THEIR REGULATION

11.1 Master Builders supports initiatives which deliver improved transparency and accountability for registered organisations. Registered organisations should be properly accountable to members and should not be operated for particular individual's interests.

11.2 Registered organisations are a central part of the fair work system. Consequently, Master Builders believes that the members of registered organisations deserve transparent and accountable representation from suitably qualified personnel of good character.

11.3 Master Builders supports amendments to the *Fair Work (Registered Organisations) Act 2009* (RO Act) which would:

- Ensure persons who hold an office and persons involved in the management or control of registered organisations must be fit and proper persons.
- Ensure that financial reports are lodged on time and in compliance with the provisions of the RO Act by clarifying circumstances where a report is non-compliant, and increasing the penalty for late filing and non-compliance will assist.
- Deter malfeasance by creating new penalties for registered organisations, their officers and employees who do not act in good faith, or use their position or information, to directly or indirectly create a financial gain for themselves or someone else to the detriment of the registered organisation.
- Deter non-compliance with court orders by creating new penalties for registered organisations, their officers and employees who do not comply with an order of a court.

11.4 Master Builders proposes that the 'fit and proper' person test referred to in the previous paragraph be a two-stage threshold test. First, persons who hold an office and persons with management or control would need to prove that they are of good fame and character and, secondly, they must not have been the subject of, or convicted of certain offences that would impinge on their role. This test would be similar to the *Fit and Proper Person Requirements 2011* (Requirements) under the *Vocational Education Training Regulator Act 2011* which ensure that people with a degree of control or influence over the operation of a registered training organisation (RTO) are fit and proper persons. As these personnel are often the same (that is they run RTOs as well as unions, for example) consistency between the two sets of laws makes sense.

11.5 Master Builders believes that these policy initiatives would provide a genuine deterrent against the misuse of power and position by registered organisations, their officers and employees.

12 INDUSTRIAL ACTION

12.1 Laws regulating industrial action must balance the rights of employees to seek improved terms and conditions with the importance of acting lawfully, in good faith. At the same time productivity must be maximised. The FW Act does not deliver the correct balance.

12.2 Unprotected action – the abuse of safety

12.2.1 Workplace health and safety requires the active participation of all parties, which is reflected in the model *Work Health & Safety* laws' emphasis on coordination, cooperation and consultation. The Cole Royal Commission confirmed the regrettable and long standing practice of construction unions using safety stoppages as a device to advance industrial objectives, as it is relatively easy to mask industrial issues given the ever changing nature of hazards on construction sites. The abuse of safety frustrates cooperation, devalues the importance and the role of safety and by doing so can expose workers at the site to needless risks to their health and safety.

12.2.2 To combat the abhorrent, tactical use of safety as an industrial weapon the BCII Act placed the burden of proving that a safety stoppage was based on a reasonable concern by the employees about an imminent risk to their health or safety.[31]

12.2.3 The abolition of the BCII Act has reversed this position, placing important advances in safety management and practices in jeopardy. The situation must be restored.

12.3 Protected action – no protected action before bargaining begins

12.3.1 Good faith bargaining is a central plank of the bargaining framework under the FW Act yet it has failed to ensure that industrial action is taken by persons acting in good faith and through the good faith bargaining framework.

12.3.2 The Government's commitment in relation to protected industrial action was that it would only 'be available during good faith collective bargaining, [and] in accordance with… clear, tough rules'.[32] However, in *JJ Richards & Sons Pty Ltd v Fair Work Australia*[33] (JJ Richards) the Full Federal Court confirmed what was the then Fair Work Australia's finding that employees can lawfully strike before bargaining has commenced. This directly

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

[32] Labor, *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces* (April 2007), p 16.

[33] Note 7 above

contradicts the Government's policy and undermines the entire agreement-making regime set up by the FW Act as discussed at section 5 of this document.

12.3.3 In coming to this position, the Court rejected the position that in order to be "genuinely trying" to reach agreement, a party must have endeavoured to compel bargaining by way of tools less drastic than protected industrial action, such as 'majority support determinations', which provide a mechanism to force an employer to bargain with its employees.

12.3.4 The result of this is that unions can sidestep good faith provisions and seek to exert industrial pressure on employers irrespective of the views of the majority of the workforce and without having to act in good faith. As a result, the agreement will be negotiated under economic duress, rather than in good faith. Parties should speak before they strike. This is an absurd and clearly unintended outcome that must be fixed, so that strike action is the last resort, as intended by the FW Act. As discussed earlier, the Panel recommended the reversal of the *JJ Richards* case.

