MASTER BUILDERS
AUSTRALIA

SUBMISSION TO

Senate Education, Employment and Workplace Relations Committee Inquiry

into

the Fair Work Bill 2008

Master Builders Australia Inc

January 2009

Master Builders Australia Inc ABN 701 134 221 001

building australia

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In this submission Master Builders identifies elements of the *Fair Work Bill* 2008 that are likely or have the potential to adversely impact the building and construction industry. We have measured the Bill against four benchmarks derived from Government policy and indicated the specific points at which it has departed from these, or where it has otherwise been found problematic or wanting. The four benchmarks are:

- consistency with the ALP's industrial policy as set out in *Forward With Fairness*;
- whether elements in the Bill are likely to have an adverse effect on productivity;
- whether the Bill contains elements that compromise the government's undertaking that independent contractors will continue to be regulated by commercial, rather than industrial, law;
- whether the Bill includes provisions that will make it more difficult for the industry to weather the economic and financial storms that have developed and still lie ahead.

Master Builders has identified matters that we believe should be rectified by appropriate amendments, as detailed in the 37 recommendations listed directly following this summary, before the Bill is passed into law.

The Bill has many good features that Master Builders supports, but in some areas we consider it too favourable to union interests and thus likely to lead to a revival of unwarranted union power that has the potential to increase levels of industrial disputation.

Master Builders' most general concern with the elements of the Bill that we have identified as threatening industrial harmony and productivity is that they will render it more complex and difficult to make enterprise agreements and ultimately will detrimentally affect jobs. We highlight clauses of the Bill that enhance union power with respect to rights of entry to work sites, inspection of books and documents, recruitment of members, and to act for workers who are not members of the union and who may not have sought its intervention.

On all these points we have suggested amendments that will, while preserving the legitimate rights of unions, protect the interests of other parties. In addition, the ambiguity and relative silence of the Bill on the crucial matter of demarcation disputes threatens to make them more rather than less likely, and may allow them to be categorised as a form of industrial action that is actually permitted under the new regime. Given the history of these disputes in the building and construction industry, we have used this area as a case study of the application of the Bill.

▪ RECOMMENDATIONS

Recommendation 1	Master Builders recommends that the period for averaging the hours of work under clause 64 of the Bill be changed to 52 weeks. (Paragraph 5.2)
Recommendation 2	Clauses 66 and 112 of the NES should be deleted (Paragraph 5.3)
Recommendation 3	Accident make-up pay should not be treated as an allowance in modern Awards. (Paragraph 6.9)
Recommendation 4	The regulation of independent contractors should be specifically excluded from the Bill. Terms purporting to regulate independent contractor arrangements should be classified as objectionable terms. (Paragraph 8.20)
Recommendation 5	The inclusion of non-permitted terms should render an enterprise agreement invalid. (Paragraph 8.20)
Recommendation 6	The extent to which unions are able to have matters about their rights reflected in the content of agreements through "permitted matters" should be set out in an exhaustive list. (Paragraph 9.5)
Recommendation 7	Non-permitted clauses should be assessed by Fair Work Australia and deleted from agreements. (Paragraph 10.3)
Recommendation 8	Unions should not be provided with an automatic right of representation as a bargaining agent; instead there should be an active appointment process. (Paragraph 11.4)
Recommendation 9	The Bill should be amended so that employees have a right to change the bargaining representative on reasonable notice. (Paragraph 11.4)
Recommendation 10	In order for a majority support determination to be lawfully and democratically made, at least 50 per cent (plus one) of the employees to be covered by the agreement must vote and a simple majority of that number must approve a majority support determination through a secret ballot. (Paragraph 11.9)
Recommendation 11	Clause 183(2) should be amended to ensure that an employer is not required to make a Greenfields Agreement with all employee organisations that are entitled to represent employees who will be covered by the agreement. (Paragraph 12.6)
Recommendation 12	In order to reduce demarcation disputes the legislative scheme should be amended so that relevant unions are notified by Fair Work Australia after a Greenfields Agreement is made with a specific union. (Paragraph 12.6)
Recommendation 13	Agreements should come into effect within seven days from date of lodgement with Fair Work Australia on an interim basis. If the agreement does not pass the better off overall test, adjustments may be required from an employer by notice served upon the employer by Fair Work Australia. (Paragraph 13.6)

Recommendation 14	Access to a bargaining order should be restricted to situations in which objective evidence exists to show that the good faith bargaining requirements are not being met. (Paragraph 14.2)
Recommendation 15	An employer exercising the legitimate rights conferred by the Clause 228(2) should not be subject to a bargaining order. (Paragraph 14.3)
Recommendation 16	The Bill should be amended so as to make clear that the employer need not disclose information that is irrelevant to the claims made upon it and which would expose the employer to any disadvantage. (Paragraph 14.4)
Recommendation 17	The Bill should be amended so that where a scope order changes the employees who will be covered by an agreement FWA should be required to void any majority support determination relating to the making of the relevant agreement. (Paragraph 14.6)
Recommendation 18	A low paid determination should be restricted to cover only those employees where bargaining will have the demonstrated effect of lifting the productivity of the specific enterprises the subject of the authorisation. (Paragraph 15.3)
Recommendation 19	The criteria in Clauses 423(2) and 423(3) should be the same so that the ability to manipulate industrial action in order to obtain an arbitrated outcome is reduced (Paragraph 15.6)
Recommendation 20	The conceptual basis for transfer of business rules, especially the "connection" test, be clarified by Government to create certainty. (Paragraph 16.5)
Recommendation 21	The phrase "because of changes in the operational requirements of the employers business" is unnecessary and should be deleted from clause 389(1)(a). (Paragraph 17.4)
Recommendation 22	Consultation processes from agreements should not be required to be followed in order to make a redundancy genuine (Paragraph 17.5)
Recommendation 23	In clause 389(2) all words after the words "redeployed" should be replaced with the concept of where possible employing the employee within the enterprise at a specific skill level. (Paragraph 17.6)
Recommendation 24	In clauses 366 and 744 the timeframe of 60 days to make a claim should be reduced to 7 days in line with unfair dismissal claims. (Paragraph 17.7)
Recommendation 25	That the term 'demarcation dispute' is defined in the Bill, and that procedures for dealing with demarcation disputes between unions are set out clearly in the Bill or in the forthcoming transitional legislation. (Paragraph 18.21)
Recommendation 26	The phrase "to a significant extent" where it appears in clause 409(5) and 410(2) should be deleted. (Paragraph 18.25)
Recommendation 27	Delete clause 423(6)(a) as unnecessary. (Paragraph 18.28)
Recommendation 28	Union right of entry for discussion purposes should be based upon historical demarcation decisions or current demarcation agreements. The union should be covered by a modern award or agreement under which the relevant employees

	are working. (Paragraph 19.6)
Recommendation 29	Access to non-member records where a suspected breach is alleged should only be granted following an application to Fair Work Australia, which should be satisfied that access is required in order to properly investigate the suspected breach (Paragraph 19.8)
Recommendation 30	The regulation of the disclosure of personal information should be more precise than set out in Clause 504. Disclosure should be limited to the use of the information in relation to the resolution or prosecution of the alleged breach (Paragraph 19.9)
Recommendation 31	Clause 515(5) should be deleted as its meaning is unclear and it adds nothing of substance. (Paragraph 19.10)
Recommendation 32	The statute should reflect the Government's intention that a permit holder will have an entry right only where the premises are mainly used for work purposes on a regular and substantial basis. (Paragraph 19.12)
Recommendation 33	A new clause should be included within the definition of 'objectionable term' in clause 12 with text along the following lines: "the creation of a right of an official of an organisation of employees to enter the premises of an employer other than in accordance with Part 3-4" (Paragraph 19.17)
Recommendation 34	The ability of an employer to stand down employees where there has been a breakdown of machinery should not be qualified. (Paragraph 20.3)
Recommendation 35	Unions should not be able to apply to Fair Work Australia in relation to a stand-down dispute unless they have received the written consent of the affected employee. (Paragraph 20.9)
Recommendation 36	Master Builders does not consider that the building and construction specialist division of Fair Work Australia should report to the Fair Work Ombudsman but should be given autonomy. (Paragraph 21.2)
Recommendation 37	Inspectors should not be permitted to go on "fishing expeditions". Any search of a premises must be related to the purpose for which the inspector entered the premises. (Paragraph 21.8)

1 INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

1.3 Master Builders' members are industrially registered organisations. Most are registered under the *Workplace Relations Act, 1996 (Cth)* (WR Act).

1.4 Master Builders has been involved in consultations regarding the drafting of the Bill and commends the Government for the level of consultation that has taken place.

2 PURPOSE OF SUBMISSION

2.1 On 25 November 2008 the Government introduced *The Fair Work Bill* (the Bill) to replace Australia's current workplace relations legislation. It passed the House of Representatives on 4 December 2008. The Committee has been asked to consider its provisions.

2.2 The Bill contains the Government's substantive changes to the law as it stood under WorkChoices. It will replace the WR Act, which will be repealed. It does not deal with transitional arrangements which will be set out in separate legislation to be introduced "in the first half of 2009."[1] We do not know whether this legislation will contain details regarding registered organisations but note that this subject has not been included in the Bill. This issue is especially important in the context of demarcation disputes, dealt with in section 18 of this submission.

2.3 The Bill has major implications for all employers, including in the building and construction industry. We are unclear as to the final effects of the Bill on the building and construction industry in that the Government has not yet made a decision about the content of industry specific laws which will apply after 31 January 2010. In other words, the Bill's impact may be different in the building and construction industry sector, depending on the nature and extent of the changes to the current industry-specific legislation. We note in this context that it is Government policy that specific laws for the sector should be retained:

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1 http://www.workplace.gov.au/workplace/Publications/News/FairWorkBillintroducedintoParliament.htm accessed 9 December 2008

> *The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.*[2]

2.4 This submission does not take into account the matters raised in paragraph 2.3, although it considers situations where industry specific measures that would differ from the Bill's provisions are mentioned.

2.5 This submission is made in order to measure the Bill against four interrelated and vital considerations that derive from Government policy statements.

2.6 The first consideration is whether the Bill reflects the terms of the Government's *Forward with Fairness* policy documents. The second is an identification of points where the Bill has the potential to adversely affect productivity. The third is to measure the Bill against the Government's promise that independent contractors will not be adversely affected by the terms of the Bill but will continue to be regulated by commercial rather than industrial law. Fourth, we emphasise that in unstable economic times certainty is critical for business confidence, especially small business, and examine the Bill from that perspective.

2.7 These four criteria are derived from the Government's statements about how the new regime for workplace relations will be constructed. The first criterion derives from the *Forward with Fairness* policy documents. In this submission Master Builders' points to areas where we believe the Bill should be changed because its provisions diverge from the *Forward with Fairness* policy documents. Master Builders has commended the Government for adhering meticulously to the policy programme announced prior to the 2007 election, as acknowledged by the Deputy Prime Minister in a speech she gave to Master Builders in May 2008:

> *Before last year's election, we made a number of commitments about the workplace relations reforms we would introduce to establish a fair and balanced workplace relations system for all. And we have stuck scrupulously to those commitments – something the MBA has publicly acknowledged.*[3]

2.8 As the Deputy Prime Minister mentioned during her speech to the Australian Financial Review Workplace Relations Conference, a principal rationale for introducing the Bill is from the Government's desire "to give Australia a better workplace relations system to help lift national productivity."[4] In this submission,

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[2] ALP *Forward with Fairness – Policy Implementation Plan,* August 2007, p 24
[3] Deputy Prime Minister Speech to Master Builders Industry Dinner 29 May 2008 available at http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TheMastersBuildersAustraliaIndustryDinner.htm,
[4] The Hon Julia Gillard MP Deputy Prime Minister http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2008/October/AustralianFinancialReviewWorkplaceRelationsConference2008.htm accessed 9 December 2008

we identify provisions which have the capacity to adversely affect productivity and we seek some changes to the Bill on the basis that it would be bad policy for a law to include provisions that would reduce productivity. We are particularly concerned about some of the more complex procedural provisions and, in particular, the new regime for agreement making. Members are concerned that these provisions will add to transaction costs without providing a concomitant benefit. Master Builders is particularly concerned that the utility of Greenfields agreements will be diminished.

2.9 The third criterion is related to the second: subjecting contractors to workplace relations law rather than to commercial law would in itself have adverse effects for productivity - see Section 8 below. In a publicly available letter[5] to the Independent Contractors Association, the now Deputy Prime Minister, the Hon Julia Gillard, and the now Minister for Small Business, Independent Contractors and the Service Economy, Dr Craig Emerson, said:

> *Labor's policy is that independent contractors are small businesses which should be regulated by commercial law and not industrial law and that contractors should be supported and should be given fair opportunity to access work.*
>
> *Labor believes unions should not be permitted to interfere in commercial arrangements involving contractors and the key tenets of freedom of association should be respected at all times."*[6]

2.10 Similar comments to those set out in paragraph 2.9 were also reported in the press.[7] Section 8 of this submission is devoted to this issue in the context of the new boundaries around agreement content. We have recommended that specific action be taken to recognise these Government promises and Recommendation 4 sets out how that protection would be intended to operate. Because our industry relies so heavily on the contract system, ensuring that the Bill does not open up increasing regulation of independent contractors is a paramount priority for Master Builders.

2.11 The building and construction industry operates on a contract basis for two principal reasons. First, while the nature of construction work is relatively labour intensive, it is also highly specialised. Many of the industry's contractors are sole traders with highly specialised skills focused on one particular aspect of the construction process. Second, competing specialist skills in an environment where work is project based naturally create efficiencies through competition. It is vital to

[5] http://www.contractworld.com.au/reloaded/ica-alpplatformOct2007.php accessed 9 December 2008
[6] Id
[7] *Smartcompany* The Briefing, *Labor firms position with independent contractors,* 1 October 2007

the efficiency of the industry that constraints on contractor engagement, such as a requirement to employ persons in a similar capacity before contractors may be sought to be engaged for "security of employment reasons," are not permitted to be a component of workplace agreements.

2.12 The fourth criterion we apply in assessing the Bill is the need to maintain certainty and stability in the industrial relations system. Australia is currently experiencing the worst financial crisis since the Great Depression: described by the Prime Minister as "the worst financial and economic crisis the world has seen in over three quarters of a century."[8] Employers do not want laws or any change to the working environment which engenders uncertainty at a time when the ongoing viability of their businesses is itself uncertain. This is especially the case for small businesses which have been hit hard by a credit squeeze. Controlling costs, including labour costs, is a key element in business survival.

2.13 Accordingly, in assessing the Bill, we have highlighted areas where provisions may generate uncertainty in their application or where they may be detrimental to employment prospects. One of the Government's underlying intentions is to bring about stability in the industrial relations system over the long term. We have identified provisions that jeopardise this aim. Even though the Government has a mandate to implement certain changes, the unexpected economic and financial crisis into which we have suddenly been plunged requires rethinking and the modification of policies so that they do not contribute to further unemployment. Indeed on 8 January 2009, Ms Gillard in her capacity as Acting Prime Minister stated that the biggest issue facing the country in 2009 was protecting Australian jobs.[9]

2.14 We emphasise that policies, including workplace relations policies, need to be rethought in light of the global financial crisis. As one journalist has put it:

> *The global crisis means everything has changed: the budget goes into deficit, fiscal stimulus replaces fiscal restraint, the Reserve Bank does a volte-face and begins to slash interest rates, and the Government guarantees deposits as Rudd declares the crisis is "sweeping across the world".*
>
> *But standing immovable is Labor's support for greater trade union power, more costly restrictions on employers, a greater role for the revamped industrial relations commission, an effective end to individual statutory contracts, a*

[8] Prime Minister's Statement: Global Financial Crisis, 26 November 2008
[9] AAP News Wire *Gillard reiterates calls for jobs protection over pay rises,* 8 January 2009

revival of arbitration, and a sharp weakening of direct employer and non-union employee bargaining. [10]

3 STRUCTURE OF SUBMISSION

3.1 The Bill comprises six chapters as set out below and the structure is, in large part, emulated in this submission :

3.1.1 Chapter 1 provides an introduction to the Bill and its structure, and contains relevant definitions.

3.1.2 Chapter 2 deals with terms and conditions of employment, including the National Employment Standards, modern awards, enterprise agreements and workplace determinations and transmission of business.

3.1.3 Chapter 3 concerns rights and responsibilities of employees, employers and organisations, including freedom of association, protection from discrimination, unfair dismissal, industrial action and rights of entry.

