

5 December 2017

Mr Mark Ritter SC  
Secretariat: L4, Gordon Stephenson House  
140 William Street  
PERTH WA 6000

Dear Sir, *Mark,*

### **Ministerial Review of State Industrial Relations System**

Master Builders welcomes the invitation of 29 November 2017 to provide further input on union right of entry under S49 of the Industrial Relations Act 1979 as part of the above Review. Master Builders provides the following additional comments on the matter. In doing so, the additional comments are made in conjunction with the submission already provided by Master Builders on 22 November 2017, not in replacement of the elements of the submission which canvass union right of entry.

Master Builders raises two additional issues regarding the broad topic of union right of entry. These are:-

- **Access to Records**

A situation has arisen over the past 12 months or so in which the CFMEU(WA) has sought to exercise right of entry under S49I of the State Industrial Relations Act in connection with alleged breaches of the OSH Act 1984. In doing so, the union sought access to various records it claimed were associated with the alleged safety breach(es). S49I 2(a) requires the employer to produce for inspection during work hours *“other documents kept by the employer that are related to the suspected breach....”*

Master Builders experience in dealing with several of these applications for entry by the union has been the union sets out in writing what it alleges are the safety breaches it wants to conduct investigations about, which is properly so. However, the union request for documents allegedly related to the suspected breach has been the union often over reaches what documents it demands the employer, or builder in the building industry, to provide the union. As the over reach is not isolated, rather forms a pattern of behaviour, Master Builders says the conduct brings S49I 2(a) into disrepute. Therefore, Master Builders contends greater clarity needs to be set out concerning the obligations of the parties when S49I 2(a) is being exercised. This follows as a breach, or alleged breach, of S49I can result in prosecution action being launched by the aggrieved union or the Industrial Inspectorate for a breach of the State Industrial Relations Act or Australian

Building and Construction Commission (ABCC) for a breach of the Fair Work Act 2009. As the union has at times overtly stated where a builder does not comply with meeting their right of entry obligations the union would look at initiating prosecution action, Master Builders concerns on this point are not imagined.

Master Builders also raises an example where a large commercial builder, when confronted with such a demand by the union sought, and gained, two separate legal opinions from eminent legal firms on this very issue and obtained conflicting legal advice about what the builder was, or was not, required to provide. Such confusion about what ought be a simple and easily understood provision has no place in the 21<sup>st</sup> century legislation nor workplace.

The reality is, the union portrays it as having greater power to obtain records than it has under S49I 2(a) with any opposition by a builder facing a union demand to produce records being met with threats of being prosecuted under the Fair Work Act. As those conducting the Review are aware, such action is before the Federal Circuit Court or Federal Court and can involve significant legal costs, even where an allegation is dismissed. That is, Master Builders assert the union uses a threat of commencing prosecution action against a builder for not supplying records to the union it demands access to as a means to coerce the builder to accede to the union's demands, even when the union has no legitimate access to these records. What further compounds this unsatisfactory situation is many site managers for commercial builders are not aware of the rights and obligations of either party in what is a complex and difficult topic. This is why Master Builders calls for greater certainty on this matter.

Some examples where the union has regularly put demands to a builder to provide documents allegedly related to a safety breach include, but are not limited to :-

- Copies of all High Risk Work Licences (HRWL) of all employees on site.

As the HRWL are issued to individual employees and must be held by those persons, much like a drivers licence, such a demand by the union cannot be met. Further, how is such a wide ranging demand related to a suspected breach of the OSH Act?

- Copies of all White Cards of all employees on site. The White Card is a requirement under the OSH legislation to be held by persons working on construction sites. Similar circumstances arise with HWRLs.
- Records of all site inductions by all employees coming on a construction site. Similar genuine questions arise as the above 2 dot points.
- Documents not in the builder's possession with it obvious that is the case.
- Documents not related to the alleged safety breach.



Master Builders submission is the union is applying s49I 2(a) in a manner never intended by the Parliament as a fishing expedition to gain access to non-union member worker details allowing the union to pursue a union membership campaign via an avenue not provided for in either the State Industrial Relations Act or the Fair Work Act. That is, the union places the widest possible interpretation of the words "*other documents kept by the employer that are related to the suspected breach.*" as a cloak to pursue union membership objectives. That is why Master Builders says the union is misusing this provision.

Master Builders suggest a simple fix which will go some way to putting an end to the confusion which surrounds this matter is for S49I 2(a) to have the word "directly" inserted after the word "related" and immediately before the words "to the suspected breach." This would read "that are directly related to the suspected breach".

The confusion which now has been generated by the union by its misuse of the intent of S49I 2(a) now requires clarification, especially given the serious consequences which can flow as a result of any breach of the right of entry laws.

- **Fit and Proper Person Test**

At first blush this might be seen as a stretch and not an issue covered by the Review's Terms of Reference. Master Builders says it does fall under a broad application of Term of Reference 7 in that breaches of right of entry flow in some cases where an authorised representative under the State IR Act seeks entry to site and is denied by the site occupier. Master Builders contention is, should that authorised union representative be entitled to have a union right of entry permit in the first place? Master Builders point being, only a fit and proper person ought be issued with a right of entry permit under s49J(1). It is plain to Master Builders there is no actual test set under the State IR Act against which the Registrar can or must apply against an application by a secretary of a state union to issue a right of entry permit to any person nominated by that union secretary. This is compounded with no requirement that nominees even be employed by the union whose secretary is making that nomination. Master Builders says such a position is untenable and must be corrected as part of this Review.

The mechanism to cancel a union official's permit needs to be clearly stipulated in the legislation.

Master Builders refers to the relevant provisions under the Fair Work Act on issuing federal union right of entry permits. A copy of the advice page which appears on the FWC website on who can hold a right of entry permit is attached.

Master Builders draws the very obvious contrast between the Fair Work Act on what tests apply when considering an application by a federal union to the (Fair Work Commission) to issue a right of entry permit to a federal union employee or federal union official. It is Master Builders strong contention that the same tests should apply under s49J.

Master Builders appreciates the opportunity of being invited to amplify its submission on these important issues for the building and construction industry.

Yours sincerely,  
Master Builders Association of WA

A handwritten signature in black ink, appearing to read 'Michael McLean', written in a cursive style.

Michael McLean  
Director

*Ref: Kim Richardson*