Master Builders Australia

Response to the Department of Employment and Workplace Relations

" 'Employee-like' forms of work and stronger protections for independent contractors"

17 May 2023

MASTER BUILDERS AUSTRALIA

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Introduction

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

2. Master Builders Australia ('Master Builders') is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 130 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

3. The building and construction industry is an extremely important part of, and contributor to, the Australian economy and community. It directly accounts for 10 per cent of gross domestic product, and around 10 per cent of employment in Australia.

4. The building and construction industry:

   - Consists of about 440,000 business entities, of which 98.7% are considered small businesses (fewer than 20 employees);
   - Employs over 1.3 million people (around 1 in every 10 workers) and is the second largest provider of full-time jobs in the Australian economy;
   - Represents about 10% of GDP;
   - Trains more than one third of the total number of trades-based apprentices every year, with over 120,000 construction trades apprentices and trainees in training; and
   - Performs building and construction work each year to a value that exceeds $245 billion.
   - Consists of over 264,000 independent contractors.

5. This submission is made in response to the Department of Employment and Workplace Relations ('DEWR') "'*Employee-like' forms of work and stronger protections for independent contractors*" - Consultation Paper ('the Consultation Paper').

Summary of Submission

6. Master Builders Australia does not support the 'Employee-like' policy and submits that the Government should not proceed to implement this commitment.

7. Only if Government decides to proceed with implementation, it should do so by ensuring any new jurisdiction or processes arising are clearly defined, narrow in scope and implemented only to the extent necessary to address the circumstances commonly used to exemplify or justify the need for such measures.

8. In other words, if the Government is concerned about new and emerging forms of work available through digital platforms commonly described as 'gig-work' or the 'gig-economy' then it should implement policy that is clearly limited to these types of arrangements and go no further.

9. Regrettably, the proposed method to implement the Government's 'Employee-like' policy has always been expressed in a broad or vague manner such that it leaves the door open to be applied far more broadly and capture a wide range of circumstances outside of the 'gig-economy'. This includes well-established forms of work that are more accurately characterised as small business rather than 'employee-like' including the use of independent contractors and self-employed tradies within the building and construction industry.

10. Master Builders has been vocal for some time in highlighting the potential for the 'Employee-like' measure to capture long-standing, lawful and legitimate arrangements used by building and construction industry participants. Despite this, the consultation paper to which this submission responds does not allay or relieve the concerns held by Master Builders and instead serves to make them far more acute.

11. As such, it is Master Builders position that the 'Employee-like' measure as outlined in the Consultation Paper represents one of the most significant and real attacks on the rights of self-employed and independent contractors, including over 264,000 self-employed tradies that currently exist within the building and construction industry. This represents around one in five workers in the industry.

12. It is well understood that many people choose to work as an independent contractor to give them the flexibility and freedom to choose the hours they work, the projects they work, who they work for and negotiate their own fees and conditions.

13. The adverse impacts and ramifications for building and construction cannot be understated if the policy is implemented in a manner foreshadowed in the Consultation Paper. It would fundamentally upend and damage the entire building and construction industry which is founded upon a model of specialist contract work arising from the way in which building work is performed.

14. It would create a range of negative impacts for the community and consumers and introduce a significant amount of uncertainty and commercial risk in circumstances that are simply unnecessary. Such outcomes could not come at a worse time for building and construction which, after years of disruption and uncertainty, continues to experience a range of growing industry pressure points against a backdrop of general economic uncertainty and growing inflationary concerns.

Concerns long-standing

15. Since the time the 'Employee-like' measure was first announced as part of the Government's "Secure Australian Jobs Policy", Master Builders has expressed significant and ongoing concerns about this commitment and the adverse impacts on the building and construction industry.

16. Primarily, these concerns arise from what might be most appropriately described as a situation in which the 'the policy solution doesn't match the policy problem'. As the Consultation paper regrettably confirms, the policy at present is expressed such that it will apply to a far broader set of arrangements than those used commonly to justify its need.

17. Far from being limited to 'gig-workers' or the 'gig-economy', Master Builders is concerned that the policy is expressed to operate far more broadly than this cohort of new and emerging forms of engagement and will also extend to self-employed tradies who operate as independent contractors in building and construction.

18. As this submission demonstrates, the use of independent contracting within building and construction is a long-standing and legitimate method of engagement. It is not a 'new and emerging' practice and is instead a model that underpins the entire operation of the building and construction industry, both domestically and internationally, and has done so for many decades.

19. This contract-based approach is deployed in building and construction simply and solely because of the phased way in which all building work is performed. It is not used as a method to undermine wages, deprive workers from job security, or to avoid the use of directly employed labour. It is the only way in which building and construction work can be performed in a manner that ensures improvements to the built environment are delivered practically, efficiently and affordably.

20. Since it was announced, Master Builders has expressed concerns about the 'Employee like' measure directly to Departmental Officials, various Government agencies and elected representatives on a consistent and regular basis. We have regularly provided detailed information and representations as to how the measure appears to go far further than just emerging work practices in the 'gig-economy' and the wide range of adverse ramifications that will result if it captured self-employed tradies and independent contractors in building and construction.

21. Despite these efforts, Master Builders has received no assurance that the 'Employee-like' measure will be limited or structured in a way so as to avoid capturing self-employed tradies. To the contrary, most indications appear to confirm the extensive range of concerns raised by Master Builders and create grounds to expect that the significant raft of adverse ramifications about which we have warned will now likely come to pass.

22. This prospect of adverse outcomes for self-employed tradies within the building and construction industry could not have come at a worse time. While all sectors of Australian industry have experienced several years of disruption and uncertainty arising from the COVID-19 pandemic, a range of its impacts are still being felt within building and construction.

23. Shortages of key construction materials has been followed by significant price escalations adding significant pressure to business viability and industry stability. Combined with a tight-labour market, growth in forecast levels of future skills shortages, and rising inflation, building and construction remains in a delicate situation with a growing range of significant pressure points.

24. The potential for the 'Employee-like' policy to create significant and adverse impacts in building and construction is only adding to this pressure, creating further uncertainty and concern to the entire industry, which is hurting business confidence, threatening investment and hindering the creation of new jobs and business enterprises.

25. To address this backdrop of growing uncertainty and concern, Master Builders calls on the Government to rule-out the extension of its 'Employee-like' policy to self-employed tradies and independent contractors in the building and construction industry.

Independent contracting in building and construction.

26. It is important to provide some key background about the building and construction industry (BCI). This is necessary not only in order to contextualise the responses in

this submission, but also as the structure of the BCI and the work it undertakes is unique and widely mischaracterised.

27. Commonly held perceptions are often inconsistent with the actual reality of worksite and industry practices, a circumstance which creates a high risk of incorrect assumption and relatedly incorrect conclusions. It is essential that this be avoided in context of assessing regulatory impact of the proposed 'Employee-like' policy. To this end, we outline below some key background information to contextualise the current status of the BCI.

Industry size

28. The Total Revenue of the BCI was $437.09 billion during 2020-21. Industry Value Added amounted to $130.80 billion over the same period. In the year to March 2023, the total value of construction work done across Australia was $246.31 billion. This is equivalent to 10 per cent of GDP.

Employment size

29. As at February 2023, the BCI employs 1.32 million persons[1]. It is important to recognise that this number is a total of those directly employed within the BCI and does not include employees indirectly employed as a result of the BCI and its operations. Master Builders estimates that we will need to attract about a half a million new entrants to our industry by November 2026 in order to allow the industry to grow while still replacing those who retire from the industry

Industry composition

30. The BCI is dominated by business entities that are small in size, mainly SMEs and subcontractors. As at 30 June 2022, there were 445,090 business entities[2] within the BCI of which:

- 413,045 have turnover of less than $2 million;
- 439,086 are SMEs (employing less than 20 people); and
- 186,809 employ at least one person.