3.1.4 Chapter 4 deals with compliance and enforcement, including remedies, and jurisdiction and powers of the courts.

3.1.5 Chapter 5 contains administrative provisions, including establishment of Fair Work Australia and the Office of the Fair Work Ombudsman.

3.1.6 Chapter 6 houses a range of miscellaneous matters.

3.2 Master Builders has not commented on all of the provisions of the Bill but has concentrated on matters that arise from the application of the four considerations set out in section 2 of this submission as well as matters most relevant to the building and construction industry.

4 RELEVANT DEFINITIONS AND OVERVIEW

4.1 Master Builders commends the manner in which the Bill is structured and the simplicity of the provisions when compared with the complexity of WorkChoices. As indicated earlier, Master Builders was involved with formal consultations on the Bill which were very much appreciated. That involvement, however, should not be viewed as endorsement of the Bill. Having said that, its structure and overall logic are well founded.

4.2 The definitions are in large part well expressed and appropriate. In the absence of provisions concerning registration and accountability, however, the definitions of employee and employer organisations are determinedly circular.

[10] P Kelly, 'IR Reforms Asking for Trouble', *The Australian,* 29 November 2008, p 1

4.3 The manner in which the terms "employer" and "employee" are defined is appropriate in that the Bill seeks to distinguish between when an employer is described so that the relevant head of power is called up and when that term is used in regard to its ordinary meaning: see Division 3 of Chapter 1.

4.4 In this submission we have made recommendations about the inclusion of further definitions in the Bill.

5 NATIONAL EMPLOYMENT STANDARDS

5.1 Master Builders made a comprehensive submission on the draft National Employment Standards (NES) as set out in a Discussion Paper released in February 2008. A number of changes were made to the proposed NES and the document was published on 16 June 2008[11] in advance of the introduction of the Bill so that the community was aware of the future safety net. The Bill contains further changes from the second published version of the NES, some of which are commented upon below.

5.2 A particular concern is with the averaging of hours. Clause 64 of the Bill reduces the period over which the hours of work may be averaged from 52 weeks as set out in the WR Act to 26 weeks for award/agreement free employees. This will have a major impact on the engagement of professionals such as project managers whose hours are often averaged over a 52 week period, given the intensity of some of their work during peak periods. There is no evidence that the practice of averaging over 52 weeks does other than improve productivity and to now reduce this period without any rationale will damage the productivity of building and construction companies that rely on specialised staff to work intensive hours during vital stages of the building process.

Recommendation 1	Master Builders recommends that the period for averaging the hours of work under clause 64 of the Bill be changed to 52 weeks

5.3 Master Builders notes that Clause 112 of the Bill is a provision not previously exposed with prior NES drafts. It has the effect of permitting State or Territory

[11] Letter from Deputy Prime Minister, the Hon Julia Gillard MP, to Justice Giudice of the Australian Industrial Relations Commission of 16 June 2008 http://www.workplace.gov.au/NR/rdonlyres/3927CE6D-17E2-4791-B35F-CCD4F551D633/0/NESLettertoJusticeGiudice.pdf accessed 10 December 2008

legislation relating to "eligible community service activities" to override the NES where the State and Territory legislation is more beneficial. Master Builders is not opposed to the underlining purpose of this provision. However, Master Builders is concerned that the NES is, in large part, otherwise self contained and does not need an employer to make reference to other documents in order to readily understand the safety net to be applied. Accordingly, we recommend against Clause 112 as it has the potential to make the NES overly complex. Further, the drafting of clause 112(2) is difficult to follow, especially when contrasted with the simple drafting that otherwise characterises the NES. There is a similar carving out of State and Territory entitlements in Clause 66 which we also recommend against. These State based carve outs were inserted following a protracted consultation process and have no justification where a simple, comprehensive safety net is the desired outcome.

Recommendation 2	Clauses 66 and 112 of the NES should be deleted

6 MODERN AWARDS

6.1 Master Builders has been an active participant in the Award modernisation process.

6.2 There is a difficulty with a specific area: Clause 537 of the Explanatory Memorandum (EM) for the Bill states: "An example of an allowance that might be included in an award under this paragraph is accident make up pay." Master Builders does not agree that proposed paragraph 139(1)(g) permits the inclusion of accident make up pay. Master Builders' argument is based upon the fact that the provisions in question emulate the current section 576J(1)(g), a matter taken up in detail below.

6.3 How accident make up pay fits in with any of the ways in which allowances are defined for the purposes of sub-paragraphs (i)-(iii) has not been explained by the Commonwealth. We note the following passage from the Government's submission to the Australian Industrial Relations Commission (AIRC) on this issue:

> *The Government notes that the Commission, in Paragraph 32 of its Statement of 12 September 2008, has not included accident make-up pay clauses in its draft modern awards. The Government is of the view that accident make-up pay is an allowable award matter as it may be characterised as an allowance for the purposes of s 576J(1)(g). Consistent with the intention that the creation of modern awards not disadvantage employees, the Government supports the inclusion of an entitlement in this respect in modern awards where it is an entitlement (either under a federal*

award or a Notional Agreement Preserving a State Award). However, as previously noted, the request does not envisage the creation of modern awards extending benefits beyond those areas where they already exist in awards and NAPSAs.[12]

6.4 Master Builders disagrees that accident make up pay may be so characterised because of the following argument, taken from Master Builders October submission to the AIRC:

6.4.1 *Master Builders understands that the issue of whether or not accident make up pay may be included in Awards has not yet been resolved by the Full Bench.* At paragraph 32 of the 12 September Statement the Full Bench notes that:

> *A number of submissions were made as to the Commission's power to include provision for accident pay in modern awards. This is a legal issue which requires further discussion. We think the matter is open to doubt and at this stage the drafts do not include accident pay provisions.*

6.4.2 *Master Builders notes that a Full Bench of the Commission had held Accident Make Up pay to be an allowable Award matter in the context of then section 89A as follows:*

> *The fact that an entitlement to accident pay is not an expressly quantified amount does not preclude it from being an allowance. Some reimbursable expense allowances are similar in that the right established is not to a specified sum but to claim an ascertainable payment. Nor does the fact that the employee is not actively engaged in duty preclude the existence of an allowance. The entitlement claimed here is in respect of a period of absence from work associated with a work related injury. In our view there is a sufficient connection with the employment for the entitlement to be an allowance.*[13]

6.4.3 *The characterisation of the payment as an allowance by the Full Bench in the extracted paragraph does not, however, appear to fit the criteria established by section 513(1)(h) and 576J(1)(g) of the Workplace Relations Act, 1996 (Cth) (WRA). That latter provision makes the three classes of allowances currently permitted as Award content to be matters that may be dealt with in modern Awards expressed in the same terms as the former provision*.

6.4.4 *Master Builders contends that accident make up pay is not an allowance which is able to be classified as an "expense incurred in the course of employment" per section 576J(1)(g)(i). Obviously, as the extract from the Full Bench decision set out in paragraph 5.2 touches upon, it is a payment made when the employee is not actively engaged in duty. The payment therefore is not connected with the activities of the employee during the course of employment. Further, there is no expense incurred by the employee*.

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[12] Australian Government submission to the AIRC dated 10 October 2008 http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=coal accessed 10 December 2008

[13] Print P1297 *The Commonwealth Bank Officers Award 1990*

6.4.5 *There are no responsibilities or skills which are associated with the payment of accident make up pay and therefore it cannot be classified as an allowance per section 576J(1)(g)(ii).*

6.4.6 *In addition it is not able to be classified per section 576J(1)(g)(iii) as a payment made for "disabilities associated with the performance of particular tasks or work in particular conditions or locations." There are no disabilities which attach to work performed relating to accident make up pay because it is a payment which is made when work is not performed. Accident make up pay is not particular to tasks or work*.

6.4.7 *Master Builders therefore submits that provisions relating to accident make up pay should not be included in modern Awards.*

6.5 Master Builders prefers its arguments to the bare assertions of the Commonwealth. The argument is reinforced by the fact that the terms of the sub paragraphs in both clause 139(1)(g) and section 576J(1)(g) are in exactly the same terms as current section 513(1)(h) dealing with the monetary allowances that are currently allowable award matters. In keeping the same meaning by way of the relevant subparagraphs there is an argument that the term 'includes' in both clause 139(1)(g) and section 576J(1)(g) is not intended to enlarge the ordinary meaning of the word 'allowance' and that the listing in the paragraphs which follow the words of introduction remain exhaustive. It follows that the statement in the EM reproduced at paragraph 6.2 of this submission is not needed as an aid to interpret the relevant provision because no ambiguity exists.

6.6 A similar issue has been considered by Pearce and Geddes.[14] This discussion is worthy of reproduction especially as it considers the difference in effect where the terms "includes" and the term "means" are used:

> *Unfortunately, this neat distinction has not always been adhered to by either drafters or judges. Particular confusion has arisen where the word 'includes' has been used in a definition and then one or more items that would usually fall within the accepted meaning of the word have been specified together with some items that would not. The problem has then arisen whether the definition, notwithstanding the use of the word 'includes', was intended to be exhaustive. From the drafter's point of view this practice can be defended simply on the basis that it is not always clear precisely what items will be regarded as falling within the scope of a word. Hence caution advises that doubtful items should be listed among those 'included' lest they be regarded as not covered by the word defined. But if some items that would normally fall within the scope of the defined word are included, is another item that would also normally be covered by the term defined, but which is not*

[14] D C Pearce and R S Geddes, *Statutory Interpretation in Australia, 6th Edition,* 2006

mentioned, to be treated as not falling within the definition? In short, is the definition intended to be exhaustive?[15]

6.7 In the current context although there is no mixing of "accepted" and "non-accepted" uses of a term, there is a repetition of allowances in categories where the prior definition from section 513(1)(h) was exhaustive. Since those paragraphs have not changed, the implication is that the provision is still intended to be construed exhaustively, despite the statement in the EM which would clarify any statutory ambiguity.

6.8 A clearer method of including accident make up pay would be to refer to it specifically as a matter that is intended to be included in modernised Awards. However, Master Builders policy is that accident make up pay is anachronistic. The State and Territory workers compensation laws generally contain provisions which provide an incentive to return to work inclusive of step-downs in payments after a specified period: for example section 35A *Workers Rehabilitation and Compensation Act*, 1986 (SA) and Clause 11, Schedule 1 *Workers' Compensation and Injury Management Act* 1981 (WA).[16] Making accident make-up pay a component of modern Awards would defeat the objects of the State legislatures in enacting these step-downs. Further the fact that accident make up pay is not at present an allowable Award matter under section 513(1) means that an additional cost not currently budgeted for will be payable by all employers.

6.9 We note that in its decision of 19 December 2008[17] the Full Bench of the AIRC did not articulate which subparagraph of section 576(1)(g) could accommodate the notion of accident make up pay. Accordingly, despite that finding and the decision of the AIRC to deal with accident make up pay as a transitional matter,[18] Master Builders recommends the Government to reverse its position in this area.

Recommendation 3	Accident make-up pay should not be treated as an allowance in modern Awards.

[15] Id at p 239
[16] Other States and Territories have similar provisions: a further example is Victoria. Under the Victorian *Accident Compensation Act* 1985 step down is provided for in sections 93CA (95% for first 13 weeks), 93CB (75% from 14 weeks) and 5A (which provides for pre-injury average weekly earnings calculation to include applicable overtime and allowances for the first 26 weeks)
[17] [2008] AIRCFB 1000
[18] Id at para 87

7 AGREEMENT MAKING – OVERVIEW

7.1 The Bill has fundamentally overhauled the agreement making system and provides for new types of agreements, good faith bargaining, new approval processes and new content rules. The distinction between union and non union agreements is no longer recognised. Unions have a statutorily protected role in the agreement making system.

7.2 Master Builders views this as a dramatic boosting of union power which will work against more productive agreement-making. Master Builders' experience with union involvement, especially where there is a clash between union representational rights sparking demarcation disputes, has been entirely negative a matter taken up in section 18 of this submission.

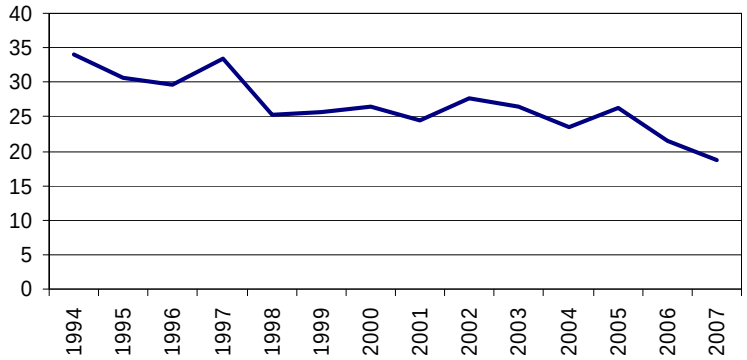
7.3 The proposition that the Bill dramatically enhances union power is not solely a Master Builders perspective. The *Wall Street Journal* was clear that:

The Fair Work Bill is, by any measure, a massive boost for unions.[19]

7.3 Graph 1 below shows the industry's unionisation rates, revealing a steady decline from 35 percent in 1994 to 19 percent in 2007. This is in line with the decline in union membership in the private sector generally. Graph 1 is useful when assessing the new powers provided to unions in the Bill. The Bill reflects an assumption that unions play a greater role than is reflected in this level of membership and shows that providing unions with institutional rights in agreement making is not founded upon their universal involvement.

Graph 1

Unionisation Rate - Construction Industry



Source: ABS catalogue 6310.0

[19] Australia's Labor Love-In, *Wall Street Journal,* 5-7 December 2008, p12

7.4 In the following sections of this submission dealing with agreement making, we highlight points where the agreement making process should be strengthened so as to enhance productivity and we make suggestions for reframing some of the provisions of the Bill so that union involvement is more consistent with democratic processes.

7.5 Master Builders notes that the Bill establishes a single stream for agreement making. The notion of union or non-union agreements has been abandoned. The Bill characterises enterprise agreements as single-enterprise or multi-enterprise agreements. The former may involve a single employer or two or more employers if they are categorised as single-interest employers. This concept embraces related bodies corporate, those companies involved in a joint venture or where they have sought and received a 'single interest employer authorisation' under Clause 248. Multi-enterprise agreements are made voluntarily between two or more employers that are not single interest employers, and relevant employees: see Clause 172(3). The Bill also makes special provision for the creation of a low paid bargaining steam for a multi-enterprise agreement: discussed at section 15 of this submission.

8 ENTERPRISE AGREEMENTS – CONTENT – INDEPENDENT CONTRACTOR REGULATION

8.1 Section 356 of the WR Act establishes that certain matters are prohibited content and may not form the content of workplace agreements. The *Workplace Relations Regulations* 2006 (WR Regs) then set out a more detailed list of what is and what is not prohibited content. Regulation 8.7 provides that a term of an agreement is prohibited to the extent that a matter "does not pertain to the employment relationship," a matter now established by Clause 172(1)(a) of the Bill.

8.2 In this context the *Electrolux* decision[20] is relevant because in that case the High Court determined that an agreement could not be certified if it contained even one item that was non-pertaining. It is worthwhile to examine the provisions of Clause 172(1)(a) and its terms in the light of the *Electrolux* decision. It is also important to note that currently the WR Regs contain explicit provisions that prohibit terms which restrict the engagement of independent contractors or labour hire workers.[21] Prohibited content is not a concept carried over to the Bill and there are no specific

[20] *Electrolux Home Products P/L v AWU* (2004) 221 CLR 309
[21] Regulations 8.2(1)(h) and (i)

provisions in the Bill which replicate the relevant parts of the WR Regs regarding independent contractors.

8.3 Master Builders is concerned that the protections from interference with the contractual arrangements currently in the legislation will be insufficient to stop constraints being placed on independent contractor arrangements, especially when the concept of "matters pertaining" brings doubt into this area. In other words, unions will be able to control elements of the independent contracting arrangements on site because there will be certain matters in this area which pertain to the employment relationship, given the common law discussed below.

8.4 *Electrolux* was decided prior to the Work Choices changes. At that time the WR Act established a framework for the registration and enforcement of certified agreements. The significance of registration lay in the imposition of legally enforceable rights and obligations upon the parties to the certified agreement; one of those obligations was not to engage in industrial action for the duration of the agreement.[22]

8.5 The WR Act did, however, allow industrial action to be taken after the nominal expiry date of the certified agreement (now a collective agreement and in the Bill an enterprise agreement) during a bargaining period. Industrial action was permitted only if it was taken for the purpose of supporting or advancing claims in respect of the proposed agreement. But not all agreements negotiated between the parties were capable of being certified by the AIRC. S170LI of the WR Act provided that an agreement could be submitted for certification to the AIRC only if it was 'about matters pertaining to the relationship between employers and their employees'.[23] This concept is a long standing feature of Australian industrial relations laws; for most of the last century, industrial relations laws have been based on the principle of settling 'industrial disputes' through the conciliation and arbitration power of the Constitution. The concept of an industrial dispute was based on the requirement that the dispute be about 'matters pertaining to the relationship between employers and employees'.[24] This concept was carried over into the WorkChoices legislation (but as a way of limiting content as discussed in paragraph 8.2 of this submission) despite the use of power underpinning the WorkChoices legislation i.e. the corporations' power.

