Master Builders Australia

Submission to the Senate Education and Employment Standing Committee

on

Fair Work Amendment (Remaining 2014 Measures) Bill 2015

22 December 2015

MASTER BUILDERS AUSTRALIA

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1 Introduction

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

1.2 Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder State and Territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

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

2 Purpose of Submission

2.1 On 3 December 2015, the Senate referred an inquiry into the provisions of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (the 2015 Bill) to the Senate Education and Employment Legislation Committee (the Committee) for inquiry and report by 4 February 2016. The closing date for submissions to the Committee's inquiry is 22 December 2015**.**

2.2 Previously, on 6 March 2014 the Senate referred the provisions of the Fair Work Amendment Bill 2014 (2014 Bill) for inquiry and report by 5 June 2014 to the Senate Education and Employment Legislation Committee. Master Builders provided a submission to the inquiry. This inquiry covers the same ground as that inquiry.

2.3 The 2015 Bill contains the elements of the 2014 Bill that were not legislated (even though in a number of instances in a form different from the original text of the 2014 Bill). The *Fair Work Amendment Act, 2015* (Cth) (Fair Work Amendment Act 2015) was given Royal Assent on 26 November 2015 with its substantive provisions commencing on 27 November 2015.

2.4 As with the 2014 Bill, the 2015 Bill makes amendments to the *Fair Work Act 2009* (FW Act) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws.*[1] The 2015 Bill also responds to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*[2] review report (Review Panel Report) into the operation of the *Fair Work Act* 2009 (FW Act) by the Fair Work Review Panel (Panel), although it is not confined to those recommendations, nor does it take up all of those recommendations.

2.5 Just as Master Builders supported the 2014 Bill, we support the 2015 Bill.

2.6 This submission sets out Master Builders' views on the provisions of the 2015 Bill. Whilst the direction of reform is strongly supported, the Bill represents only a very small proportion of the necessary reform agenda required to overhaul the flawed FW Act. Master Builders has elsewhere set out in some detail its view of the range of reforms required, particularly in its submissions to the Productivity Commission on that Commission's reference on the workplace relations framework.[3]

2.7 Despite the support expressed for the changes set out in the 2015 Bill, more industrial relations reform is needed to restore balance to the industrial relations system. Specific reforms for the building and construction industry are, in particular, vital to restore the rule of law in the industry. It is imperative that the Parliament passes the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 as well as any appropriate law reform measures recommended by the Royal Commission into Trade Union Governance and Corruption.

2.8 This submission contains discussion under the headings set out in Schedule 1 of the 2015 Bill and Schedule 2 transitional provisions. Master Builders continues to rely on the submission dated 24 April 2014 (2014 Submission) on the 2014 Bill which is attached at Attachment A. This submission revisits some of the issues raised in the 2014 Submission but, for the sake of

[1] http://www.liberal.org.au/improving-fair-work-laws

[2] http://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation

[3] http://www.pc.gov.au/__data/assets/pdf_file/0011/188192/sub0157-workplace-relations.pdf

simplicity, emphasises the substantive points that need to be updated from that submission or where particular matters fall well short of required reform. The 2015 Bill, whilst welcomed, represents a minor step towards workplace reform.

3 Payment for Annual Leave

3.1 Part 1 of Schedule 1 to the Bill amends section 90 of the Fair Work Act to provide that on termination of employment, untaken annual leave is paid out at the employee's base rate of pay. The amendment implements the Panel recommendation 6.

3.2 Importantly, Item 3 in Part 1 would substitute a new subsection 90(2). As expressed in the Explanatory Memorandum for the 2015 Bill (EM), new subsection 90(2) provides that if an employee has a period of untaken paid annual leave at the time when the employment of the employee ends:

- the employer must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and
- that hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

3.3 Again as expressed in the EM, the amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.

3.4 Master Builders submits that the reform does not go far enough. There is no policy justification for a variable safety net in relation to this issue. Having a different standard in different awards just adds needless complexity to modern awards and adds to the litigation burden of the modern award review process. That process is slow and adds unnecessary complexity to the safety net. The policy position established by this sensible amendment should be applied across the safety net without modification for the purposes of efficiency and simplicity.

3.5 As with Master Builders' comments on the 2014 Bill, we recommend that the amendment be changed so that the new standard established is mandated for all industrial instruments with a grandfathering period should that reform disadvantage employees currently governed by a different standard.

4 Taking or Accruing Leave Whilst Receiving Workers' Compensation

4.1 As set out in the EM, Part 2 of Schedule 1 to the Bill repeals subsection 130(2) of the FW Act. The effect of this is that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the FW Act during the compensation period. The amendment in this Part implements Panel recommendation 2 and should be uncontroversial. In effect, the amendment would restore fairness. If a worker is not at work because of being injured, then entitlements relating to attendance at work should not be payable.

4.2 As Master Builders indicated in section 5 of the 2014 Submission:

> *Master Builders considers that the manner in which s130 currently interacts with State and Territory workers' compensation laws and with modern awards/enterprise agreements is overly complex and difficult. Importantly, currently s130(2) sets out that s130(1) does not prevent an employee from taking or accruing leave if this is permitted by state and territory workers' compensation laws. Accordingly, currently under the FW Act an examination of the terms of State and Territory workers' compensation regimes is required to answer the question as to whether or not an employee on a compensated absence is entitled to accrue leave. This is not a simple exercise. State and Territory law does not in a number of instances clearly address this matter, adding to current confusion.*

4.3 The complexity of this area of the law as expressed in the extract at paragraph 4.2 has recently been reinforced by the decision in *NSW Nurses and Midwives Association v Anglican Care*[4] (*Anglican Care*). Under the provision the subject of the proposed amendment, section 130 FW Act, an employee is prevented from taking or accruing leave when the employee is absent from work because of a personal illness or injury and for which they are receiving compensation payable under a law regarding workers' compensation. However, where a specific compensation law permits an

[4] [2014] FCCA 2580

employee to take or accrue leave, then the FW Act exemption does not apply. In those circumstances, an employee will be permitted to take or accrue leave under the FW Act whilst receiving workers' compensation.

4.4 In *Anglican Care*, the judge construed the relevant statute beneficially so that the employee was able to accrue leave whilst receiving workers compensation. The interpretation could be construed as specific to the NSW statute or be applied more generally, although no definitive answer to whether or not the decision is to be confined to NSW is able to be made until it receives further consideration by other courts. Master Builders has raised this question with the Fair Work Ombudsman because of the manner in which the judge reached her conclusions. We indicate that Judge Emmett in *Anglican Care* accepted that the NSW workers' compensation statute did not create an express right to receive annual leave payments during receipt of workers' compensation, but that the section expressly provided the opportunity for the worker to receive both workers' compensation and accrue annual leave. Therefore, Her Honour held that a 'beneficial construction' of the relevant provision permits the accrual of annual leave payments while on workers' compensation and that the FW Act therefore gives permission for the worker to accrue annual leave whilst on workers compensation under the NSW statute.

4.5 This broad interpretation may or may not be accepted by courts in other jurisdictions. Accordingly, the necessity of the change in the law proposed in the 2015 Bill is emphasised by the decision in *Anglican Care*. Its passage is made more important as a means of clarifying the law.

5 Individual Flexibility Arrangements (IFAs)

5.1 Master Builders supports the concept and rationale for IFAs. At present under the FW Act, every modern award and enterprise agreement must contain a flexibility term that allows an employer and an individual employee to make an individual flexibility arrangement that varies the effect of certain terms of the modern award or agreement to meet their genuine needs. During the course of hearings on the 2014 Bill, a number of submissions were made that IFAs presented an opportunity for employees to be exploited by way of "trading away" their terms and conditions. In Part 4 of Chapter 2 of the Committee's

Report on the 2014 Bill,[5] the evidence from the Department was that the FW Act's protections do not permit exploitation, a matter that Master Builders endorses.

5.2 The scope of an enterprise agreement flexibility term is a matter for bargaining but in the building and construction industry, with the CFMEU's pressure tactics, the IFAs permitted to be implemented have been narrowed to insignificant, trivial matters. This underlines the need for industry specific legislation.

5.3 As expressed in the EM, the amendments in Part 3 of Schedule 1 respond to recommendations 9, 11, 12 and 24 made by the Panel. The Government's intention is that the changes will provide clarity and certainty for employers and employees, whilst maintaining the current protections in the FW Act. Master Builders submits that the changes are straight forward and that there is no intention or facilitation of "exploitation" of employees. The Panel ignored the lack of genuine flexibility of IFAs that form part of enterprise agreements, especially those with unions as a party. As a result, the reforms set out in the 2015 Bill are a worthwhile step in the right direction but fall short of the level of required change. All of the points made in the 2014 Submission remain relevant.

6 Transfer of Business

6.1 As Master Builders mentions in the 2014 Submission, the Panel per its Recommendation 38 recommended that the FW Act be amended to make it clear that when employees, on their own initiative, seek to transfer to an associated entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer. Items 19 and 20 of the 2015 Bill implement that recommendation.

6.2 This is one minor reform in an area that is fundamentally flawed. The sensible reform should be undisputed. Master Builders believes that the notions of simplicity, ease of understanding and practical application have

[5] *Fair Work Amendment Bill 2014 [Provisions]* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Work_Amendment/Report/index

been set aside in this area of the law. It is anticipated that the Productivity Commission will recommend broad changes.

6.3 As Master Builders said in its submission to the Productivity Commission:

> *Transfer of Business rules under the FW Act are dense and difficult to apply. This particular part of the legislation has proved disappointing as it overturned the long established and well understood laws regarding transmission of business. The preexisting laws operated on the simple premise that a person could not transfer a business and thereby avoid their industrial obligations. 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.*[6]

6.4 Master Builders would also recommend that, in keeping with section 580(4) of the former *Workplace Relations Act 1996* (Cth), the transmission period be limited to a period of 12 months as follows:

> *The period of 12 months after the time of transmission is the transmission period for the purposes of this Part.*

6.5 This proposed amendment is congruous with recommendation 26.3 of the Productivity Commission's recent report into the Workplace Relations Framework. [7]

7 Right of Entry (ROE)

7.1 As expressed in the EM, the 2015 Bill will have the following effects on ROE law:

- repeal amendments made by the Fair Work Amendment Act 2013 that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
- provide for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting

[6] Above note 3 at page 68

[7] http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf at page 841

interviews with one or more employees or Textile, Clothing and Footwear award workers;

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

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

7.2 Section 10 of the 2014 Submission deals with this issue. We maintain the arguments of the submission. As expressed, this area of the law requires reform. RoE is the subject of frequent abuse by the CFMEU, particularly on false safety grounds.

7.3 Master Builders in the main submission made to the Productivity Commission on this issue (noting that the position with the Queensland legislation mentioned in this extract has now been reversed) said:

> *Union officials can lawfully enter construction sites under both the FW Act and model WHS legislation. Respectively, the FW Act allows for industrial organising or discussions with employees or investigations about employment law breaches, while model WHS legislation allows for safety consultations with workers or investigations about safety breaches. The most common rights of entry exercised by unions in the construction industry are investigative rights of entry under model WHS legislation, which provide for an extremely broad entry regime. Unlike the FW Act, which requires 24 hours advance written notice prior to entry, other than in Queensland, the model WHS legislation does not require any advance notice prior to investigative entry (and the wide powers entailed). This severely limits an employer's ability to manage any illegitimate disruption. Similarly, unlike the investigative regime under the FW Act (which limits investigations to breaches relating to actual union members) the WHS Act entitles union officials to enter a workplace where any potential union member (rather than an actual union member) might perform work. This provides unions with virtually industry-wide rights to enter workplaces, regardless of whether they actually represent employee-members in the workplace concerned.*[8]

7.4 Master Builders' Board has a policy on right of entry that is at Attachment B. It contains a number of recommendations for reform in this area of the law which exceed those currently set out in the 2015 Bill. Having said that, the

[8] Ibid at page 70

reforms contained in the 2015 Bill, with the rationale for their introduction as set out in the 2014 Submission, would be a good start to necessary reform. Master Builders agrees with the conclusion set out in the Committee's report on the 2014 Bill at paragraph 2.85 that the proposed reform creates an appropriate balance bounded by "the ability of employees to participate in and be represented by trade unions, but also the ability of employers to conduct their businesses without unnecessary or inappropriate burdens."[9]

8 FWC Hearings and Conferences

8.1 Part 6 of Schedule 1 of the Bill would change the law so that, subject to certain conditions, the FWC would not be required to hold a hearing or conduct a conference, when determining whether to dismiss an unfair dismissal application under section 399A or section 587 FW Act. The amendments would implement the Panel recommendation 43.