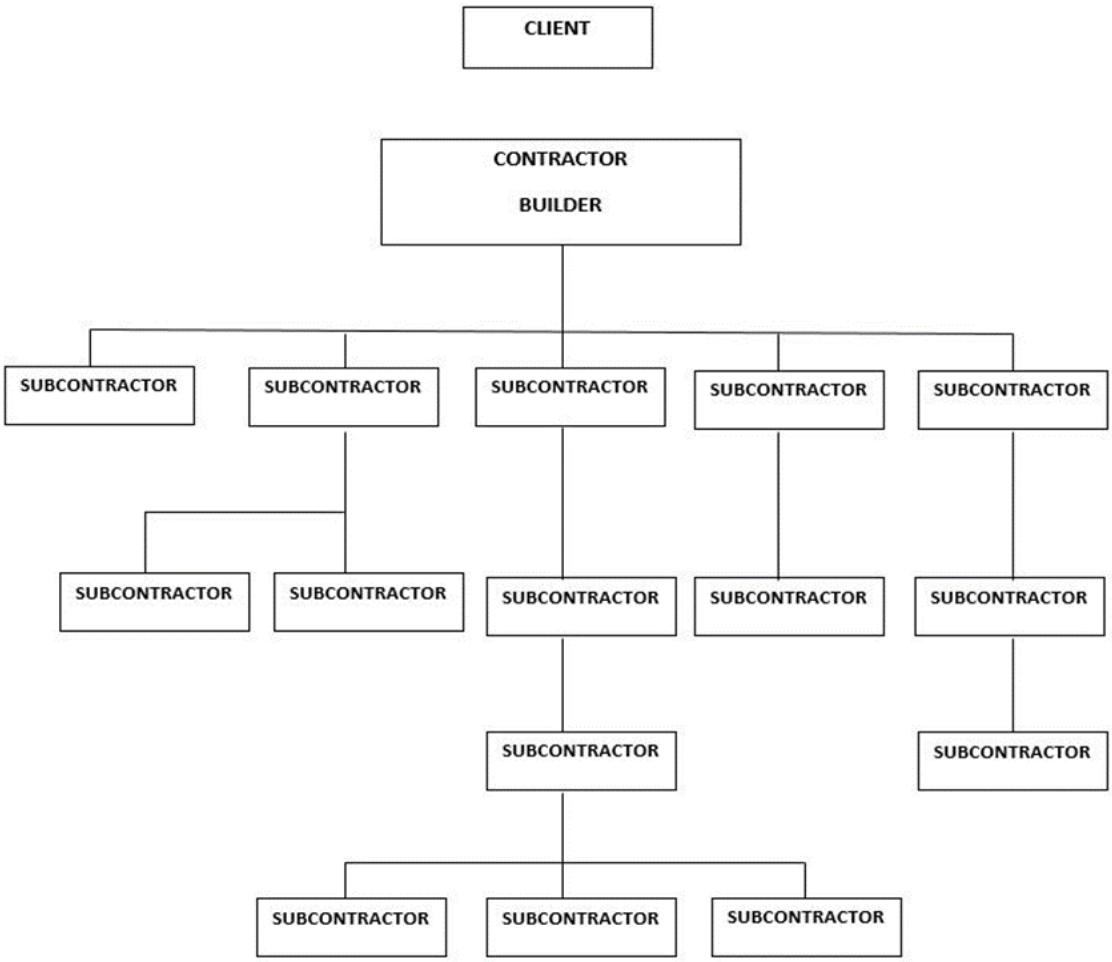
31. Industry Model

32. The BCI arises from the way in which work is performed. In general terms, building and construction work conventionally involves a client engaging a building contractor that will act as a 'project manager'. The building contractor uses sub-contractor companies to perform particular tasks at different stages of construction.

33. Sub-contractors often specialise in specific phases of construction work and it is common for them to also engage sub-contractors who are specialists in specific types of work. For example, a contractor may engage a sub-contractor to undertake the internal fit-out stage of a construction project. That sub-contractor may require the services of further sub-contractors who undertake specific aspects of the fit-out, such as joinery or air-conditioning.

[1] *ABS Labour Force Detailed Quarterly, May 2019 – 6291.0.55.003*
[2] *ABS Counts of Australian Businesses 8165.0*

34. The impression commonly gleaned from passing a large commercial construction site is that the work is performed by one building company. That impression, while reasonable, is entirely contrary to reality. At any point in time, a large commercial construction site may involve work being performed by dozens of separate small business sub-contractors. A graphical explanation follows:



35. The ramifications and complexity of these circumstances are obvious, particularly insofar as it relates to the 'Employee-like' policy. Key points to note are:

- A builder or head contractor may utilise dozens of different sub-contractors or sub-sub-contractors over the life of a project;
- Those sub-contractors can be all operating on the same site at the same time;
- Sub-contractors may be working on numerous sites at any one time, often for different head contractors;
- The work performed by sub-contractors is often technical and specialised, involving practices, activities and equipment that are unique and distinct from other forms of construction work;
- The use of sub-contractors at a particular time is dependent upon the particular phase of construction and is therefore dependent upon factors that are fluid and beyond the control of a builder/head contractor; and

- The work performed by specialised sub-contractors is often of a type that requires specialised tasks not necessarily known to the sector more broadly.

36. These points emphasise the complexities of construction work and are supported by a range of reports and reviews focussed on the sector. For example, in its 1999 Report "*Work Arrangements on Large Capital City Building Projects*" the Productivity Commission described the underpinnings of the industry as follows:

> *"Work on any one project is generally concentrated at a particular site, is of finite duration, and requires a broad range of skills which are usually provided by a combination of enterprises, many of which specialise by trade. From an industrial relations perspective, this means many enterprises and their workers need to coexist at the one workplace. In addition, appropriate sequencing of tasks is critical to successful completion of a building project. The level of complexity increases with project size, and is high on large capital city projects."*[3]

37. The same report[4] goes on to explain how the underpinning 'Contractual chain' within building and construction operates as follows:

> *"The production process for buildings involves a complex sequence of interdependent tasks from the design through to the finishing stages, that require different types of specialist workers. Typically, the client (increasingly institutional investors) has very little to do with either the design or construction of the building. The design phase is usually undertaken by specialist consultants, while management of the construction work is awarded to a head contractor, who usually employs only a small workforce on site for project-wide duties. Most of the construction work is sub-let to specialist subcontractors, who may employ up to 90 per cent of workers on a site.*
>
> *Thus, there is no direct relationship between head contractors, who have ultimate responsibility for a project, and the majority of employees on site. Selection of head contractors and subcontractors is often done on the basis of tender bids. Costs of market entry are low for many types of subcontracting and so the bidding process can be highly competitive at that level.*
>
> *Fixed price building contracts have become the most common form of contract for large capital city building projects since the early 1990s. These contracts impose client-determined penalties to reflect the costs of delays (liquidated damages) and are used to transfer most of the risks associated with a project from the client to the head contractor. A portion of this risk is passed down the contractual chain to each subcontractor, again through fixed price contracts. The contractual system thus provides a strong incentive for both head contractors and subcontractors to complete their work on time and within budget."*

38. Bruner (2007) argues that the contract-based nature of how building and construction work is performed can be traced back as far as Roman times and argues that the birth of what we identify as the contemporary contract-based underpinnings of construction occurred around the mid-1800s.[5]

[3] Productivity Commission, 1999, page XVII
[4] Ibid, pages XIX to XX/
[5] Bruner, Philip L. (2007) "The Historical Emergence of Construction Law," William Mitchell Law Review: Vol. 34: Iss. 1, Article 6. Available at: http://open.mitchellhamline.edu/wmlr/vol34/iss1/6

39. Watkins (2017) also pinpoints this era, by noting:

> *"However, by the nineteenth century (1800s) architects, engineers, and contractors increasingly were separate parties who were responsible for separate parts of the project. Architects designed along with engineers and contractors built along with subcontractors. The contract arrangement continues to evolve, but this was the starting point and beginning contract structure for construction projects".*[6]

Master Builders approach to independent contracting

40. Master Builders has maintained consistent support for independent contracting in building and construction for over 100 years. Our core policy is to recognise and understand that the project-based nature of work performed means the building and construction industry operates with structurally unique underpinnings involving a high degree of co-dependency amongst participants.