[22] Harris, J. "Federal Collective Bargaining After Electrolux", *Federal Law Review* 34, pp 45-46.
[23] Ibid, p46.
[24] Ibid, p47.

8.6 Unfortunately, the High Court has been unable to develop a clear and consistent interpretation of what matters may or may not 'pertain to the relationship between employers and employees'.[25] Even though the EM at paragraph 670 states that there is substantial jurisprudence around the formulation in paragraph 172(1)(a), and "that the courts' formulation over time has changed," there is no acknowledgment of the uncertainty that this test engenders.

8.7 Early decisions defined the concept of matters pertaining to the employment relationship relatively broadly but in later decisions a more restrictive approach was adopted. The current prevailing view seems to accept that a matter does not pertain to the employment relationship merely because it involves employers and employees, rather the matter must relate to the employer and employee in their capacity as such.[26] This is a difficult distinction to apply in practice.

8.8 For some time, there was considerable confusion about whether each individual clause in a proposed collective agreement had to satisfy the s170LI requirements or, rather, whether the proposed agreement should be examined as a whole. As stated above, the High Court's majority decision in *Electrolux* found that an agreement could not be characterised as a proposed agreement for the purposes of taking protected industrial action if it contained substantive clauses that did not pertain to the relationship between the employer and its employees.[27] This approach then caused a number of practical problems for parties negotiating collective agreements or considering taking industrial action in relation to a collective agreement, due to the potential consequences if a clause was later found not to pertain to the employment relationship. The decision also created considerable uncertainty about certified agreements that predated the decision, and industrial action predating the decision with respect to those certified agreements.

8.9 The former federal government then passed legislation intended to resolve some of the uncertainty, the *Workplace Relations Amendment (Agreement Validation) Act 2004* (Cth). The High Court's decision in *Electrolux* had thrown into doubt the validity of many existing certified agreements that contained substantive provisions that might not satisfy the Court's interpretation of the requirements of s170LI. The Act amended the WR Act so that existing certified agreements, and protected industrial action taken before 2 September 2004 (the date of the *Electrolux*

[25] Ibid, p47.
[26] Ibid, p47.
[27] Ibid, p47.

decision) would not be invalidated or rendered unprotected because of the decision.[28] The Act left it up to legal tribunals to determine which matters were "non pertaining";[29] hence the relevance of subsequent case law.

8.10 The *Workplace Relations Amendment (WorkChoices) Act 2005 (Cth)* (WorkChoices) introduced significant amendments to the WR Act. These amendments removed the requirement for certification for workplace agreements; instead agreements took effect after being lodged (a principle we support, discussed below). However, this procedure was not conclusive of the agreement's legal force under the Act. As stated above, WorkChoices also introduced the concept of prohibited content, shifting the responsibility for vetting agreements to the parties, consistent with the effect of the *Electrolux* case.

8.11 The Bill will replace the prohibited content rules with inter alia a clause saying that agreement clauses that do not pertain to the employment relationship will have no effect; as a matter not encompassed by section 172(1), they will not be "permitted matters" (see clause 253 of the Bill, combined with s172 (1)). In the Second Reading Speech for the Bill the Deputy Prime Minister stated:

> *The Bill provides that all matters pertaining to the relationship between the employer and its employees, as well as to the relationship between the employer and a union representing those employees will be the subject of bargaining.*
>
> *Agreements can also deal with the deduction of wages for any purpose authorised by the employee and contain terms dealing with how the agreement will operate. This means salary-sacrifice and pay-roll deduction arrangements and terms setting out how the parties agree to conduct negotiations for a replacement agreement can now be included in agreements.*
>
> *The Bill provides that only terms that are about the relationship between the employer and the employee will be able to be the subject of protected industrial action. For example, employees will not be permitted to take protected industrial action in pursuit of a claim that the employer should make a donation to a charity or should start to manufacture a particular product.*[30]

8.12 The Explanatory Memorandum sets out the Government's policy as to why prohibited content is no longer to be a part of the law:

> *The WR Act introduced a concept of prohibited content which lists some 30 matters which are not to be included in workplace agreements. This*

[28] Ibid, p 62
[29] Drawing on Skulley, M "Electrolux Case Starts to Bite", *Financial Review*, 6 January 2005
[30] Fair Work Bill 2008 (Cth) 2nd Reading Speech, The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, pp 8-9 http://www.workplaceauthority.gov.au/docs/forwardwithfairness/FairWorkBillSecondreading.pdf Accessed on 2/12/08.

includes matters that do not pertain to the employment relationship between the employer and the employees covered by the agreement. 'Objectionable provisions' that breach freedom of association provisions, that provide remedies for unfair dismissal or restrict the use of independent contractors or labour hire workers are also prohibited.

Other prohibited content relates specifically to union-related clauses. This includes deductions from wages for union membership or dues, employees receiving trade union training leave, employees receiving paid leave to attend union meetings, the renegotiation of a workplace agreement, and the foregoing of annual, compassionate or personal leave for pay or another entitlement.

Prohibited content in an agreement is unenforceable but does not render the agreement invalid. The Workplace Authority Director is able to remove such clauses from agreements with significant penalties of up to $33,000 applying for recklessly including prohibited content in an agreement, and for making misrepresentations about prohibited content.

The extensive regulation of what can and cannot be included in agreements complicates the bargaining process, with many parties unsure of what clauses were allowable content. It has also exposed employers to penalties for contravening the WR Act. Employers have sought to avoid this by seeking a statement from the Workplace Authority that there is no prohibited content included in the agreement prior to lodging the agreement. This has further lengthened the agreement making process.

There is anecdotal evidence that another result of this regulation is the frequent use of 'side deals' between an employer and employees and the relevant union. Such side deals have unclear legal status and unnecessarily complicate the bargaining process.[31]

8.13 Section 172 provides that enterprise agreements may be made about permitted matters as follows:

*(1) An agreement (an **enterprise agreement**) that is about one or more of the following matters (the **permitted matters**) may be made in accordance with this Part:*

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

[31] Explanatory Memorandum, p xxxii. (r123).

8.14 Section 253(1) provides that a term of an enterprise agreement has no effect to the extent that:

(a) it is not a term about a permitted matter; or

(b) it is an unlawful term.

Unlawful terms are quite different from non permitted matters, discussed below.

8.15 It is clear that the common law which currently defines what matters do pertain to the employment relationship remains relevant as set out in the EM and as discernible from the proposed statutory provisions. In *Electrolux* the High Court decided that:

- In order for a certified agreement to be about the requisite employment relationship, it must be about matters which affect employers in their capacity as employers and their employees in their capacity as employees (the *Electrolux* principle).
- Industrial action taken to support or advance claims for conditions in a certified agreement that does not comply with the *Electrolux* principle cannot be 'protected action' under the Act.
- The prohibition on coercion in the course of certified agreement negotiations will apply to industrial action in support of claims for conditions that do not come within the *Electrolux* principle.

The decision did not expressly resolve the question of whether an ancillary, incidental or machinery clause that is not about the requisite employment relationship would make an agreement incapable of certification and/or industrial action unprotected. This issue is now addressed by Clause 172(1)(d) of the Bill.

8.16 In *Wesfarmers*[32] the Federal Court (French J) found that industrial action taken by the AMWU was not protected because it was taken in support of claims which included matters that did not pertain to the employment relationship, namely demands for:

- payment by the employer for off duty employees to attend union meetings; and
- limits on the use of contractors, including minimum terms for contractors' employees where they were used.[33]

8.17 Despite the second of these points, clauses that seek to limit an employer's use of contract labour illustrate the difficulties that result from a narrow interpretation of

[32] *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering, Printing and Kindred Industries Union* (No 2) [2004] FCA 1737 (23 December 2004) **http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2004/1737.html?query="wesfarmers%20Premier%20Coal"**

[33] Napper, N. "Cleaning Up After Electrolux", *Deacons News and Insights*, March 2005

'matters pertaining to the employment relationship' stemming from *Electrolux*. Harris[34] suggests that an employer's use of contract labour is a borderline issue: in some circumstances it could be found to be a matter not pertaining to the employment relationship, while in others it could be found to pertain. This area is too important to be left to the common law where the boundaries around regulation of contractors and labour hire arrangements are not clear. At a time when we are moving into a new era of workplace relations this is too important an issue to leave shrouded.

8.18 Master Builders' policy is that this matter must not be the subject of legal doubt and that the protections of the kind now contained in Regulation 8.5(1)(h) and (i) of the WR Regulations should continue. This is to ensure that independent contractors are not subjected to workplace laws with adverse effects for efficiency. As in *Wesfarmers,* it has been held that a blanket limitation on the use of contract labour is not a matter pertaining to the employment relationship. [35] Yet in other cases, it has been held that regulating the use of contract labour may be a matter pertaining to the employment relationship if the manner of regulation has a direct connection with the employment security of the workers covered by the agreement.[36] Harris suggests that the difference in outcome is directly determined by the different wording of the proposed agreement and the linking of the matter to the workplace terms and conditions of the employees covered by the agreement, for example by requiring that contract workers are engaged on terms and conditions no less favourable than those offered by the proposed agreement. While this is a distinction that lawyers or other experts may readily discern, it is not a feasible test for independent contractors themselves or for small businesses.

8.19 In *Schefenacker*[37] the Full Bench found that a clause which directed the employer to instruct labour hire agencies to pay their workers the same wage rates as applied under the certified agreement was a matter pertaining to the employment relationship, or was at most an aspirational clause that did not confer a substantive obligation on the employer and, therefore, did not prevent the agreement from

[34] Harris "Collective Bargaining after Electrolux", *Federal Law Review*, 34, pp 65-66
[35] Ibid, pp 65-66 citing *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313; *Transport Workers' Union of Australia v National Transport Operations Pty Ltd* (2003) 121 IR 339; *Construction, Forestry, Mining & Energy Union v Mount Thorley Operations Pty Ltd* (1997) 79 FCR 96; *Wesfarmers* (2004) 138 IR 362
[36] Ibid citing *R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia* (1978) 140 CLR 470, 472-3 (Gibbs J); *Ballantyne* (unreported, AIRC, Voss VP, PR 952656, 22 October 2004) at [113]; Schefenacker (2005) 142 IR 289, 320-1 [83]
[37] (2005) 142 289

being certified.[38] In another case, by contrast, a clause which provided that casual employees engaged by a labour hire company working in "a position covered under this agreement shall be employed on the same wages and conditions as applied to a casual engaged directly by the employer'' was found to be an attempt to make a non-party to the agreement (i.e. the labour hire company) bound by the agreement. It was not therefore a matter pertaining to the employment relationship.[39]

8.20 The Government has promised that independent contractors will not be the subject of industrial relations regulation as indicated in paragraph 2.9 of this submission. The regulation of independent contractors is too important an area for there to be doubt as to the extent to which regulation is or is not a permitted matter under the Bill. In the past, clauses which regulate independent contractors on the fine legal distinction that a specific clause is about terms upon which they may be engaged as opposed to whether or not they may be engaged, for example, have been held to pertain.[40] This is unacceptable because it extends industrial law to the regulation of the terms and conditions of contractors' engagement.

8.21 The Bill should be amended so that regulation of independent contractors is specifically excluded and becomes an objectionable term. The indication in paragraph 673 of the Explanatory Memorandum that permitted matters would not include "terms that would contain a general prohibition on the employer engaging labour–hire employees or contractors" is not sufficient. The indication that only a **general prohibition** is not permissible means that new life is breathed into

[38] Ibid citing *Schefenacker* (2005) 142 IR 289, 320-1 [83]. This decision was applied by the subsequent Full Bench in *Re Transport Workers' Union of Australia and Australian Air Express* (2005) 142 IR 409.
[39] Ibid citing *Re Inghams Enterprises (Mile End Feedmill) Certified Agreement 2002* (unreported, AIRC, O'Callaghan SDP, PR956998, 5 April 2005).
[40] SDP Lacy Transfield Worley North West Shelf Onshore and Offshore (Maintenance Modification and Upgrades) Certified Agreement 2004 PR952538, 21 October 2004. In Bundaberg Foundry Engineers Ltd certified agreement 2005PR960367 18 July 2005 Commissioner Richards said that:
"For purposes of the approach to determining whether or not a term of an agreement relating to contractors pertains to the requisite relationship, the Full Benches in Re: Schefenacker and Re: TWU would appear to require that the Commission must reach a number of express, related judgments about the clause before it. These judgments require resolving, on a case by case basis, each of the following questions:

- Firstly, can the relevant term of the agreement fall within the scope of the definition of s.170LI of the Act; and
- Secondly, on the basis of the plain words of the relevant clause in the context of the agreement, as a whole, and any other relevant evidence, is the clause of the agreement concerned with contractors directly concerned with employees' job security such that it may be taken to constitute a pertaining clause, or is incidental to such a clause (and in a way which is direct and more than consequential, and not "*contrived*" or "*academic*"); and
- Thirdly, on the basis of the plain words of the relevant clause in the context of the agreement, as a whole, and any other relevant evidence, is the relevant clause of the agreement which concerns contractors, one that is permissible for reasons of a consideration of the judgments of the High Court in *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others ("Re: Cocks")*[40] and *R v Moore and Others; Ex parte Federated Miscellaneous Workers' Union of Australia ("Re: Moore")*[40]"

provisions which restrict independent contractors' terms and conditions. Such provisions do not fit in a modern and global economy. They are a legacy from the past and should not be resurrected to form part of a modern industrial relations system which was rightly placed productivity and flexibility as the pivotal outcomes. They should not be returned from the dead, but consigned to the grave where they belong.

Recommendation 4	The regulation of independent contractors should be specifically excluded from the Bill. Terms purporting to regulate independent contractor arrangements should be classified as objectionable terms.

Recommendation 5	The inclusion of non-permitted terms should render an enterprise agreement invalid.

8.22 To illustrate the point made in paragraphs 8.19 and 8.20, Master Builders has drafted a clause which could be included in an enterprise agreement under the Bill but which unacceptably regulates independent contractors: see Box 1.

Box 1 – Independent Contractor Regulation Provision- NEGATIVE EXAMPLE

(i) **T**est Case Pty Limited may use contractors to carry out work on its building sites, irrespective of any other clause in this Agreement.

(ii) Test Case Pty Limited acknowledges the need to strike a balance between safeguarding the security of employment of its permanent staff with the need for flexibility in a competitive economic environment.

(iii) While Test case Pty Limited generally endeavours to employ a mix of permanent employees and contractors at its sites, given the competitive nature of the industry and the difficult economic environment within which Test Case Pty Limited operates, Test Case Pty Ltd reserves the right to vary its employee mix at any time and at its complete discretion to ensure the longevity and prosperity of the company.

(iv) For the life of the Agreement, contractors must be employed on no less favourable terms and conditions than those of permanent employees.

(v) Test Case Pty Limited must keep detailed records of all contractors employed on its sites, and make these records available on request to the Union to demonstrate compliance with this Agreement.

Notes to Box 1:

Clause (i) is similar to the first paragraph of the relevant clause from the *Transfield Worley* case.[41]

Clause (ii) contains similarities with clauses in the case law (found to pertain to the employment relationship), by referring to the thematic issue of security of employment.

By contrast, clause (iii) is deliberately drafted to emphasise the managerial prerogative. In some respects, it could be interpreted as undermining the policy objective cited in (ii).

Clause (iv) within the context of these provisions, emphasises that the attempt to regulate the terms and conditions of contract employees through the Agreement, occurs within the broad context of the policy objectives stated in clause (ii), that is, safeguarding the security of employment of the permanent employees.

Clause (v) is an additional clause seeking to impose conditions on the relationship of management with the independent contractors for the benefit of the union per clause 172(1)(b) of the *Fair Work Bill 2008.* This clause is unlikely to constitute an unlawful term under clause 194 of the Bill. It does not refer to union right of entry; instead, it provides a separate right for unions to access contractors' records under the terms of this agreement.