8.2 As stated at section 11 of the 2014 Submission these sensible changes are supported.

9 Application and Transitional Provisions

9.1 Schedule 2 would insert a new Schedule 5A at the end of the FW Act to make application and transitional provisions.

9.2 Master Builders supports these provisions and submits that they provide the required certainty about the commencement of the reforms in the 2015 Bill.

10 Conclusion

10.1 Reform of workplace relations in Australia is a necessity if the balance in the FW Act is to be restored. The reforms proposed by the 2015 Bill are merely a good start to the reform process rather than a fundamental change to workplace law.

10.2 Master Builders strongly recommends that the Committee endorse the passage of the 2015 Bill.

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[9] Note 5 above

Attachment A

Master Builders Australia

Submission to Senate Education and Employment Legislation Committee

on the

Fair Work Amendment Bill 2014

24 April 2014

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1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

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

2 Purpose of this submission

2.1 On 6 March 2014 the Senate referred the provisions of the Fair Work Amendment Bill 2014 (the Bill) for inquiry and report by 5 June 2014 to the Senate Education and Employment Legislation Committee (Committee). The Committee has agreed that submissions should be received by 24 April 2014.

2.2 The Bill makes amendments to the *Fair Work Act 2009* (FW Act) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws*.[1] The Bill also responds to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*[2] review report (Review Panel Report) into the operation of the *Fair Work Act* 2009 (FW Act) by the Fair Work Review Panel (Panel), although it is not confined to those recommendations, nor does it take up all of those recommendations.

2.3 This submission sets out Master Builders' views on the provisions of the Bill. Whilst the direction of reform is strongly supported, the Bill represents only a very small proportion of the necessary reform agenda required to overhaul the

[1] http://www.liberal.org.au/improving-fair-work-laws

[2] http://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation

flawed FW Act. Master Builders has elsewhere set out in some detail its view of the range of reforms required.[3] Despite the support expressed for the changes set out in the Bill (with suggested amendments, as indicated) more industrial relations reform is needed to restore balance to the industrial relations system. The Bill, whilst heading in the right direction, has at the same time introduced unacceptable levels of complexity, especially in the law relating to greenfields agreements. This is at odds with the Government's deregulation agenda. Our recommendations are shown in bold.

2.4 This submission contains discussion under the headings set out in Schedule 1 of the Bill with a consideration then following of the Schedule 2 transitional provisions.

3 Extension of Period of Unpaid Parental Leave

3.1 Currently the National Employment Standards (NES) provide, in the context of unpaid parental leave, that an employee using 12 months' unpaid parental leave may request a further period of up to 12 months' unpaid leave. Employers have the ability to refuse requests for the additional 12 months' leave. Pursuant to s76(4) of the FW Act the employer may refuse a request only on reasonable business grounds. The amendment proposed at Part 1 of Schedule 1 of the Bill requires employers not to refuse the request for the second 12 month period unless the employer has given the employee a reasonable opportunity to discuss the request. The proposed amendment responds to Recommendation 3 of the Review Panel Report. Master Builders supports this recommendation with qualifications.

3.2 Any statutory provision that emanates from the Panel recommendation as reflected in the proposed amendment should contain further qualifications. **We recommend that the amendment should specify that the meeting occurs within a reasonable period before the current period of paid parental leave is due to end. Secondly, there should be no consequences for employers if the request is denied. Thirdly, if the employee does not attend the meeting (i.e. acts unreasonably) then that should be the end of the employer's obligation to consider the request.**

[3] See Industrial Relations Policies 2013: Essential Changes to the Fair Work Regime
http://www.masterbuilders.com.au/Content/ViewAttachment.aspx?id=1048&attachmentNo=272

3.3 Master Builders supports the holding of a meeting, even though we would generally not support a prescriptive provision relating to a method of consultation. However, we believe it is appropriate for a meeting to occur so that clarity around the issue of when an extension is to be put in place is beyond doubt.

4 Payment for Annual Leave Loading

4.1 Part 2 of Schedule 1 of the Bill amends s90 of the FW Act. That amendment will provide that annual leave loading is not payable on termination of employment (of course unless a modern award or enterprise agreement expressly sets out an obligation to the contrary). The amendment reflects Recommendation 6 of the Review Panel Report.

4.2 Master Builders notes that this amendment will solve a long-standing problem with the FW Act. The payment of annual leave loading on termination is not appropriate given that it is the loading to fund an employee whilst on holiday and is not related to termination of employment. Disappointingly, modern awards are not required to reflect this policy approach. Master Builders submits that there is no policy justification for a variable safety net in relation to this issue. We believe that it is likely that the union movement will seek to include clauses in modern awards during the current 2014 review process and in enterprise agreements requiring the payment of annual leave loading on termination of employment. **We recommend that the amendment should be changed so that the standard in s90 as now amended is mandated for all industrial instruments.**

5 Taking or Accruing Leave Whilst Receiving Workers' Compensation

5.1 This matter is dealt with in Part 3, Item 5 of Schedule 1 of the Bill. It adopts the Review Panel Report Recommendation 2. Master Builders strongly supports this recommendation. In essence the repeal of s130(2) to be effected by the Bill will ensure that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments. Master Builders considers that the manner in which s130 currently interacts with state and territory workers' compensation laws and with modern awards/enterprise agreements is overly complex and difficult.

5.2 Importantly, currently s130(2) sets out that s130(1) does not prevent an employee from taking or accruing leave if this is permitted by state and territory workers' compensation laws. Accordingly, currently under the FW Act an examination of the terms of state and territory workers' compensation regimes is required to answer the question as to whether or not an employee on a compensated absence is entitled to accrue leave. This is not a simple exercise. State and Territory law does not in a number of instances clearly address this matter, adding to current confusion.

5.3 Because s130(1) is also directed towards leave "under this Part" (i.e. Part 2-2 of the NES) it is also necessary to consider whether leave provided under modern awards or enterprise agreements (compared with the NES) can avoid the terms of the exclusion of s130(1).

5.4 It is noted that the exclusion at s130 is directed only at leave arising 'under this Part', i.e. Part 2-2: the NES. This means that where modern awards or enterprise agreements supplement the NES,[4] any entitlement in addition to that provided under the NES will accrue while an employee is on a compensated absence. For example, if an enterprise agreement provided six weeks annual leave per year, four weeks would arise under the NES[5] (which currently would be excluded by s130, unless State or Territory law stated otherwise) while two weeks would arise under the enterprise agreement, which would accrue to an employee on a compensated absence. This kind of complexity is striking in comparison to the plain drafting which characterises much of the NES. **Master Builders recommends that s130 should be redrafted, to make it clear that employees on compensated absences are not able to accrue leave, whether arising under the NES, a modern award or an enterprise agreement.** This would not only make the provision simpler, it would also be fair: employers should not have to pay employees who are absent from work when they are being separately remunerated under a workers' compensation regime.

5.5 The complexity in the current provision should be removed and the safety net made clearer. Hence, the proposed repeal of s130(2) is strongly supported.

[4] *Fair Work Act*, s55.

[5] *Fair Work Act*, s55(6), legislative note.

6 Individual Flexibility Arrangements

6.1 Part 4 incorporating items 6 to 18 of Schedule 1 of the Bill sets out proposed changes to individual flexibility arrangements (IFAs). Division 2 of Part 4 relates to changes to IFAs made under modern awards and Division 3 to IFAs made under enterprise agreements.

6.2 From Master Builders' perspective, the design of IFAs has been an abject failure. The way in which IFAs are required to operate effectively means that they are infrequently used in the building and construction industry. Their duration is too short and they are hotly opposed by unions. In particular, the building unions do not permit scope to access IFAs when enterprise agreements are negotiated. This strategy has, together with the inappropriate timeframe for their duration, discussed below, meant that they are little used. The Review Panel Report noted a 2011 Fair Work Australia survey which indicated that only six per cent of the employers surveyed had used IFAs. Disappointingly, the Review Panel Report ignored the lack of genuine flexibility of IFAs that form part of enterprise agreements, especially those with unions as a named party. Hence, the reforms set out in the Bill are a worthwhile step in the right direction but fall short of the level of required change.

6.3 Under Items 6 and 14 a new requirement would be introduced so that where an IFA is entered into through either a modern award or an enterprise agreement respectively, it must be accompanied by a statement from the employee setting out why the employee believes, at the time of agreeing to the arrangement, that it meets their genuine needs and results in the employee being better off overall. The change is supported.

6.4 Items 7 and 15 introduce a further requirement where the employer must ensure that any IFAs agreed to must be able to be terminated by either the employee or the employer giving 13 weeks' notice. This increases the current 28 day period to 13 weeks. The extension to 13 weeks highlights a critical issue for the building and construction industry. As indicated earlier, IFAs are not used in the sector. This is especially because of the project-based nature of the sector's work. Employees are able currently to cancel IFAs with just 28 days' notice. Recommendation 12 of the Review Panel Report recognises the existing problem. The solution proffered by the Panel and as expressed in the

Bill is, however, inadequate. Whilst extending the period from 28 days to 13 weeks' notice may assist, **it would be better if engagement could be linked to the term of a specific project. For example, if a project on which an employee is engaged has an expected duration of say three years then the IFA should apply for that period. This is recommended.** Master Builders' members do not wish to provide benefits to employees that make them better off overall only to have the underpinning arrangement ended after just 28 days, or as proposed after 13 weeks.

6.5 Master Builders recommends that a better policy approach is to have the contract of employment linked with a relevant IFA as a condition of employment. This would ensure that benefits conferred on the employee (which under the required test would make the employee better off overall) could not be unilaterally terminated by that employee and the certainty required in establishing labour costs on projects could be assured. That further reform would benefit all parties but also contribute to the necessary certainty in assessing labour costs in the calculation of the cost of building.

6.6 The provisions of Part 4 also indicate that benefits other than an entitlement to a payment of money may be taken into account for the purposes of assessing whether or not the employee is better off overall than the employee would have been if no IFA were agreed to; Master Builders supports this change.

6.7 Items 10 and 18 deal with contravention of a flexibility term by an employer. They provide a defence to an alleged contravention of a flexibility term where the employer reasonably believes that the requirements of the term were complied with at the time of agreeing to a particular IFA. This provision has been inserted in response to recommendation 11 of the Review Panel Report. Sensibly, the amendment does not take up the provisions of recommendation 10 of the Review Panel Report that the Fair Work Ombudsman (FWO) be notified in writing of the fact of the completion of an IFA as a precursor to the operation of this provision, or generally. Master Builders' view is that the amendment appropriately indicates that an employer should have a reasonable basis upon which to gauge that the test has been met and be able to provide any evidence of that matter to any auditor.

6.8 Master Builders believes these amendments to be a good start in remediating the basis for the establishment of IFAs. However, further reform is required.

7 Greenfields Agreements

7.1 Part 5 items 19 to 52 of Schedule 1 of the Bill sets out the reform proposals for greenfields agreements. That reform is necessary is clear. Paragraphs 7.2 to 7.9 below show why that is the case.

