Master Builders Australia

Response to the Department of Employment and Workplace Relations

"'Same Job, Same Pay"

17 May 2023

MASTER BUILDERS AUSTRALIA

CONTENTS

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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.

5. This submission is made in response to the Department of Employment and Workplace Relations ('DEWR') "Same Job, Same Pay" - Consultation Paper ('the Consultation Paper').

Summary of Submission

6. Master Builders Australia does not support the "Same Job, Same Pay" policy and submits that the Government should not proceed to give it legislative effect.

7. This submission sets out details of a selection of the numerous policy and practical grounds that give rise to the above position, including:

   - There is no justification or evidence to support the need for the policy, especially in building and construction;
   - Workers in Australia, including Labour Hire workers, are already subject to a comprehensive safety net of minimum conditions;
   - As currently expressed, the 'Same Job, Same Pay' policy appears to be capable of having application far more broadly than to the circumstances frequently cited to justify its need;

- This includes potential extension to the use of independent and sub-contracting within building and construction, which is a legitimate and long-standing method of engagement arising from the way building work is performed;
- There will be significant problems arising from the practical application of the 'Same Job, Same Pay' policy in workplaces;
- If Government remains committed to this policy, it should be limited in application and only apply to labour hire providers who are required to be licenced under the proposed single national framework for labour hire regulation; and
- The definition of labour hire should be narrow, targeted, and specifically exclude group training providers and subcontracting in the building and construction industry.

8. The following parts of the submission expand on the above matters and responds to the questions and detail within the discussion paper.

Concerns long-standing

9. Since the time the 'Same Job, Same Pay' 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.

10. As per our related submission on the Government's 'Employee-like' policy, Master Builders is gravely concerned that the proposed 'Same Job, Same Pay' policy is expressed broadly and may extend to subcontracting arrangements in the building and construction industry.

11. As this submission demonstrates, the use of independent and subcontracting within building and construction is a long-standing and legitimate method of engagement. These arrangements are not 'labour hire' in its traditional sense but 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.

12. 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 efficiently and affordably.

13. Since it was announced, Master Builders has expressed concerns about the 'Same Job, Same Pay' measure directly to Departmental Officials, various Government agencies and elected representatives on a consistent and regular basis and explained how the measure will create a wide range of adverse ramifications if it captured self-employed tradies and independent contractors in building and construction.

14. Despite these efforts, Master Builders has received no assurance that this policy will be narrowly defined. 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.

15. This prospect of adverse outcomes for self-employed tradies and subcontracting arrangements 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.

16. 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.

17. The potential for the 'Same Job, Same Pay' 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.

18. To address this backdrop of growing uncertainty and concern, Master Builders calls on the Government to rule-out the extension of its 'Same Job, Same Pay' policy to self-employed tradies and independent subcontractors in the building and construction industry.

Independent and subcontracting in building and construction

19. 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.

20. 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 'Same Job, Same Pay' policy. To this end, we outline below some key background information to contextualise the current status of the BCI.

Industry size

21. 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

22. 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

[1] *ABS Labour Force Detailed Quarterly, May 2019 – 6291.0.55.003*

Industry composition

23. 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.

24. Industry Model

25. 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.

26. 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.