41. Master Builders believes that the interaction between commercial entities and the frameworks that guide the industry is central to securing future growth, sustainable sector prosperity, and ensuring members can deliver infrastructure, homes and buildings of the highest quality at the best price. This approach is underpinned by the following principles:

- Policy and regulatory settings must be balanced, sensible, and promote fair opportunity for all industry participants while driving competition and innovation.
- There is a necessary and legitimate role for independent contracting both in the industry and economy that should be maintained, distinguished and never undermined.
- Any attempt to misuse contractual relationships to avoid a legal obligation or engage in commercial conduct that is capricious or deliberately adverse, is condemned and should be targeted using the full force of the law.
- The use of industry specific contractual arrangements is supported where it reduces disputation and confusion, increases clarity and compliance, and improves opportunities for industry participation.
- A high standard of commercial conduct amongst participants is crucial and measures to support and improve that standard must be meaningful, appropriate and practical.
- Industry participants should at all times have practical, equitable and reasonable opportunities to obtain work regardless of size or type.
- Wherever possible, arrangements that give industry opportunities to drive and lead improvements relevant to contracting matters are preferred to the imposition of laws and the influence of external parties.
- Settings should always aim to increase the number of industry participants, reduce the number of industry exits, and promote stable prosperity.

42. It is crucial to ensure that the rights of independent contractors are protected by retaining the current laws that give people choice about how they work and encourage entrepreneurship. Master Builders believe laws should not restrict the use

[6] Watkins, Lawrence (2017) "A brief history of construction law". Available at: http://www.constructionlawresource.com/construction-law/2402/

of contractors in such a way that has a negative effect on the industry, particularly its costs and the way in which work is programmed and undertaken.

Sham Contracting

43. The subject of sham contracting is an important matter to the sector. Deliberate and wilful attempts to enter a sham contract arrangement (when an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees) is a behaviour and a deliberate act by those who choose to act illegitimately and should be condemned.

44. Sham contracting should not, however, be confused with misclassifying an employee as a contractor, a mistake that may often be made because of the dense and confusing law that governs this distinction, inclusive of a multitude of statutory deeming provisions.

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

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

Response to Issues raised in consultation paper

General position

47. Master Builders believes that the Federal Government should seek to promote stability and certainty for independent contracting within the *existing Independent Contractors Act 2006* (Cth), which we also note includes a framework for the review of potentially unfair contract terms.[7]

48. Master Builders does not support the wide-ranging and broad powers proposed for the Fair Work Commission to make decisions with respect to independent contracting.

49. Only in the event the Government determines to proceed with its policy, Master Builders submits the scope of the Commission's proposed new functions should be limited to the rideshare and food delivery industries only.

50. Master Builders does not support the policy to give the Commission the power to set minimum standards in the road transport industry. Such a move will create significant detriment for owner-drivers and will result in increased pressure on existing supply

[7] Ref section 12 of the *Independent Contractors Act 2006 (Cth)*

chains, including that which plays a significant role within the building and construction industry.

51. Master Builders is disappointed in the manner by which consultation paper seeks to represent 'independent contracting' and its failure to fairly and appropriately acknowledge the benefits of such engagement type. For example, the paper:

- Does not acknowledge that the ABS recognises independent contractors as "persons running their own business" or any benefits arising from this approach;
- Assumes that certain forms of independent contractors lack rights or protections even when they may be successful and viable family businesses, and ignores the existence of protections under both the Independent Contractors Act[8] and Fair Work Act 2009[9];
- Falsely asserts that workers have their 'rights fall off a cliff' when they are not in employment relationships;
- Ignores the role that independent contracting plays in driving competition and encouraging innovation within both the building and construction industry, and the Australian economy generally;
- Does not give appropriate regard to certainty and clarity in the meaning of "independent contractor" at common law, which has been determined by the High Court of Australia[10] and recognises the parties "legitimate freedom to agree upon the rights and duties which constitute their relationship"[11].

52. From a building and construction industry-specific perspective, the consultation paper:

- Fails to acknowledge that the structural underpinnings of the building and construction industry which are long-standing and applied both domestically and internationally;
- Fails to acknowledge that generic tests, such as 'control over their own work', may not be feasible in building and construction where work is necessarily dependent on limitations arising from the carefully programmed and phased schedule way in which building work is conventionally undertaken and performed;
- Ignores the wide range of existing and industry-specific legislative regimes which create avenues through which building industry participants can already raise and resolve disputes[12];
- Does not appropriately acknowledge the role that the market plays in affecting the bargaining power which, especially in building and construction, allows participants to demand they be engaged as independent contractors.

[8] For example, the paper does not reflect that the Independent Contractors Act 2006 (Cth) has the following objectives: (i) "to protect the freedom of independent contractors to enter into services contracts"; (ii) "to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial"; and (iii) "to prevent interference with the terms of genuine independent contracting arrangements".
[9] For example, the sham contracting protections under S.357 of the Fair Work Act 2009.
[10] CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1 (Personnel Contracting); Jamsek v ZG Operations Pty Ltd [2022] HCA 2 (Jamsek).
[11] Jamsek at [58].
[12] E.g NSW - Building and Construction Industry Security of Payment Act 1999; VIC - Building and Construction Industry Security of Payment Act 2002; QLD - Building and Construction Industry Payments Act 2004; WA - Construction Contracts Act 2004; NT - Construction Contracts (Security of Payments) Act 2004; ACT - Building and Construction Industry (Security of Payment) Act 2009; SA - Building and Construction Industry Security of Payment Act 2009; TAS - Building and Construction Industry Security of Payment Act 2009

53. The sections that follow deal with the main concepts outlined in the Consultation Paper and provide responses to particular questions outlined therein. To the extent that a particular question (or set of questions) is left unaddressed, Master Builders response can be taken to be that of the general related commentary as expressed.

Allowing the Fair Work Commission to set minimum standards for workers in 'employee-like' forms of work

***Question 1:* What is the best approach to defining the scope of the Fair Work Commission's new functions, taking into account the engagement of a worker through a platform as the primary factor?**

54. Master Builders submits that only if the Government determines it wishes to proceed with this commitment, any new power should be limited in scope such that it is narrowly limited only to those situations used to exemplify the need for such a measure. To this end, it should be limited to the development of minimum standards for digital platform or 'gig' workers.

55. The scope must clearly limited, narrowly defined and involve work arrangements that are 'new and emerging'. It must be clear insofar as excluding certain types of existing arrangements and not extend to well-established forms of work that are more accurately characterised as small business, such as the use of independent contractors within the building and construction industry.