12.4 Only those acting in good faith should be able to take protected industrial action

12.4.1 Good faith bargaining is a central pillar of the bargaining framework. It is designed to ensure that parties negotiate within a framework requiring the parties' representatives to meet, exchange information and give genuine consideration to proposals in a timely manner.[34] However, they do not require parties to make concessions or to actually reach an agreement.[35]

12.4.2 The threshold required to be 'genuinely trying' to reach agreement and therefore be able to access protected action, with the applicant usually only being expected to 'demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side'[36] before being afforded the privilege of protected industrial action. There is no requirement that the applicant has been, or is, acting in good faith.

[34] FW Act, subsection 228(1).

[35] FW Act, subsection 228(2).

[36] *Total Marine Services Pty Ltd v Maritime Union of Australia* (2009) 189 IR 407at para 32; *FWAFB 368*

12.4.3 It makes little sense, and runs counter to the scheme of good faith bargaining, that a party should only be able to take industrial action in support of a claim, if acting in good faith. The very purpose of good faith bargaining is to create a framework through which sensible, fair and transparent negotiations can take place, including protected industrial action, if required. A party, having met a very low threshold of articulating its claims, can currently commence industrial action with no further obligation to act in good faith before going on strike.

12.4.4 The FW Act should be amended to make it clear that parties must be acting in good faith in order to take protected industrial action.

12.5 Protected action ballot orders must consider pattern bargaining

12.5.1 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."[37]

12.5.2 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 or template agreements (with the return of a 'sign up or else' culture which the BCII Act was designed to eliminate).

12.5.3 The FW Act does not contain a requirement that a party must satisfy the Commission that it is not pattern bargaining before applying for a protected action ballot.[38] This, combined with the absence of any constraints relating to good faith bargaining, have permitted the re-establishment of 'take it or else' agreement making.

12.5.4 While the FW Act does permit an employer to seek to prevent industrial action from being taken where a party is pattern bargaining, this can only occur once it becomes clear that the action is taking place (typically three

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

[38] 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.

days' notice). Importantly, the *John Holland* case found that a party can still be genuinely trying to reach agreement even if it is pattern bargaining.[39] This effectively neuters any attempt to police pattern bargaining, except in extreme cases.

12.5.5 A protected action ballot must not be ordered unless the FWC is satisfied that a party is not pattern bargaining.

12.6 **Stop the "go nuclear or do nothing" approach to employer response action**

12.6.1 Protected industrial action taken by employees can take many forms, including strikes, bans, limitations and other novel forms. Employers, on the other hand, have only one option – the extreme step of locking out the workforce.

12.6.2 The fundamental imbalance in alternatives was seen in the Qantas dispute, with the employer being forced to either accept targeted action designed to inflict maximum damage to the employer and its branding or take drastic action. Had the employer had access to other forms of industrial action, such as bans or limitations on work, the situation could have been different. The employer could, and should be able, to take industrial action against employees that does not necessarily involve a complete lockout. For example, an employer could respond to employee claim action by banning the allocation of overtime to employees who engaged in protected action. This would provide employers with the capacity to engage in proportionate responses to employee action, rather than creating the framework for intractable disputes. The FW Act should be amended accordingly.

13 RIGHT OF ENTRY

13.1 Right of entry (RoE) provisions under the FW Act urgently need attention. There is ample evidence to suggest that the current obligations concerning RoE rules are being abused, and there is no recourse against union officials who intentionally fail to renew entry permits. A number of CFMEU officials have, for some time, adopted the practice of letting their permits lapse to avoid action being taken against them.

[39] Labor, *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces* (April 2007), p 15.

Contractors are then faced with the escalation of a dispute which invariably requires police involvement to remove union officials on the grounds of trespass.

13.2 The current laws are also failing the industry because union officials are provided with a discretion to either show, or not show, their federal permit. The law must be amended to mandate the production of entry permits if union officials wish to exercise legitimate right of entry privileges.

13.3 If RoE abuses are to be adequately addressed in the building and construction industry, real, substantial and certain penalties must apply. Union officials should know that if they abuse the rights and privileges attaching to a permit, their permit will be suspended for a minimum known period or revoked entirely.

