

Senate Education and Employment Committee

Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Master Builders Australia - Answers to Questions on Notice

QUESTION

Senator KETTER: *In paragraph 39 of your submission you point to a finding of the Heydon royal commission in respect of workers being funded who engaged in illegal industrial action. Can you give us an update on that? Has that been investigated by ASIC?*

Mr Schmitke: *You're stretching my memory. What I would say is that I'm aware that the payment of strike pay under the Fair Work Act is something which is illegal and is prohibited. I understand that, in this situation, money was paid to workers in circumstances where, sensibly, they were on strike. That came from a particular worker entitlement fund. That is something which we don't necessarily think is the appropriate use for a worker entitlement fund, but I would be happy to take on notice that question and provide you with more information in the event I'm able to do so.*

ANSWER FROM MASTER BUILDERS AUSTRALIA:

Master Builders Australia understands that an investigation was undertaken by ASIC. It is understood that investigation related to whether or not the fund had acted inconsistently with its rules. No action resulted from that investigation

It is relevant for the Committee to note that at the point in time the payments referred to during the Royal Commission were made, Master Builders Queensland ('MBQ') did not have involvement with said fund and nominations to any governing board (or similar) were made by the Queensland Major Contractors Association ('QMCA'). QMCA is not associated with, or part of, Master Builders Queensland or Master Builders Australia. It is understood that since MBQ took over from QMCA in July 2015 additional governance policies and procedures have been implemented which would preclude any form of strike pay.

We also observe that (except where noted below) regulators generally would not be able to pursue action for payments made in such circumstances. This is because:

- (a) rules regarding payments are set by the Fair Work Act 2009;
- (b) the rules only apply to employers and their employees;
- (c) the Fair Work Ombudsman ('FWO') is the regulator who would conventionally pursue penalties for breaches of these rules;
- (d) the Fair Work Ombudsman would have no jurisdiction to investigate such a fund as it is not the employer or employee;
- (e) any regulator with jurisdiction over such a fund would not have jurisdiction to enforce rules that exist under the Fair Work Act insofar they related to payments for periods of industrial action; and
- (f) any regulator would only be able to take steps to ensure a fund operated in accordance with whatever structural or governance arrangement that underpins it.

The Fair Work Act establishes rules governing payment to employees for periods of industrial action. That Act requires that an employer is prohibited from making payment to an employee for the total duration that the employee is engaged in protected industrial action. Where an employer is prohibited from making payment under the FW Act, it is a contravention for both the employer to make the payment and the employee (or employee organisation) to ask for, or accept payment for such periods. Penalties of up to \$12,600 for an individual and \$63,000 for a corporation may apply and there is currently no scope for others to be penalised (for example, where

payments are made through entities other than the employer.) This is notwithstanding any such payments would, in practice, represent circumstances otherwise prohibited by the Fair Work Act.

QUESTION

Mr Schmitke: *I would say without referring to that particular provision that it is not effective to necessarily overcome what we would say is the practice within the sector in terms of soliciting some sort of understanding or arrangement. In the building and construction sector, the nature of the work that we perform is such that it lends itself to industrial parties putting pressure on the other party. That is because of the way work is undertaken, as I'm sure the committee is very familiar. In our sector, it is one of those situations where you could have lots of laws protecting you. Whether or not those laws necessarily make a huge difference in practice on the ground is another story.*

Senator KETTER: *But that behaviour is within the scope of the current section 343 of the Fair Work Act, isn't it?*

Mr Schmitke: *I'd have to take that question on notice.*

ANSWER FROM MASTER BUILDERS AUSTRALIA:

While s.343 of the Fair Work Act 2009 deals with coercive behaviour, the extent to which it has an impact in a practical or 'on the ground' sense in the building and construction industry is debatable.

Evidence for this proposition can be found with reference to Chapter 6 of the *Building and Construction Industry (Improving Productivity) Act 2016* that contains industry specific provisions relating to coercive conduct. These provisions have specific application to building industry participants and arise from the frequency in which such behaviour manifests itself in the sector.

In 2015/16 the ABCC undertook 104 investigations that involved coercion and this rose to 111 in 2016/17. Penalties arising from these investigations over the same periods were \$576,275 and \$710,000 respectively.

Notwithstanding the frequency with which courts have found s.343 to be breached, recent decisions confirm that the behaviour continues and that no regard is had for the penalties or repeated contraventions thereof by those to whom they apply. A decision on penalties from January of 2017 (*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union & Ors SAD248/2014*) noted a common example of coercive conduct where a CFMEU official at a hospital building site stated "if you try anything there will be Armageddon" and "all hell will break loose and we will take this national."

The Court found that the purpose of the threats was to coerce the head contractor to not exercise its legitimate workplace right to enforce an order of the Fair Work Commission. The Judge in that case referred to the CFMEU's "significant record of non-compliance" with workplace laws, particularly those provisions relating to coercion. The Judge also found the officials' actions to be deliberate and noted "there is no suggestion of contrition or corrective actions by Mr Cartledge or Mr McDermott".

That decision was one of several involving \$1,126,600 in penalties imposed by the Federal Court against the CFMEU and its officials for unlawful conduct that occurred across Adelaide in a nine-month period, described as "Unfortunately, the conduct we've seen in this case is not isolated, but instead reflects a widespread contempt for the rule of law that pervades the industry."