***Question 2:* What other factors should be considered?**

56. Master Builders believes that any other factors should operate in such a way as to provide absolute clarity and certainty as to application. Any application must be narrow and not disrupt or jeopardise the operation of genuine contractor arrangements, or apply to well-established forms of work such as those which exist for independent contractors in building and construction.

57. Any tests or factors to be applied should preserve and maintain the certainty and stability arising from the tests established by recent High Court decisions.

***Question 3:* What 'guardrails' should be set to guide the Fair Work Commission in exercising its functions?**

58. Master Builders recommends that the most appropriate 'guardrail' is to clearly and narrowly define the scope of any proposed power or function for the Fair Work Commission. The Government should avoid an outcome in which the Commission is left with discretion or broad parameters of any type that 'guides' how its power is exercised. This should be clear and provide certainty.

***Question 4:* What factors should be included in the Fair Work Commission's 'objective' for setting standards?**

59. Master Builders submits that any 'objective' for setting standards should be structured with reference not to what they "should achieve" but rather to what the setting of any standards "should avoid". For example, an objective should be to avoid:

- Any disruption, jeopardy or undermining of the operation of genuine independent contractor relationships;

- Any watering down of the test adopted in recent High Court decisions, or uncertainty as to the operation of those tests;
- Eroding or interfering with the freedom of independent contractors to enter into services contracts;
- Any outcome that fails to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial;
- Application to long-established forms of work that are more appropriately regarded as small businesses rather than 'Employee-like', or
- Interference with the terms of genuine independent contracting arrangements.

***Question 5:* What kinds of minimum standards are needed and why?**

60. Master Builders position is that any new power is limited to digital platform or 'gig' workers. Therefore, any minimum standards should be adapted to the form of work and not impose 'employment' conditions that are incompatible to the above limitation on scope. Unless evidence exists to the contrary, there should be no need to set any minimum standard outside of those that deal with:

- Minimum earnings
- Transparency in relation to pay setting and conditions; and
- Effective and efficient dispute resolution (but only in the absence of any already existing avenue)

61. Master Builders also notes that the consultation paper outlines that the "*Fair Work Commission could be directed to make minimum standards in respect of, but not limited to:*

- *minimum rates of pay*
- *concepts of 'work' time (e.g. which activities performed by a worker should attract compensation)*
- *payment times (e.g. timeframes between performance of work and payment)*
- *workplace conditions, such as portable leave, rest breaks, etc.*
- *treatment of business costs, including vehicles and maintenance, insurances, licences, etc.*
- *record keeping*
- *training and skill development, and*
- *dispute resolution."*

62. Save for those outlined in the paragraph preceding the one above, Master Builders would object to FWC being able to set Minimum Standards for areas in the above list.

63. In fact, the inclusion of several of the above dot points usefully exemplify how the proposed range of 'minimum standards' could cause extreme confusion in the building and construction industry. For example, setting standards in relation to:

- *"concepts of work time"* would potentially run foul of the extremely complex but long-standing notions of matters such as time, progress and programming as conventionally used and deployed within building and construction. Such notions are clearly and uniquely defined and underpin the operation of common commercial contractual arrangements.

- *"payment times"* are similarly subject to well-known and long-standing existing arrangements, underpinned by an array of very diverse State and Territory legislative regimes which already define comprehensive arrangements for the terms upon which payments are made to industry participants. These existing regimes account for a vast set of circumstances including time and progress claims, processes and times the provision of a payment schedule in response, varying default timeframes, industry-specific nuances associated with disputed claims, defective work, or rectification, and other common matters unique to building and construction including the existing of a comprehensive Security of Payment regime.[13]

Question 6: How can the standard-setting process in the Fair Work Commission be designed to deliver efficient, reliable, sustainable and fair outcomes?

64. Master Builders submits that, further to our overall position and answers to the above questions, Government should ensure that those within FWC able to exercise such power should have some demonstrated understanding and familiarity with the use of commercial arrangements in the gig-economy.

Question 7: How can the Fair Work Commission's processes reflect the character of 'employee-like' workers and engage with them appropriately?

65. Master Builders relies on our responses to questions 1 and 2 above.

Question 8: How can potential unintended negative impacts for workers, businesses, consumers and the labour market be mitigated?

66. Master Builders submits that if the Government adopts the approach advanced in this submission, especially given in answer to question 4 above, it would avoid the potential for unintended negative impacts.

Question 9: How could the Fair Work Commission's orders be enforced?

67. Master Builders submits that a separate enforcement body should be established that is not the Fair Work Ombudsman. This is because the orders being made are not impacting upon employment, rather they will be impacting commercial arrangements entered into by independent contractors deemed to be engaging in an "Employee-like" form of work. In these circumstances, it is appropriate that a separate body oversee the enforcement of the orders.

Agreement making

68. The consultation paper outlines the Government's considerations in this respect as follows:

> *"The Government is considering a framework to allow the Fair Work Commission to approve consent agreements reached between individual businesses and groups of independent contractors that supply services to them, without necessarily creating a parallel agreement-making stream for independent contractors. Agreements could be made after the Fair Work*

[13] See for example, *Building and Construction Industry Security of Payment Act 1999 (NSW), Building and Construction Industry Security of Payment Act 2002 (VIC), Building and Construction Industry Payments Act 2004 (QLD), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payments) Act 2004 (NT), Building and Construction Industry (Security of Payment) Act 2009 (ACT), Building and Construction Industry Security of Payment Act 2009 (SA), Building and Construction Industry Security of Payment Act 2009 (TAS)*

Commission sets standards for covered workers, or they could be made before that occurs, provided appropriate safeguards are in place to ensure standards are not undermined"[14]

69. Master Builders strongly opposes this measure. Put simply, this is an unwarranted and inappropriate attempt to provide an employment relations tribunal with significant and unnecessary powers to regulate the terms of commercial contracts.

70. An industrial tribunal is an industrial tribunal. It does not exist to regulate, interfere in or set commercial arrangements between recognised businesses entities. Any measure along these lines would represent a fundamental and radical change to what has hereto been a clear and workable delineation between the operation of various existing jurisdictions and legislative regimes.

71. There are simply no grounds to justify or warrant such a significant change and the consultation paper provides no evidence or explanation as to why it is even being considered by Government. Master Builders notes that there is not even an identifiable link (tenuous or inferred) between this proposed measure and the issue of 'Employee-like' standards for those in the gig-economy.

72. Other reasons as to why Master Builders opposes this measure include:

- Businesses and independent contractors are already able to make enforceable agreements between themselves;
- It is unclear as to what the purpose of allowing FWC power to 'approve' such agreements would be, other than to give registered organisations of employees greater scope and role in the negotiation and enforcement of such arrangements;
- Such arrangements would only facilitate the setting of agreements which stipulate standardised arrangements across groups of independent contractors, which would be both anti-competitive and serve to stifle innovation. Master Builders notes that not only is such an outcome entirely inconsistent with a principle in the discussion paper to "encourage competition" but it may also run foul of existing legislative regimes that only make such a function available in limited circumstances and to limited cohorts of businesses;
- Such arrangements would encourage and expand the use of 'standardised' or 'pattern' arrangements, the use of which is already an unfortunate feature within certain parts of building and construction that results in unproductive and inflexible work outcomes which causes the cost of construction to be higher for consumers and taxpayers and discourages the involvement of a more diverse workforce;
- It would create yet another forum or avenue through which unions could seek to exercise control and influence which contractors perform what jobs, and who gets to work on those jobs;
- It ignores the existing applicable regimes and options for dispute resolution that currently exist;

[14] Consultation Paper, p.15

- It would likely impose restrictions upon how and when specialist work can be undertaken and by whom, giving rise to significant disruptions in construction programming and project delivery; and
- It would create uncertainty about arrangements on foot and inject a new form of commercial risk for industry participants, thereby jeopardising the use of opportunities for those new to building and construction and the creation of future jobs.