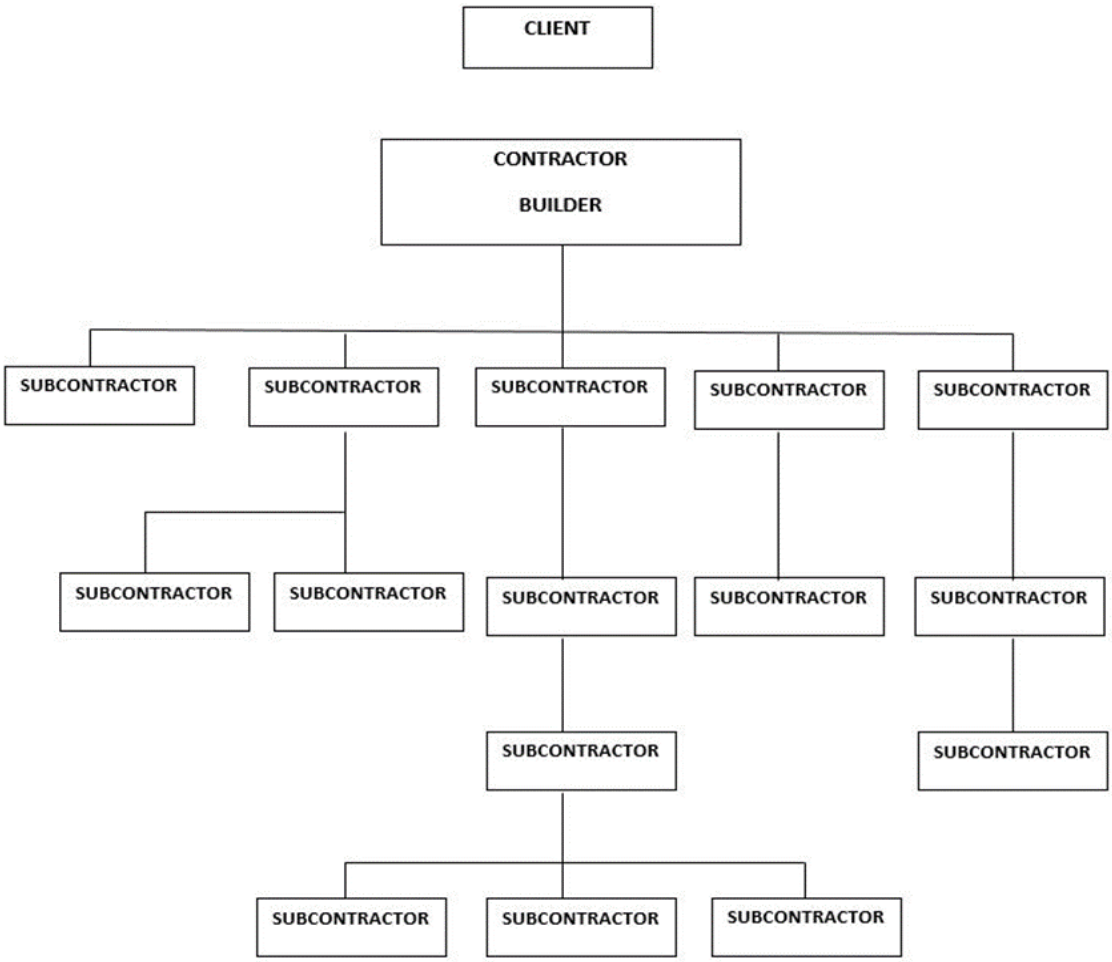
27. Group Training Organisations (GTO)

    GTOs employee apprentices and trainees, placing them with a host employer who they work for whilst receiving on-the-job training. These organisations may be registered training organisations. They provide opportunities for employers who can't support an apprentice or trainee for the full term of an apprenticeship or traineeship, or think it is too administratively cumbersome, to still take on an apprentice or trainee.

28. Within BCI, GTOs experience much higher than average retention rates of apprentices and trainees compared to other training models which is crucial to attracting and retaining workers in an industry that is experience acute labour market shortages. The opportunity to be exposed to a variety of employers and experiences is an incentive for apprentices and trainees.

[2] *ABS Counts of Australian Businesses 8165.0*

29. 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:



30. The ramifications and complexity of these circumstances are obvious, particularly insofar as it relates to the 'Same Job, Same Pay' and 'Employee-like' policies. 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.

31. 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]

32. 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."*

33. 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

[3] Productivity Commission, 1999, page XVII
[4] Ibid, pages XIX to XX/

that the birth of what we identify as the contemporary contract-based underpinnings of construction occurred around the mid-1800s.[5]

34. Watkins (2017) also pinpoints this 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 subcontracting

35. Master Builders has maintained consistent support for independent and subcontracting 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.

36. 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.

[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

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

Sham Contracting

37. 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 subcontractor 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.

38. 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.

39. 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.

40. 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.

Key positions on issues covered by consultation paper

41. This section outlines Master Builders response to key issues raised in the consultation paper.

Key positions

42. **Genuine subcontracting must not be captured:** Master Builders believes that the 'Same Job, Same Pay' policy should not be implemented in a manner that extends to independent and subcontracting arrangements that are long-standing, legitimate and lawfully used in building and construction. There must be clear and strong exclusions for service contracts and genuine subcontracting, as commonly and legitimately used in building and construction.

43. As currently expressed, the 'Same Job, Same Pay' policy appears to be capable of having application far more broadly than the examples commonly cited by its proponents to justify its need, including the legitimate and long-standing use of subcontracting in the building and construction industry – a very real prospect accompanied by a range of significant adverse outcomes for not only industry participants, but for Australian consumers, taxpayers and the general community.

44. The use of independent and subcontracting within building and construction is a long-standing and legitimate method of engagement. This is a model that underpins the entire operation of the building and construction industry, both domestically and internationally, and has done so for many decades. This contracting-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 efficiently and affordably Building and construction.