7.2 The FW Act gives unions a great deal of power in the negotiation of greenfields agreements. Greenfields agreements cannot be considered as akin to "ordinary" enterprise agreements that may be made only with the approval of the employees who will be covered by the agreement. This is because, at the time of the making of the agreement, there will be no such employees engaged. Section 172(2)(b)(i) and s172(3)(b)(i) contain the requirement that a greenfields agreement must relate to "a genuine new enterprise" which pursuant to s12 of the FW Act may encompass a new project. Hence, greenfields agreements are common in the construction industry. Section 172(2)(b) also indicates that a greenfields agreement must be made with one or more relevant employee organisations. A relevant employee organisation is defined as an employee organisation that is entitled to represent the industrial interests of one or more employees who will be covered by the agreement in relation to work to be performed under the agreement – s12 FW Act.

7.3 In the construction industry this requirement means that disputes involving rival unions are common-place, and proceed either through the courts or are manifested in practice; disruption of projects where unions resent that another union has been chosen as the negotiating entity occur frequently in the building and construction industry, e.g. see *Australian Workers Union v Leighton Contractors Pty Ltd*[6] a case which proceeded to the Full Federal Court and involved a clash between the CFMEU and the AWU, a common clash.

7.4 Under s182(3) a greenfields agreement is made when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover. Obviously, a greenfields agreement does not need to cover every relevant employee organisation given the terms of the statute. However, the power that is vested in unions comes, in large part, from the fact

[6] (2013) 209 FCR 191

that employee organisations may merely hold up the completion of greenfields agreements by refusing to sign them, inclusive of making demands in respect of other projects before agreeing to sign.

7.5 As pointed out in paragraph 77 of the Explanatory Memorandum to the Bill, Part 2-4 of the FW Act provides a framework for the making of enterprise agreements through a process of collective bargaining in good faith. This process operates through the use of the bargaining representative concept where those bargaining representatives are bound to negotiate in good faith. This is not the case however for enterprise agreements that are greenfields agreements. Hence, currently there is no requirement for the parties to bargain in good faith, nor any capacity for the FWC to assist with greenfields bargaining disputes. This gives unions further leverage, especially when considered against the background of what has just been described about their ability to simply refuse to sign a greenfields agreement until their demands are met.

7.6 As also expressed in the Review Panel Report,[7] the bargaining practices of unions potentially threaten the future investment in major projects in Australia. The unacceptable behaviour of the unions was rightly recognised by the Panel as representing a risk which undermines the need for certainty over labour costs, particularly in construction projects, and has the capacity to inappropriately delay the commencement of major new projects. Unions are aware that the longer negotiations take, the more project costs increase and that to avoid these cost increases employers are likely to provide concessions to the unions.

7.7 The difficulties with greenfields agreements has meant that employers have often sought approval of an enterprise agreement, as defined in s172(2)(a), in the context of arrangements for establishing a new project. Employers have sought to make agreements with a small number of employees, albeit that the agreement contains a number of classifications beyond the employment terms of those current employees. In this way the employer does not have to negotiate a greenfields agreement with the union, especially as the union would view that opportunity to press what are often extravagant claims or claims in respect of other projects. Accordingly, many employers wish to elect

[7] Above note 2 at p171

to engage some workers with whom to negotiate as a means to avoid the inappropriate and costly provisions relating to greenfields agreements.

7.8 Following the recent judgment in *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* [8] it is clear that FWC must be satisfied that a group of employees is fairly chosen, based on the personnel who made the agreement. Justice Siopis in the decision said that the appropriate question for the FWC is whether the parties that made the agreement acted fairly in choosing the employees to be covered by the agreement. In that case there were three employees who had made the agreement. The CFMEU argued that they had not been fairly chosen because to permit the agreement to contain classifications in which the three employees were not engaged was inappropriate. The CFMEU also argued that it would be inappropriate because, ultimately, the employees to be covered by the agreement could not be specifically identified. The judge rejected the CFMEU's arguments, although this matter is on appeal.[9]

7.9 Master Builders supports the approach reflected in this case. It reinforces Master Builders' policy of seeking reform in this area by reinstating employer greenfields agreements. These are not exploitative instruments, as has been suggested by unions, because employees would be protected by the better off overall test and market conditions. **A better and recommended solution to the complex provisions in the Bill is the reintroduction of employer greenfields agreements.**

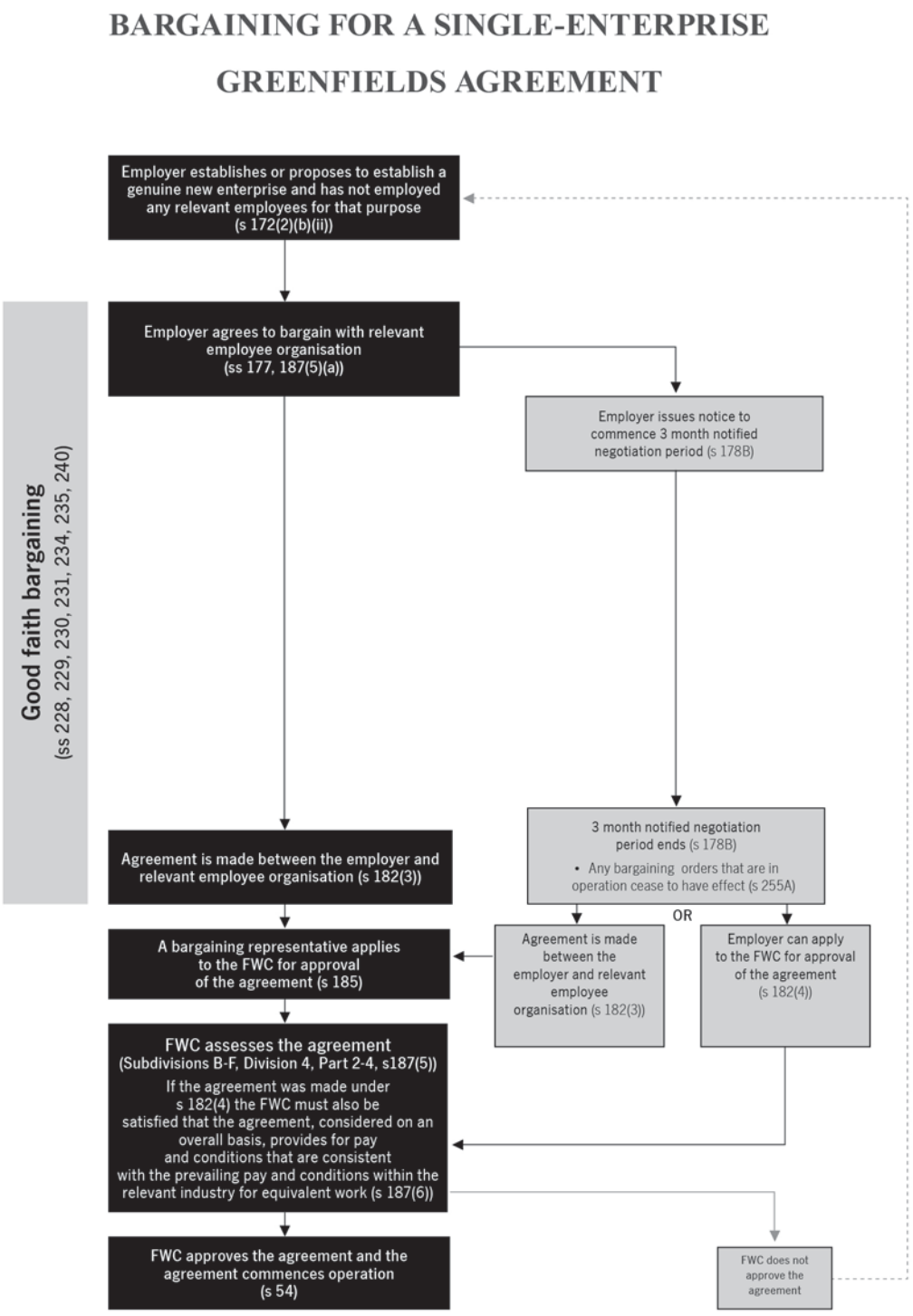
7.10 The Government has determined that the changes represented in Part 5 of Schedule 1 are an appropriate element to bring about reform in relation to greenfields agreements. Essentially, the concept of appointing a bargaining representative has been extended to greenfields agreements negotiations and their completion. In essence, Part 5 enables an employer to take a proposed greenfields agreement to the FWC for approval where agreement has not been reached within three months of the commencement of a notified negotiation period. The agreement will need to satisfy the existing approval tests under the FW Act as well as a new requirement that the agreement, considered on an overall basis, provides for pay and conditions that are

[8] [2014] FCA 286 (27 March 2014)

[9] See M Dunckley *CFMEU to appeal landmark pay case* Australian Financial Review 16 April 2014 p10

consistent with the prevailing standards and conditions within the industry in relation to the notion of "equivalent work". The arrangements for this new line of reform are extraordinary complex. This, in part, reflects the existing complexity of the agreement-making provisions of the FW Act generally. But the manner in which the reform is proposed adds to that complexity, albeit tentatively supported by Master Builders in light of the fact that the Government has not to date, from a policy perspective, embraced the re-introduction of employer greenfields agreements.

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



7.12 Item 23 of Part 5 Schedule 1 contains proposed s177 which sets out who would be bargaining representatives for greenfields agreements. It stipulates that an employer will be a bargaining representative. In addition, an employee organisation which was entitled to represent the interests of one or

more of the employees who would be covered by the agreement in relation to the work to be performed under the agreement will be a bargaining representative. That would be the case where the employer agrees to bargain with that union for a greenfields agreement per proposed s177(b)(ii). A facility also exists for an employer to appoint, for example, an industry association to be a bargaining agent per s177(c).

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

7.14 The Government is also committed to implementing an appropriate period for negotiation of greenfields agreements. Item 27 inserts proposed s178B which sets out the new process in relation to greenfields agreements. Under this process, in essence, a three month time limit for negotiating enterprise agreements will be able to be set. Following that period an employer may apply to the FWC to have the agreement made invoking the tests discussed at paragraph 7.10 above. A mechanism by which the three month period is established is in proposed s178B(1). It provides that a notice must be given to each employee organisation as a bargaining representative which specifies the day on which the notified negotiation period for the agreement will commence. The Bill contains some complex subsidiary provisions concerning that rule.

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

apply to the FWC for approval of the agreement. This approval process is set out under new s182(4).

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

7.17 The FWC must apply the existing approval requirements for agreements. As indicated in paragraph 7.10, in addition, the FWC would be required to consider a new matter. The FWC must consider that the agreement overall provides for pay and conditions which are consistent with the prevailing pay and conditions within the relevant industry for equivalent work per proposed s187(6). Master Builders opposes this provision. Because even though a note to s187(6) states that "in considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area", the uncertainty caused by this proposed provision and the high levels of discretion vested in the FWC may cause further uncertainty about what is or is not appropriate content. It is anticipated that complex and potentially lengthy litigation in the FWC to determine first the meaning of these new concepts and thereafter their differential application, having regard to the location where the greenfields agreement would operate, will exacerbate delays in completion of greenfields agreements contrary to the intent of the new provision. This delay is especially likely in the early stages of application of the new provisions. In addition, this test has not been introduced following supportive evidence of its necessity. There is no evidence of market failure

that the test is required to address. **Master Builders recommends that this new provision be removed from the Bill because it adds unnecessary administrative complexity and would permit the continuation of inflated workplace terms and conditions currently in place.**

8 Transfer of Business

8.1 Part 6 of Schedule 1 will implement Recommendation 38 of the Review Panel Report. The Panel recommended that the FW Act be amended to make it clear that when employees, on their own initiative, seek to transfer to an associated entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer. Items 54 and 55 implement that recommendation. This is effected by the non-application of the FW Act's transfer of business rules in circumstances where, before the termination of the employee's employment with the "old employer", the employee sought to become employed by the new employer. That step must be at the employee's initiative.