Expanded avenues to challenge unfair contractual terms

73. The consultation paper outlines that the Government "*has indicated that a low-cost jurisdiction could be introduced for the Fair Work Commission to deal with unfair contract disputes for certain classes of independent contractors*."[15]

74. Master Builders strongly opposes this measure and does not support the Fair Work Commission being empowered to deal with unfair contract disputes.

75. The grounds and reasons for Master Builders position are the same as outlined earlier above in the section titled "Agreement Making". We reiterate and re-emphasise those core concerns, in particular that:

    - FWC is an industrial tribunal – it has no experience in determining commercial matters that should properly remain the domain of experienced courts and existing state-based business dispute resolution bodies; and
    - There is no evidence or grounds set out in the Consultation Paper to justify the need for an expanded FWC jurisdiction.

76. To assert that the existing avenues are "little used" is not a justification to expand jurisdiction. It may instead reflect the fact that the existing regime created by the *Independent Contractors Act 2006* is actually working as intended such that it minimises the prospect of disputation occurring. It also ignores the operation and existence of a number of industry-specific legislative regimes and dispute resolution processes that exist within building and construction.

77. The prospect of such a jurisdiction would only serve to create further uncertainty and commercial risk for participants in building and construction. As noted earlier herein, existing industry pressure points would be worsened by such additional uncertainty and risk.

78. A further ground on which Master Builders opposes this measure relates that the increasing tendency for Governments at all levels towards discouraging the use of standard-form contracts.

79. For example, the unfair contracts provisions within the Australian Consumer Law are enlivened in circumstances in which a 'standard-form' contract is offered on a 'take it or leave it' basis. Originally, these laws were designed to be a measure limited to contractual arrangements between consumers and business and sought to target contracts that were used in a capricious and unfair manner (for example, mobile phone contracts with clauses that were unfairly punitive for consumers).

80. Over time, the jurisdiction and application of unfair contract terms has expanded to include a range of 'business to business' contracts that meet certain thresholds. While

[15] Consultation Paper, p.17

this jurisdiction is applicable only to contracts which are 'standard-form' and offered on a 'take it or leave it' basis, the subjective nature of the test to establish jurisdiction has resulted in building industry participants being hesitant to use a 'standard form' contract.

81. This is an undesirable outcome as many 'standard form' contracts used in building and construction are the result of decades of negotiations between various industry representatives and are specifically designed to contain 'standard' terms which anticipate, and comprehensively prevent, commonly occurring situations that would ordinarily cause a dispute between the parties.

82. Although organisations such as Master Builders (including the various State/Territory Master Builders Associations), publish a suite of standard form construction contracts, there are equally a significant number of contracts that are drafted in partnership with principal/owner representatives such as the:

- ABIC suite (a joint venture partnership of Master Builders Australia and the Australian Institute of Architects);
- Standards Australia General Conditions of Contract Suite including: AS 2124-1992, AS4000-1997 and AS4901-1998 (sub-contract conditions);
- GC21 – NSW Government General Conditions of Contract.

83. The contracts noted above are drafted on the well-established Abrahamson Principles[1] which suggest that to achieve a fair and equitable allocation of the risks inherent in construction projects, that risk should be allocated to a party if:

- the risk is within the party's control;
- the party can transfer the risk, for example, through insurance, and it is most economically beneficial to deal with the risk in this fashion;
- the preponderant economic benefit of controlling the risk lies with the party in question;
- to place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation; and/or
- the risk eventuates, the loss falls on that party in the first instance and if it is not practicable, or there is no reason under the above principles, to cause expense and uncertainty by attempting to transfer the loss to another.

84. The Abrahamson principles of balanced risk allocation are well known amongst construction law practitioners and are widely regarded as the basis of balanced, fair or efficient risk allocation and minimise disputation. More broadly, there are many advantages to parties who use standard form construction contracts which include:

- Creating more certainty, as often the terms are already understood by the parties;
- Reduced legal costs, by eliminating the need for the drafting of costly bespoke contracts;
- Limiting the time and expense associated with considering "one-off" contract conditions which may be unfamiliar to either party;

[1] *Max W Abrahamson, "Risk Management" (1983) International Construction Law Review 241, 244.*

- Reduced tender pricing, as tenders have greater certainty around risk allocation under a standard-form construction contract as opposed to unfamiliar risks or terms under a bespoke contract;
- Additional contract administration costs in circumstances where administrators are unfamiliar with bespoke contract terms;
- Reduced disputation because of parties' familiarity with the risk allocation in a standard form contract;
- Reduced risk of contractor default, as opposed to a bespoke contract which may not adequately provide for unfamiliar risks to the contractor;
- Increased bidding competition, as some potential tenderers may not feel comfortable tendering for a non-standard form contract; and
- Clarity of precedent of interpretation, which has been established due to the wide use of standard form construction contracts.

85. Notwithstanding the significant benefits standard form construction contracts offer either party to a contract, Master Builders always encourages parties entering into such a contract to seek advice and/or further negotiate their terms.

86. Again, the use of these types of contracts is not mandatory but often preferred by building industry participants as they know the terms and conditions therein represent a fair balance of risk and a reasonable framework under which common types of building work is performed. Put simply, these contracts anticipate and operate to avoid disputation and unfairness amongst industry participants.

87. This is yet another example of the nuances associated with how work is performed in the building and construction industry which is not otherwise a feature of other industry sectors, and rarely understood or appreciated by those unfamiliar with the operation of the sector.

Member experiences with "Trade Comparison" websites

88. During consultations with officials from the Department of Employment and Workplace Relations that took place on Friday 12th May 2023, the use of "trade comparison" websites was discussed. Master Builders was asked to provide feedback as to the experience of any Members who have used such sites.

89. Specifically, the Department raised the website https://www.hiretrades.com.au/ and noted that other related websites also operate domestically. Master Builders took this question on notice and have made enquiries with officers in each State and Territory association within the Master Builders network.

90. The information received in response to these enquiries is as follows:

- The use of various 'trade comparison' websites in building and construction is limited to that of connecting consumers with trades and related service providers in a particular geographical area for 'one-off' instances of 'tradie' work;
- These sites are not used by industry participants to obtain or offer work to or from other industry participants;
- The 'rates' various included in these various websites do not reflect or impact the rates actually charged for the provision of such services; and

- Any arrangements for work arising from the use of these websites are subject to conventional and normal business practices, and at all times remain subject to applicable Commonwealth, State and Territory laws and related legislative requirements/obligations.

91. Master Builders will continue to relay any further feedback to the Department as relevant.

Minimum standards for the Road Transport Industry

92. As noted earlier above, Master Builders does not support the policy to give the Commission the power to set minimum standards in the road transport industry. Such a move will create significant detriment for owner-drivers and will result in increased pressure on existing supply chains, including that which plays a significant role within the building and construction industry.

93. Master Builders position and view on arrangements in the transport sector is set out in two earlier submissions **attached hereto**.

Conclusion

94. Master Builders appreciates the opportunity to make a submission in response to the Department of Employment and Workplace Relations ('DEWR') "'Employee-like' forms of work and stronger protections for independent contractors" - Consultation Paper.

95. Any further information or questions relating to this submission can be obtained by contacting Master Builders Australia on 02 6202 8888.

