

Master Builders Australia

Submission to the Department of Employment

on the

Post-Implementation Review of the Fair Work Amendment Act 2013 (Cth)

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1 Introduction

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

2 Purpose of Submission

- 2.1 The Department of Employment (the Department) has sought the input of Master Builders into the second post-implementation review (PIR) of the *Fair Work Amendment Act 2013* (Cth) (FW Amendment Act).
- 2.2 The Department has circulated a number of questions it would like stakeholders to respond to directly and has asked Master Builders to provide evidence of the practical impact of amendments to Schedules 1, 2, 3, 4, and the inclusion of Schedule 4A, within the FW Amendment Act.
- 2.3 In this submission Master Builders, wherever evidence has been made available to us, provides a response to each of the Department's questions. Where no evidence has been gathered, we note this in our response but have general policy concerns with the changes made by this largely inopportune legislation.
- 2.4 Master Builders welcomes the opportunity to provide feedback to the Department and advocates for continued legislative reform to remove statutory restraints, regulatory burden and unreasonable costs to business.
- 2.5 As opposed to the preparation of a Regulation Impact Statement (RIS), from which the FW Amendment Act was exempted, we would argue that the PIR is the least efficient method of review. Master Builders recommends that a RIS be prepared as a precursor to the introduction of all legislation by the Federal Government.

3 Response to the Department's general questions following the enactment of the FW Amendment Act

3.1 Anti-bullying

Have you had an employee/member seek orders under the Fair Work Commission's new anti-bullying jurisdiction? How long did it take to apply/respond? What staff were involved?

Our response on anti-bullying is at section 4 of this submission. However, we have only been made aware of one matter where a member was party to an anti-bullying proceeding in the Fair Work Commission (FWC). The matter involved approximately 5 staff and took a number of months to resolve.

3.2 Rostering

Have you been involved in consultations about changes to employees' regular roster or ordinary hours of work under the new consultation requirements in an enterprise agreement or modern award? How long did consultation take? What staff were involved in the consultation?

Members have had exposure to consultation obligations which have generally spanned 5-10 days with then a full pay cycle's notice before any introduction of change. Human resources staff, the relevant employee and their direct supervisor were involved in the consultations.

3.3 Excessive right of entry

Have you been involved with an application to the Fair Work Commission to deal with a dispute about excessive right of entry visits for discussion purposes under s 505A of the Fair Work Act? How long did it take to make an application and what staff were involved? How long did it take to respond to an application and what staff were involved?

To date, disputes in relation to excessive right of entry have been resolved without recourse to the FWC. Master Builders, however, anticipates that this provision may play a significant role in the future with the removal, under some State and Territory legislation, of the 24 hour notice period previously required before a work health and safety (WHS) entry permit holder can enter a workplace.

In recent weeks, Master Builders has been made aware of several incidences in Western Australia where union officials have attended a building site under the pretext of conducting a WHS investigation. This is despite unions having no power under model WHS laws. On these occasions, after gaining access to the site, the officials then sought to coerce the head contractor into signing a 2015 union pattern agreement.

Masters Builders has received information from members that incidences of this nature are commonplace across the country. Site visits by union officials under the guise of investigations into alleged breaches to WHS impose an unreasonable burden upon the resources of head contractors and are an abuse of the right of entry provisions under the FW Amendment Act.

3.4 Right of entry – accommodation and transport

Have you made an accommodation and/or transport arrangement under the right of entry provisions to access premises in a remote area? How long did it take to make the arrangements and what staff were involved in the process? Were staff required to escort union officials on site? Was a site induction required for the union official?

Master Builders has not received any evidence to date in response to this question.

3.5 Right of entry – location of discussions

In circumstances where a union has exercised right of entry rights for discussion purposes, has there been a dispute about the location of discussions that has meant the location defaulted to the meal or break room? What was the impact?

Master Builders has received complaints from employees of members who, whilst trying to have meal breaks, have found themselves in the middle of union meetings. These employees have alerted Master Builders that after raising an objection to the meeting being held in the meal room, they were verbally abused by union organisers who claimed that it was their right to conduct the meeting without union members being present. On some occasions these employees have said that they were bullied by the union organisers to leave the meal room.

3.6 General protections

Have you been involved in a general protections dismissal dispute and/or unlawful termination dispute that has been arbitrated by the Fair Work Commission with the consent of the parties? What was the outcome?

Master Builders has been advised of one matter where a member was the respondent and the applicant failed to abide by the timetable set by the FWC to file evidence. After protracted dealings with the FWC, an order for costs was made against the applicant in favour of the respondent. Disputes have otherwise been settled at a FWC conciliation.