QUESTION

Senator McKENZIE: *BERT gave us some evidence this morning around some of the funds being used for a mentoring program for young apprentices, to address the retention of young apprentices in the construction industry. He was unclear about whether the mentors had to be a member of the CFMEU or whether they were able to be others. I assume within your membership base there are a raft of organisations who are concerned about retention of apprenticeships, particularly small businesses. That relationship does take on a similar type of relationship, I guess, to what Mr Shenfield was going to. He couldn't tell us. Do you have any idea about the funding and the program he was speaking about and whether those funds can only go to CFMEU members as mentors or not?*

Mr Schmitke: *I am very happy to take that question on notice and make further inquiries. As I indicated, there are nine of our member organisations with different arrangements. What I can say, though, is that I am aware of feedback that I have received in our sector about the operation of some of these mentoring programs. Again, let us be very clear*

in noting that the concept of mentoring is a good thing, and what we can be doing to support apprentices in our sector and, in particular, keep them in our sector is excellent.

Senator McKENZIE: Agreed.

Mr Schmitke: That said, the reports that we receive on occasion are that the individuals who provide these services are there ostensibly to provide the service but whether they're necessarily concerned with providing the service as the No. 1 reason for being involved in the sector is not always very clear. I do understand, as well, that there are many providers of particular types of mentoring, training or support—however it's so described—and you don't have to dig too far to determine the backgrounds of the individuals who are providing that support or, indeed, to look at the entities providing that support and who make up the controlling people on that particular entity. Would there be people in the CFMEU, formerly in the CFMEU or associated with the CFMEU conducting that mentoring? I would say it's far more likely than it is unlikely.

Senator McKENZIE: But exclusively?

Mr Schmitke: I'm not aware. I can't answer that definitively but I certainly will take it on notice.

ANSWER FROM MASTER BUILDERS AUSTRALIA:

Master Builders Australia has been unable to obtain any additional specific information that would allow us to determine whether all mentoring services nationwide are provided exclusively by the CFMEU. We also refer the Committee to the answer given to the last question in this response.

Notwithstanding this, it is understood that in Queensland there are approximately ten mentors are engaged using funding from BERT. These mentors are engaged and paid by the CFMEU directly who is the recipient of the funding from BERT and other sources. It is understood that while many uses of income generated from fund contributions are awarded by tender, the mentoring service is not one that undergoes such a process. It is also understood that these mentors attended the protest noted below.

We are also aware that many unions, including the CFMEU, engage personnel with specific roles to support apprentices. For example, the CFMEU in Victoria has the following section on its website <https://vic.cfmeu.org.au/apprenticeship-training>

Apprenticeship Officer

As part of this commitment the CFMEU employs a full-time apprenticeship officer. Being badly treated or ripped off puts many young workers off finishing or taking up apprenticeships.

We are also aware that the CFMEU National Office has published a media release that links the Bill under consideration to apprenticeships and related services. See <https://cq.cfmeu.org.au/news/chaotic-turnbull-government-goes-after-funds-apprenticeships-health-safety-training->

The Committee should also be aware that the Queensland CFMEU organised a protest about the Bill that commenced *prior* to its introduction into Parliament. That protest focussed on apprentices and welfare. A speech delivered at the protest indicated that the redundancy fund in Queensland '*invested*' in youth and there '*were a whole lot of apprentices who have had their job opportunities associated with the BERT fund*'. A link to a video of the speech can be found at <https://www.facebook.com/cfmeuqldnt/videos/1549776515079922/>

QUESTION

Senator McKENZIE: We were told today that it's all audited. Could you check with your members who sit on those organisations that that is actually the case and the process by which it occurs?

Mr Schmitke: I certainly will and I will take it on notice. Let me say that 'audited' might mean 'We said we'd deliver 20.'

Senator McKENZIE: I put that direct question of how people understand 'audited', when they just mean paperwork is just paperwork. I was assured that that wasn't the case and so I would like you on notice to examine that and give some feedback.

ANSWER FROM MASTER BUILDERS AUSTRALIA:

Master Builders Australia (except where identified hereunder) has not been able to obtain and written information that would enable us to answer this question in the timeframe permitted.

This is largely because Master Builders Australia does not itself nominate persons for involvement on the boards (or similar) of entities such as those that premised this question. Those nominating rights, where they so exist, are conventionally vested within the State and Territory organisations within the Master Builders network which is a federated model.

It is, however, our understanding that persons so nominated would be responsible for discharging whatever duties and obligations may apply to them once so nominated and details about these are contained in various types of fund rules or constitutions. These are either not be available without permission of the entity to which they are nominated or not publicly available on the websites of the funds we have visited.

On the basis of the inquiries we have made, it is understood that where income generated from contributions is distributed to third parties, those parties are required to provide information that would allow the acquittal of such expenditure. We have not been provided with information that indicates there is an audit undertaken in a manner that extends beyond an examination of the information provided by parties who have received monies from a fund.

With reference to Queensland and the BERT fund, Master Builders understands the following that funding it provides regarding the apprentice programme is subject to the following process:

- A quarterly progress report is required by BERT and provided by the CFMEU;
- It is reviewed operationally every quarter for its accuracy compared to the funding program which determines payment for the upcoming payment period; and
- The quarterly claims are not subject to audit however the final acquittal for each cohort is audited by the CFMEU's financial auditors (and covers both financial and operational reconciliation) and then submitted to BERT Board who then sign off on the report.