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Master Builders Australia

Submission to the Department of Employment

on

The Road Safety Remuneration System

5 April 2016

MASTER BUILDERS AUSTRALIA

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1 Introduction

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

1.2 Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder State and Territory Associations. Over 126 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

2 Purpose of Submission

2.1 The Road Safety Remuneration Act 2012 (RSR Act) required a review of its operation be conducted in the second half of 2015. The review was conducted by PricewaterhouseCoopers (PwC) and completed in January 2016 to account for the Road Safety Remuneration Tribunal's most recent order issued on 18 December 2015.

2.2 The review examined the extent to which the Tribunal has fulfilled its functions and the objects under the RSR Act. This involved assessing the current and future impacts of the Tribunal's first two road safety remuneration orders, considering the effectiveness of the Tribunal's processes, and undertaking a cost benefit analysis of the Road Safety Remuneration System.

2.3 The Department of Employment has released a Discussion Paper with options for reform and will be undertaking consultations during April 2016 on these options with industry stakeholders. This submission is in response to the Discussion Paper.

3 Observations

3.1 Master Builders has a direct interest in the role and functions of the Road Safety Remuneration Tribunal ('Tribunal') as the building and construction industry is reliant on the transport of building materials. As such, many of Master Builders' member companies are caught by the Road Safety Remuneration System as 'participants in the supply chain'.

3.2 Master Builders is committed to the concept of continual improvement in work health and safety. That improvement can occur only within a policy framework that provides an environment that is conducive to the advancement of WHS and one which is structured to engage the participants.

3.3 The Road Safety Remuneration System was established on the basis of limited evidence that suggests there is a correlation between rates of pay and safety within the road transport industry. Master Builders submits that this theory is flawed and that the entire structure serves no useful purpose.

3.4 Master Builders believes that the Road Safety Remuneration System is superfluous as there is overlapping regulation that is better suited to regulating safety within the road transport industry.

4 Position of Master Builders

4.1 As such, Master Builders submits that the Road Safety Remuneration System should be abolished. We therefore support Option 4(b) set out in the relevant Discussion Paper as circulated by the Department.

4.2 Further, Master Builders does not support any other option set out in the relevant Discussion Paper. Were any of these options to be entertained by the Government, it would have the consequence of (directly or indirectly) legitimising the role and/or effect of a Tribunal that was established on flawed grounds that is extremely unlikely to have any positive material or measureable effect on road safety.

5 Conclusion

5.1 We thank the Department for the opportunity to make this submission. Please contact Mr Shaun Schmitke, National Director Industrial Relations, should any further information be required.

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Master Builders Australia

Submission to the Department of Employment

On

REVIEW OF THE ROAD SAFETY REMUNERATION SYSTEM

15 January 2014

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1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

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

2 Purpose of submission

2.1 The Terms of Reference for the Review of the Road Safety Remuneration System state that the purpose of the review is to:

> *Assess the operation of the Road Safety Remuneration Act 2012 (Cth) and the Road Safety Remuneration Tribunal and to advise Government whether the Road Safety Remuneration System is an effective and appropriate means of addressing safety concerns in the road transport industry*.[1]

2.2 Master Builders has a direct interest in the role and functions of the Road Safety Remuneration Tribunal (Tribunal) as the building and construction industry is reliant on the transport of building materials. As such, many of Master Builders' member companies are caught by the Road Safety Remuneration System as 'participants in the supply chain'.[2]

2.3 This submission outlines the flawed evidentiary base for establishing the Road Safety Remuneration System, outlines the regulatory overlap the System creates and points out the impact the System has on the building and construction industry. Master Builders advocates the repeal of the legislation and the consequent abolition of the Tribunal.

[1] Review of the Road Safety Remuneration System: Terms of Reference.

[2] See: *Road Safety Remuneration Act 2012* (Cth), s9.

3 Commitment to work health and safety

3.1 Master Builders has a demonstrated commitment to the concept of continual improvement in work health and safety (WHS). That improvement can occur only within a policy framework that provides an environment that is conducive to the advancement of WHS and one which is structured to positively engage the participants.

3.2 The capacity of industry to deliver on its commitment to safety relies in part on the practicality of installing and maintaining all the elements of safe systems of work. Merely prescribing regulation without bearing this issue in mind has adverse consequences for the building and construction industry and other industry participants. Regulation that is divorced from the practical realities of day-to-day activity also raises construction costs unnecessarily, particularly the cost of housing. To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and good human resource practices.

3.3 In this latter regard, we believe that reliance on the mere correlation between rates of pay and the existence of unsafe work practices in a limited sample of a particular sector as the evidentiary basis for the establishment of the Tribunal and the underpinning laws, misconceives the issue. Correlation is not cause. The fallacy is also known as *cum hoc ergo propter hoc*.[3]

4 Evidentiary base for establishing the Road Safety Remuneration System

4.1 When the Gillard Government announced the establishment of the Road Safety Remuneration System on 22 November 2011, the then Minister for Infrastructure and Transport, Hon Anthony Albanese, and the then Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Hon Chris Evans, made a joint media statement in which they said, 'Research by the National Transport Commission shows low rates of pay can lead to and [sic] risky work practices by drivers to make ends meet'.[4] The research referred to is a report

[3] Latin for 'With this, therefore because of this'.

[4] Anthony Albanese and Chris Evans, 'Joint Media Statement' (Press Release, 22 November 2011).

published by the National Transport Commission in 2008 entitled 'Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry'.[5] This report formed the basis of a Directions Paper released by the then Department of Education, Employment and Workplace Relations on 26 November 2010 entitled, 'Safe Rates, Safe Roads'.[6] The research contained in the Directions Paper was in turn used as the basis of modelling the regulatory impact of the Road Safety Remuneration System in the Regulation Impact Statement[7] prepared by PricewaterhouseCoopers.

4.2 The evidence on which a link between rates of pay and safety that has been made[8] in the Directions Paper relies in part on studies undertaken by Professor Williamson, with the work being summarised as follows:

> *The evidence Professor Williamson cites to support her argument is two national surveys of long distance truck drivers in Australia. These surveys were conducted in 1991 and 1998. These surveys show that drivers who were paid on a payment by results or piece rate form of payment, e.g. by trip or load, were two to three times more likely to report taking stimulants while driving as drivers paid on a time basis. A third survey undertaken in NSW in 2005 found that stimulant drug use is a continuing characteristic of long distance truck drivers.*
>
> *Williamson et al in their 2001 study of a sample of Australian drivers found that 46.6 per cent of independent owner/drivers were more likely to report the need to do more trips to earn a living as the reason for breaking road rules, while only 25.6 per cent of large company drivers were likely to do the same. These differences are statistically significant at the 95 per cent confidence level.*[9]

4.3 The correlations exhibited in the evidence do not adequately propose a theory for drug taking. Obviously improving safety in the road transport industry may require the introduction of a mandated drug and alcohol national testing regime or other means to change the culture of the industry. However, Master Builders rejects the notion that payment regimes can be the motivator of drug use.

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[5] National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, http://www.ntc.gov.au/filemedia/Reports/SafePaymentsFinalReportNov08.pdf.

[6] DEEWR, *Safe Rates, Safe Roads*, November 2010, http://www.vta.com.au/LinkClick.aspx?fileticket=7g4ChCj3W2M%3D&tabid=1080&language=en-AU.

[7] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4733_ems_127a9ae1-bf67-4d34-9745-aca2e85a0b64/upload_pdf/11267RIS.pdf;fileType=application%2Fpdf.

[8] National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p14.

[9] Ibid.

4.4 Master Builders does not accept the underlying assumption about rates of pay being a stimulus for drug taking. There is no evidence to show that means to address problems of drug taking, fatigue, speeding and poor vehicle conditions would not be best met by stronger compliance and enforcement mechanisms which apply the existing law with greater rigour (see section 5 of this submission for a discussion of the regulatory overlap). This proposition is reinforced bearing in mind that the data in the report relied upon was not up-to-date and is now well out of date.