8.23 As noted in this submission at paragraphs 9.1 to 9.3, the Bill extends the concept of "matters pertaining to the relationship between employers and employees" to "matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations" pursuant to paragraph 172(1)(b). Matters that fall within this latter test are also "permitted matters" for the purposes of agreement content. Thus, while it is unclear whether Clause (v) in Box 1 would have consisted of a 'matter pertaining to the relationship between employers and employees' under *Electrolux* principles, under the Bill Clause (v) is likely to comprise a matter pertaining to the relationship between an employer and an employee organisation.

8.24 Journalists expert in industrial relations have already raised concerns over the Bill's right of entry provisions which allow unions to inspect non members' employment records. They point out that despite the 'notional' protections in clause 504 of the Bill, in practice, these new powers could expose individuals' sensitive personal information.[42] Under expanded right of entry provisions in the Bill, union officials can inspect and copy any documents, including wage records of those who are eligible to be a member of the union, to check for a breach of workplace laws and industrial agreements.[43] This matter is taken up further at paragraph 19.7 and 19.8 of this submission

[41] Transfield Worley North West Shelf Onshore and Offshore (Maintenance Modification and Upgrades) Certified Agreement 2004, PR952538, 21/10/04
[42] Scott, S. "Union plan could reveal personal data: bosses". *Australian Financial Review*, 12 December 2008.
[43] Clauses 481 and 482.

8.25 Clause (v) expressly permits unions to access the names and employee records of independent contractors separately from their rights under the union right of entry provisions in the Bill. There is thus no need for the union to comply with the additional legislative requirements imposed on unions which seek to access records under the legislative right of entry provisions. For example, the protection of clause 504 which prohibits unauthorised use or disclosure of records in contravention of the National Privacy Principles would not apply. (Clause 504 is a civil remedy provision under the Bill discussed at paragraph 19.9 of this submission). Nor is the right to access these records limited to situations where there is a suspected contravention of the Act, or of a 'fair work instrument', as under the new right of entry provisions

8.26 Given the history of intimidation of subcontractors in the building and construction industry by certain unions, extensively documented in the Cole Royal Commission, in ABCC investigations, and in relevant case law,[44] clause (v) is fraught with danger.

8.27 In contrast to the Bill, the current WR Act and WR Regulations expressly prohibit any terms which have the effect of imposing restrictions on the engagement of independent contractors or labour hire workers or which impose requirements on the conditions of their engagement in collective agreements. (These rules have applied since the Workchoices amendments). Under these provisions, the independent contractor regulation provisions of the kind illustrated in Box 1 would be prohibited content, and so void. Master Builders submits that this is the better approach.

8.28 It must be stressed that there are other good policy reasons for not constraining contractor engagement through industrial agreements, including the central concern of not affecting productivity. Because of its volatility and fluctuations, increasing labour costs and the move towards specialisation independent contractors play a fundamental part in the building and construction industry. The Cole Report[45] recognised that contracting is both an important and legitimate form of business activity and working arrangement. Commissioner Cole also found that

[44] See Master Builders submission to the Wilcox Inquiry now publicly available at: http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/Submissions.htm

[45] The Final Report of the Royal Commission into the Building and Construction Industry http://www.royalcombi.gov.au/hearings/reports.asp.

"the trend to contracting has been accepted by significant numbers of workers,"[46] which accords with Master Builders' view. Contracting arrangements are not peculiar to this industry but are extensively used in other industry sectors and reflect a modern and productive market economy.

8.29 In the building and construction industry, business uses independent contracting arrangements to deliver the following efficiencies:

8.29.1 contractors can enter the industry with very little capital outlay resulting in a very competitive environment, as barriers to entry are low;

8.29.2 the system provides an important opportunity for skilled tradespersons with the necessary motivation to significantly increase their earnings. Their income is directly related to their efficiency in the actual time they work;

8.29.3 the system is administratively simple and reduces supervision considerably as the principal contractor does not incur the administrative overheads of employing staff;

8.29.4 there is an incentive to solve problems which develop on site quickly and effectively, since contractors do not get paid for delays. Employees, on the other hand, have little incentive to solve such problems;

8.29.5 a contractor quotes a price for a job which reflects the situation in regard to work on hand and the market price reflects the level of demand;

8.29.6 results based contracts are generally more efficient than time costed labour working towards the same ends;

8.29.7 the production process requires a variety of tasks that require different skills at different points in time and the completion of these tasks to a certain level of quality can be easily monitored. It is thus well suited to the work of contractors;

8.29.8 because of the fluctuations in demand in building and construction, there is much competition between firms. The resulting uncertainty about demand leads many firms to use contract labour;

[46] Ibid at paragraph 277, Chapter 23, Volume 9.

8.29.9 the current skills shortage in the industry means that contractors are able to mobilise quickly and more efficiently place themselves to meet the needs of companies, projects and the industry at a particular time;

8.29.10 regional variations in prices paid to contractors encourage mobility, thus helping to achieve and improve balance within regional markets; and

8.29.11 the housing sector, which predominately uses contractors, has not faced any major stoppages or strikes. This is because a contractor is bound by the contract entered into in respect of the work to be performed and has an incentive to get on with the job.

8.30 In the past it was common for unions in the building industry to seek to regulate the engagement of contractors in a myriad of ways. This obstructive practice has been curtailed by the prohibited content rules and by the application of the *National Code and Implementation Guidelines,* which have also deterred the making of building and construction industry side deals referred to in the extract from the EM set out at paragraph 8.12 of this submission. Master Builders does not want a return to the "bad old days" when enterprise agreements could regulate independent contractors because of the damaging effects on productivity that would result. The policy considerations outlined in the extract from the EM are, therefore, far less relevant to the building and construction industry.

9 ENTERPRISE AGREEMENTS – RELATIONSHIP WITH A UNION

9.1 The Bill extends the concept of "matters pertaining to the relationship between employers and employees" to "matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations" pursuant to paragraph 172(1)(b). Matters that fall within this latter test are also "permitted matters" for the purposes of agreement content.

9.2 This concept appears to have arisen from the Australian Council of Trade Unions paper entitled "A Fair Go at Work: Collective Bargaining for Australian Workers."[47] The ACTU asserts that in some countries visited by the authors "agreements can and do cover matters related to relationships between unions and employers as well as matters related to workers."[48] Under the heading in the same terms as adopted for the purposes of defining a permitted matter pursuant to clause 172(1)(b), the paper makes these comments on North America:

[47] ACTU Bowtell et al 2006 (ACTU)
[48] Id at p 66

> *In North America unions can take industrial action in pursuit of closed shop agreements, preference clauses and payment of union dues by non-members. In North America, bargaining fees "check off" (payroll deductions of union dues) and union security clauses (a clause requiring non-members to pay union dues) are considered an important guarantee of financial viability for unions, who in turn are seen as integral to democratic workplaces. It is ironic that what is outlawed in Australia is antithetical to "individual rights" is seen in the United States and Canada as a component necessary of the freedom to associate and as an outworking of democracy in the workplace.*[49]

9.3 The ACTU paper ignores the fact that twenty-two US states have "right to work" laws that prohibit agreements between trade unions and employers making membership or payment of union dues or "fees" (by non-members) a condition of employment, either before or after hiring.[50] As Oswalt[51] has noted:

> *Although states differ in the extent to which they utilize 14(b)[of the* National Labor Relations Act] *to restrict security agreements, in general, a right-to-work law "forbid[s] unions and employers from conditioning employment on any form of union 'membership,' even if a majority of employees in the bargaining unit have selected the union as their exclusive bargaining representative."*[52]

9.4 The ACTU has not recognised the very different nature of the workplace relations systems involved. For example, in the United States union representation in agreement negotiations are subject to majority employee approval, generally via secret ballot – with small business exemptions also applying.[53]

9.5 The uncertainty surrounding the nature and extent of obligations encompassed by this new test are far in excess of those generated by the *Electrolux* test. Although Clause 676 of the EM provides a list of permitted matters, there does not seem to be a discernible test as to the nature of the "relationship" mentioned in the clause. In other words, there is little or no basis for labelling the interactions between an employer and a relevant union as a "relationship" in a formal sense; any contract is not between the employer and a union but between employees and the union or unions of which they are a member. The ACTU paper from which the idea appears to have been taken establishes the presence of a "relationship" from the sort of examples set out in the extract from its paper quoted above. This does not

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[49] Ibid
[50] http://www.dol.gov/esa/whd/state/righttowork.htm
[51] M M Oswalt *The Grand Bargain: Revitalising Labor Through NLRA Reform and Radical Workplace Relations 57 Duke L. J. 691*
[52] Id at p 700
[53] The small business exemption is shortly summarised in an overview of proposed law changes at http://www.barkerolmsted.com/news/legal-updates/newsletter0090.php accessed 8 January 2009

offer a useful test to establish the boundaries of this concept. Accordingly, Master Builders would prefer that the list of matters that are permitted should be set out as an exhaustive list and the matters listed in Clause 676 of the EM become the substance of the law. This will avoid litigation about the nature and extent of this new test of what may be included in agreements and will provide sufficient rights to unions. Having said that, the feedback that Master Builders has received from some of its members on the Bill is that clause 172(1)(b) should not found agreement content rules and should be discarded. Whilst this is the Master Builders' preferred position, Recommendation 6 will clarify the extent of permitted content if the Government prevails with its current policy.

Recommendation 6	The extent to which unions are able to have matters about their rights reflected in the content of agreements through "permitted matters" should be set out in an exhaustive list.

10 EFFECT OF INCLUDING NON PERMITTED MATTERS

10.1 As indicated in paragraph 8.14 above, an individual term of an enterprise agreement will have no effect to the extent that it is not about a permitted matter. Despite a particular term not being effective, subclause 253(2) of the Bill makes it clear that the inclusion of a term that is not about a permitted matter does not affect the validity of an enterprise agreement. Fair Work Australia (FWA) will not be assessing the content of an agreement except to determine whether the terms of the agreement contravene the NES (see clause 186(2)) and the other matters set out in Clause 186 including per Clause 186(4), which provides that the agreement must not contain unlawful terms.

10.2 This status of a non permitted matter clause aggravates uncertainty generated by the new tests about permitted matters. Given the breadth of the tests set out in clause 172, how is a small business to be aware of whether or not a clause of an agreement contains a permitted matter or otherwise? Master Builders' recommends that the tests be narrowed in accordance with the recommendations set out in this submission and that the inclusion of non-permitted matters should render the agreement invalid. Master Builders supports the principle that matters which are not permitted should be unable to found protected industrial action but we consider that the inclusion of those provisions in published and circulated copies of workplace agreements will add to confusion and difficulty in their

application in the workplace. [54] Small businesses, in particular, will find it difficult to determine whether a clause is about a permitted matter and this will be a boon for lawyers; it will not assist the process of productive agreement making.

10.3 Many employers in the building and construction industry are family owned and operated businesses with poor understanding of industrial relations laws. To expect these small employers, many of which will not be members of any employer association, to understand what is a not permitted matter in an agreement, and therefore unenforceable (notwithstanding that agreement having been approved by FWA) is unrealistic and potentially very costly. These employers will assume that the approved agreement contains lawful and permitted matters; the proposed law opens the agreement making process to abuse in connection with the content of agreements. A credible agreement making process must engender user confidence; confidence will be undermined by allowing non-permitted matters to be included in agreements.

Recommendation 7	Non-permitted clauses should be assessed by Fair Work Australia and deleted from agreements.

11 FORCING EMPLOYERS TO BARGAIN

11.1 Under the new bargaining regime in the Bill, employers are required to bargain with a union concerning non greenfields agreements in two circumstances.

11.2 The first is where an employer wants an agreement and at least one employee is a member of a union. This obligation arises because it is a requirement of clause 174(3) that if an employee is a member of a union and the employee has not appointed another person as a bargaining representative, the union automatically becomes the bargaining representative for that employee.

11.3 This "default representation right" given to unions also means that where a union was a bargaining agent in respect of the agreement, it has a right to notify FWA that it wants to be covered by the enterprise agreement. So long as this notice is given before FWA approves the agreement, the union is covered by the particular

[54] Clause 409(1)(a) specifies that 'employee claim action' is industrial action which is organised or engaged in for supporting or advancing claims in relation to the agreement that are about or *are reasonably believed to be about*, permitted matters (and which complies with the other requirements of that clause.) Employee claim action is protected industrial action under the terms of clause 408(a). Master Builders considers that this clause is too broad at present (see italics) and this could be remedied if Recommendation 7 is implemented.

agreement (Clause 183). As expressed in paragraph 753 of the EM, where a union is so covered additional rights under the legislation are conferred, such as the ability to enforce the agreement against the employer. Union involvement also expands the permitted matters in the agreement - matters that relate to the relationship between the employer and the union may then be contained in an enterprise agreement, as discussed at section 9 of this submission.

11.4 Master Builders is concerned that even though an employee may desire this default mechanism to operate, it does not appear to be possible for employees to change their representative or to nominate someone other than the union once the bargaining process has commenced. This is a matter that should be addressed in the Bill so that employee choice is preserved, especially where an employee might be unhappy with the way in which the bargaining representative is operating.

11.5 Employees join unions for a variety of reasons but there are circumstances in which an employee may not wish to be represented by a union in the agreement making process. The employee may also wish to exclude the union from being a party to the agreement. The practical effect of having the union as the default bargaining representative deprives the employee of the right to choose; the employee must therefore be given a remedy and the right to replace the default representative if the employee feels aggrieved. Master Builders points out that the default mechanism could arguably operate even where a union member was unfinancial.

11.6 Master Builders' position is that unions should not be provided with an automatic right of representation but if the current policy in the Bill is to prevail, there should be the capacity for employees to change the bargaining representative on reasonable notice. Master Builders policy regarding no automatic right of involvement by unions in collective bargaining is reinforced when considering the terms of *Forward with Fairness: Policy Implementation Plan* which states that "a union does not have an automatic right to be involved in collective enterprise bargaining." [55]

Recommendation 8	Unions should not be provided with an automatic right of representation as a bargaining agent; instead there should be an active appointment process.

[55] Supra note 2 at p 13

Recommendation 9	The Bill should be amended so that employees have a right to change the bargaining representative on reasonable notice.

11.7 The second situation in which an employer can be forced to bargain with a union is where an employer is subject to a majority support determination - essentially where a majority of employees vote to establish an agreement. Clause 236(1) makes it clear that a bargaining representative of an employee who will be covered by a proposed single enterprise agreement may apply to Fair Work Australia for such a determination where the majority of employees who will be covered by the agreement want to bargain with the employer: see Clause 237(2). This process thus means that an employer may be forced to bargain even where the employer does not want to enter into an agreement.

11.8 In the context of majority support determinations, we note that the basis upon which a majority is ascertained is a discretionary matter for FWA. This is unacceptable. Because a majority support determination has the consequences discussed above, the processes followed to effect a determination must be completely democratic. This is especially important in the building and construction industry where employees and subcontractors have in the past been coerced in relation to the agreement making process. Accordingly, Master Builders recommends that at least 50 per cent (plus one) of the employees who would be covered by any subsequent agreement must vote, and that a simple majority of that number must approve the making of a determination.

11.9 Further, the process must involve a secret ballot. This is to ensure that no element of coercion arises, even covert coercion such as may occur in a situation where a show of hands has been used as a means to ascertain majority support. It has been reported to Master Builders that in the West Australian building and construction industry union officials who have been unsuccessful in gaining support for a union demand by a show of hands have then sought a show of hands expressing opposition to the union claim. A minority of hands to the latter proposition has then been taken to indicate support for the union demand. Quite obviously this is not an accurate or democratic representation of the views of those participating in such a ballot. This form of behaviour is covert intimidation.

Recommendation 10	In order for a majority support determination to be lawfully and democratically made, at least 50 per cent (plus one) of the employees to be covered by the agreement must vote and a simple majority of that number must approve a majority support determination through a secret ballot.

11.10 We reiterate that Master Builders considers that these provisions take matters beyond the policy set out in *Forward with Fairness*. In *Forward with Fairness: Policy Implementation Plan* it was set out that "under our proposed system, a union does not have an automatic right to be involved in collective enterprise bargaining."[56]

11.11 In the two instances mentioned above, the unions do have an automatic right to be involved, triggered first of all by the default bargaining status that they have been provided with, and secondly under the mechanism for a majority support determination and are therefore inconsistent with *Forward with Fairness*.