13.4 New laws must require strict compliance with RoE or subject the union to an automatic penalty on an ascending scale where repeat offences occur. In this way the actions of union officials can be isolated from the merits of the matters in dispute. This would apply a reverse onus e.g. the union would be required to prove it did not breach RoE rules. The CFMEU's deplorable record of contraventions of the law must rank as a significant consideration when setting new penalty provisions.

14 THE BUILDING CODE 2013

14.1 On 30 January 2013, the Minister for Employment and Workplace Relations, the Hon Bill Shorten announced the introduction of the *Building Code 2013* (Code) and that it would take effect two days later on 1 February 2013. As there was no formal consultation with industry about the Code, Master Builders has significant concerns about this legislative instrument and the manner which it has been imposed.

14.2 Despite consultation since its registration, the Code was introduced without any, let alone adequate, prior consultation with industry. This lack of consultation has resulted in the industry reacting negatively to the Code's poorly thought out provisions. Rather than cutting red tape, the Code's coverage has been broadened so that building contractors and sub-contractors must comply with the requirements of the Code for every project they undertake. The Code also introduced another WHS regulator, the Fair Work Building and Construction agency.

14.3 The hasty implementation of the Code has created confusion and uncertainty regarding compliance. The square aim of the Code appears to negate the effect of State government procurement guidelines.

14.4 Master Builders has called on the Government to withdraw the Code. Its hasty introduction reflects its poor drafting, which has placed additional unnecessary compliance obligations on the building and construction industry.

15 SHAM CONTRACTING

15.1 A sham contract arrangement arises when an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. This is currently proscribed in s357 to s359 FW Act. Master Builders stresses that this behaviour is a deliberate act by those who choose to act illegitimately. It is a practice we condemn. It should not, however, be confused with misclassifying an employee as a contractor, a mistake that may often be made because of the dense and confusing law that governs this distinction, inclusive of a multitude of statutory deeming provisions.

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

15.3 Relatedly it appears that some of the fallacious assumptions about this subject arise from the CFMEU's "Race to the Bottom: Sham Contracting in the Australian construction industry".[40] This report contains completely unreliable statistics which seek to demonstrate that nearly $2.5 billion a year is being allegedly lost in the tax system because of sham contracting. This is not the case. It is inaccurate and falsely damning of the industry.

15.4 In respect of the CFMEU's statistics in "Race to the Bottom" the ABCC found that without further explanation by the CFMEU it is difficult to find other than the

[40] http://www.cfmeu.asn.au/downloads/nat/reports/race-to-the-bottom-sham-contracting-in-australias-construction-industry. Accessed 24 April 2013

conclusions reached by the CFMEU are not reliable. We can be more direct. The Report is wrong and misconstrues the issues. The research released by the Fair Work Building Construction agency on 21 December 2012 about sham contracting[41] falls into error as well. The estimate of 50,000 people being potentially "on a sham contract" may indicate possible misclassification. But it does not represent a proper indication of sham arrangements – the deliberate misuse of the law. This is especially the case with the report's reliance on self-assessment combined with the finding that 54% of workers have never heard of the term "sham contracting". This finding leads to the conclusion that Government should provide funds for an industry-wide education programme.

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

16 RECOGNITION OF EMPLOYER PAYMENTS – SUPERANNUATION

Legislation was passed by the Gillard Government to implement a phased increase in the superannuation guarantee levy from nine per cent to 12 per cent between 1 July 2013 and 1 July 2019. Master Builders called on the Government to support the absorption of the increased superannuation contributions into wage increases which would otherwise have been paid through minimum wage increases. It is vital that the legislation require the Fair Work Commission to take the increased superannuation guarantee levy into account when determining minimum wage increases. A similar provision was contained in the Workplace Relations Act (s90A) which required the tribunal to have regard to the superannuation guarantee levy when making national wage case decisions. Despite phasing in of the increase from 9 per cent to 12 per cent to 1 July 2019 the increases will add a large cost burden to the sector and there should be a statutory mechanism for recognising this impost.

[41] http://www.fwbc.gov.au/sham-contracting-research-released-0. Accessed 24 April 2013

17 CONCLUSION

The building and construction industry and the community would benefit from comprehensive workplace relations reform. Legislating the Master Builders' Recommendations would be a vital step on the path to increased productivity.

****