4.5 Whilst not related to the example of drug taking, the recent Cootes Transport petrol tanker crash and explosion that killed two bystanders in Mona Vale, New South Wales led to 136 out of 205 of that company's prime movers and trailers being found to be defective by VicRoads.[10] This example demonstrates that enforcement of the existing law leads to an improvement in safety and must be the preferred regulatory response; there was an immediate and obvious improvement derived from greater enforcement. The same principle applies when examining means to reduce drug taking.

4.6 Becker and Murphy[11] analysed drug addiction using economic concepts. The Becker and Murphy study implies that the long-run demand for illegal heroin and other illegal addictive drugs tends to be much reduced by severe punishments that greatly raise their costs.[12] In addition, reliance on this model to further research would start from a different perspective than that adopted in the Directions Paper and which underpins the basis of the Road Safety Remuneration System. Rather than label drug takers in the industry as 'oppressed' in the relevant construct the behaviour would be considered from the point of view that:

> *present and future consumption of addictive goods are complements, and a person becomes more addicted at present when he expects events to raise his future consumption. That is in our model, both present and future behaviour are part of a consistent maximising plan.*[13]

[10] Deborah Gough, 'Maribyrnong council to call for ban on trucks after Cootes Transport checks', *The Age*, 14 October 2013, http://www.theage.com.au/victoria/maribyrnong-council-to-call-for-ban-on-trucks-after-cootes-transport-checks-20131014-2vid0.html.

[11] G Becker and K Murphy, 'A Theory of Rational Addiction' *Journal of Political Economy* (1988) 96, No 41 p 675.

[12] Ibid at p 687.

[13] Ibid at pp 691-692.

4.7 Based on the Becker and Murphy model, efforts to stop reliance on drugs should proceed from the basis that a rational person decides to end their drug addiction if events lower either the demand for addictive goods sufficiently or their stock of consumption capital sufficiently. Raising minimum rates would likely increase the stock of consumption capital of those in receipt of additional remuneration and is therefore not supported as a 'cure' in this context. Nor is there evidence to suggest that drug use in the road transport industry has remained constant, increased or decreased over time.

4.8 A recently published study[14] that summarises the scientific evidence on the prevalence of psychoactive substance use among truck drivers reported that 'truck drivers with higher incomes and engaged in longer trips were more prone to use amphetamines'.[15] The study also reported that 'better working conditions such as roads and vehicles in good repair, would contribute to a reduction in accidents and the implications these have for individual truck drivers and public health'.[16] The Heavy Vehicle National Law (discussed in section 5 of this submission) prescribes certain vehicle requirements for heavy vehicles, including ensuring trucks are in good repair.

4.9 We also submit that the following, which is a mere assertion, at paragraph 24 of the Directions Paper is problematic:

> *In an environment of fierce competition among operators and cost containment and reduction pressures from large and powerful clients, the result has been extensive use of subcontracted owner/drivers at reduced and questionable, unsustainable rates.*

That paragraph also asserts that:

> *There are also problems with lack of compliance with awards and agreements, especially among small operators.*

4.10 These assertions, if true, should trigger a regulatory response to increase Government endeavours for operators to follow the law as expressed in awards and agreements and for legal action to be taken against those who unfairly contract with owner/drivers utilising the provisions about unconscionability in the *Consumer and Competition Act 2011* (Cth) or the civil

[14] Girotto, Mesas, Andrade and Birolim, 'Psychoactive substance use by truck drivers: a systematic review' *Occup Environ Med* 2014; 71: 71-76.

[15] Ibid, 75.

[16] Ibid, 75.

remedy provisions under the *Fair Work Act 2009* (Cth).[17] In other words, the answer to the problem raised again appears to be greater enforcement of the existing law rather than the continuation of the Road Safety Remuneration System with its new rules and unnecessary bureaucracy.

5 Regulatory overlap

5.1 The Road Safety Remuneration System does not operate in an environment where other regulatory provisions are absent. The regulatory burdens created by the system produce regulatory overlap. Road transport drivers, hirers, consignors, consignees, and participants in the supply chain are bound by other regulatory systems that seek to ensure that road transport is conducted in a safe manner.

5.2 The primary laws that regulate safety in workplaces are the Commonwealth and state and territory work health and safety laws. These laws create statutory criminal duties which capture employers, workers, and all other people involved in the workplace which set rules to ensure work is undertaken in a safe manner. Work health and safety laws have been subject to a harmonisation process since 2008 with the establishment of the tri-partite agency, Safe Work Australia. The Commonwealth and all states and territories, except Victoria and Western Australia, have now adopted the model *Work Health and Safety Act*[18] that was developed by Safe Work Australia. As well as the model Act each of these jurisdictions has also adopted the model *Work Health and Safety Regulations*. As well as the model legislation, the harmonisation process involves the development of model Codes of Practice and guidance material.

5.3 Two recent documents published by Safe Work Australia have a direct role in regulating the safety performance of the road transport industry; the Code of Practice for *Managing Cash-in-transit Security Risks*[19] and the *Guide for managing the risk of fatigue at work*.[20] The road transport industry is also a

[17] See sections 45, 50 and 539.

[18] *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (NT); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

[19] http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/cash-in-transit.

[20] http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-fatigue-at-work.

priority industry in Safe Work Australia's *Australian Work Health and Safety Strategy*[21] and supply chains and networks are an action area.[22]

5.4 Another area of law that complements the work health and safety laws is the establishment of the Heavy Vehicle National Law.[23] This new law commences in Queensland, New South Wales, South Australia, Tasmania and Victoria on 10 February 2014 by application of state based legislation in each jurisdiction.[24] The Australian Capital Territory and Northern Territory will adopt the Heavy Vehicle National Law at a later stage, while Western Australia will not be adopting the law. The Heavy Vehicle National Law is administered by the National Heavy Vehicle Regulator.[25] The National Law and Regulations aim to improve safety within the road transport industry. The objects of the National Law are:

> *(a) promotes public safety; and*
>
> *(b) manages the impact of heavy vehicles on the environment, road infrastructure and public amenity; and*
>
> *(c) provides for efficient road transport of goods and passengers by heavy vehicles; and*
>
> *(d) encourages and promotes efficient, innovative, productive and safe business practices.*[26]

5.5 The Heavy Vehicle National Law covers such areas as vehicle registration, heavy vehicle standards, loading requirements, and vehicle operations including speeding and driver fatigue.

5.6 Each of the jurisdictions that have agreed to adopt the Heavy Vehicle National Law have also agreed to adopt four regulations. The regulations are *Heavy Vehicle (Vehicle Standards) National Regulation 2013*, *Heavy Vehicle (Mass, Dimension and Loading) National Regulation 2013*, *Heavy Vehicle (Fatigue Management) National Regulation 2013*, and *Heavy Vehicle (General) National Regulation 2013*.

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[21] Safe Work Australia, *Australian Work Health and Safety Strategy 2012-2022*, October 2012, p 17.

[22] Safe Work Australia, *Australian Work Health and Safety Strategy 2012-2022*, October 2012, p 11.

[23] http://www.ntc.gov.au/filemedia/Reports/HeavyVehicleNatLawNov2011.pdf.

[24] For example: *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW).

[25] See: https://www.nhvr.gov.au/.

[26] *Heavy Vehicle National Law*, s 3, http://www.ntc.gov.au/filemedia/Reports/HeavyVehicleNatLawNov2011.pdf.

