Master Builders Australia

Submission to Senate Education and Employment Legislation Committee

on the

Fair Work Amendment Bill 2014

24 April 2014

MASTER BUILDERS AUSTRALIA

Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

CONTENTS

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.**

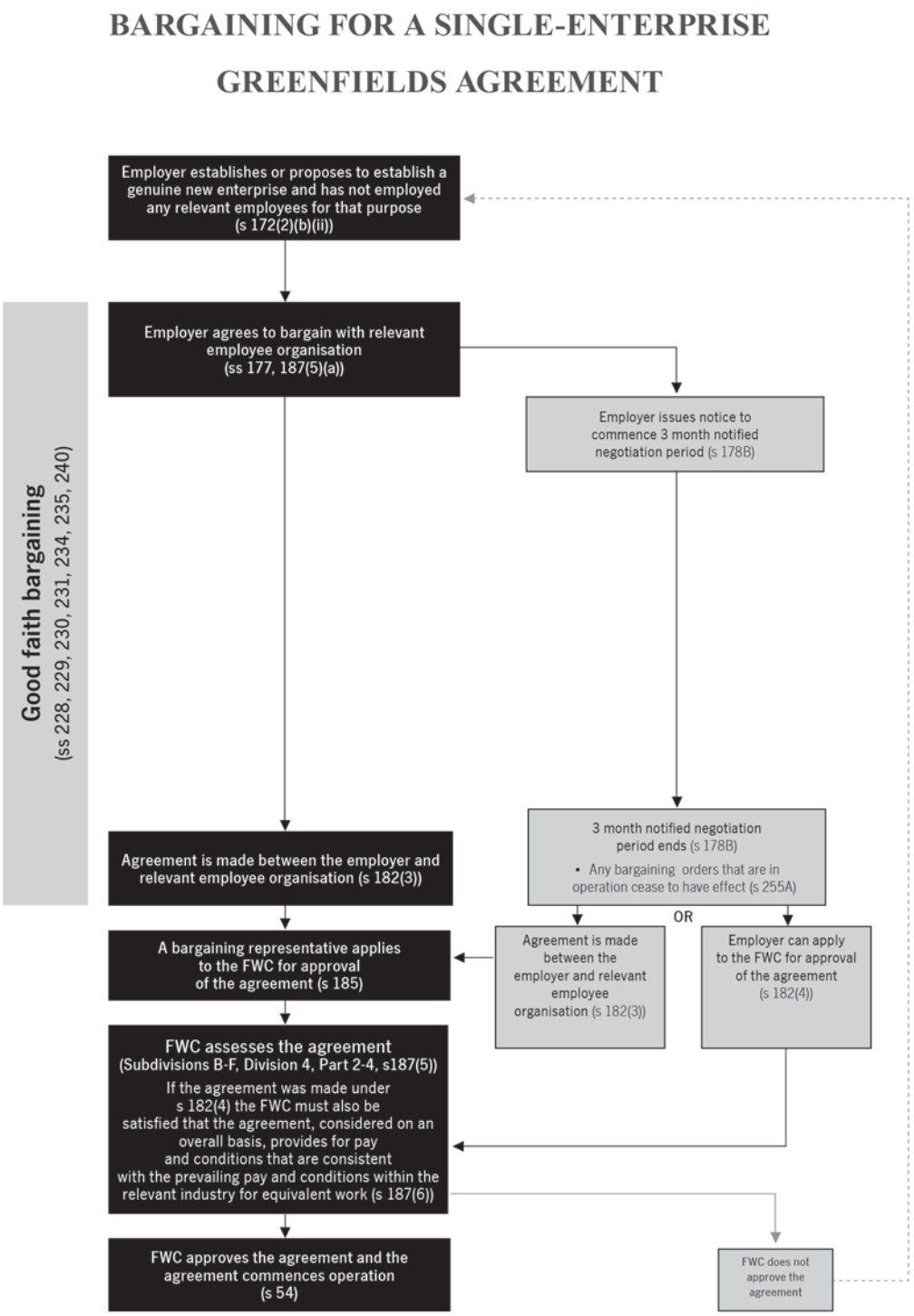
7.10 The Government has determined that the changes represented in Part 5 of Schedule 1 are an appropriate element to bring about reform in relation to greenfields agreements. Essentially, the concept of appointing a bargaining representative has been extended to greenfields agreements negotiations and 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.

****