12 GREENFIELDS AGREEMENTS

12.1 The WR Act currently provides for two types of Greenfields Agreement, a union Greenfields Agreement and an employer Greenfields Agreement. The latter is not provided for in the Bill as a result of deliberate Government policy. Master Builders supports the concept of employer Greenfields agreements. In respect of union Greenfields Agreements, under section 329 WR Act an agreement may be made with one or more unions which are entitled to represent the industrial interests of the workers likely to be covered by the agreement. They are commonly used in the building and construction industry, particularly for large infrastructure projects and have proved efficient in establishing labour costs, especially over the first twelve months of the project. Their content is a vital factor in assessing investment decisions about the project.

12.2 Master Builders believes that in their new form Greenfields Agreements will damage productivity because they must now be made with all eligible unions and because the certainty about labour costs that is currently available to investors, especially for the first twelve months of a project, will disappear.

[56] Australian Labor Party August 2007 *Forward with Fairness: Policy Implementation Plan*, p 13

12.3 Driven by our members' concern that Greenfields Agreements will no longer be useful, Master Builders issued a media release entitled *Increased Union rights will damage productivity*. The release focused upon the new procedures for Greenfields Agreements. Master Builders was concerned that the Bill's requirements would curtail the use of Greenfields Agreements for fear of sparking demarcation disputes and that builders would be forced to use more cumbersome procedures.

12.4 The media release (25 November 2008) contained the following paragraphs:

> *"The unions have also been given extra leverage to impose these agreements on workplaces: they have been given enhanced rights of entry, contrary to Forward with Fairness; and, worryingly, new rights to be notified about Greenfields agreements which will be restricted to a union only form," said Mr Harnisch.*
>
> *Under the Federal Government's new IR system, a Greenfields agreement cannot be made until it is signed by the employer and each relevant union so for example, you could have the CFMEU, the ETU and the Clerks Union all needing to sign an agreement before it takes effect.*
>
> *"Effectively, when the agreement process has commenced with one union, Fair Work Australia and other unions that might be affected must also be notified of the intent to make a Greenfields agreement," said Mr Harnisch.*
>
> *"This will impact builders' ability to deliver projects with certainty because unions can intervene at a critical time in the tender process.*
>
> *"There is also a high risk that unions will get into costly and damaging demarcation disputes about the particular terms which are to apply to the agreement, drawing out the negotiation process to the benefit of no one," said Mr Harnisch.*

12.5 The accuracy of the statements in these paragraphs was called into question and Master Builders therefore sought external legal advice on this issue. A copy of the opinion provided by Blake Dawson and dated 27 November 2008 is attached to this submission as Attachment A. The opinion suggests that Clause 182(3) of the Bill be amended to ensure that the meaning is clear and that there is no possibility of reading it as requiring that an employer must make a greenfields agreement with all employee organisations that are entitled to represent employees who will be covered by the agreement. Master Builders notes that the Government view, as recently expressed in the media,[57] is that if an employer strikes a deal "with just one of the relevant unions, then the employer can ask to have the Greenfields agreement approved." [58] On the basis of the external expert legal opinion Master

[57] P Williams *CCI warns IR reforms could hamper Labor's building push* West Australian 8 January 2009 p 12
[58] Ibid Statement attributed to a Government spokesperson

Builders recommends that this policy position should be adopted. Implementing Recommendations 11 and 12 would put the matter beyond doubt.

12.6 Box 2 below sets out a scenario for the making of a greenfields agreement that shows the difficulties which might be encountered by a company seeking to make a greenfields agreement under the envisaged legislative structure.

Box 2 – Case Study Re Greenfields Agreements

Company YX P/L (YX) wants a Greenfields with the AWU and other unions for some major civil works. Under Clause 175(1) of the Bill YX must take all reasonable steps to give notice of its intention to make the agreement and give that notice to "each employee organisation that is a relevant employee organisation." The term relevant employee organisation is defined in clause 12 as an organisation that is entitled to represent the interests of one or more employees that will be covered by the agreement in relation to work to be performed under the agreement.

Accordingly, YX notifies the CFMEU, the ETU (electrical works) the AWU of course, the ANF (nurse on site) and the clerks union. 175(5) says YX must also give the notice to Fair Work Australia. Each of the unions notified is a bargaining representative per Clause 177. YX cannot refuse to bargain with the CFMEU per Clause 179 of the Bill. YX can then make the deal with the AWU but must also get the ETU, the ANF and the Clerks union to sign per 182(3).

The effect of this is that if one employee organisation (e.g. ETU) does not sign YX cannot make a Greenfields Agreement that will cover the whole site. YX could change the scope of the agreement but that would enable part of the workforce to take industrial action which defeats the purpose of entering into a Greenfields Agreement, especially where labour costs must be settled for input into a tender for the project to be covered by the Greenfields Agreement.

12.6 Master Builders points out that the likelihood of subsequent industrial action in the case study illustrated in Box Two is, ironically, more likely given that clause 413(2) of the Bill does not permit protected industrial action in relation to a proposed Greenfields agreement. Master Builders supports clause 413(2). However, the provision is likely to motivate a union to separate itself from the processes of making a Greenfields agreement, then seeking to bargain in the respect of terms and conditions which will form a bargain that can support protected action.

Recommendation 11	Clause 183(2) should be amended to ensure that an employer is not required to make a Greenfields Agreement with all employee organisations that are entitled to represent employees who will be covered by the agreement.

Recommendation 12	In order to reduce demarcation disputes, the legislative scheme should be amended so that relevant unions are notified by Fair Work Australia after a Greenfields Agreement is made with a specific union.

13 THE BETTER OFF OVERALL TEST

13.1 As indicated elsewhere in this submission, FWA will be required to approve enterprise agreements. Clause 186(2)(d) requires FWA to be satisfied that the relevant agreement passes the better off overall test.

13.2 Clause 193 of the Bill sets out when an enterprise agreement passes the better off overall test. Subclause 193(1) establishes that an agreement (other than a Greenfields Agreement) passes the better off overall test if FWA is satisfied that each award-covered employee and each prospective-award covered employee would be better off overall if they were employed under the agreement rather than under the modern relevant award. The test requires an assessment of every employee. This is impractical and therefore is unacceptable. As was noted in a recent *Workplace Express* report:[59]

> *The BOOT retains a global test of the new instrument against the award, so employers and employees can agree to a reduction in one condition in exchange for a better improvement in others. But the often inexact nature of the trade-off required in those situations is likely to mean that, in practice, delivering a better result overall will result in a stronger outcome for the employee than under the no disadvantage test.*

13.3 A similar focus on each individual employee is established for Greenfields Agreements by subclause 193(3). How an employer is to establish that each and every employee would be better off than under the award is a very difficult question and, indeed, raises the issue of whether or not the test's attribution as a "global" test in the quotation above is accurate. Answering it will escalate the required trade offs and therefore increase the costs of bargaining. This is especially the case when seeking to measure the effect on future employees.

13.4 Master Builders has experienced real difficulty with the processing of agreements under the current global test. In our assessment, establishing that each and every employee to be covered under an enterprise agreement is better off will be even more time consuming than under the current system. Accordingly, we do not understand the comment in paragraph 768 of the EM "that it is intended that Fair Work Australia will usually act speedily and informally to approve agreements with most agreements being approved on the papers within seven days." This is tantamount to wishful thinking.

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[59] *BOOT tougher than the NDT says AiG; ACTU disagrees,* 28 November 2008

13.5 Since the EM period has not been legislated and the EM indicates that there will be instances where approval takes longer in an environment where currently some agreements are taking up to two years to be approved, Master Builders doubts that it will be possible for agreements to be processed and approved within seven days. This is especially so in light of the fact that nobody yet knows how an employer will assess the position of each employee and then translate that situation into an agreement.

13.6 In the context of the uncertainty introduced by the new test, Master Builders recommends that the statement set out in the EM concerning the seven day turnaround should be given formal recognition. Master Builders recommends that there should be a schedule for the approval process and that this should be achieved either through a maximum specified period within which FWA must discharge the function of approving the agreement or not. Alternatively agreements could be deemed to come into operation within seven days following lodgement with the FWA with an automatic provision for any adjustment if FWA's assessment is that the better off overall test has not been met. This change will also accommodate the assessment of whether agreements contain non-permitted matters.

Recommendation 13	Agreements should come into effect within seven days from date of lodgement with Fair Work Australia on an interim basis. If the agreement does not pass the better off overall test, adjustments may be required from an employer by notice served upon the employer by Fair Work Australia.

14 GOOD FAITH BARGAINING

14.1 The requirements about good faith bargaining are set out in clause 228 and following of the Bill. Bargaining representatives are obliged to meet the good faith bargaining requirements set out in clause 228 although the provisions of 228(2) make it clear that bargaining representatives are not required to make decisions or to reach agreement on the terms to be included in the enterprise agreement.

14.2 Although the provisions of clause 228(2) are clear, in that they specify that there is no requirement to make concessions or actually reach agreement, FWA has a great deal of power in this area and this will affect the way in which bargains are negotiated. Master Builders submits that the threshold for access to a bargaining order is set too low. In Clause 229(4) a bargaining representative may apply for a

bargaining order based upon the notion that it "has concerns" that one or more of the bargaining representatives for the agreement have not met the good faith bargaining requirements; or if the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement. The test appears to be subjective, a proposition reinforced by the criterion for obtaining a bargaining order set out in Clause 229(4)(d) that the relevant bargaining representative considers that the other representatives have not "responded appropriately" to the concerns. In order to avoid litigation and to prevent a serious breach declaration being made under Clause 234 with the consequence that FWA may make a determination under Clause 269, Master Builders recommends that objective criteria be established by regulations that restrict access to a bargaining order to circumstances in which the good faith bargaining requirements are not being met.

Recommendation 14	Access to a bargaining order should be restricted to situations in which objective evidence exists to show that the good faith bargaining requirements are not being met.

14.3 Master Builders is also concerned that it appears unclear as to whether an employer who is exercising a legitimate right under Clause 228(2) not to reach an agreement may still be subject to a bargaining order. This question should be placed beyond doubt.

Recommendation 15	An employer exercising the legitimate rights conferred by Clause 228(2) should not be subject to a bargaining order.

14.4 During internal consultations on the Bill, Master Builders' members indicated that one of their key concerns in relation to good faith bargaining is the uncertainty around the extent of the disclosure requirements expressed in Clause 228(1)(b). We point out that the exclusion relating to "confidential or commercially sensitive information" has not been defined. Master Builders submits that the information must be relevant to the particular claims or terms and conditions of the bargain under discussion. The Bill should make it clear that where any disclosure of information would be likely to expose the undertaking to any disadvantage then that disclosure should not be required.

Recommendation 16	The Bill should be amended so as to make clear that the employer need not disclose information that is irrelevant to the claims made upon it and which would expose the employer to any disadvantage.

14.5 Clause 238 confers a right upon bargaining representatives to seek a scope order from FWA. An application for a scope order may be made if the bargaining representative "has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover."

14.6 The making of a scope order could radically alter the coverage of the agreement from that anticipated by employers and could also cut across a majority support determination that is in place. Where a scope order changes the employees who will be covered by an agreement FWA should be required to void any majority support determination and the employees asked to vote again on the issue of collective bargaining.

Recommendation 17	The Bill should be amended so that where a scope order changes the employees who will be covered by an agreement FWA should be required to void any majority support determination relating to the making of the relevant agreement.

15 WORKPLACE DETERMINATIONS

15.1 Workplace determinations are of three different kinds depending on their purpose. Master Builders notes that **low paid determinations** may be made and are dealt with in Clauses 260-265. These provisions follow on from Clauses 241-246 which deal with obtaining a low paid authorisation which is a pre-requisite to the making of a low paid determination.

15.2 Master Builders does not believe that a capacity to make what is equivalent to an arbitrated outcome will in fact foster bargaining. There is an inherent contradiction in specifying a determinative process for the low paid as a means to facilitate bargaining. These are mutually exclusive concepts. The

proposition that a low paid determination is required also ignores the existence of a comprehensive safety net for wages and conditions that apply to Australian workers, including a rigorous minimum wage process. In this context, "low paid workers" (undefined) can only be a relative term (as acknowledged in Clause 243(2)(d)) and one that will cause a difficulty in practice. The identification of low paid workers should not be as broad as those whose terms and conditions are regulated by the minimum safety net because that defeats the objective of having safety net conditions.

15.3 At a time of economic difficulty, reliance on a safety net of fair terms and conditions of employment should be sufficient and has proved to be so. The concept of having arbitrated outcomes for a class as amorphous and relative as the "low paid" is likely to harm productivity by creating uncertainty and costs. The term should be restricted to cover only those employees where bargaining will have the demonstrated effect of lifting the productivity of the specific enterprises the subject of the authorisation – this goes beyond the requirement in 243(3)(a) which requires FWA to be satisfied that the authorisation would "assist in identifying" improvements to productivity and service delivery at the enterprise.

Recommendation 18	A low paid determination should be restricted to cover only those employees where bargaining will have the demonstrated effect of lifting the productivity of the specific enterprises the subject of the authorisation.

15.4 Clauses 266 to 268 deal with **industrial action related workplace determinations**. Whilst these, arguably, may be necessary as a last resort, when read together with subclauses 423(2) and 423(3) Master Builders submits that the process of obtaining such a determination is able to be manipulated. Under Clause 423 FWA has the discretion to order the suspension or termination of protected industrial action on the basis that it is causing significant economic harm to employers and/or employees when it is satisfied certain requirements have been met. Clause 266 of the Bill requires FWA to make an industrial action related workplace determination if it has terminated industrial action (amongst other things under clause 423) and agreement has not been reached in the "post industrial action negotiating period" (generally speaking, 21 days from the date of the termination by FWA).

15.5 Clause 423(2) provides that where the action is employee claim action (as defined) the employer and an employee must be subject to significant economic harm. However, this test is different where employee response action is taken per Clause 423(3)(a). It permits FWA to terminate the protected industrial action even where only a single employee is subject to significant economic harm.

15.6 Employee response action is initiated by employees. Accordingly, they should not be able to rely upon harm that they then suffer through their own actions in order to trigger the ability to obtain an arbitrated outcome; this situation could easily be manipulated where the employees were aware of one of their number who could not financially sustain the protracted industrial action; this need not be a person actively involve in taking the action so long as the employee falls into the category of an employee who will be covered by the agreement.

Recommendation 19	The criteria in Clauses 423(2) and 423(3) should be the same so that the ability to manipulate industrial action in order to obtain an arbitrated outcome is reduced.

16 TRANSMISSION OF BUSINESS

16.1 The provisions of the Bill substantially change the current law. They will create uncertainty and increase costs. The subject is dealt with in Clauses 307 to 320 of the Bill. This part of the Bill has been renamed "transfer of business."

16.2 In this area of the law the underlying aim is to obtain a balance between protecting the interests of the employees of the business to be transmitted whilst maintaining the rights of the new employer to restructure a business to obtain greater efficiencies and, as a paramount consideration in many instances, to remain in business. Industrial instruments that impede flexibility or which inflate costs are often in themselves a stimulus to outsourcing or merger. Master Builders contends that in overtly moving away from the law based upon the High Court principles in *PP Consultants P/L v Finance Sector Union of Australia,*[60] as expressly acknowledged at paragraph 1205 of the EM,

[60] (2000) 201 CLR 648

the Bill creates several areas of uncertainty that should be clarified prior to passage of the Bill.

16.3 The Bill deals with situations in which there has been a transfer of business for the purposes of the legislation by establishing criteria in clause 311(1). They are three broad steps:

- An employee changes employer (which can occur within a three month period).
- The 'work' the employee does for the old and new employers is the same or substantially the same.
- A 'connection' exists between the old and new employers, referable to the concepts to engage this notion set out in subclauses 311(3) to 311(6).

16.4 The way that the concept of 'connection' has been expressed unacceptably broadens the situations where an instrument will transmit with the transferring employee. Subclause 311(3) extends the basis upon which a connection will be established to situations in which the new employer has the beneficial use of some or all of the assets of the old employer, inclusive of intangible assets. This would mean that a transfer of business could occur where one entity takes over a contract from another (e.g. in landscape maintenance work) and uses certain assets of the old employer that might have been abandoned- for example a wheel barrow and other gardening equipment left behind. If the new employer then engaged employees of the old contractor after it had gone into liquidation there would be a technical transfer of business and the employee would carry with him or her the prior industrial instrument. This seems an absurd example in some senses – illustrating the extent of the connection test. Further, there would be a connection sufficient for the Bill even if a registered trade mark was transferred, even though the mere fact of such a transfer has nothing to do with the purposes for which such provisions are made.