8.2 There are many issues of concern with the transfer of business provisions. Whilst the proposed changes are beneficial, the new law does not go far enough to effect reform in this problematic area.

8.3 It should not be necessary to require the parties to apply to the tribunal where an employee voluntarily seeks to transfer to a similar position in a related entity. This proposed amendment would spare the parties the time and expense in making such an application. However, Master Builders emphasises that overall the uncertain rules regarding transfer of business impede employers' ability to invest in established enterprises and their negative ramifications extend well beyond the current context.

8.4 Transfer of business rules should be limited to circumstances where a business has actually been transferred rather than to circumstances where there has been a transfer of work between two employers and the reason for the transfer of that work is the connection between two employers. **An immediate amelioration with the difficulties imposed by the rules would be to introduce a provision which replicates the effect of s582(2)(c) *Workplace Relations Act, 2006.* The effect of the provision was that the "old" arrangements only applied to the transferring employee for a**

maximum of 12 months and we recommend an urgent change to the law along those lines.

8.5 Master Builders however, recommends that this entire area of law should be urgently dealt with by way of further reform. But in the meantime the current limited reform proposal is supported.

9 Protected Action Ballot Orders

9.1 Part 7 of Schedule 1 implements the Review Panel report Recommendation 31. That recommendation was 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. It was also recommended that that the FW Act expressly provides that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.

9.2 The Bill would insert s437(2). This provision would clarify that bargaining is only begun where an employer has agreed to or initiated bargaining, or a union has obtained a majority support determination. Because a union has sought a scope order to determine the coverage of the proposed agreement is not sufficient to trigger the commencement of bargaining under the terms of the law that the Bill would introduce.

9.3 This Recommendation and the Bill's provision arise from the vexed outcome for employers of the *JJ Richards* case.[10] 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 enacted meant that this intention was not carried through into the legislative provisions.

9.4 This is a very important new provision. Protected industrial action should not be available before bargaining has commenced. Protected industrial action should only occur in support of claims made in bargaining. This provision will ensure that, at least in this part of the legislation, it is operating as intended and as pointed to by the Full Federal Court.

[10] *JJ Richards and Sons P/L v Fair Work Australia* [2012] FCAFC 53 (20 April 2012)

9.5 Again, this is an area crying out for reform generally. In particular, the test as to whether an applicant for a protected action ballot order is genuinely trying to reach agreement is set too low. All too often engagement in pattern bargaining or seeking that non-permitted matters are included in agreements are insufficient considerations to show that the applicant is not genuinely trying to reach agreement. Toughening the test to better curb pattern bargaining would assist with reform of building and construction industrial relations arrangements.

10 Right of entry

10.1 Part 8 of Schedule 1 deals with changes to right of entry laws. The Government's intention is to restore the rules about right of entry to those in place prior to the FW Act coming into force on 1 July 2009. The Government also wishes to reverse the onerous provisions introduced by the Fair Work Amendment Act 2013 (which came into effect on 1 January 2014) concerning rights to transport and accommodation on remote sites as well as mandating access to lunch rooms.[11]

10.2 As set out at paragraph 149 of the Explanatory Memorandum specifically the Bill will:

- repeal amendments made by the Fair Work Amendment Act 2013 that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
- provide for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers;
- repeal amendments made by the Fair Work Amendment Act 2013 relating to the default location of interviews and discussions and reinstating pre-existing rules; and

[11] Note 1 p5

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

10.3 The Royal Commission into the Building and Construction Industry[12] (Cole Report) found that the proper regulation of entry and inspection rights exercised by unions is a matter of considerable importance in bringing about change to the workplace relations of the building and construction industry. The overwhelming evidence presented to the Cole Royal Commission was that industrial disruption on building and construction sites followed upon union officials entering sites as a result of the exercise or purported exercise of a statutory entitlement. The Cole Report's finding was that industrial disputation was almost always the result of intervention in workplace relations by union officials. Nothing has changed since that time. Intervention is often contrived, uninvited and unwanted by affected employees. The Report found that entry and inspection provisions are routinely contravened in the building and construction industry. In order to restore the rule of law in the building and construction industry, entry and inspection provisions must be fundamentally reformed. That fundamental reform has not occurred and the provisions of the FW Act do not assist with the industrial realities faced by employers on a daily basis. Indeed, there is evidence that unions are deliberately seeking to eschew the FW Act's right of entry regime and to obtain "invitations" to enter premises[13]. Right of entry in this context requires root and branch reform. However, in the short term, the provisions of the Bill are welcomed.

10.4 In relation to the first dot point under paragraph 10.2 of this submission, items 57 to 61 of Schedule 1 of the Bill have the effect of repealing the requirements for employers to provide accommodation and transport to assist right of entry to remote or offshore sites. This repeal is supported. Employers are not travel agents.

10.5 In relation to the provision discussed at the second dot point under paragraph 10.2 of this submission, Master Builders fully supports the provisions of the new proposed s484. Item 61 of Part 8 of Schedule 1 of the Bill repeals the current s484 of the FW Act. It substitutes new criteria in relation to entry to

[12] http://www.royalcombci.gov.au/hearings/reports.asp

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

hold discussions. There are new criteria that a permit holder's organisation must satisfy so that right of entry for discussion purposes is lawful. Section 484(1) would provide for right of entry for discussion purposes in circumstances where the permit holder's organisation is covered by the enterprise agreement that applies to the work performed on the site. A permit holder is entitled to hold discussions in those circumstances with workers who perform work on the premises and whose industrial interests the permit holder's organisation is entitled to represent. In addition, the worker must want to participate in those discussions.

10.6 New proposed s484(2) sets out that for a right of entry for discussion purposes where the permit holder's organisation is not covered by enterprise agreement, different criteria apply. In those circumstances a permit holder may hold discussions with persons who satisfy three criteria that are the same as those set out in s484(1). The permit holder may hold discussions with those persons if, as expressed, in the Explanatory Memorandum:

- Either:
    - An enterprise agreement applies to work performed on the premises, but the enterprise agreement does not cover the permit holder's organisation (new subparagraph 484(2)(d)(i)); or
    - No enterprise agreement applies to work performed on the premises (new subparagraph 484(2)(d)(ii), and
- The organisation has been invited to send a representative to the premises by a member or prospective member who performs work on the premises, and whose industrial interests the permit holder's organisation is entitled to represent (new subparagraphs 484(2)(e)(i) and (ii)).

10.7 As can be seen proposed s484(2) requires a member or prospective member who performs work at the site to invite the organisation to send a representative to the site to hold discussions. The legislative note to s484(2) refers to the FWC's power to issue an invitation certificate under proposed s520A. That provision sets out that the FWC must be satisfied that the organisation has been invited. It is not mandatory for an organisation to apply for an invitation certificate to demonstrate that the requirement to be invited

onto the site has been satisfied. Instead, it is intended that, as expressed in the Explanatory Memorandum "for example a letter or voluntary statement from the member or prospective member who issued the invitation stating that he or she has extended such an invitation would be sufficient to demonstrate an invitation requirement has been satisfied."

10.8 Master Builders believes that, given the rivalry between unions in the building and construction industry, mentioned elsewhere in this submission, this is a balanced approach to the rights of unions to hold discussions, particularly in relation to discussions with those eligible to join particular unions. The reform will discourage "entrepreneurial" entry by unions and strategies that might have the effect of adversely affecting an employer and those working on site. Master Builders has no concerns with the Bill's requirements set out in s520A about the basis upon which invitation certificates may be issued by the FWC.

10.9 Despite the comments in the prior paragraph, Master Builders is concerned that the concept of a required statutorily recognised "invitation" may engender disputes. It is commonplace for construction union officials exercising right of entry to investigate suspected breaches (both under the Fair Work Act 2009 and work health and safety laws) to state that they are entering on the basis of some undisclosed member's request or advice. Determining the veracity of these statements currently leads to considerable confusion on the site, with disputation resulting. The present drafting of the substitute s484 provision does not allay concerns that similar tactics may be adopted by union officials, with the threat of prosecution for hindering or obstructing the official being used to press the right to enter (note 2 of the proposed s484(2) specifically raises this question). To avoid this issue, Master Builders recommends that the Bill be amended so that it indicates that an occupier is not unduly delaying entry by requiring the official to obtain a certificate under the new s520A unless the occupier has received a written request from a member who meets the other criteria set out in the proposed s484(2)(e).

10.10 In respect of the matter dealt with at the third dot point under paragraph 10.2, Master Builders fully supports the reactivation of the prior law. Item 62 of Part 8 of Schedule 1 reinstates the prior law and repeals current s492. Currently s492(1) enables permit holders to conduct interviews or hold discussions in rooms or areas agreed by the "occupier of the premises" or site in the case of the building and construction industry. However, if no agreement exists, the

default location for interviews or discussions will be any room or area where one or more of the persons interviewed or involved in discussions usually take their meal or other breaks. This is a default arrangement highly favourable to unions. We do not support changes which gave unions the ability to use an employer's lunch room to hold meetings. Lunch rooms are places where employees are able to take a spell from their job and enjoy their meal time in peace. Union meetings and activities should not be forced upon non-union workers enjoying their meal breaks, especially as approximately 82 per cent of Australian workers are not members of a trade union.

10.11 The default position also currently enables unions with a small membership at a site to expose non-members to discussions and hence aid recruitment into a rival union. It pushes the balances of the arrangements too far in favour of the unions, an environment where union rivalry is already adversely affecting productivity as illustrated in the example in this submission of the rivalry between the CFMEU and the AWU. There was nothing in the prior law which was deficient which required the change to the law made by the *Fair Work Amendment Act 2013.* The prior law which is that employers had the right to determine the location of union meetings in the workplace on the basis of the location being reasonable is a fair provision. This is because unions possessed the right to challenge the location in the FWC if they regarded it as unreasonable. The lack of disputes in this particular area over many years indicates that the balance was appropriate and the expansion that was brought about (now to be reversed) was inappropriate.

10.12 Master Builders supports the additional powers vested in the FWC, discussed at the fourth dot point in paragraph 10.2 concerning the frequency of visits to premises for discussion purposes. There should be a mechanism in the legislation which permits employers to obtain relief where multiple visits disrupt construction sites because visits to discuss matters with employees proliferate, especially where a number of union officials insist on those visits as a group: see box for case study.

Condor Towers: Abuse of Right of Entry

The project was "Condor Towers", a multi-storey unit complex being built in Adelaide Terrace Perth. The builder Q-Con, only undertook "one off" projects like this and secured their own private sector finance for the project. As a result, the builder did not "sign off" an enterprise pattern agreement endorsed by the CFMEU, as it had no ongoing presence in the commercial sector.

The Condor Tower project started in late 2005 but attracted union attention from early 2006 as the CFMEU attempted to persuade the builder to sign up to the union pattern agreement. The builder refused. The construction site was subject to significant levels of union harassment and intimidation as a result.

The builder kept a log of union visits to the site which revealed union visits numbering up to 4 per day by CFMEU and CEPU officials. The site logs from February 2006 to May 2007 showed 96 separate site visits by union officials of which 39 were for reasons of investigating alleged safety breaches.

The site suffered one major safety incident involving a small concrete blow-out of a concrete pre-cast panel during a concrete pour. All safety procedures on site worked resulting in no injury or risk to employees except being splashed with wet concrete.

