

Master Builders Australia

Submission to the Senate Education and
Employment Standing Committee

on

*Fair Work Amendment (Protecting Australian
Workers) Bill 2016*

4 April 2016



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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 On 17 March 2016 the *Fair Work Amendment (Protecting Australian Workers) Bill 2016* ('the Bill') was referred to the Senate Education and Employment Legislation Committee for inquiry and report.
- 2.2 The Bill is a Private Members' Bill introduced into the Senate on 15 March 2016 by Senator Cameron of the Australian Labor Party ('ALP').
- 2.3 The Bill seeks to give legislative effect to a policy of the Australian Labor Party announced on 1 February 2016 by the Leader of the Opposition and the Shadow Minister for Employment and Workplace Relations.
- 2.4 The policy is entitled "*Protecting Rights at Work*" ('the Policy') and proposes a "*suite of reforms to protect rights at work by cracking down on unscrupulous employers who are willing to exploit workers*".
- 2.5 As the Bill purports to give effect to the Policy this submission is written with reference to both documents. We also refer to the accompanying Explanatory Memorandum ('EM') where appropriate.

3 General Observations

- 3.1 Master Builders has some serious reservations about the Bill (outlined herein) and would not support its passage as drafted. We urge the Committee to adopt this position and recommend that this Bill not be passed.

- 3.2 Master Builders notes the underlying intent of the Policy is to provide workers greater protections, deter employers from engaging in worker exploitation, and to improve employer compliance with employment conditions set out in the *Fair Work Act 2009* (Cth) ('the FW Act').
- 3.3 Master Builders supports, in-principle, the notion that persons whom repeatedly and deliberately breach the law should be exposed to higher penalties where appropriate.
- 3.4 Notwithstanding this, Master Builders has serious reservations about the Bill as currently expressed. There are several reasons for these reservations (set out hereunder with reference to discrete topics) however in general terms they are:

Disconnect between Policy and Bill

- 3.5 The Policy and its stated intentions are not borne out in the body of the Bill. The Bill appears, in many respects, to go far further than the stated intent of the Policy creating a 'disconnect' between what the Policy intends and what the Bill actually does.
- 3.6 For example, the Policy states an intention to protect workers from adverse action when asking about whether they are employed as an employee or engaged as an independent contractor. The Bill goes much further than this. As drafted, the Bill would prevent adverse action against a worker for asking about the existence of a workplace right, not only on their own behalf, but on behalf of others, and is not limited to the question of a workers status.

The Act already provides effective redress for recovery of entitlements

- 3.7 The Policy makes reference to several relatively 'high-profile' cases of employer non-compliance with worker employment conditions as examples of why the current law is deficient and should be improved. Master Builders notes that in all of these examples, the Fair Work Ombudsman ('FWO') has, quite rightly, taken action in holding employers to account and has assisted workers to recover any loss they have suffered. They are, in many respects, examples of how the current law works and that existing regulators are effective where breaches occur.

There is no distinction between breaches that are deliberate or repeated and breaches that are inadvertent

- 3.8 Master Builders supports, in-principle, the notion of higher penalties for employers who deliberately and repeatedly do the wrong thing. Equally, we support the notion of distinguishing between those employers that are 'repeat offenders' and those employers who breach their obligations through inadvertency or genuine error. The Bill as drafted does not appear, in several crucial areas, to make this distinction or even provide courts/tribunals with the discretion to make such a distinction. Master Builders accepts that some areas of industrial law require penalties that are applied using the notion of strict liability. There are, however, other areas to which it is application would be clearly inappropriate.

Breaches for which increased penalties are proposed are not balanced

- 3.9 The Policy is concerned with the protection of rights at work, however, the conduct giving rise to penalties for which increases are proposed appears to be imbalanced. No increases are proposed, for example, to breaches of Part 3-4, s353 – 355, s343, s345 or s348 of the FW Act, or for conduct breaching the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

Penalties are inappropriate

- 3.10 Combined with the above concerns, the penalties under consideration are inappropriate. On Master Builders' reading of the Bill and Policy, an employer who underpays a worker could receive a penalty of \$216,000 for an individual, \$1,080,000.00 for a body corporate, or two years imprisonment or both. This level of penalty is disproportionate considering that they could apply for one single breach, without regard to history or magnitude of the breach. It is also disproportionate to, and inconsistent with, those proposed in the ALP '*Better Union Governance*' document¹ along with the proposed pre-requisites for demonstrating a breach.

¹ ALP - Fact Sheet – Better Union Governance – 7 December 2015

4 Migrant Workers

4.1 Master Builders opposes those who exploit migrant workers. We have previously expressed support for measures that allow additional resourcing for the Fair Work Ombudsman ('FWO') and higher penalties for employers who deliberately and repeatedly underpay migrant workers.

4.2 The changes proposed in the policy appear to address a circumstance which is based on a misunderstanding of the current situation. The relevant section in the EM refers to both the views of the Productivity Commission ('PC') and the FWO. However, Master Builders is aware of correspondence from the FWO to the PC which appears to challenge the PC's view. In that correspondence, the FWO states:

the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions.²

4.3 It is clear the FWO can and do prosecute employers who exploit migrant workers and enforce the Fair Work laws with respect to all workers irrespective of their visa conditions.

5 Adverse Action

5.1 Master Builders' view is that the protection of workplace rights should be limited to protecting employees from adverse action for filing, or proposing to file, a formal inquiry or complaint with a competent administrative authority that is directly in relation to his or her employment.