3.7 Experiences and observations generally

Any experience and/or observations about the following changes in the Fair Work Amendment Act 2013 would also be appreciated:

- *Amending the modern awards objective to require that the Fair Work Commission (FWC) take into account the need to provide additional remuneration for employees working outside normal hours.*

Our position, as stated in our recent submission to the Productivity Commission (PC) on its Draft Report – Workplace Relations Framework (Draft Report) was in support of the PC’s call for legislative amendment in this regard.¹

In the Draft Report, the PC stated that the wording of section 134(1)(da) may contribute to ambiguity by stipulating the ‘need to provide additional remuneration.’ In our submission on the Draft Report to the PC, Master Builders argued that legislative amendments were necessary to achieve greater clarity in this regard.

- *Aligning the time limit for making an unlawful termination application with the time limits for making an unfair dismissal and general protection application to 21 days.*

¹ Australian Government Productivity Commission, Workplace Relations Framework – Draft Report , August 2015, page 529 <http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>

Master Builders believes that the consistency that this amendment creates is positive.

4 Response to the Department's specific questions on the FWC's anti-bullying jurisdiction

- 4.1 *Do you consider workplace bullying to be a significant issue for your organisation's members? Can you provide evidence to support this view?*

Master Builders receives minimal enquiries from members on this issue and does not consider there to be a necessity for the FWC to have jurisdiction over these matters given there are other regulatory bodies better equipped to deal with complaints.

- 4.2 *What were the views of your organisation on the Fair Work Act 2009 anti-bullying provisions prior to their implementation? Have these views changed since the measures were implemented? If so, how?*

Given the FWC's lack of power to order damages as a remedy, Master Builders was doubtful many anti-bullying applications would be made. The lack of applications to date confirms this view.

- 4.3 *What has been the impact of the anti-bullying provisions on your members? Can you provide any evidence to support this?*

As noted at 3.7, Master Builders is only aware of one incident where a member was the respondent to an anti-bullying application in the FWC. It should be noted that our members are conscious of their obligations to ensure a safe and productive workplace and accordingly put in place measure to mitigate the risk of bullying.

- 4.4 *Are you aware of any unintended/unexpected consequences of the anti-bullying provisions?*

No.

4.5 *What recommendations do you have on the provisions? Do you recommend changes external to the provisions that may improve their effectiveness or efficiency?*

No.

4.6 *If you have recommended removal of the anti-bullying provisions, is this because there are other adequate regulatory mechanisms available to address workplace bullying or is it because you consider there is a more effective measure that could be introduced (either regulatory or non-regulatory)?*

Although we agree that it makes good business sense for organisations to prevent bullying in the workplace, in our submission in response to the PC's Draft Report, Master Builders stated that it was questionable as to whether a separate anti-bullying jurisdiction under the FW Act is required. In our submission we argued that bullying conduct already invokes the jurisdiction of two federal government regulators and the current regime creates unnecessary duplication and red tape.

Master Builders, along with other employer groups submitted to the PC that as bullying is a WHS issue and the FWC is not a WHS regulator, its members do not have the necessary expertise to deal with bullying claims.

5 Conclusion

5.1 Rostering

Master Builders recommends the provisions under Schedule 1 Part 4, that require employers to consult with employees about changes to regular rosters, be repealed as they impose an unreasonable administrative burden and additional costs on business.

5.2 Restrictions on remuneration

Section 134(1)(da), that provides that the FWC must consider the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; weekends or public holidays; or shift work, should also be repealed. These requirements are entirely inflexible and do not take into account the increased cost burden to employers, by entrenching labour costs.

5.3 Anti-bullying jurisdiction

Master Builders argues that Schedule 3, which enables an individual to seek an order to stop bullying directly from the FWC, should be repealed. In the first instance, bullying complaints should instead be investigated by a regulatory body such as the Fair Work Ombudsman (FWO) who has greater expertise in this area and would be better equipped to investigate bullying claims. If a legitimate claim was unable to be resolved, alternatively, the FWO could be empowered to make an application to the FWC to seek a remedy in response to the bullying conduct.

5.4 Right of entry

Master Builders also recommends that Schedule 4, which expands the right of entry provisions, should also be repealed as it provides unions with unreasonable benefits and access to work sites, and creates an increased opportunity to inflame an often already adversarial working environment.

5.5 Regulatory impact statements

Finally, Master Builders advocates for the preparation of RIS's prior to the introduction of all Commonwealth legislation. We disagree that the current process has the same utility.