That incident was investigated by Worksafe WA which found no breaches of safety standards. The blow-out was caused by a manufacturing fault in the pre-cast panel with site safety systems all working well to keep workers away from the site and pour. However, the intense level of disruption continued into 2008 and for most of the project's construction phase. This dispute was covered in the press including as follows:

> *MILITANT union boss Joe McDonald, caught on video directing an expletive-ridden tirade about safety issues at a construction manager, has claimed vindication after a workplace accident at the same building site yesterday.*
>
> *Labor leader Kevin Rudd last month called for Mr McDonald to be dumped from the party after the union hardman was shown calling the manager a "f...ing thieving parasite dog" while apparently trespassing on a Q-Con site in Perth.*
>
> *Yesterday he returned to the Condor Towers construction site in the city's CBD after chunks of concrete were reported to have fallen from the 16th floor during a concrete pour at 9.30am. It was claimed that three tonnes of concrete was then poured through the hole.*
>
> *"It's the same building, the Q-Con building," said Mr McDonald, the assistant secretary of the Construction Forestry Mining and Energy Union's West Australian branch.*
>
> *"Nobody was hurt but it is just a miracle. Someone is going to be killed on this job. We've been saying that for months."*
>
> *A spokeswoman for WA's WorkSafe challenged details of the accident.*
>
> *She said the officers found that concrete had not fallen from the building, but a 30cm by 40cm piece of the panel had "given way" following the pour and was "hanging like a cat door".*
>
> *"It was hanging there until the officers safely removed it," she said.*
>
> *Mr McDonald, 53, has lost his state and federal right-of-entry cards and is not allowed on any building site uninvited following indiscretions, which include kicking a construction manager in the shin in 2004.*[14]

[14] The Australian 6 July 2007

10.13 To deal with the sort of situations set in the case study, the Bill would amend current s505. At present, an employer may challenge the frequency of visits where the frequency of entries by permit holders of a single union would require an unreasonable diversion of the occupier's critical resources. That restriction (with its inherent difficulty in distinguishing what is "critical" as opposed to "other" resources) would be removed by Item 65. In turn, Item 66 would establish new criteria by which FWC must deal with the relevant dispute about frequency of visits. Master Builders supports these criteria. FWC must take into account:

- fairness between the parties concerned (see new paragraph 505A(6)(a)); and
- if the dispute relates to an employer – the combined impact on the employer's operations of entries onto the premises by permit holders of organisations (see new paragraph 505A(6)(b)); and
- if the dispute relates to an occupier of premises – the combined impact on the occupier's operations of entries onto the premises by permit holders of organisations (see new paragraph 505A(6)(c)).

10.14 The question of right of entry permits including a photograph of the permit holder is also Government policy.[15] Whilst this provision is absent from the Bill, it is recommended that such a provision be introduced via regulation[16] to reinforce the current reform and to reduce the risk of misrepresentation of the status of an invalid permit holder.

11 FWC Hearings and Conferences

Part 9 of Schedule 1 deals with this issue. It amends the FW Act in relation to unfair dismissal. The effect of the amendments would be that FWC would not be required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application in certain circumstances. Relevant amendments implement the Fair Work Review Panel Recommendation 43. Master Builders supports all of these amendments because they will add to the efficiency of the processes in dealing with unfair dismissal applications. They are supported without qualification.

[15] Above Note 1 at p18.

[16] See s521, *Fair Work Act, 2009* for a suitable power.

12 Unclaimed Money

Part 10 of Schedule 1 deals with unclaimed money. Essentially when the FWO collects underpaid or unpaid wages or other monies by way of entitlement on behalf of employees and those monies are unclaimed, the FWO would be required to pay interest on those amounts where they exceed $100 and have been unpaid for more than six months. This is supported. Workers deserve to have their entitlements remitted to them with interest that would otherwise accrue to the holders of those monies.

13 Application and Transitional Provisions

13.1 There are a large number of differential changes in respect of each part of the Bill's commencement. Two aspects of these applications dates are of concern. In short the transitional provisions are as follows:

- Requests for additional unpaid parental leave is required after the commencement of the legislation, i.e. requests following the day the Act receives Royal Assent will be caught;

- Payment of leave loading on termination will also apply the day after the Act receives Royal Assent where the end of employment occurs after that time;

- Annual leave during workers' compensation - the provisions of Part 3 of Schedule 1 will also take affect the day after the legislation receives Royal Assent. In other words the provisions of that part will apply to periods of workers' compensation which are paid on or after that day.

- Individual flexibility arrangements. The changes to IFAs are scheduled to begin on a day fixed by proclamation. If the provisions do not commence within six months after the giving of Royal Assent they are deemed to commence on the day after the end of that six month period. Given the urgency in relation to the problems with IFAs, **Master Builders does not agree that the provisions should await a further six months before they are implemented.**

- Greenfields Agreements. These new provisions will commence the day after the Act receives Royal Assent. In other words negotiations which

begin after the provisions commence will be governed by the reforms. This is supported.

- Transfer of business. Part 6 will also commence the day after the Act receives Royal Assent. Obviously the trigger for their application is where an employee becomes employed by a new employer after that date.

- Protected action of ballot orders. Part 7 is also to come into effect the day after the Act receives Royal Assent and will apply to applications for orders after that date.

- Right of entry. These provisions will commence on a day to be fixed by proclamation and in default after six months from the date of Royal Assent. The delay proposed is again unacceptable and **the provision should be changed to as soon as possible.**

- FWC hearings and conferences. These provisions are due to come in the day after the Act receives Royal Assent. In other words they would apply to unfair dismissal applications made after the provisions commence.

- FWO interest payments. These are due to come into effect on a day to be fixed by proclamation or within six months after the giving of Royal Assent as a default. In this context the delay is appropriate given the need for the FWO to implement new systems to meet the additional requirement.

14 Conclusion

14.1 The Bill, while supported, is nevertheless a piecemeal approach to reform. The complexity of the changes set out in the Bill, particularly in relation to greenfields agreements and right of entry show that these areas in particular need an approach which starts with a root and branch examination of the policy parameters of the FW Act.

14.2 Master Builders looks forward to working with the Government to overhaul the unbalanced Fair Work Act and, in the interim, submits that the Bill should be passed, preferably with the changes set out in this submission.

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Attachment B

Master Builders Australia

NATIONAL WORK HEALTH AND SAFETY RIGHT OF ENTRY POLICY

July 2014

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LIST OF RECOMMENDATIONS FOR NATIONAL WORK HEALTH AND SAFETY RIGHT OF ENTRY POLICY 2014

Recommendation	**1.**	The person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety, as a defence to taking industrial action, has the burden of proving that the imminent risk exists.
Recommendation	**2.**	WHS permit holders that are found to have contravened their permit conditions should be prosecuted and the WHS permit holder's permit should be suspended or revoked.
Recommendation	**3.**	Permit holders should be accompanied by a nominee of the PCBU at all times while on site.
Recommendation	**4.**	Given the history and on-going occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to them being accompanied by an authorised inspector from the relevant regulatory body if requested by a PCBU who has management or control of the workplace.
Recommendation	**5.**	Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.
Recommendation	**6.**	The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and/or State and Territory law should not be eligible to obtain a permit.
Recommendation	**7.**	The model Act should be amended to require officials to hold a FW Act entry permit before being issued with a WHS entry permit.
Recommendation	**8.**	Union officials exercising right of entry powers for WHS purposes should be required to hold approved nationally recognised WHS qualifications under the Australian Qualifications Framework system, such as a Certificate IV in Workplace Health and Safety.

Recommendation	**9.**	Each jurisdiction should amend its model Work Health and Safety Act to require any person wishing to enter a workplace under sections 68, 81 or 117 of the model Act to give at least 24 hours' written notice during usual working hours in all circumstances. Persons should not be able to tender multiple dates as a way of circumventing this requirement. If a person fails to adhere to these notification requirements, that person must be penalised for breaching a condition of the entry permit and WHS regulators must rigorously apply the law.
Recommendation	**10.**	Each jurisdiction should amend its model Work Health and Safety Act to require a WHS permit entry holder to provide a written report as soon as practicable but at least within 14 days from the date of entering a workplace. The report should be lodged with the regulator and served on the PCBU. The report must be completed in good faith and set out any allegations clearly and objectively, providing substantiation of any allegations of imminent danger. It should be in a form similar to the Workplace Health and Safety Queensland Inspection Report and contain the following information: • The WHS entry permit holder's full name and signature; • The permit number; • The name and address of the workplace that was entered; • Details of conversations and actions taken by the WHS entry permit holder when attending the workplace; • Details of any alleged contravention of the Act that, in the opinion of the WHS entry permit holder, has occurred; and • Whether there was considered to be a serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation known to the WHS entry permit holder. Where multiple WHS entry permit holders attend a workplace on the same occasion, each WHS entry permit holder is required to submit an individual report. Failure by a WHS entry permit holder to provide a report in accordance with this provision or abuse of the reporting

		requirement should be grounds for a suspension or revocation of the WHS entry permit holder's permit.
Recommendation	**11.**	Each jurisdiction's work health and safety regulator should implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time. It should be grounds for the suspension or revocation of the WHS permit holder's permit if the WHS permit holder has been found to have intentionally breached WHS right of entry laws or has breached WHS right of entry laws on multiple occasions.
Recommendation	**12.**	The model Act should be amended to include a statutory note or provision acknowledging the fact that it operates in conjunction with Part 3-4 of the FW Act. The model Act should be amended to clarify that entry to a site for the purpose of assisting a health and safety representative pursuant to s 68(2)(g) of the model Act is a State or Territory OHS Right for the purposes of the FW Act. The model Act should be amended to clarify that entry to a site for the purpose of attending discussions with a view to resolving a dispute pursuant to s 81(3) of the model Act is a State or Territory OHS Right for the purposes of the FW Act.
Recommendation	**13.**	Section 125 of the model Act should be amended to require a WHS permit holder to present their permit for inspection upon entering a workplace. The permit should be displayed in a manner so as to allow proper inspection by the person inspecting the permit. Entry permit holders should be required to clearly display their permits at all times whilst on site. This requirement should not be dependent on a request from any person to view the permit. The model Act should also be amended to penalise a WHS permit holder from altering or tampering in any way with their permit.

Recommendation	**14.**	Each jurisdiction should amend its model Act to ensure that an objective need for assistance is demonstrated before a health and safety representative may request assistance under s 68(2)(g). A health and safety representative must be able to demonstrate that assistance was reasonably necessary in the circumstances and that the need for assistance can be objectively proven. In order to gain entry to a site for the purpose of assisting a health and safety representative, an assistant should possess sufficient qualifications to be able to provide assistance to the health and safety representative appropriate to the particular problem. Minimum qualifications required for entry to a site in accordance with Recommendation 8 should not be taken as sufficient per se to satisfy this requirement.

1 INTRODUCTION

1.1 The safety and health of all participants in the building and construction industry is of the utmost importance to Master Builders Australia. Master Builders has a range of policies that promote a healthy and safe construction industry. Master Builders also acknowledges that trade unions also share these goals.

1.2 Union officials have broad rights to enter a workplace for work health and safety reasons under the model *Work Health and Safety Act* (WHS Act) and other OHS legislation.[1] Throughout this document when reference is made to work health and safety (WHS) law it includes the laws of all jurisdictions dealing with occupational health and safety. These rights are often the subject of dispute between employers and unions.

1.3 This policy gives an overview of the abuse of WHS right of entry powers and the current legal framework that sets out the powers and procedures for entering a workplace under a WHS right of entry permit. The policy then sets out Master Builders' proposal for reform and sets out recommendations to ensure that WHS right of entry powers are only used for legitimate purposes. It is an update of Master Builders' prior policy.

2 ABUSE OF WHS RIGHT OF ENTRY

2.1 The Cole Royal Commission into the building and construction industry was the first national review of conduct and practices in the building and construction industry in Australia.[2] The principal reasons given by the then Minister for Employment and Workplace Relations for commissioning the inquiry included high levels of complaint about freedom of association ('no ticket no start'), a strike rate that was five times the national average, massive variations in commercial construction costs from State to State as a result (sometimes as much as 25 per cent), and concerns about violence and intimidation on building sites,[3] which is clearly a WHS issue.