16.5 Master Builders submits that the underlying approach to the transfer of business will create confusion and will not meet the aims of the law in this area. Of particular concern is the failure of the Bill to fix a period after which the transferred instrument will cease to have effect. The effect of this will be to make it harder for the employees of transferred or failed business to find work. Because the Bill makes it easy to create a technical connection involving the ongoing application of the previous industrial instrument, Master Builders

believes that many professional associations will recommend that former employees should simply not be re-employed.

Recommendation 20	The conceptual basis for transfer of business rules, especially the "connection" test, be clarified by Government to create certainty.

17 UNFAIR DISMISSAL

17.1 Unfair dismissal is dealt with in clauses 379-405. Master Builders acknowledges the mandate that the Government received to introduce these laws and we point out that we have worked with the Government in the development of the draft fair dismissal Code.

17.2 There are, however, aspects of the proposed law that should be clarified, particularly given the deteriorating economic circumstances expected for 2009 and beyond. It is likely that businesses will, unfortunately, be required to make employees redundant. Accordingly, the process should be simple and fair. Clause 385 rightly excludes from the compass of unfair dismissal a "genuine redundancy." That term is then defined in Clause 389.

17.3 Clause 389 should be improved. In 389(1)(a) the first leg of the test of whether there has been a genuine redundancy is if " the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise." The term "operational requirements" is not defined in the legislation. It should be defined because the use of the term "requirements" throws doubt on the applicability of changes that are conscious and voluntary, such as the decision of a small business person to retire and close their business. That sort of decision is not obligatory and would not be a change brought about by a "requirement" because the business owner was not obliged or required by any externality to take the step of closing the business.

17.4 The phrase "because of changes in the operational requirements of the employer's business" is unnecessary and confusing. Its inclusion will generate uncertainty and disputation and should be deleted from the provision.

Recommendation 21	The phrase "because of changes in the operational requirements of the employers business" is unnecessary and should be deleted from clause 389(1)(a).

17.5 We note that the second leg of the test requires that consultation processes set out in modern awards or agreements must be followed in order for the redundancy to be genuine. We agree that there should be a reference to modern awards in this provision but do not believe that the consultation processes in agreements should be called up. This requirement could mean that where "consultations" embrace union agreement to levels of severance pay for example, the scope for disputation is unnecessarily enlarged.

Recommendation 22	Consultation processes from agreements should not be required to be followed in order to make a redundancy genuine.

17.6 Clause 389(2) requires employers to seek to "redeploy" persons who would otherwise be made redundant. This obligation will cause disputes, especially if the employee made redundant is at a skill level beyond the jobs that remain available. The term "redeploy" should be replaced with a formula such as "continue to employ the employee within the enterprise in another position at the same skill level." The Bill also creates an obligation to redeploy the relevant person to an "associated entity" of the employer. Associated entity has the meaning given by section 50AAA of the *Corporations Act* 2001. Master Builders is concerned, however, that association in the sense used in the *Corporations Act* may not mean that the affected employer has the power to control the "hiring and firing" at the other entity, which would usually be vested in the relevant managing director. This also has the potential of creating inequities for existing employees in the associated entity and extending financial hardship across the spectrum of businesses. The test should be modified to take that consideration into account.

Recommendation 23	In clause 389(2) all words after the words "redeployed" should be replaced with the concept of where possible employing the employee within the enterprise at a specific skill level.

17.7 In the context of unfair dismissals, Master Builders has one other concern that appears to be a policy anomaly. The unfair dismissal provisions deliver on the *Forward with Fairness* policy as highlighted in clause 394, where an employee has 7 days to make an unfair dismissal claim. However, in contrast employees under clauses 366 and 744 have 60 days to make a claim against the employer in relation to termination of employment disputes. The time frame of 60 days compared to 7 days for unfair dismissal claims is highly disproportionate. 60 days is excessive. This period does not assist the parties to resolve the matters practically or expediently. There is no merit in having different timeframes. The timeframe in clauses 366 and 744 should be reduced to 7 days to enable the parties to resolve the disputes quickly and effectively.

Recommendation 24	In clauses 366 and 744 the timeframe of 60 days to make a claim should be reduced to 7 days in line with unfair dismissal claims.

18 DEMARCATION AND INDUSTRIAL ACTION

18.1 The Cole Royal Commission[61] noted that inter-union rivalry over the right to enrol and represent workers has been a cause of disputation in the building and construction industry in Australia for many years. [62] Demarcation disputes continue to be a problem in the construction industry, as illustrated in December 2008 when the CFMEU construction division WA branch was the only major union in WA to oppose a 10 point agreement designed to avoid demarcation disputes among the State's unions.[63] Demarcation has also been at the centre of concerns relating to the making of modern awards, as illustrated by this extract from the submissions of counsel for the AWU in a recent AIRC case:

The CFMEU refer to the elephant in the room being what they described as demarcation. With all due respect the elephant in the room is the CFMEU in that respect. And it would be those of us around whose hair has gone grey on the service of industrial actions in this country in the last 15, 20 years would understand what is being said when the AWU says that it would be remiss of this Commission [AIRC] to embark upon award modernisation in a way that was absolutely guaranteed to open up old wounds, old contests, old battle grounds and

[61] Supra note 45
[62] *Id* Volume 7, February 2003, Chapter Four, p139-172. Available at: http://www.royalcombci.gov.au/ accessed on 22/12/08. p 141.
[63] "Reynolds holding out in WA demarcation pact", *Workplace Express*, 12 December 2008.

old disputes which have been resolutely settled by some fairly emphatic decision making by this Commission [AIRC] over a large number of years. [64]

18.2 Unions WA secretary Mr D. Robinson commented that the increased importance of union eligibility rules in determining coverage and entry rights under the Bill reinforce the need for unions to "get their act together."[65] Master Builders agrees that, given their "destructive"[66] history, demarcation disputes are a critical issue for the industry.

18.3 Given that demarcation problems have been endemic in the industry, Master Builders submits that elements of the Bill are likely to increase the likelihood of such disputes. Because of the costly nature of demarcation disputes to employers, employees and the general community, Master Builders submits that the relevant provisions of the Bill should be amended to promote industrial harmony, so that they minimise rather than increase the incidence of this problem. This matter is taken up further below.

18.4 Inter-union disputes are commonly known as 'demarcation disputes'. That term is defined in s4(1) of the WR Act to include:

> *a dispute arising between two or more organisations, or within an organisation, as to the rights, status or functions of members of the organisations or organisation in relation to the employment of those members; or*
>
> *a dispute arising between employers and employees, or between members of different organisations, as to the demarcation of functions of employees or classes of employees; or*
>
> *a dispute about the representation under this Act, or the Registration and Accountability of Organisations Schedule of the industrial interests of employees by an organisation of employees.*

There is no equivalent definition in the Bill which largely ignores this subject. There are in fact only six references to demarcation disputes in the Bill.[67] Accordingly, we anticipate that this matter will be dealt with to a greater extent in the forthcoming transitional legislation.

18.5 The Cole Royal Commission observed:

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[64] Mr A Herbert on behalf of the AWU, Transcript of Proceedings dated 1 December 2008, AM2008/15, Award Modernisation under s576E, at: http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=building

[65] "Reynolds holding out in WA demarcation pact", *Workplace Express*, 12 December 2008.

[66] Ibid.

[67] See Clause 409 and 410 of the Bill.

Demarcation disputes have the potential to cause serious economic damage to participants in the industry and the economy generally. Time and energy which might be better directed towards productive work is taken up with negotiations to resolve the demarcation dispute. If the dispute leads to industrial action, it can have wider ramifications, particularly if the action impinges on work which is on the critical path for a project. [68] *Most importantly, demarcation disputes involving two or more unions usually affect entirely innocent parties. In the building and construction industry, those parties include clients, contractors and workers.*[69]

18.6 The largest unions with coverage in the building and construction industry are the CFMEU, the AWU and the AMWU, together with their respective state-registered counterparts. The CFMEU has the strongest presence on building projects in the capital cities, while the AWU has coverage on many civil projects. The AMWU has a presence in both the commercial construction and civil sectors of the industry. Other trade unions cover a number of sub sectors, including the CEPU, which represents electricians and plumbers.[70]

18.7 Demarcation disputes in the building and construction industry tend to fall within one of the following two categories:

- attempts by individual unions to expand their coverage;and
- dual ticketing.[71]

Demarcation disputes arising from attempts by individual unions to expand their coverage involve situations where the eligibility rules for joining one union overlap with the eligibility rules for joining another, such as with the CFMEU and the AWU, especially in civil construction. In this situation, two unions may compete with each other for the membership of the workers, leading to a dispute about which union is entitled to represent them. These disputes have been common. Dual ticketing is where the workers are already members of one union but where a particular work site is in practice a closed site controlled by a rival union, which enforces a 'no ticket, no start' policy. As a result of the recent building and construction industry reforms, these disputes are almost historical. In order to resolve the dispute, the employer was often obliged to allow the worker to join the second union and meet the cost of their membership dues, with the result that the workers were covered by "dual tickets". These two categories are illustrated more fully with practical examples below.

[68] *Supra note 45*, Reform: National Issues Part 1, Volume 7, February 2003, Chapter Four, p139-172. Available at: http://www.royalcombci.gov.au/ accessed on 22/12/08, cited at p 141.
[69] Id, p 141.
[70] Id, p 141-142.
[71] Id, p 143.

Attempts to expand coverage

18.8 Underlying most demarcation disputes are disagreements between unions regarding the scope of their rules dealing with eligibility for membership, a factor which is given prominence in the Bill; for example in Clause 481 of the Bill, discussed in section 19 of this submission, one of the criteria for exercising right of entry is that the permit holder's organisation is entitled to represent the industrial interests of the relevant member. Sometimes eligibility rules overlap, so that two or more unions have an entitlement to enrol certain classes of workers. In other cases unions assert an entitlement to enrol which is inconsistent with their rules.[72] These realities are relevant to the Bill which includes many instances where union rights are defined by reference to their ability to represent the interests of particular employees.

18.9 As the Cole Royal Commission reported:

In the building and construction industry there is a history of disputation between the CFMEU and the AWU over eligibility to recruit members working in the civil construction area. The civil construction area has traditionally been the preserve of the AWU but the CFMEU has from time to time attempted to assert and expand upon its coverage. Demarcation disputes between the CFMEU and the AWU are complicated by the fact that many workers and the contractors for whom they work move between the commercial and high-rise residential construction sector and the civil construction sector.[73] Workers who have joined the CFMEU while working on a city office building site might next obtain employment on a major infrastructure project which brings them within AWU eligibility rules. The same subcontractor may one day be working on a high-rise apartment building and the next on an oil refinery. The contractor's workers will be eligible to join the CFMEU on the first day and the AWU on the second.[74]

18.10 The Royal Commission noted that the situation outlined in paragraph 18.9 has given rise to considerable tension between the two unions, culminating in long-running litigation arising out of an attempt by the CFMEU to amend its rules to give it the right to move into the civil construction sector.[75] Before 19 May 1997, the predecessors of the CFMEU were party to a series of demarcation agreements made with a number of the AWU's predecessors. For some time these agreements were generally accepted and honoured by both parties. From about

[72] Ibid, p 143.
[73] Ibid, p 143.
[74] Ibid, p 143.
[75] Ibid, p 143.

1995, however, the unions began increasingly to break these agreements, and in 1997 the CFMEU advised the AWU that it was withdrawing from them.[76]

18.11 On 25 July 1997 the CFMEU lodged an application under s204 of the WR Act for consent to change its eligibility rules. Essentially, the proposed rule change sought to extend the coverage of the CFMEU to include:

> *Any worker (other than metal, electrical or plumbing tradespersons), engaged in any work in or in connection with or incidental to the construction, repair, renovation, maintenance, ornamentation, alteration, removal or demolition of any building or structure or any other works or projects.*[77]

18.12 A long list of different types of civil construction projects was expressly included within this definition. The proposed rule change attempted to extend the CFMEU's coverage to all non-tradesmen engaged on civil projects. Without the rule change, this area was outside the scope of the CFMEU's existing eligibility rules, and within the scope of other unions' eligibility rules. In the standpoint of the building and construction industry, the main competition was again the AWU.[78] The AWU, several other unions and several employer organisations objected to the proposed rule change. Some objections were settled by agreement during the course of the hearing.[79]

18.13 At first instance on 28 January 2000, Williams SDP granted the CFMEU's application,[80] but on appeal a Full Bench of the AIRC determined that Williams SDP had erred in the application of s204. [81] The Full Bench decided to quash that decision and refuse the CFMEU's application.[82] On 27 May 2002 the Full Federal Court quashed the Full Bench's decision and remitted the matter for reconsideration.[83] On 31 July 2002 the Full Bench of the AIRC again decided to refuse the application of the CFMEU. [84] Its reasoning was that the class of employees who would be affected by the rule change by reason of becoming eligible for CFMEU membership could more 'conveniently belong' to the AWU.[85] The Full Bench held that granting the proposed rule change would lead to

[76] Ibid, p 144.
[77] Ibid, p 144.
[78] Ibid, p 144.
[79] Ibid, p 144.
[80] Ibid, p 144 citing Reasons for Decision of Williams SDP, AIRC Print S2640, 28 January 2002.
[81] Ibid, p 145 citing Reasons for Decision of Full Bench of AIRC, Print PR 901486, 28 February 2001.
[82] Ibid, p 145 citing Reasons for Decision of Full Bench of AIRC, Print PR 905003, 13 June 2001.
[83] Ibid, p 145 citing (2002) 114 IR 185.
[84] Ibid, p 146 citing Reasons for Decision of Full Bench of AIRC, Print PR 920670, 31 July 2002.
[85] Ibid, p 146 citing Reasons for Decision of Full Bench of AIRC, Print PR 920670, 31 July 2002.

demarcation disputes between the AWU and the CFMEU.[86] This was the main consideration that led the Full Bench to reject the application.

18.14 Considering the comments from the AWU's counsel as set out in paragraph 18.1 of this submission, it is apparent that these conflicts are likely to arise again as modern awards amalgamate existing awards.

Dual ticketing

18.15 The resolution of demarcation disputes often has implications for the rights of individual workers. Under the WR Act, workers are free to join or not to join a union. If they do choose to join a union, workers may apply for membership of any union which has constitutional coverage of the type of work which they perform. As indicated earlier, one way of resolving demarcation disputes is 'dual ticketing'.[87]

18.16 With 'dual ticketing', an asphalting contractor might have a workforce whose members have chosen to join the AWU. When it is known that the contractor is to perform work on or adjacent to a building project, the CFMEU may use industrial pressure in an attempt to prevent the contractor performing the work. To avoid trouble the head contractor or the asphalting contractor may then decide to pay the CFMEU to issue union membership tickets to the workers who are already members of the AWU. This type of arrangement might forestall the threatened industrial action and allow the work to proceed. The consequence for the workers is that they are treated as members of the CFMEU, even though they may have no wish to join that union. [88] In the forthcoming transitional legislation, we recommend that this issue be addressed and specific measures introduced to stop its recurrence.

Existing approach to demarcation disputes in the WR Act

18.17 The WR Act contains provisions for the resolution of demarcation disputes under Commonwealth law. Organisations registered under the WR Act are required to have rules that specify the conditions of eligibility for membership of that organisation.[89] The current WR Act defines a demarcation dispute in s4, set out in full above, and also in s 6 of Schedule 1 (which contains provisions relating to

[86] Ibid, p 146 citing Reasons for Decision of Full Bench of AIRC, Print PR 920670, 31 July 2002.
[87] *Final Report of the Royal Commission into the Building and Construction Industry*, Reform: National Issues Part 1, Volume 7, February 2003, Chapter Four, p 146. Available at: http://www.royalcombci.gov.au/ accessed on 22/12/08, p 146.
[88] Ibid, p 146.
[89] WR Act s 141.

registration and accountability of organisations). As noted in section 2 of this submission, similar provisions are absent from the Bill. Chapter 4 of Schedule 1 to the WR Act deals with representation orders. It enables the AIRC to make orders, in the context of demarcation disputes, about the representation rights of organisations of employees.[90] The AIRC may, on the application of an organisation, an employer or the Minister, make an order that:

- an organisation of employees is to have the right, to the exclusion of another organisation or organisations, to represent the industrial interests of a particular class or group of employees who are eligible for the membership of the organisation; or
- an organisation of employees that does not have the right to represent that class or group of employees under the legislation, is to have that right to represent those employees or;
- an organisation of employees is not to have the right to represent the industrial interests of a particular class or group of employees, who are eligible for membership of the organisation.[91]

18.18 While the AIRC appears to have some latitude in its decision making in this regard, there are some significant restrictions on these powers. The AIRC may not make an order unless it is satisfied that the conduct or threatened conduct of the organisation is preventing, obstructing or restricting the performance of work, or is harming the business of the employer. Alternatively, it must be satisfied that these consequences have ceased but are likely to recur or are imminent. [92] The AIRC must take certain factors into account before making a representation order.[93] The AIRC must have regard to the wishes of the employees who are affected by the dispute, and, where the AIRC considers it appropriate, must also consider several other factors. These include:

- the effect of any order on the operations of an employer who is party to the dispute, or to the effect on a union member where the union is party to the dispute;

[90] WR Act, Schedule 1, Chapter 4, Part 1. s 132 (Simplified Outline).
[91] Ibid, s133.
[92] Ibid, s134.
[93] Ibid, s135.