5.7 Master Builders supports the Heavy Vehicle National Law as a more responsive approach to the issue of national road safety than the Road Safety Remuneration System.

6 Road Safety Remuneration Order

6.1 The Tribunal operates under distinct legislation, the *Road Safety Remuneration Act 2012* (Cth). The Tribunal is required to establish a forward work program for each ensuing year which identifies the matters it will inquire into with a view to making a road safety remuneration order (RSRO). The work program may identify sectors, issues or practices affecting the industry or a sector of it and the Tribunal must consult in the preparation of the work program. The first work program was issued on 10 December 2012 and the Tribunal asked for proposed RSROs or RSRO terms for any of the five sectors which were identified in the work program (retail, livestock, bulk grain, intra- and inter-state long distance driving), the latter two which affect the building and construction industry (e.g. transport of bricks, blocks, structural steel, ultrafloor, formwork, plant, pre-cast flooring systems, cement and timber). The Tribunal may make a RSRO which is consistent with the objects of the Act. The second work program was issued on 18 December 2013.[27]

6.2 The Act's principal object is to promote safety and fairness in the road transport industry by ensuring that drivers do not have remuneration related incentives to work in an unsafe manner and a range of related outcomes including that drivers are paid for their working time.[28] When deciding whether to make a RSRO the Tribunal must have regard to a range of factors such as viability, complexity, overlap and the need to apply fair, reasonable and enforceable standards. RSROs can be made on the Tribunal's own motion or on application by an interested party. However, before it makes a RSRO the Tribunal must prepare and consult on 'the draft of the order'.

6.3 During March 2013 the Tribunal received a number of proposals for RSROs, including from the Transport Workers Union, to be made covering the long distance and retail sectors and there were submissions in response in May 2013. The Tribunal undertook 24 site visits during April – July 2013 and also

[27] *http://www.rsrt.gov.au/default/assets/File/decisions-files/2013rsrtfb14.pdf*

[28] See: *Road Safety Remuneration Act 2012* (Cth), s 3.

undertook 5 days of 'facilitated discussions' during June 2013 involving retailers, long distance freight operators, unions and some employer organisations about proposed long distance and retail RSROs. It issued a report on 28 June 2013 about the outcomes of the discussions. Large transport operators and retailers were generally in favour of a comprehensive order but some employer groups, including Master Builders, were not. These groups reserved their rights to raise whether the Tribunal possessed the jurisdiction to make orders in terms of a number of the proposals being put forward.

6.4 The Tribunal sat on 8 July 2013 to hear parties on the question of the report, applications and whether the Tribunal should issue a draft order. Master Builders was represented in those proceedings. It was submitted that the decision of whether to issue a draft RSRO is a matter for the Tribunal and that employer groups represented would not comment on possible content in advance of anything that the Tribunal might decide to determine. It was further submitted that, if the Tribunal did decide to issue the draft order it was then considering, employer groups reserved the right to make submissions about jurisdictional capacity as well as any of the terms which might be in the draft. Submission were made that under the Act the Tribunal's obligations to consult and consider really began at the point at which it issues the draft of any order it considered making.

6.5 On 12 July 2013 the Tribunal issued a statement[29] and a single draft RSRO intended to cover all five sectors identified in the work program. The Tribunal's statement appeared to take the view that the range of consultation undertaken to develop the draft RSRO went some way to discharge the Tribunal's obligation to provide a reasonable opportunity to make written submissions about the draft of the RSRO it considered making. This did not appear to sit comfortably with the obligations under sections 22 – 26 of the *Road Safety Remuneration Act 2012* (Cth) which require the Tribunal to prepare and consult on a draft order, publish the draft order and to ensure that persons likely to be affected if a RSRO based on the draft were to be made have a reasonable opportunity to make written submissions in relation to the draft of the order. The Tribunal can make any changes it thinks appropriate to

[29] Road Safety Remuneration Tribunal, Statement, 12 July 2013, http://www.rsrt.gov.au/default/assets/File/decisions-files/2013rsrtfb3.pdf.

the draft, or decide to make no order based on the draft. The draft order purported to affect those in the transport 'supply chain'. For example, the draft order required the terms of engagement of drivers to be in writing and contain 11 mandated matters and required a builder to check that a contract for the provision of a road transport service was consistent with the requirements of the order. Its ramifications extended well beyond the road transport industry.

6.6 On 17 December 2013 the Tribunal handed down a decision[30] which brings the RSRO entitled *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* into operation from 1 May 2014. The RSRO is limited in its application to the supply of goods to a supermarket chain by the road transport and distribution industry and to long distance operations in the private transport industry.

6.7 Among other things, the RSRO requires written contracts for road transport drivers and safe driving plans to be developed for long-distance trips of more than 500km. Companies that operate in the building and construction industry that rely on the transportation of construction materials by road are considered to be 'participants in the supply chain'. Builders are subject to the RSRO if they are undertaking a construction project, say, in a regional area that requires the transportation of construction goods or materials over 500km. Contravention of a RSRO is a civil penalty provision[31] with a maximum penalty of 60 penalty units,[32] currently $10,200.[33] Whilst bodies such as Master Builders communicate matters of regulation to our members, we have received feedback that builders believe it to be counterintuitive that such an order would bind them in the manner in which they carry out their day-to-day tasks.

7 Impact on the building and construction industry

7.1 As mentioned, companies which operate within the building and construction industry are subject to the Road Safety Remuneration System as 'participants in the supply chain' or if they directly engage a road transport driver as an

[30] [2013] RSRTFB 7.

[31] *Road Safety Remuneration Act 2012* (Cth), s28.

[32] *Road Safety Remuneration Act 2012* (Cth), s46(2).

[33] *Crimes Act 1914* (Cth), s4AA(1A).

employee or enter a contract with an owner-driver to provide transport services for the supply of construction goods and materials.

7.2 The RSRO recently handed down by the Tribunal requires participants in the supply chain to take all reasonable measures to ensure that any contract it has with another participant in the supply chain contains provisions which are relevantly consistent with the requirements of the RSRO.[34] In other words, builders must ensure the contracts they make with their subcontractors are relevantly consistent with the RSRO where trips of the particular duration are made to deliver, say, building materials. Master Builders questions how this requirement improves the safety of the road transport industry. Imposing these requirements down the supply chain only adds to the cost of administration with no correlation to an improvement in safety provable. Notably, the additional compliance obligation is uncosted. At the least, an instrument similar to a Regulatory Impact Statement should accompany this depth of regulation.

7.3 Regulation through the RSRO is of an inefficient kind. Appropriate regulation, that which is responsive, follows a model which reflects the principles of proportionality and parsimony. The regulatory intervention employed should do no more than what is necessary to achieve its objective.[35] The regulatory burdens and compliance costs encountered by those down the supply chain that are caught by the RSRO need to be borne in mind. The regulatory model is hence completely inappropriate; it is uncosted and the fundamental tests of proportionality and parsimony cannot be measured.

8 Conclusion

8.1 Master Builders is committed to the concept of continual improvement in work health and safety. That improvement can occur only within a policy framework that provides an environment that is conducive to the advancement of WHS and one which is structured to engage the participants. The Road Safety Remuneration System was established on the basis of limited evidence that suggests there is a correlation between rates of pay and

[34] *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, cl 8.

[35] Arie Freiberg, *The Tools of Regulation* (2010), 98.

safety within the road transport industry. Master Builders submits that this theory is flawed and that the entire structure serves no useful purpose.

8.2 Master Builders believes that the Road Safety Remuneration System is superfluous as there is overlapping regulation that is better suited to regulating safety within the road transport industry. As such, Master Builders submits that the Road Safety Remuneration System should be abolished.

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