[1] For example: *Occupational Health and Safety Act 2004* (Vic) and *Occupational Safety and Health Act 1984* (WA).
[2] *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, volume 1, February 2003, 3.
[3] *Current Issues Brief* no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations.

2.2 The Cole Royal Commission reported that:

> *OH&S is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. The scope for misuse of safety must be reduced and if possible eliminated.*[4]

2.3 The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

- it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
- the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
- the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
- time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere.[5]

2.4 One of the responses to the Cole Royal Commission was the passage of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act). Section 36(1)(g) of the BCII Act, which is now repealed, provided that employees and others were not taking building industrial action where:

> *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*
>
> *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.*

2.5 This provision proscribed the taking of industrial action on the basis of spurious WHS grounds. Despite this provision employers in the construction industry reported that abuse of WHS continued to be a problem and is confronted regularly and, on some sites, on a regular basis over protracted periods. The former

[4] Above n1, 57.
[5] Above n1, 102.

Australian Building and Construction Commissioner brought a number of cases of abuse of WHS for industrial purposes to the courts.[6]

2.6 The introduction of the *Fair Work Act 2009* (Cth) (FW Act) changed this law. Section 19(2) of the FW Act excludes from the notion of industrial action, action taken by an employee based on his or her concern about an imminent risk to their health or safety and where they have not unreasonably failed to comply with an employers' direction to perform other available work. The onus of proof appears not to be the same as was under the BCII Act per *CFMEU v Hooker Cockram Projects NSW Pty Ltd*[7] where Master Builders intervened. The Full Bench of the then Fair Work Australia was of the opinion that the decision to not include a similar provision into the FW Act was intentional.

2.7 There have been many examples of unions using spurious health and safety issues as justification for the disruption of work on construction sites. For example, in the recent case of *Laing O'Rourke Australia Pty Ltd v CFMEU*,[8] the allegations by the Construction, Forestry, Mining and Energy Union (CFMEU), the Communications, Electrical, Plumbing Union (CEPU) and Builders Labourers Federation Queensland (BLF) of serious workplace health and safety issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland.[9] Justice Collier stated that:

> *The contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues*.[10]

2.8 The Building and Construction Industry (Improving Productivity) Bill 2013 introduced by the Abbott Government contains a clause which stipulates that 'whenever a person seeks to rely on [the health and safety exception for industrial action], the person has the burden of proving the paragraph applies'.[11] Master Builders supports the re-establishment of this provision, i.e. the reverse onus of proof criterion. Master Builders contends that the reverse onus of proof provision should also be inserted into the FW Act.

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[6] See for example: *Cruse v Construction, Forestry, Mining & Energy Union* (2009) 187 IR 335; *Alfred v Wakelin (No 4)* (2009) 180 IR 335; *Draffin v Construction, Forestry, Mining & Energy Union* [2009] FCAFC 120; *Hadgkiss v Construction, Forestry, Mining & Energy Union* (2008) 178 IR 123.
[7] [2013] FWAFB 3658 at [4].
[8] [2013] FCA 133.
[9] Ibid, at [33].
[10] Ibid, at [33].
[11] Building and Construction Industry (Improving Productivity) Bill 2013, clause 7(4).

2.9 Master Builders submits that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. The reintroduction of the repealed reverse onus of proof provision will essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.

Recommendation 1

The person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety, as a defence to taking industrial action, has the burden of proving that the imminent risk exists.

2.10 Master Builders is aware of the industry practice of some union officials who enter a workplace to inquire about the suspected contravention of WHS laws, find a dubious WHS hazard, warns workers that they are exposed to a serious risk to their health or safety, and then directs that the workers cease work. The entire project then shuts down and all workers walk off the job under the guise of WHS concerns. Examples of these are given in the table at paragraph 2.22 below. Master Builders submits that this behaviour needs to be investigated by WHS regulators and breaches of the cessation of unsafe work provisions of the WHS Act, including the requirement to undertake alternative work, need to be enforced. If it is found that a WHS permit holder has pressured a worker or group of workers into ceasing work where that cessation is not in response to a reasonable concern that the worker would be exposed to a serious risk emanating from an immediate or imminent exposure to a hazard, the WHS permit holder should be prosecuted for contravening the permit conditions.

Recommendation 2

WHS permit holders that are found to have contravened their permit conditions should be prosecuted and the WHS permit holder's permit should be suspended or revoked.

2.11 Master Builders is also aware of a number of abuses of right of entry in the construction industry where builders are faced with flagrant breaches of the right of entry laws with some industry participants wearing trespass prosecutions as a badge of honour.[12] This abuse is especially evident in relation to WHS where urgent Government action to resolve the potential conflict between s121 and s146

[12] 'Union Boss Arrested in Perth' (*WA Today*l, 4 February 2011), http://www.watoday.com.au/wa-news/union-boss-arrested-in-perth-20110204-1agly.html, accessed 17 July 2014.

of the harmonised WHS Act is required. In particular, the drafting of section 146 of the WHS Act makes it unclear whether or not the phrase 'or disrupt any work at a workplace' is intended to be read as being conjunctive or subjunctive. If the phrase is conjunctive, then the qualifier 'intentionally and unreasonably' would apply to a disruption to work. If the phrase is subjunctive, then any disruption to work would appear to be prohibited which, prima facie, appears to be at odds with the very broad right of entry granted by s121 of the WHS Act. Master Builders has received reports over many years that the WHS Act is being used to gain entry where disruption follows, as we now illustrate.

2.12 On 8 October 2010, CFMEU organiser, Derek Christopher, entered a building site in Bourke Street, Melbourne. While on the site, the organiser verbally abused and assaulted a project manager. The organiser was fined by the Melbourne Magistrates Court.[13] The CFMEU was also fined $10,000 by the Federal Magistrates Court after it admitted that the same organiser, Derek Christopher, repeatedly abused a site manager and threatened him with assault at a building site in La Trobe Street, Melbourne in October 2009.[14]

2.13 In *Darlaston v Parker*,[15] the Federal Court of Australia found that three CFMEU officials had breached the then *Workplace Relations Act 1996* (Cth) while on a building site under a right of entry permit on 3-4 December 2008. The three union officials failed to follow a reasonable safety instruction, namely to undergo a brief safety induction before entering the site.[16] The Court also found that CFMEU official, Thomas Mitchell, was also in breach of the Act by not following a reasonable request to come down from scaffolding,[17] CFMEU official, Brian Parker, was in breach for hindering and obstructing workers,[18] and Thomas Mitchell was found to be acting in an improper manner when he intentionally drove his car into a cyclone fence, endangering a bystander.[19]

2.14 WHS requirements vary from site to site and are often extensive and complex. The full extent of safety requirements may not be apparent to visitors to the site,

[13] Steve Butcher, 'CFMEU official Derek Christopher fined for assaulting manager' (*The Age*, 28 August 2013), http://www.theage.com.au/victoria/cfmeu-official-derek-christopher-fined-for-assaulting-manager-20130828-2spop.html, accessed 17 July 2014.
[14] Fair Work Building and Construction, 'Vic CFMEU penalised $10,000 for abuse and assault threats' (media release, 21 February 2012), http://www.fwbc.gov.au/vic-cfmeu-penalised-10000-abuse-and-assault-threats, accessed 17 July 2014.
[15] [2010] FCA 771.
[16] Ibid, at [125].
[17] Ibid, at [144].
[18] Ibid at [165].
[19] Ibid at [193].

including WHS right of entry permit holders, particularly in light of the failure to undergo safety induction by the officials in *Darlaston v Parker*.[20] Another example is a recent Federal Circuit Court case which considered the actions of a union official on a Brisbane construction site. When reminded about protective clothing he should have been wearing, the union official replied, "I don't have to answer to you, you f***ing little grub."[21] This demonstrates how the actions of union officials can deliberately devalue safety on site where officials refuse to follow reasonable safety procedures.

2.15 In order to ensure the maintenance of a safe work site, and prevent the abuse of rights of entry, WHS right of entry permit holders should be accompanied by a nominee of the PCBU at all times while on site. Although this recommendation is made in the face of many union officials refusing to undertake site safety inductions, there is not, nor should there be, any requirement for WHS entry permit holders to undertake full site inductions, unless requested by site management.. Note that recommendation 4 does not obviate the need for the person to be accompanied by an officer of the PCBU. Union officials should be accompanied by site management at all times while on site, regardless of whether or not they are also accompanied by an authorised inspector.

Recommendation 3

Permit holders should be accompanied by a nominee of the PCBU at all times while on site.

2.16 The Federal Magistrates Court fined the CFMEU and two of its organisers, Michael Powell and Alex Tadic, for encouraging workers to stop work on a Victorian project on 31 January 2008.[22] While on the site it was alleged that Mr Tadic refused to comply with requests made by Victoria Police for him to leave the site and

[20] Ibid at [125].

[21] Fair Work Building and Construction, 'Judge finds CFMEU's actions represent "gross failure of corporate governance" (Media Release, 9 July 2014). http://fwbc.gov.au/sites/default/files/Judge%20finds%20CFMEU%27s%20actions%20represent%20gross%20failure%20of%20corporate%20governance.pdf, accessed 17 July 2014.

[22] 'Trade union and two officials fined' (*The Australian*, 7 April 2011), http://www.theaustralian.com.au/news/latest-news/trade-union-and-two-officials-fined/story-fn3dxity-1226035600885, accessed 17 July 2014.

repeatedly swore at the police officers and encouraged them to "f*****g well shoot".[23]

2.17 Other historical, albeit well documented, examples below show blatant examples of abuse of WHS rights by the CFMEU or its officials; these cases comprise the tip of the iceberg.

2.18 In *Cruse v CFMEU and Stewart*[24] a bus which was travelling to a site was involved in a 'near miss' with a train at a level crossing. A stop-work meeting was called while the OHS committee discussed the issue. The site OHS representatives agreed that it was safe for the workers to return to work. By the end of the day, the head contractor had repainted the lines on the road, installed electronic signs and erected a stop-sign. Despite this, the workers voted to go on strike for 10 days. Penalty of $35,000 imposed on the CFMEU and a penalty of $7,000 imposed on the CFMEU official ($3,500 suspended for 12 months).

2.19 In *Alfred v Wakelin, Abela, Batzloff, Jones, O'Connor, CFMEU, CFMEU QLD branch, FEDFA QLD, AWU and AWU (NSW)*,[25] a maggot was found inside an employee's lunch box. The unions claimed this constituted "…major hygiene concerns with the camp". The workers went on strike twice for a total of 4 days. Two NSW Health Inspectors conducted an inspection and neither found serious breaches of hygiene standards. The CFMEU notified the AIRC of a dispute relating to the hygiene standard. The AIRC accepted that while the performance of the caterer had been less than exemplary the claim of safety problems was not convincing.

2.20 In *A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU (NSW), Primmer, Lane & Kelly*,[26] the CFMEU took action with intent to coerce a head-contractor to terminate its contract with Silvestri because Silvestri didn't have a union EBA. With intent to coerce the head contractor, the union threatened to call the NSW OHS Authority and have the job shut down.

[23] Office of the Australian Building and Construction Commissioner, 'ABCC v Powell and Tadic' (Backgrounder, 15 July 2011), http://www.fwbc.gov.au/sites/default/files/20110715ABCCvPowellAndTadic_BG.pdf, accessed 17 July 2014.
[24] [2007] FMCA 1873.
[25] [2009] FCA 2677.
[26] [2007] FCA 1047.