- any agreement or understanding (for example a union agreement) relating to the right of a union to represent the class or group of employees;
- the consequences of not making an order for the employer, employees or union involved;
- any other order made by the AIRC, in relation to other relevant demarcation disputes.[94]

18.19 Orders may also be subject to limitations[95] and are enforceable through the federal court. The powers of the AIRC to resolve demarcation disputes may be exercised only by a Full Bench or Presidential Member of the AIRC. [96] Before these provisions were enacted, the procedure for resolving demarcation disputes (under the old s118A of the WR Act) was much slower, leading to significant delays and considerable expense for employers when demarcation disputes arose. These factors were identified by the Cole Royal Commission in its Final Report. [97] The Report notes:

As a result, formal proceedings to resolve demarcation issues lack practical utility and are potentially costly. As a result, most demarcation disputes are resolved at site level following industrial action or the threat of industrial action. A person affected by industrial action in connection with a demarcation dispute may commence proceedings in tort without first obtaining a certificate from the AIRC. Where industrial action taken during a bargaining period relates, to a significant extent, to a demarcation dispute, the AIRC may, in its discretion, suspend or terminate the bargaining period. A negotiating party may make an application to the AIRC for such an order.[98]

18.20 We now move specifically to consideration of these issues in the context of the Bill. Unions have traditionally been listed as respondents to the various awards that apply in the industry. As part of the award modernisation process, however, unions will no longer be listed as respondents to modernised awards; furthermore, 'modernised' awards will deal with a broader range of workers as part of a simplified system with fewer awards. These changes, together with other aspects of the Bill discussed in this submission, such as changes to union right of entry and changes to the notification to unions of greenfields agreements, are likely to increase the potential for demarcation disputes between unions.

[94] Ibid s 135.
[95] Ibid, s136.
[96] Ibid, s138.
[97] *Final Report of the Royal Commission into the Building and Construction Industry*, Reform: National Issues Part 1, Volume 7, February 2003, Chapter Four, p 152. Available at: http://www.royalcombci.gov.au/ accessed on 22/12/08.
[98] Ibid, p 152.

18.21 While the Bill contains some provisions referring to demarcation disputes, there is a need for the procedures relating to the resolution of these disputes to be more clearly set out, either in the Bill or in the forthcoming transitional legislation. The procedures should provide a speedy and effective means of resolving demarcation disputes.

Recommendation 25	That the term 'demarcation dispute' is defined in the Bill, and that procedures for dealing with demarcation disputes between unions are set out clearly in the Bill or in the forthcoming transitional legislation.

18.22 Subdivision A of the Bill deals with protected industrial action for a proposed enterprise agreement. Clauses 409 and 410 provide that if industrial action is being organised by a union ('bargaining') representative, it must not relate to a significant extent to a demarcation dispute or contravene an FWA order that relates to a significant extent to a demarcation dispute. (These provisions deal with industrial actions called 'employee claim action', and 'employee response action' to industrial action taken by an employer, as defined in the Bill.)[99]

18.23 The use of the wording 'to a significant extent' in clause 409(5) indicates that industrial action (employee claim action) relating to a demarcation dispute may in some circumstances be protected industrial action.[100] In other words, where industrial action also relates in part to other factors, such as working conditions, it may be protected, thus reducing an employer's options for settling a demarcation dispute in the expeditious manner permitted by the WR Act, and described above. Under the Bill there is the potential for unions to manipulate these provisions to gain protection for what would otherwise be industrial action connected to a demarcation dispute.

18.24 Furthermore, in clause 410(2) industrial action (employee response action) relating 'to a significant extent' to a demarcation dispute or which contravenes an FWA order dealing 'to a significant extent' with a demarcation dispute may in some circumstances be protected industrial action.[101] These provisions are alarming given the potential cost to employers of industrial action and demarcation disputes

[99] Bill clauses 409, 410.
[100] Bill clause 409(5)
[101] Bill clause 410(2).

generally, and the sorry history of demarcation disputes in the construction industry.

18.25 Master Builders submits that no (employee claim) industrial action associated with demarcation disputes should be protected action. Master Builders also submits that no (employee response) industrial action should be protected if it relates to a demarcation dispute or if it is in contravention of an FWA order that deals with a demarcation dispute in any respect.

Recommendation 26	The phrase "to a significant extent" where it appears in clause 409(5) and 410(2) should be deleted

18.26 FWA's power to deal with disputes generally is contained in clause 595, although clause 595(1) provides that FWA may deal with a dispute only if FWA is expressly authorised to do so under or in accordance with another provision of the Act. FWA's powers to make orders with respect to industrial action are contained in Part 3.3 of the Bill. According to Division 4 clause 418(1), if FWA considers that industrial action that is not or would not be protected action, is happening or is threatened, impending or probable, or is being organised, then it must make an order that the industrial action stop, or not occur.

18.27 In Division 6, Clause 423, FWA may make an order suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances. Amongst other things, these are if: the industrial action is causing or threatening to cause significant economic harm and; if harm is imminent and; if the industrial action is *protracted* and the dispute is unlikely to be resolved in the reasonably foreseeable future. It is easy to see how an industrial dispute relating partly to a demarcation dispute could quickly become costly.

18.28 It is unclear why the requirement that industrial action be protracted should be a necessary requirement of the provision relating to protected industrial action causing significant economic harm generally where there is a demarcation dispute at issue. Master Builders submits that clause 423(6)(b) should in itself be a sufficient criterion because the test in that clause, that the dispute will not be resolved in the reasonably foreseeable future, is sufficient.

Recommendation 27	Delete clause 423(6)(a) as unnecessary.

18.29 The EM states in the context of its discussion of Greenfields agreements that:

> *A Greenfields agreement must be made with one or more relevant employee organisations. However, a demarcation order may provide that an employee organisation is not entitled to represent the industrial interests of a particular class or group of employees, despite those employees being eligible to be members of that employee organisation.*[102]

18.36 As discussed earlier in this submission, Greenfields agreements are defined in clause 172(4), and the notification procedure to each relevant union that may be covered by the agreement is contained in clause 175. Master Builders is concerned that the notification procedure for Greenfields Agreements as currently drafted in clause 175 will increase the likelihood of demarcation disputes, a point already mentioned in the earlier discussion of this topic.

19 RIGHTS OF ENTRY

19.1 One of the main undertakings in *Forward with Fairness* is that there would be no change to the laws relating to right of entry. In bold letters at the commencement of the section of *Forward with Fairness: Policy Implementation Plan* dealing with right of entry the following words are set out in bold type:

> *Labor will maintain the existing right of entry rules.*[103]

19.2 This subject is of vital concern to Master Builders, not least because there has been systemic abuse of right of entry provisions in the building and construction industry. The Cole Royal Commission found as follows:

> *The evidence presented to the Commission generally was that permit holders see themselves as being entitled to enter sites on demand and without notice for whatever purpose they consider appropriate.*[104]

19.3 It further reported:

> *Statutory provisions which entitle officers and employees of unions to enter premises authorise conduct which would otherwise constitute a trespass. Because they are a statutory intrusion into the premises and business affairs of another and because of their potential to cause disruption to workplaces, the circumstances in which entry is permitted need to be*

[102] Ibid, p 111.
[103] ALP August 2007 *Forward with Fairness: Policy Implementation Plan,* p 23
[104] Supra Note 40, *Final Report*, Vol 7, p 206 at para 121

> *precisely defined and limited to what is necessary to achieve the purpose for which entry is permitted.*[105]

19.4 Master Builders is concerned that, in the context of a history of abuse and conduct that has been acknowledged to cause disruption, the Bill extends union rights of entry and expands rights available to unions under the existing law. This is an unfortunate and retrograde step. Master Builders submits that the Bill should be changed so that these new rights do not become part of the revised workplace system. This point is elaborated in the paragraphs that follow. The comments highlight points of concern.

19.5 Clause 484 deals with **right of entry for discussion purposes**. This provision removes the current requirement in section 760 WR Act that a union official may enter premises for this purpose only where there are eligible employees on the premises. This means that an employee must be working under an industrial instrument binding on the union and that the union must be eligible to represent that employee. The new requirement is that a union official who is a permit holder and who provides the required notice may enter to hold discussions with employees who are "entitled to be represented by the permit holder's organisation." This means that unions will be able to enter premises on a "recruiting drive" where employees are working under an Award or agreement irrespective of whether that Award or agreement binds the union, and it includes situations where employees may be working under AWAs and ITEAs. This will exacerbate demarcation disputes, particularly between unions such as the AWU and the CFMEU, which have overlapping coverage such as in civil construction. Demarcation disputes are a matter of deep concern to Master Builders as articulated in the previous section of this submission.

19.6 Contrary to the statement in the *Forward with Fairness* policy documents, the new test dramatically expands union rights of entry. Master Builders believes that reliance on union coverage rules will work only where historical union coverage is adhered to and demarcation agreements are respected: hence our earlier emphasis on the CFMEU indicating that it would not be bound to a proposed demarcation agreement in Western Australia. As discussed in the section of this submission on demarcation, the finalisation of demarcation agreements between unions is currently problematic. Accordingly, Master Builders believes that the

[105] Supra Note 40, *Final Report of the Royal Commission into the Building and Construction Industry*, Vol 7, p 175, para 3

recognition of historical lines of demarcation and/or formal agreements should govern the law in this area and that, in addition, a union should be covered by a modern Award or an agreement in order to gain entry to hold discussions.

Recommendation 28	Union right of entry for discussion purposes should be based upon historical demarcation decisions or current demarcation agreements. The union should be covered by a modern award or agreement under which the relevant employees are working.

19.7 The Bill alters the current law in relation to right of entry to investigate a suspected breach of the legislation or the term of a fair work instrument. A fair work instrument is defined in Clause 12 to mean a modern award, an enterprise agreement, a workplace determination or an FWA order. Currently under the WR Act, section 748(4) permits a union to inspect member records relevant to the breach. Clause 482 of the Bill expands that right so that the proposed clause 482(1)(c) would vest the permit holder with a right to require the occupier or an affected employer to allow the inspection and copying of any record or document kept on or accessible from the premises so long as the record etc is relevant to the suspected breach. Section 748(9) of the WR Act permits access to non member records where an order is made by the AIRC for that purpose. Section 748(10) provides that the AIRC must be satisfied that "the order is necessary to investigate the suspected breach." Master Builders submits that the current law should be retained, given the potential abuses that could arise from access rights as proposed.

19.8 Potential searching of records could be widespread. Even when they were relevant to a breach they could provide a vast array of information for recruitment or prosecution of OH&S breaches. A union in NSW for example, would then have the power to prosecute separately under the specific OHS law and retain a moiety or benefit from that prosecution. An allegation of unreasonable hours of work in breach of Clause 62 could involve the union in seeking to determine whether other employees were asked to work those hours including managerial staff. This could give it access to a wide range of records which may also reflect whether a person was a member, for example, of another union. Particularly in small businesses each person's file contains a multiplicity of detail that is not nicely separated. For all of these reasons, and for the very real issues concerning privacy that are

acknowledged by the provisions of the Bill, we submit that the existing protections should remain.

Recommendation 29	Access to non-member records where a suspected breach is alleged should only be granted following an application to Fair Work Australia, which should be satisfied that access is required in order to properly investigate the suspected breach.

19.9 Master Builders is concerned that the privacy provision in Clause 504 is obscurely drafted and requires an assessment of Privacy Principle 2 in Schedule 3 to the *Privacy Act* 1988 (Cth). The Principle is far more extensive than suggested in the statutory note and is difficult to apply in the context of third party access. Master Builders submits that the restriction on disclosure should be more precise and should be limited to the use of the information in relation to the resolution or prosecution of the alleged breach.

Recommendation 30	The regulation of the disclosure of personal information should be more precise than set out in Clause 504. Disclosure should be limited to the use of the information in relation to the resolution or prosecution of the alleged breach.

19.10 Master Builders believes that there has been a drafting error in Clause 515(5). Clause 515 relates to the imposition of conditions on entry permits. Pursuant to Clause 505(2)(a) FWA may make an order imposing conditions on an entry permit. Clause 515(5) then seems to limit this power. It is thus:

> *To avoid doubt, a permit holder does not contravene an FWA order merely because the permit holder contravenes a condition imposed on his or her permit by order (whether the condition is imposed at the time the entry permit is issued or at any later time).*

The EM is silent about the purpose of this clause. But although its apparent aim is to avoid doubts, the effect is more likely to create doubt. If a union official has breached a condition of the entry permit then the relevant consequences should follow no matter how the condition came to be incorporated as part of the relevant exercise of the right of entry.

Recommendation 31	Clause 515(5) should be deleted as its meaning is unclear and it adds nothing of substance.

19.11 As indicated earlier, many of the businesses operating in the building and construction industry are small family enterprises. Master Builders therefore has concerns with the change in the law in Clause 493 of the Bill which is as follows:

The permit holder must not enter any part of premises that is used mainly for residential purposes.

19.12 The Bill changes the current law by providing that the premises must be used "mainly" for residential purposes. Difficulties obviously arise in cases where the premises are used for both work and residential purposes. The provision offers no guidance as to when a home or part of a home might be entered if used for work purposes. The EM appears to go further than the terms of the Bill and provides the needed clarity. Paragraph 1973 states that for premises that are used for both residential and work purposes, it is intended that a permit holder will have an entry right only where the premises are mainly used for work purposes on a regular and substantial basis. It is the concept of a "substantial basis" that should be embodied in the statute itself. This test should be included in the statute or the prior law restored.

Recommendation 32	The statute should reflect the Government's intention that a permit holder will have an entry right only where the premises are mainly used for work purposes on a regular and substantial basis.

19.13 As indicated earlier in this submission, clause 194 of the Bill defines an 'unlawful term'. For FWA to approve an enterprise agreement, it must be satisfied that the agreement does not include any unlawful terms (clause 186(4)).

19.14 Clause 194(f) and (g) deal with right of entry. Under clause 194(f) an unlawful term is an entitlement to enter premises for a purpose referred to in clause 481 (investigation of suspected contraventions) or to enter premises to hold discussions of a kind referred to in clause 484 other than in accordance with the Bill's right of entry provisions in Part 3-4. A term that provides for the exercise of a State or Territory OHS right other than in accordance with the Bill's right of entry provisions in Part 3-4 is also an unlawful term under Clause 194(g).

19.15 Clause 194(f) and (g) attempt to prevent the parties to an agreement from seeking to create separate right of entry entitlements, or from seeking to exercise State or Territory OHS right of entry entitlements, in a way that differs from the regulation of right of entry in the Bill.

19.16 The rationale behind these provisions is noted in the EM:

> *The right of entry framework provides balanced and appropriate processes and requirements for entry for these purposes that must be complied with.*[106]

19.17 Master Builders supports the policy position that enterprise agreements should be restricted in their capacity to address right of entry. Yet there are circumstances where additional rights of entry may be introduced. The EM notes:

> *It is intended that agreements can include terms allowing for union officials to enter the employer's premises for purposes other than those set out in paragraphs 194(f) and (g). An agreement might, for example, provide an entitlement to enter the employer's premises for a range of reasons connected to the terms of the agreement, such as:*
>
> - *to assist with representing an employee under a term dealing with the resolution of disputes or consultation over workplace change; or*
> - *to attend induction meetings of new employees; or*
> - *to meet with the employer when bargaining for a replacement to the current agreement.*[107]

Master Builders opposes the creation of additional rights of entry in agreements. We support the insertion of similar wording to that of Regulation 8.5 (1)(g) of the WR Regulations into the Bill so that a term of this kind in an agreement would have no effect (under clause 356). That regulation currently provides that prohibited content includes:

> *the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement.*

[106] EM, paragraph 836, p131.
[107] EM, paragraph 838, p131-132.