45. **If it proceeds, the 'Same Job, Same Pay' should only apply to those covered by the proposed single national framework for labour hire regulation:** Only if the Government proceeds to implement this policy, it should extend no further than to those labour hire providers who are required to be licenced under the proposed single national framework for labour hire regulation, those host-employers that utilise such licenced providers, and adopt the same definition of 'labour hire'.

46. To define coverage of the national framework for labour hire, Master Builders recommends that Government adopt the definition used in the existing *Victorian Labour Hire Licensing Act 2018* to define 'labour hire provider'. This definition would involve '*a person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person* (the host)'.

47. To avoid extension to genuine subcontracting arrangements as used in building and construction, Master Builders also recommends that the above definition adopt existing exclusions to the definition of 'labour hire' such as that used in the current labour hire licencing regime in Queensland. An extract of that exclusion follows:

> However, a person does not provide ***labour hire services*** merely because—
>
> (a) the person is a private employment agent under the *Private Employment Agents Act 2005*; or
>
> (b) the person is a contractor who enters into a contract to carry out construction work within the meaning of the *Building and Construction Industry Payments Act 2004*, section 10, and engages subcontractors to carry out the work; or
>
> (c) the person is, or is of a class of person, prescribed by regulation.

48. **Group training arrangements must be excluded:** Master Builders also recommends that the national framework for labour hire exclude group training providers who supply apprentices and trainees to host employers. This is a common practice within building and construction and is a crucial element under which new workforce entrants, in particularly women, are able to obtain the necessary worksite experience to become trade qualified. Master Builders recommends that the approach adopted be the same as that which currently exists in the *South Australian Labour Hire Licensing Act 2017* as follows:

> **5—Registered group training organisation exempt from application of Act**
>
> (1) This Act does not apply in respect of a registered group training organisation to the extent that the organisation supplies apprentices or trainees to do work for other persons.
>
> (2) In this section—
>
> ***registered group training organisation*** means a group training organisation registered in South Australia on the Group Training Organisation National Register maintained by the Commonwealth.

49. '**Same Job, Same Pay' must not be unwieldy or unworkable:** While the concept of a 'Same Job, Same Pay' policy may appear superficially sensible to some, its application in 'real world' workplaces raise an almost endless series of practical problems, considerations and questions. Chief amongst these is the fact that no two workers, jobs or workplaces are identical or the same. Therefore, any definition of 'job' and 'pay' should be clearly and strongly defined, to avoid unnecessary and inappropriate compliance burdens.

50. As this submission notes, the use of genuine subcontracting arrangements within building and construction is a commonly deployed practice and extensively used. Master Builders estimates that, each week, there would be thousands of new and genuine subcontracting arrangements formed and put into practice.

51. Unless clear and workable approaches are adopted, or a general construction exclusion adopted, Master Builders warns that the implementation of the 'Same Job, Same Pay' policy will result in one of two likely outcomes – either an entirely unreasonable, unnecessary and disproportionate set of complex red-tape and administrative compliance obligations leading to reduced productivity – or a permanent injection of ongoing uncertainty and risk that acts to discourage competition, stifle innovation, drive up costs to the community and hinder future job creation.

52. **Prospects for workplace disputes must be minimised:** Any implementation of the 'Same Job, Same Pay' measure must minimise the potential for workplace disputation and disruption. This is an especially key consideration for building and construction workplaces for two key reasons.

53. The first of these relates to the nature of how building work is performed as noted earlier within this submission. Any disruption or delay to carefully programmed construction phases causes significant cost and delay to builders and consumers. Following the abolition of the Australian Building and Construction Commission, and other recent changes to Australian workplace laws, there are already a vastly wide range of ways by which third-parties can easily disrupt construction workplaces. Master Builders does not want to see this range expanded further.

54. The second reason relates to the history of unlawful and illegal conduct in the building and construction industry, and the frequency by which particular trade unions ignore compliance with workplace laws and exploit their use. Court judgments regularly call out the above conduct and have become increasing fervent in their criticisms of certain building unions, to the extent they are labelled 'recidivist' and their conduct such that it '*brings the trade union* movement *into disrepute'.* A selection of key examples follows:

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."* [7]
>
> *"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must*

[7] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*

weigh heavily when the need for both specific and general deterrence is brought to account." [8]

"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act." [9]

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." [10]

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised." [11]

"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct." [12]

"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..." [13]

"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts." [14]

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that

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[8] *Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407*
[9] *Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845*
[10] *Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436*
[11] *Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173*
[12] *Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145*
[13] *Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548; (2009) 182 IR 327*
[14] *Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429*

> *presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."* [15]
>
> *"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means."* [16]
>
> *"The CFMEU is to be regarded as a recidivist rather than as a first offender."* [17]
>
> *"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry."* [18]
>
> *"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."* [19]

55. Against the above backdrop, it is easy to appreciate why Master Builders cautions against giving further avenues to facilitate such conduct.