2.21 Other common examples of routine breach of union right of entry by the CFMEU noted by Master Builders in 2013 include the following examples, none of which are before the courts:

2.21.1 CFMEU organiser who holds a federal permit enters a construction site without permission from the occupier or exercising a formal right of entry. The organiser initially alleges that there is an immediate risk to health and safety and directs workers to stop work and vacate the site. When challenged by management on the immediate risk, the organiser advises that no further work will occur until a CFMEU–appointed health and safety representative is employed on site. Despite best efforts of site management, employees of a number of subcontractors engaged on-site leave site at the direction of the organiser.

2.21.2 CFMEU official who holds a federal permit enters a construction site without permission of the occupier or exercising a formal right of entry. When told by site management to leave as he has no right to be there, he refuses to follow the formal right of entry process and threatens to close down the site (and other projects of the company) if they seek to have him removed. The organiser advises site management that he will stop all of its jobs around Melbourne unless they sign the union pattern agreement. This unlawful demand is refused. The following day, access to five of their sites is blocked by workers from other sites, allegedly at the direction of the CFMEU. This results in the prevention of concrete truck deliveries to the site.

2.21.3 CFMEU organiser who holds a federal permit enters construction site asserting that it is in accordance with right of entry. The organiser presents inter alia a Notice of Suspected Contravention (as required under the Victorian OHS Act) to a subcontractor alleging that the workers had not been provided with manual handling training and that an immediate risk to health and safety exists. Prior to issuing the notice, the organiser had directed work to cease (something that the organiser has no power to do). Whilst on site, the organiser advises the subcontractor not to work on the upcoming long weekend and also seeks to have them appoint a CFMEU nominated health and safety representative/shop steward. WorkSafe is called in and confirms that there was no immediate risk to workers such

that work should have ceased, but does not follow up on the alleged clear breach of the OHS Act by the CFMEU.

2.22 The reality reported to Master Builders by members is that in addition to union reprisals, there is simply no appetite by the relevant authorities to actively follow up on right of entry/trespass abuses, which are regularly mischaracterised as safety disputes. Queensland Master Builders Association provided a submission to the Queensland Government describing the spurious WHS stoppages contained in the following table. These examples were not litigated:

Emergency Lighting:
Union officials stop all employees working on a major construction project as there was no battery backup for lights in the amenities.

Union officials stop all employees working on a major construction project as there was no battery backup for emergency stairwell lights.

Evacuation Plan:

Union officials stop all employees on site to conduct a fire drill without notice, without consultation and without regard for the productivity of workers.

Fire extinguishers:

Union officials stop all employees working on one level of a construction project as there was not three separate fire extinguishers despite the two extinguishers complying with all fire requirements.

Site Access & Egress:

Union officials stop all employees working on site as one of the two emergency stairwells was partly wet from rain or if rubbish bins were blocking an exit.

Amenities:
Union officials stop all employees working on a major construction site due to any of the following: insufficient toilets, insufficient water coolers, dirty toilets, no covered walkways to amenities, insufficient seating for all site workers, a minor urine spill, no plumbed in toilets and insufficient tables.

Dewatering:
Following rain the union enter site and sit the workforce in the lunch rooms until the full site is inspected and dewatering is conducted. The union prevent workers returning to work in dry unaffected areas.

Housekeeping:
The union stop all workers on site while three of four workers clean the site.

Two Stair Access:
The union stop all workers on site when there is no second set of stair access to a work area despite there being no such legislative requirement.

Emergency access:
The union stop workers on site whilst they conduct a review of emergency access and rescue from Jump-forms or tower cranes regardless of any prior liaison with and drills with Queensland Fire and Rescue by the builder.

2.23 To ensure that WHS right of entry powers are not abused and only legitimate WHS issues are being investigated, right of entry permit holders should be accompanied by an authorised inspector from the relevant regulatory body if requested by a person conducting a business or undertaking (PCBU) who has management or control of the workplace.

Recommendation 4

Given the history and on-going occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to them being accompanied by an authorised inspector from the relevant regulatory body if requested by a PCBU who has management or control of the workplace.

2.24 This ongoing abuse of WHS jeopardises the objective of achieving a significant and sustained reduction in building and construction workplace fatalities and injuries because it does nothing to foster the constructive approach required to achieve this outcome. The practice of using WHS as a smokescreen for other issues denigrates its importance on building sites and shows gross disrespect to those who are genuinely seeking to improve WHS performance. Safety should not be relegated to a device to obtain workplace relations outcomes.

3 WHS RIGHT OF ENTRY LAWS

3.1 Right of entry for WHS purposes is authorised under State and Territory WHS laws, although the FW Act imposes the following additional requirements on union officials seeking to exercise those rights:

- A union official who wishes to enter a site for WHS purposes must have an entry permit under the FW Act as well as a WHS permit.[27] A permit holder must produce his or her permit for inspection when requested to do so by the occupier of the site or an affected employer.[28]
- A permit holder may only exercise right of entry under WHS laws during work hours.[29]
- A permit holder must not exercise a WHS right unless he or she complies with any reasonable request by the occupier of the site to comply with any

[27] Model Act, s 124; FW Act s 494.

[28] Model Act s 125; FW Act s 497.

[29] Model Act s 126; FW Act s 498.

WHS requirements that apply to the site.[30] For example, a permit holder may be asked to wear personal protective equipment or follow a particular route to gain access to part of the site.

- A permit holder must not exercise a WHS right to inspect or otherwise gain access to an employee record unless the permit holder gives at least 24 hours' notice.[31]

3.2 An application for a WHS entry permit can only be made by an employee of a union.[32] Applications to be issued with a WHS right of entry permit are made to the relevant authorising authority in each state.[33] The process of obtaining a WHS right of entry permit should be subject to strict guidelines. Only 'fit and proper' persons as defined under an enhanced test advocated by Master Builders[34] should be able to hold a WHS right of entry permit. This proposed two-stage threshold test would require persons wishing to hold a WHS entry permit to prove:

3.2.1 that they have not, within the past five years, been convicted of any offence involving:

- occupational health and safety;
- entry onto premises;
- fraud or dishonesty;
- intentional use of violence against another person; or
- intentional damage or destruction of property; and

3.2.2 that they are of good fame and character. This would involve providing a declaration that:

- they have not been refused membership of, or had their membership suspended or cancelled by a registered organisation, because they had engaged in fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;

[30] Model Act s 128; FW Act s 499.

[31] FW Act, s 495.

[32] Model Act, s 133.

[33] Ibid.

[34] Master Builders Australia, 'Submission on Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and Proper Person Test', Submission made to the Minister for Workplace Relations, 26 August 2013.

- they have received appropriate training about their rights and responsibilities as a WHS entry permit holder; and
- the public would have confidence in the person's suitability to hold a WHS entry permit.[35]

3.3 A WHS entry permit gives the holder broad powers to enter workplaces and investigate WHS issues.[36] Ensuring only 'fit and proper' persons are able to obtain a permit would be a useful vetting tool in this regard. Any person who has a criminal record or a history of breaches of right of entry provisions should also not be able to hold a WHS right of entry permit.

Recommendation 5

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

Recommendation 6

The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and/or State and Territory law should not be eligible to obtain a permit.

3.4 Union officials are currently able to obtain a WHS entry permit where the official "holds, or will hold, an entry permit" under the FW Act or a relevant State or Territory law. The circumstances in which it can be said that an official 'will hold' a FW Act permit are unclear, and Master Builders has received reports of union officials obtaining WHS entry permits without possessing a FW entry permit, or with a low probability of being issued with one. Officials may then seek to enter sites on the basis of their WHS entry permit, which can be confusing for site managers. In order to clarify this discrepancy, Master Builders recommends that possession of an entry permit under the FW Act should be a condition precedent to obtaining a WHS entry permit. This should be done by deleting the words "or will hold" from section 133(c) of the model Act.

[35] Master Builders also promoted the test in a submission to the Royal Commission into Trade Union Governance and Corruption dated 11 July 2014 (G:\Submissions\2014\40 - Submission to Royal Commission into Trade Unions - Duties of union officials.pdf).

[36] See generally, model Act, Parts 7-2 and 7-3.

Recommendation 7

The model Act should be amended to require officials to hold a FW Act entry permit before being issued with a WHS entry permit.

3.5 WHS is a complex area in which regulations, codes of practice and guidelines change frequently, and nowhere is this truer than in the building and construction industry. This is sufficient reason in itself to require officials who wish to enter a site for WHS purposes to have specialised WHS knowledge and relevant industry experience. Right of entry powers are more likely to be inappropriately exercised by union representatives who do not have relevant WHS training and expertise, thereby causing disruption to the workplace where there may not be a genuine WHS issue.

Recommendation 8

Union representatives exercising right of entry powers for WHS purposes should be required to hold approved nationally recognised WHS qualifications under the Australian Qualifications Framework system, such as a Certificate IV in Workplace Health and Safety.

3.6 The WHS Act contains two grounds which allow a permit holder to enter a workplace for WHS purposes. The first ground allows entry to inquire about a suspected breach of the WHS Act that relates to or affects a relevant worker.[37] If the permit holder enters under this ground, he or she may examine employee records for the purposes of investigating the suspected breach, provided that they give advance notice. The second ground allows entry into the workplace in order to advise or consult on WHS matters.[38] In order to understand how these grounds should be applied and interpreted, an interpretative guideline has been published by Safe Work Australia.[39] Although the guideline gives the regulator's current view about how the grounds should apply, these matters have not yet been tested in the courts.

[37] Model Act, s 117.

[38] Model Act, s 121.

[39] Safe Work Australia, *Interpretive Guideline – Model WHS Act; Workplace Entry by Work Health and Safety Entry Permit Holders*, 30 October 2012. Available at: http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/727/right-of-entry-interpretive-guide.pdf, accessed 17 July 2014.

3.7 Union officials entering a site for WHS purposes possess broad but limited powers on site. They may only:

- inspect any object or thing relevant to the suspected contravention;
- consult with relevant workers in relation to the suspected breach;
- consult with the relevant person conducting a business or undertaking (PCBU) about the suspected breach;
- require any PCBU to allow the permit holder to inspect and make copies of relevant documents that are kept at the workplace or are accessible from a computer that is kept at the workplace; and
- warn any person who the permit holder believes is at risk from exposure to a hazard.[40]

3.8 Advance notice of entry is required when the permit holder is entering to inspect employee records related to a suspected breach or to consult with workers on health and safety matters. Such notice must be given during usual working hours at a particular workplace at least 24 hours, but not more than 14 days, before the entry.[41] If a permit holder enters a workplace to investigate a suspected breach, he or she must give notice of entry and notice of the suspected breach as soon as is reasonably practicable after entry.[42] However, the permit holder does not have to give notice if it would defeat the purpose of entry; for example, result in the destruction of evidence, or unreasonably delay the permit holder in an urgent case.[43] Where workers are exposed to a hazard that poses a serious and immediate threat to their health and safety, entry to investigate that imminent danger does not generally require notice.

3.9 Earlier this year, the Queensland Government introduced amendments[44] to the model (Queensland Act) which require WHS right of entry permit holders to give at least 24 hours' written notice before they can enter a worksite to inquire into a suspected breach of the WHS Act.[45] The Queensland Act also requires a health and safety representative to give 24 hours' notice of an assistant's proposed entry

[40] Model Act, s 118.

[41] Model Act, s 120.

[42] Model Act, s 119(1).

[43] Model Act, s 119(2).

[44] *Work Health and Safety and Other Legislation Amendment Act 2014* (Qld) (date of assent: 9 April 2014).

[45] Queensland Act, s 119.

to the workplace.[46] However, there is no express requirement that notice be given before a person enters the workplace under section 81(3), which relates to a person attending discussions with a view to resolving a dispute.

3.10 Master Builders submits that requiring a permit holder to give at least 24 hours' written notice during usual working hours in all circumstances before they enter a worksite would help to curb the misuse of WHS right of entry laws where work health and safety is used as a guise for industrial relations ends. WHS permit and FW Act entry permit holders that breach the conditions of their right of entry permit should be subject to the civil penalties contained in the model WHS Act.