Recommendation 33	A new clause should be included within the definition of 'objectionable term' in clause 12 with text along the following lines: "the creation of a right of an official of an organisation of employees to enter the premises of an employer other than in accordance with Part 3-4"

20 STAND DOWN

20.1 The Bill deals with stand down provisions in Chapter 3, Part 3.5, Divisions 1-3. These provide for a 'national system employer' to stand down a 'national system' employee without pay in certain circumstances. Division 2 sets out these circumstances. Division 3 provides for FWA to deal with disputes about stand down.

20.2 Clause 524 details the circumstances in which employees may be stood down. It provides that during a period in which an employee cannot usefully be employed because of industrial action, a break down of machinery or equipment (where the employer cannot reasonably be held responsible) or a stoppage of work for any cause for which the employer cannot be held responsible, an employer may stand down the employee.[108] During the stand down period, the employer is not required to make payments to the employee.[109] This is an issue that impacts upon productivity. Obviously, productivity will be harmed if no work is undertaken but payment must be made. This is common in situations where one part of the workforce is on strike and the balance of the workforce is consequently not able to be productively engaged. For this reason employers have traditionally been provided with the right to stand down employees.

20.3 The circumstances for a stand down are more restrictive in the Bill than in the WR Act. The WR Act specifies that stand down provisions will apply to break downs of machinery or equipment, but makes no qualification as exists in the Bill which limits the cases to 'where the employer cannot reasonably be held responsible'.[110] This qualification will be difficult to apply in practice. For example, is the break down due to an employer's failure to perform sufficiently regular maintenance, or is it the result of ordinary wear and tear on the machine? If an employee performs an act that causes the machinery or equipment to break down, is the employer ultimately responsible for failing to supervise the employee sufficiently? This

[108] Clause 524(1)
[109] Clause 524(3)
[110] S691A WRA 1996

question would usually be answered in the affirmative, as the employer has the responsibility to properly supervise an employee, especially under OHS laws. An employer bears the onus of proof in the test set out. It would be difficult if not impossible to meet this onus as the test of what is reasonable appears to be an objective test rather than a subjective test which could take into account the particular circumstances of the individual employer.

Recommendation 34	The ability of an employer to stand down employees where there has been a breakdown of machinery should not be qualified.

20.4 Clause 525 states that where the statutory stand down provisions apply, an employee is not taken to be stood down when the employee is taking paid or unpaid leave authorised by the employer, or is otherwise authorised to be absent from his or her employment. Under this provision an employee may take paid annual leave during all or part of a period when the employee would otherwise be stood down under s524 (1).

20.5 Clause 526 of the Bill notes that FWA may deal with a dispute about the operation of the stand down provisions. It may deal with a dispute by arbitration,[111] mediation or conciliation, or by making a recommendation or expressing an opinion.[112]

20.6 FWA may deal with a dispute on application by an employee who has been or is going to be stood down; or by an employee who has made a request to take leave to avoid being stood down, and the employer has authorised the leave; on application by a union entitled to represent the employee; or by an inspector.[113]

20.7 In dealing with the dispute FWA must take into account fairness between the parties concerned.[114] A person must not contravene a term of a FWA order.[115]

20.8 In the current Act, in the event of a dispute over whether a stand down period is authorised, the model dispute resolution process applies.[116] On an application by an employee who has been stood down, or by an inspector, a court or the Federal Magistrates Court may grant an injunction where an employer purports to invoke a stand down period which is unauthorised. [117] This is a quite different approach to

[111] Clause 526(2)
[112] Clause 595(2)
[113] Clause 526(3)
[114] Clause 526(4)
[115] Clause 527
[116] Part 13, WRA 1996
[117] Part 13, WRA 1996

that in the Bill. In the current Act, the object of the provisions is to encourage the resolution of the dispute 'at a workplace level' and provide flexibility for the resolution of disputes by allowing the parties to determine the best forum for the resolution of the dispute,[118] while ensuring that parties maintain their right to litigate.[119]

20.9 The Bill has quite a different focus. From the outset, the parties appear to be encouraged to apply to FWA for intervention and a remedy. Furthermore, the Bill allows unions to intervene in the process so long as they are entitled to represent the industrial interests of the employee who has been or is going to be stood down. The Bill provides such unions with the right to make an application to FWA for a remedy without requiring the union to obtain the consent of the employee. Given the history of industrial disputation by the construction industry unions touched upon in section 18 of this submission, the Bill provides the unions with yet another avenue to disrupt the legitimate operations of a workplace even when an employee and another union are satisfied with the outcome. If this provision is permitted to remain in the Bill, invoking a stand down provision is likely to become a far more contested process and will enable unions to play out demarcation disputes.

Recommendation 35	Unions should not be able to apply to Fair Work Australia in relation to a stand-down dispute unless they have received the written consent of the affected employee.

21 THE OFFICE OF THE FAIR WORK OMBUDSMAN

Powers of Inspectors under the Bill

21.1 Division 3 of Part 5-2 of the Bill establishes the Office of the Fair Work Ombudsman and the functions and powers of Fair Work Inspectors. The functions and powers of Fair Work Inspectors are similar to those set out in the WR Act. Importantly, the Bill avoids some of the more extreme rights provided to inspectors under say the NSW Occupational Health and Safety (OH&S) legislation, such as the right of an inspector to enter a premises using force provided for by section 54 of the *Occupational Health and Safety Act 2000 (NSW).* Fair Work inspectors must enter a premises without force.

[118] Part 13, Division 1, s692 WRA (object clause)
[119] Part 13, Division 1, s693 WRA

21.2 Master Builders' support for the structure and process of this inspectorate should not be taken to imply support for a merger of the proposed building and construction industry inspectorate powers with those of Fair Work Inspectors. However, in the context of the controversy surrounding the current powers of the Australian Building and Construction Commission an analysis of this area is useful. Master Builders considers that the promised specialist division of Fair Work Australia should not report to the Fair Work Ombudsman but should be given autonomy, as advocated in Master Builders' submission to the Wilcox Inquiry.[120]

Recommendation 36	Master Builders does not consider that the building and construction specialist division of Fair Work Australia should report to the Fair Work Ombudsman but should be given autonomy.

21.3 There are several differences between the powers of inspectors under the Bill and those currently applicable under the WR Act. The primary differences are as follows:

21.3.1 The Bill provides that in certain circumstances, inspectors may exercise their compliance powers in respect of an entitlement under a contract between an employee and employer. This issue is discussed in more detail below.

21.3.2 Under the Bill, inspectors may not enter a part of a premises used for residential purposes unless they reasonably believe that this part of the premises is being used for work. The relevant provision (subclause 708(2)) provides greater certainty and clarity than the WR Act, which does not specifically deal with access to those parts of premises used for residential purposes.

21.3.3 While on the premises, the inspector can inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises (clause 709(d)), including where an employer has failed to produce requested documents. This differs from the WR Act, which only permits inspectors to inspect and make copies of documents that are provided to them – see below.

[120] Submission 16 at http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/Submissions.htm

21.3.4 Under clause 711 of the Bill, inspectors are empowered to ask for a person's name and address. There is no equivalent provision in the WR Act.

21.3.5 Inspectors can be accompanied on to the premises by an assistant. An assistant may be used only where the Fair Work Ombudsman is satisfied that the assistance is necessary and reasonable and if the assistant has suitable qualifications and experience to properly assist the inspector. The inspector is responsible for all actions of the assistant. This provision is similar to Section 68(1) of the *Occupational Health and Safety Act 2000 (NSW).*

21.3.6 Under clause 715 of the Bill, employers will be able to enter into an enforceable undertaking. Enforceable undertakings can apply in lieu of a compliance notice. Employers have the right to withdraw the undertaking (subclause 715(3)). The Fair Work Ombudsman can apply to a relevant court should the employer fail to comply with the undertaking (subclause 715(6)). Master Builders supports the availability of enforceable undertakings as an option to deal with an area of non-compliance. It enables employers and regulators to take a non-adversarial approach to addressing an area of non-compliance and avoids the need for a court process. It also provides for a hierarchy of enforcement measures with escalation points if required.

Inspection of contracts between an employer and employee

21.4 Clause 706(1)(b) of the Bill enables inspectors to investigate a contravention of a safety net contractual requirement,[121] provided that the inspector also has reason to believe that there has been a contravention of one of the following:

- provision of the National Employment Standards
- term of a modern award
- term of an enterprise agreement
- term of a workplace determination
- term of a national minimum wage order
- term of an equal remuneration order.

[121] A safety net contractual requirement is defined in the Dictionary (section 12 of the Bill) as:
An entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:
(a) subsection 61(2) (which deals with the NES); or
(b) subsection 139 (1) (which deals with modern awards).

21.5 This is an expansion of the powers of inspectors, and will enable inspectors for the first time to examine common law contracts between an employer and employee. Master Builders does not oppose this clause, given that inspectors are limited to ensuring that certain statutory requirements are met. Master Builders would oppose such powers being vested in unions.

Power to search for documents and records

21.6 As noted above, the Bill proposes to give inspectors the power to inspect and copy documents and records, including in circumstances where an employer has failed to produce requested documents. The EM states that this power can also be used where the inspector reasonably believes that its exercise is necessary to avoid the destruction of evidence. There is no requirement for a search warrant, or for the person to consent to the search. In contrast, the WR Act provides that an inspector may inspect, make copies of or take extracts from, a document only if it is produced to him or her.

21.7 There are different approaches in State and Territory OH&S legislation to the capacity of inspectors to search for records and documents. The Victorian OH&S legislation enables an inspector to inspect and make copies only of documents that are provided to the inspector (sections 100 and 124). Under the *Workplace Health and Safety Act 1995 (Qld)* an inspector can take and copy documents, including where those documents are not provided by the occupier (section 108). The inspector also has the power to seize documents and other items if the occupier of the premises has given permission for the inspector to enter the premises and the seizure is consistent with the purpose of entry as told to the employer (section 109). The NSW OH&S legislation enables an inspector to make searches, require the production of and inspect any documents in or about those premises, and to take copies of or extracts from any such documents (see section 59 of the *Occupational Health and Safety Act 2000 (NSW)*).

21.8 Master Builders does not support inspectors having an unfettered right to search for documents and records. It runs the risk of a fishing expedition rather than a targeted search. At a minimum, Master Builders recommends that a qualifier along the lines of section 109 of the *Workplace Health and Safety Act 1995 (Qld)* be included in the Bill. This would ensure that any search is related to the purpose for which the inspector entered the premises.

Recommendation 37	Inspectors should not be permitted to go on "fishing expeditions". Any search of a premises must be related to the purpose for which the inspector entered the premises.

Power to ask for a person's name and address

21.9 A new provision in the Bill (clause 711) enables an inspector to ask a person for their name and address if the inspector reasonably believes that the person has contravened a civil remedy provision. If the inspector believes that the name and address is false, the inspector may require the person to produce evidence of its correctness (such as a driver's licence). A person must comply with such a request, provided that the inspector has advised the person that they may contravene a civil remedy provision if he or she fails to comply with the requirement, and the inspector has shown the person his or her identity card.

21.10 Enabling an inspector to confirm a person's name and address is consistent with the approach adopted in OH&S legislation (for example, see section 63 of the *Occupational Health and Safety Act 2000 (NSW),* section 120 of the *Workplace Health and Safety Act 1995 (Qld)* and section 119 of the *Occupational Health and Safety Act 2004 (Vic).* Master Builders supports the capacity of Fair Work Inspectors to have similar powers. This will ensure the correct identification of persons who may have contravened a civil remedy provision.

Master Builders' overall position

21.11 Subject to an appropriate qualifier to the power of inspectors to search for documents not provided to the inspector by the employer, Master Builders supports the proposed functions and powers of Fair Work Inspectors. The powers are appropriate and extensive. Inspectors may exercise compliance powers even where no complaint has been made (this is equivalent to the current rights of inspectors under the WR Act). Given the proposed powers of inspectors, it is difficult to justify the extensive rights for unions to enter premises and inspect records, including those of non-members, provided for in the Bill. They establish unions as de facto inspectors, with much the same rights as Fair Work Inspectors themselves. Officials from the regulator, with appropriate powers (as provided for by the Bill) are the relevant persons to deal with contraventions of an employer's obligations under the Bill. It is not appropriate to give such powers to unions which may have another agenda such as forcing an employer to enter into an agreement on certain terms. This discussion reinforces prior arguments to that effect in this submission.

22 CONCLUSION

22.1 In this submission Master Builders has attempted to identify elements of the Bill that are likely or have the potential to harm the building and construction industry and thus the many thousands of people who depend on it for their livelihood. We have measured the Bill against four benchmarks derived from Government policy and indicated the specific points at which it has departed from these, or where it has otherwise been found problematic or wanting. The four benchmarks are:

- consistency with the ALP's industrial policy as set out in *Forward With Fairness*;
- whether elements in the Bill are likely to have an adverse effect on productivity;
- whether the Bill contains elements that compromise the government's undertaking that independent contractors will continue to be regulated by commercial, rather than industrial, law;
- whether the Bill includes provisions that will make it more difficult for the industry to weather the economic and financial storms that have developed and still lie ahead.

22.2 In each of these areas we have found and identified matters that we believe should be rectified by appropriate amendments, as detailed in our recommendations, before the Bill is passed into law. The aim of these amendments is to protect the interests not only of the building and construction industry and its workforce, but to advance the welfare and prosperity of the Australian community.

22.3 The Bill has many good features that Master Builders supports, but in some areas we consider it too favourable to union interests and thus likely to lead to a revival of unwarranted union power that has the potential to return us to the "bad old days" of industrial disputation. We would remind Senators of the uniquely turbulent history of industrial relations in the building and construction industry and of the period not so long ago when the law of the jungle prevailed. Thanks to the reforms that followed the Cole Royal Commission, lawlessness has been diminished and the rule of law established, leading to remarkable gains in productivity, higher take-home pay for employees and a lower incidence of workplace injuries. It is vital that there should be nothing in the Bill that could result in even a partial return to the turmoil of the past.

22.4 Master Builders' most general concern with the elements of the Bill that we have identified as threatening industrial harmony and productivity is that they will render it more complex and difficult to make agreements and ultimately will detrimentally affect jobs. We particularly draw attention to the clauses of the Bill that enhance union power with respect to rights of entry to work sites, inspection of books and documents, recruitment of members, and to act for workers who are not members of the union and who may not have sought its intervention. On all these points we have suggested amendments that will, while preserving the legitimate rights of unions, protect the interests of other parties.

22.5 In addition, the ambiguity and relative silence of the Bill on the crucial matter of demarcation disputes threatens to make them more rather than less likely, and may allow them to be categorised as a form of industrial action that is actually permitted under the new regime. The new rules may even create situations in which employers are obliged to continue paying workers involved in an industrial action arising from a demarcation dispute with another union. Demarcation disputes are not about worker entitlements or fairness but an instance of union in-fighting and really about the power and prestige of union officials. They do no good and are thus a form of industrial action that should be vigorously discouraged. We anticipate that this subject will be extensively dealt with in the forthcoming transitional legislation.

22.6 In commending this submission to the Committee's attention, we would particularly emphasise the significance of two features of the building and construction industry that make it unusual, if not unique, among Australian business categories. The first is its turbulent history, as already mentioned. Until the reforms which saw the introduction of the *Building and Construction Industry Improvement Act,* 2005 (Cth) and the related establishment of the Australian Building and Construction Commission, the industry was characterised by a culture of violence and lawlessness, involving union thuggery and intimidation directed as much against the members of rival unions as against the so-called bosses. Nobody who has the interests of the industry or of the Australian community at heart wants to run the risk of a return to the uncertainty of what some nostalgic sentimentalists might regard as the good old days, but which to most people was a period of fear, lost opportunities and disappointed hopes.

22.7 The second feature is the employment structure of the industry. Only 19 per cent of the workforce in the building and construction industry are members of unions.

The rest are employees of mostly small firms with total construction industry employment at May showing over 950,000 workers in the industry. Anybody who tries to picture disputes in the industry as a confrontation between a mass of union members ("the workers") and a few (by definition, "exploitative") bosses is turning the truth upside down.

22.8 Master Builders commends the principal objective of the Bill, that of promoting fairness in industrial relations, but we point out that fairness means fairness to all – not only to employees, but to contractors, sub-contractors, tradespeople and managers as well. We also point out that, while fairness is an admirable aspiration, it is not the only issue that must be considered. The principal purpose of the building and construction sector – as with any value-creating industry – is not to achieve social objectives or promote social change. The purpose of the industry is to create the structures – homes, schools, hospitals, sports stadiums, roads, port facilities, mining projects, recycling plants, wind farms etc – that the Australian community needs, and to produce them as efficiently as possible. Any industrial relations reforms that threaten to interfere with this fundamental objective demand the most careful scrutiny.