Is there a problem to fix?

56. Master Builders questions the rationale and principles which underpin the 'Same Job, Same Pay' policy, captured in the following extract:

> *Evidence recently accepted by several Senate inquiries has shown that some employers use these arrangements to deliberately undercut bargained pay and conditions and to avoid bargaining for an enterprise agreement. This can have the effect of eroding job security and undermining the framework of enforceable minimum wages and conditions established by the Fair Work Act, including wages and conditions negotiated through enterprise bargaining.*

57. Within building and construction, Master Builders has not been able to identify instances by which labour hire has been used in a way that is cheaper than directly employed workers or to 'deliberately undercut' bargained outcomes.

58. Common feedback from Master Builders members is that the use of 'labour hire' is always more expensive and less preferred than the use of directly employed labour, however, in some instances it is unavoidable. More broadly, Master Builders is not aware of any instances in which the use of labour hire has been deployed by employers as a strategy to undermine or weaken any existing industrial arrangements or in some other industrially motivated way.

59. The consultation paper outlines the concept that labour hire workers '*should receive the same pay and conditions for performing work as those directly employed by a host employer*'.

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[15] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[16] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[17] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[18] *White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432*
[19] *Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134*

60. All workers in Australia are already subject to a complex and long-standing regime of workplace laws that provide all workers protection via a comprehensive safety-net of some of the most generous minimum employment terms and conditions in the OECD.

61. These are given effect via the *Fair Work Act 2009* and are known as the National Employment Standards, the National Minimum Wage and a widely-operative regime of Modern Awards containing specific industry-based enforceable minimum terms and conditions of employment. Labour hire workers are not exempt from this safety-net and enjoy the same protections and rights these laws provide to all workers.

62. To this end, we question whether there is a policy problem that needs to be addressed. As noted later below, unless narrowly applied, the potential compliance obligations arising from the 'Same Job, Same Pay' policy are huge and extremely disproportionate in context of the apparent 'mischief' the measure seeks to address.

Response to consultation paper questions

63. 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.

Defining labour hire arrangements within scope

How should different labour hire arrangements be identified or defined? Should any arrangements be excluded from the Same Job, Same Pay measures?

64. Master Builders is concerned that the Consultation Paper appears to inappropriately include service contracting arrangements and genuine subcontracting (where business are not 'labour hire' but provide defined services) in scope as 'labour hire'.

65. As noted earlier above, the entire building and construction industry is underpinned by a genuine and long-standing subcontracting model that arises from the way building work is programmed, phased and undertaken. This is a lawful and legitimate practice which has existed in building and construction, in various guises, for over 150 years.

66. Per the 'key positions' section earlier above, Master Builders would oppose any definition that fails to clearly distinguish labour hire from genuine subcontracting, whereby services are delivered under a scope of work and generally involve the combination of equipment, plant and intellectual property with labour. We reaffirm the proposed approach outlined earlier above, which draws on various existing legislative regimes.

67. The measure should not extend to capture a range of normal commercial contracting arrangements that are clearly not labour hire, for example self-employed subcontractors, trades services or engineers on building and construction sites. These are businesses that provide specialist services, whose core business is to provide a specific service with specific expertise. They exist to provide a particular service, rather than to provide workers.

68. Master Builders warns that a broader application will have negative impacts for a wider range of businesses, which will have negative economy-wide consequences.

Capturing non-labour hire service providers will make companies that have contracted their services uncompetitive.

69. Master Builders also reiterates our earlier view about the need to exclude group training arrangements which would, in addition, prevent any related disincentives to engaging apprentices

Identifying the 'Same Job'

Would the criteria set out on page 8 capture when a labour hire worker is performing the 'same job' as a directly engaged employee?

Are there scenarios where these criteria would not operate clearly or lead to unintended outcomes? If so, what criteria should be used to identify when a labour hire worker is performing the 'same job' as a directly engaged employee, and why?

70. The Consultation Paper proposes that the 'same job' be determined on the basis of whether an employee does 'the same work'. As earlier noted, the superficial appeal of such approach is not workable in practice as the 'work' that employees do can vary from day to day, depending on the tasks they are assigned. This is:

- particularly so where employees are employed under 'the same' award classification but that classification covers a wide band of duties;
- especially problematic for work performed on construction sites – none of which are the same – and will always involve different approaches to the way specific work and tasks are performed.