5.2 The changes as drafted are not consistent with this view and are therefore not supported. It should also be noted that Master Builders, for the same reason, does not support the existing relevant provisions in the FW Act. They are unclear and require amendment in the terms we have advanced elsewhere (refer submissions at item 6 below).

² Correspondence from FWO (per Natalie James) to PC (per Mr Peter Harris) 18 September 2015

6 Sham Contracting and Phoenixing

- 6.1 Master Builders does not support sham contracting or phoenix-like behaviour and has expressed this position on the public record on numerous occasions.
- 6.2 Earlier Master Builders' submissions set out our views in this area. Please refer to our:
- submission to the [Productivity Commission on the Draft Report – Workplace Relations Framework - 18 September 2015](#) ;
 - submission to the [Senate Economic References Committee on Insolvency in the Australian Construction Industry, 17 April 2015](#) ; and
 - submission to the [Productivity Commission on the Review of the Workplace Relations Framework Issues Papers 1-5, 11 March 2015](#)

7 Contraventions – Financial Penalties

- 7.1 The Policy states that existing penalties are “*clearly an inadequate deterrent given the brazen and systematic underpayment of workers we have seen in the last 12 months*”³ and explores higher penalties alternatives such as the higher of three times the value of the underpayment or \$216,000 for an individual or \$1.08 million for a body corporate.
- 7.2 Master Builders supports the notion that an employer who underpays workers ‘brazenly and systematically’ should suffer a penalty that is commensurate to the magnitude of the breach. This is, however, already provided under the FW Act and there is no need to change the law in this regard.
- 7.3 For example, the policy statement refers to the case of 7/11 workers and widespread underpayments. Media reporting suggests that these underpayments may have affected around 20,000 workers and that 2,100 have lodged claims for underpayment.⁴
- 7.4 Assuming there are 2000 workers underpaid, employers would be subject to penalties that would total a maximum of \$108,000,000.00 (2000

³ ALP - Fact Sheet – Protecting Rights At Work – p.2

⁴ <http://www.abc.net.au/news/2016-02-05/7-eleven-workers-physically-intimidated-and-beaten/7144460>

underpayments x \$54,000 existing maximum). A maximum penalty of \$108 million is, in Master Builders view, commensurate with the magnitude of the underpayment. It is significant enough to deter ‘brazen and systematic’ breaches of the law.

- 7.5 Notwithstanding the above position, the proposed section in the draft Bill (clause 16) does not reflect the stated policy intent to deter “egregious” cases of “widespread” underpayment⁵. There is no regard to, or distinction made for, either of these descriptors. As drafted, the higher penalty provisions under consideration could be applied for any underpayment regarded as ‘deliberate’ irrespective of the magnitude of underpayment and whether earlier instances of contravention have occurred.

8 Contraventions of Employment Conditions – Director Disqualification

- 8.1 Master Builders’ view with respect to this area is outlined in the submissions noted at item 6 above.
- 8.2 In general terms, we say that matters involving corporate law and director duties ought to be dealt with in the *Corporations Act 2001(Cth)* and note that action available pursuant to s206E therein.

9 Serious Contraventions of Employment Conditions

- 9.1 Master Builders takes the view that the penalty of a \$43,200 individual fine and up to two years imprisonment are disproportionate given they could apply to one single instance of underpayment, on one occasion, whether inadvertent or deliberate, and without regard to any previous contraventions and breach magnitude. We also refer to the general observations expressed at item 3 above and item 10 hereunder.

⁵ ALP - Fact Sheet – Protecting Rights At Work – p.3

10 Alternatives

- 10.1 Master Builders remains open to supporting changes to the law to achieve the intent of the Policy as described. Such changes should adopt the following principles.
- 10.2 Penalty provisions should, where so practicable, acknowledge and account for the distinction between deliberate action to flout the law and inadvertence or mistake;
- 10.3 Were penalty provisions to be increased for repeat offenders who deliberately breach the law relating to Migrant workers, then such increase should have regard to the value of any underpayment or loss to an employee suffered as the result of the deliberate breach;
- 10.4 Applications for penalties involving director disqualification should only be capable of being brought by a regulator or competent authority (for example, ASIC);
- 10.5 Applications for penalties in respect to repeat offenders should only be capable of being brought by a regulator or competent authority (for example, FWO);
- 10.6 Materials used by the FWO and other agencies in educating workers and employers about their rights and obligations should make it clear that penalties set in the act are 'per breach' and not a 'total maximum';
- 10.7 Matters relating to corporate activity and directors responsibilities should be dealt with in the relevant Corporations laws and not the FW Act which is expressed to that deal with the "*framework for cooperative and productive workplace relations*".⁶
- 10.8 The detection of illegal phoenix activity requires coordinated resources and expertise amongst agencies and greater use of the current law; and
- 10.9 The FWO should be given whatever resourcing is required for them to discharge their duties and obligations.

⁶ Division 2, Section 3, Fair Work Act 2009

11 Conclusion

- 11.1 For the reasons outlined herein, Master Builders is unable to support the Bill as drafted and urges the Committee to conclude accordingly.
- 11.2 Master Builders thanks the Committee for the opportunity to respond to the Policy and associated documents and would welcome the opportunity to provide further evidence to the Committee to assist in its consideration of the Bill.