3.11 Accordingly, the amendments made to the Queensland Act should be extended across all jurisdictions. To prevent union officials from circumventing the notice requirement, the model Act should also be amended in all jurisdictions to require 24 hours' written notice from a person seeking to enter a site to attend discussions with a view to resolving a dispute.[47]

Recommendation 9

Each jurisdiction should amend its model *Work Health and Safety Act* to require any person wishing to enter a workplace under sections 68, 81 or 117 of the model Act to give at least 24 hours' written notice during usual working hours in all circumstances. Persons should not be able to tender multiple dates as a way of circumventing this requirement.

If a person fails to adhere to these notification requirements, that person must be penalised for breaching a condition of the entry permit and WHS regulators must rigorously apply the law.

3.12 As discussed, and with the exception of Queensland, a WHS safety permit holder is not currently required to give prior notice when entering a workplace to inquire into a suspected breach of the WHS Act. However, as soon as reasonably practicable after entering the workplace the WHS permit holder must give notice of entry and the suspected breach to the PCBU, and the person with management or control of the workplace.[48] When providing this notice the WHS entry permit holder is not required to identify specific safety concerns, but may only enter if they have a reasonable suspicion that a breach is occurring or has occurred. The interpretative guideline states that to have a reasonable suspicion, the entry permit holder must

[46] Queensland Act, s 68(3C).

[47] Model Act, s 81(3).

[48] Model Act, s 119.

have some information about the events that have caused, or are causing the breach; for example, a complaint from a worker which details the events that constitute a breach.[49] However, as permit holders do not need to reveal their reasonable suspicion to the employer upon entry, it is difficult for employers to assert that a permit holder has entered unlawfully.

3.13 In addition to the general entry notice requirements, the notice of entry to inquire about a WHS breach must include, as far as reasonably practicable, the particulars of the suspected breach. The requirement makes entry permit holders accountable for the proper exercise of right of entry. An inability to provide particulars may call into question the reasonableness of the belief that a breach occurred. Alternatively, knowledge of the particulars of the suspected breach better isolates safety concerns.

3.14 Master Builders recommends that those who enter a worksite for safety reasons should be required to provide a report to the PCBU detailing any conversations and actions taken while at the workplace, the details of any alleged contravention of the WHS Act, and whether any serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation that are known by the WHS entry permit holder. This information will not only support the legitimacy of the entry but will also add to the state of knowledge of safety hazards.

3.15 South Australia has already adopted a requirement for permit holders to provide a report following entry to a site.[50] However, Master Builders is aware of instances where the reporting requirement has been abused and used to make defamatory statements in relation to workers including setting out spurious and unsubstantiated allegations of breaches. In light of these abuses, Master Builders recommends a requirement that written reports:

3.15.1 be made in good faith and bona fides;

3.15.2 set out any allegations of imminent danger clearly, factually and objectively; and

3.15.3 provide evidence of any allegations of imminent danger.

[49] Safe Work Australia, *Interpretive Guideline*, above n 39, page 2.

[50] Pursuant to the *Work Health and Safety Act* 2012 (SA), s 117(6)(a); *Work Health and Safety Regulations 2012* (SA), reg 28.

3.16 Master Builders recommends that the model Act be amended to provide for a mechanism to punish those who abuse the reporting obligation and use it as an additional means of intimidation. Failure to follow these requirements should result in the application of a civil penalty and should be grounds for suspension or revocation of the WHS entry permit.

Recommendation 10

Each jurisdiction should amend its model Work Health and Safety Act to require a WHS permit entry holder to provide a written report as **soon as practicable** but at least within 14 days from the date of entering a workplace. The report should be lodged with the regulator and served on the PCBU. The report must be completed in good faith and set out any allegations clearly and objectively, providing substantiation of any allegations of imminent danger.
It should be in a form similar to the Workplace Health and Safety Queensland Inspection Report and contain the following information:

- The WHS entry permit holder's full name and signature;
- The permit number;
- The name and address of the workplace that was entered;
- Details of conversations and actions taken by the WHS entry permit holder when attending the workplace;
- Details of any alleged contravention of the Act that, in the opinion of the WHS entry permit holder, has occurred; and
- Whether there was considered to be a serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation known to the WHS entry permit holder.

Where multiple WHS entry permit holders attend a workplace on the same occasion, each WHS entry permit holder is required to submit an individual report. Failure by a WHS entry permit holder to provide a report in accordance with this provision or abuse of the reporting requirement should be grounds for a suspension or revocation of the WHS entry permit holder's permit. Failure to comply with these requirements should also result in the application of a civil penalty.

3.17 Master Builders also recommends that each jurisdiction's work health and safety regulator implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time. This complaints system may go some way to deterring unlawful or inappropriate behaviour by WHS right of entry permit holders.

Recommendation 11

Each jurisdiction's work health and safety regulator should implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time.

It should be grounds for the suspension or revocation of the WHS permit holder's permit, if the WHS permit holder has been found to have intentionally breached WHS right of entry laws or has breached WHS right of entry laws on multiple occasions.

3.18 In addition to WHS permit holders' right of entry, the model Act contains two additional methods by which union officials may gain access to a site.

3.19 Section 68(2)(g) provides that a health and safety representative may "whenever necessary, request the assistance of any person." Section 70(1)(g) provides that a PCBU must "allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided."

3.20 Section 81(3) provides that where a WHS matter arises and is not resolved by discussion between the parties, a "representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue."

3.21 Section 494(1) of the FW Act requires a person exercising a State or Territory OHS Right[51] to hold a permit issued under s 512 of the FW Act. The model Act should be amended to state explicitly that this requirement applies to union officials exercising rights of entry to assist a work health and safety representative (pursuant to s 68(2)(g)) and to attend discussions in relation to a dispute under s 81(3), as well as WHS permit holders.

3.22 The findings of Reeves J in *Ramsay v Sunbuild Pty Ltd*,[52] demonstrate that Part 3-4 of the FW Act is to be read in conjunction with State and Territory WHS laws. Part 3-4 imposes additional requirements, particularly the requirement to obtain an entry permit,[53] on permit holders exercising a right of entry under WHS laws but does not override those rights.[54] Reeves J stated that the effect of the FW Act "is to allow the

[51] As defined in FW Act s 494.

[52] [2014] FCA 54 (11 February 2014).

[53] FW Act, s 494.

[54] Ibid, [75].

Commonwealth Executive to control the standards, qualifications and conduct of those officials of organisations who are regulated by Commonwealth laws"[55] and who enter premises under State or Territory legislation.

3.23 Master Builders is aware of instances where union officials in Victoria have entered a workplace to support a health and safety representative, claiming that this does not constitute exercise of a State or Territory OHS Right for the purposes of Part 3-4 of the FW Act. Whilst we disagree, the current law is unclear, despite previous case law that stated that this was the case under the *Workplace Relations Act 1996* (Cth).[56] Accordingly, Master Builders recommends that the legislation be amended to clarify that entry to a worksite under s 68(2)(g) and s 81(3) of the model Act are State or Territory OHS Rights, the exercise of which requires a person to hold an entry permit under s 512 of the FW Act.[57]

3.24 Master Builders welcomes these amendments, but suggests that the requirement should also be extended to persons seeking to enter a site to assist a health and safety representative[58] or to attend discussions with a view to resolving a dispute,[59] in order to prevent union officials circumventing the notice requirement.

Recommendation 12

The model Act should be amended to include a statutory note or provision acknowledging the fact that it operates in conjunction with Part 3-4 of the FW Act.

The model Act should be amended to clarify that entry to a site for the purpose of assisting a health and safety representative pursuant to s 68(2)(g) of the model Act is a State or Territory OHS Right for the purposes of the FW Act.

The model Act should be amended to clarify that entry to a site for the purpose of attending discussions with a view to resolving a dispute pursuant to s 81(3) of the model Act is a State or Territory OHS Right for the purposes of the FW Act.

3.25 Instances have occurred where permit holders have tampered with their entry permits, shrinking them to the size of postage stamps so that they are illegible.[60]

[55] *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54 (11 February 2014) at [87].

[56] *Australian Building and Construction Commission* [2007] AIRC 717.

[57] Model Act, s 124.

[58] Model Act, s 68(2)(g).

[59] Model Act, s 81(3).

[60] Workplace Express, *Hadgkiss steps up union investigations* (30 May 2014); available at http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=52371&hlc=2&hlw=, accessed 17 July 2014.

Master Builders has also received reports of permit holders quickly flashing their permits, and refusing to show them again when a clearer look is requested. In order to ensure the integrity of the permit system, there should be a positive requirement imposed on permit holders entering a site to present their entry permits for inspection and to clearly display their permits at all times whilst on site. The permit holder must not enter the site until the PCBU or person in management or control of the site has inspected the permit. The tampering with or shrinking of entry permits should result in imposition of a civil penalty.

Recommendation 13

Section 125 of the model Act should be amended to require a WHS permit holder to present their permit for inspection upon entering a workplace. The permit should be displayed in a manner so as to allow proper inspection by the person inspecting the permit. Entry permit holders should be required to clearly display their permits at all times whilst on site. This requirement should not be dependent on a request from any person to view the permit.

The model Act should also be amended to penalise a WHS permit holder from altering or tampering in any way with their permit.

3.26 Section 68(2)(g) of the model Act provides that a health and safety representative may, "whenever necessary, request the assistance of any person". There are no restrictions on when assistance may be considered necessary, or requirements as to the qualifications of the assistant.

3.27 Master Builders recommends that in order to prevent abuse of this power, the FW Act should be amended to make explicit that entry for the purpose of supporting a health and safety representative is a State or Territory OHS Right. Master Builders also recommends that the model Act be amended to provide that where a health and safety representative requests assistance, an objective need for that assistance must be proven. Furthermore, the assistant must possess sufficient qualifications to enable them to provide assistance to the health and safety representative appropriate to the circumstances. Minimum qualifications, such as a Certificate IV in workplace health and safety, should not be taken to be sufficient to satisfy this requirement where additional knowledge (such as engineering or geotechnical expertise) would be necessary to assist the health and safety representative.

Recommendation 14

Each jurisdiction should amend its model Act to ensure that an objective need for assistance exists before a health and safety representative may request assistance under s 68(2)(g). A health and safety representative must be able to demonstrate that assistance was reasonably necessary in the circumstances and that the need for assistance can be objectively proven.

In order to gain entry to a site for the purpose of assisting a health and safety representative, an assistant should possess sufficient qualifications to be able to provide assistance to the health and safety representative appropriate to the particular problem. Minimum qualifications required for entry to a site in accordance with Recommendation 8 should not be taken as sufficient to satisfy this requirement.

4 CONCLUSION

The abuse by unions of WHS right of entry laws is widespread within the building and construction industry. When unions use 'safety issues' as a means of entry into construction sites to push industrial relations agendas, they devalue the importance of safety in the workplace. They also devalue safety where they refuse to comply with directions which are designed to protect their own safety.[61] Master Builders acknowledges that unions play an important role in ensuring that workers are protected at work. However, unions are not work health and safety regulators and need to play a constructive role in promoting safety at work instead of using it as an industrial relations weapon. Master Builders contends that there would be a reduction of WHS abuses and malpractice by adopting the 14 recommendations of this policy, creating an environment of WHS best practice by eliminating the devaluing of 'safety' by permit holders under the guise of industrial relations purposes.

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[61] Fair Work Building and Construction, 'Judge finds CFMEU's actions represent "gross failure of corporate governance" (Media Release, 9 July 2014). http://fwbc.gov.au/sites/default/files/Judge%20finds%20CFMEU%27s%20actions%20represent%20gross%20failure%20of%20corporate%20governance.pdf, accessed 17 July 2014.