71. Master Builders notes that while two jobs can look as though they involve doing the same work, it will never be the case that a job in one organisation is the same as a job in another. Building and construction businesses vary in their purpose, approach to work, expectations on employees, levels of profitability, policies and procedures, nature of equipment and plant used, and so forth.

72. The Consultation Paper includes the example of 'Jane' and refers to 'the work Jane does'. Master Builders submits that this not a workable approach and notes that the criteria listed in the Consultation Paper would not be appropriate.

Calculating the 'Same Pay'

Is calculating 'same pay' with reference to 'full rate of pay' appropriate? Are there scenarios where this would not operate clearly or lead to unintended outcomes?

If 'full rate of pay' is not an appropriate definition for calculating 'same pay', why not?

What method of calculating 'same pay' is appropriate, and why?

Should 'same pay' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?

73. Master Builders submits that the requirement to provide the 'same pay' should not extend to conditions. As with other separately identifiable amounts of pay, conditions

are often intrinsically connected to the employment of the directly engaged employee and vary significantly within building and construction.

74. Additionally, it would be contrary to the objective of the policy which is about providing the 'same pay', not the 'same terms and conditions'.

75. Providing labour hire employees with the same conditions as those to which direct employees are entitled would be highly problematic. For example, host employers should not be required to consult labour hire workers, who they do not employ, about major workplace changes. Similarly, host employers should not be required to provide labour hire workers with training, special leave entitlements, or flexibility arrangements, which are provided to direct employees.

76. In addition, an obvious consequence of the policy's application would be to reduce the incentive for workforces in labour hire service providers to bargain which would be contrary to the intended principles underpinning the policy.

77. An additional consequence will be that businesses will be reluctant to reward or encourage workforce productivity by providing pay and conditions linked to improvements in worker outcomes which will have an adverse impact on workplace productivity. It will also discourage employers from recognising and rewarding high individual worker performance on the grounds that their remuneration may become a comparator for the application of the policy.

Implementing Same Job, Same Pay entitlements and obligations

If an obligation were imposed on labour hire providers and host employers:

What guidance should the Fair Work Act include about 'reasonable steps'?

To what extent should consultation and information-sharing provisions prescribe the steps to be taken by labour hire provides and host employers to comply?

Should any other criteria or thresholds for triggering obligations apply (for example, criteria or thresholds relating to the length of labour hire engagements)?

Should Same Job, Same Pay obligations apply differently for small business?

Are there alternative mechanisms the department should consider in order to confer entitlements and obligations about Same Job, Same Pay? If so, please provide details.

78. Master Builders submits that the obligations should not be imposed on both labour hire providers and host employers. It should only be imposed on labour hire providers, who ultimately engage or employ the workers to whom it applies. If a host employer fails to provide a labour hire provider with the correct pay information that is necessary to satisfy the obligations, then that is a dispute between two businesses that is beyond the scope of the workplace relations system.

79. The FW Act should provide extensive guidance about what reasonable steps must be taken by parties to avoid liability and satisfy its obligations.

80. Master Builders submits that the "Same Job, Same Pay" obligation should only apply to labour hire arrangements where the worker is engaged for a reasonable continuous period. For example, more than 12 months. This would mean that businesses which use labour hire for short-term purposes are not impeded by the administrative and compliance burden which the obligations will impose. It will also eliminate the complexities that arise in identifying the 'same pay' for labour hire workers that perform work at different sites.

81. Further, the "Same Job, Same Pay" obligation should not apply to labour hire arrangements under which the labour hire provider and its employees have bargained for an enterprise agreement. Where these circumstances apply, forcing labour hire providers to remunerate its employees at a rate higher than what was bargained for in the agreement, while still guaranteeing the employees all other terms of the agreement, is unreasonable.

Dispute resolution

What parameters (if any) should be imposed on the Fair Work Commission's jurisdiction to deal with Same Job, Same Pay disputes, and why?

Would the Fair Work Commission's existing powers be sufficient to deal with Same Job, Same Pay disputes? If not, what powers would be needed, and why?

Should the Fair Work Commission be authorised to arbitrate disputes (within constitutional limitations)? If not, why not?

If the Fair Work Commission were authorised to arbitrate disputes, what orders should the Commission be authorised to make, or be precluded from making?

82. As noted earlier above, Master Builders questions the rationale and justification given in support of the "Same Job, Same Pay" measures. Notwithstanding the lack of evidence, if the Government determines a key basis to implement the policy is "to avoid the deliberate undercutting of bargained terms and conditions" then the Government should introduce a prohibition on that deliberate activity.

83. This would avoid the need to impose unreasonable compliance burdens on businesses and avoid the potential for site disruption and commercial risk amongst building and construction industry participants.

Conclusion

84. 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.

85. 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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