

1 - 11 - 2011
Mark Englebert LIC1 Affiliated.

Form F3 Employer's Response to Application for Unfair Dismissal Remedy

(Rules 14A and 15, Fair Work Australia Rules 2010)

IN FAIR WORK AUSTRALIA

FWA Matter No.: U2011/12376

Applicant (Employee): Sean Butler

Respondent (Employer): Butler Constructions Pty Ltd (Receivers and Managers Appointed) ACN 009 371 340

EMPLOYER'S RESPONSE TO APPLICATION FOR UNFAIR DISMISSAL REMEDY

Respondent (Employer)*

Legal name:	Butler Constructions Pty Ltd (Receivers and Managers Appointed)		
Trading name:	Butler Constructions Pty Ltd (Receivers and Managers Appointed)		
	ABN:	73 009 371 340	
Address:	c/- Mark Englebert and Ian Francis Taylor Woodings Level 6 30 The Esplanade		
Suburb:	Perth	State: WA	Postcode: 6000
Contact person:	Mark Englebert		
Email:	mark.englebert@twcs.com.au	Telephone:	(08) 9321 8533
Contact number for telephone conciliation (if different from above): The Receivers will be available on the above telephone number. The Receivers will be represented by their solicitors, Minter Ellison Lawyers, available on (02) 9921 4932.			
Fax:	(08) 9321 8544	Mobile:	N/A

Note: Butler Constructions Pty Ltd (ACN 009 371 340) has been in receivership since 18 July 2011. Ian Francis and Mark Englebert (**Receivers**) are joint and several receivers of Butler Constructions Pty Ltd in its own right and as trustee for The Cargill Trust (**Company**). The Receivers have, at all relevant times, acted as agents for the Company in their capacity as joint and several receivers and managers of the Company. The Receivers provide this Response in their capacity as agents for the Company and do not concede any personal liability to the Applicant.

Respondent's representative (if any)

Name:	Minter Ellison Lawyers		
Address:	Allendale Square 77 St Georges Terrace		
Suburb:	Perth	State: WA	Postcode: 6000

Contact person: Richard Johnson / Jon Karolczak			
Email:	richard.johnson@minterellison.com	Telephone:	(08) 6189 7887
	jon.karolczak@minterellison.com		(08) 6189 7873
Fax:	(08) 6189 7987	Mobile:	N/A
	(08) 6189 7973		

**1. What was the Applicant's period of employment?
If you disagree with the period of employment specified in the Application for Unfair Dismissal Remedy, please provide the following information:**

1.1 The Applicant was an employee of the Company at the date of termination of his employment on 23 September 2011.

1.2 The Receivers have not been able to identify from the Company's records when the Applicant commenced employment with the Company.

1.3 In any event, the dates of employment and dismissal referred to in the Application for Unfair Dismissal Remedy are inconsistent with the Applicant's claim that he was employed by the Company for a period of 22 years. *They did not ask !!* **TRUE**

1.4 The Applicant was appointed as a director of the Company on 27 February 1989.

1.5 At no point in time has the Applicant been employed or otherwise engaged by the Receivers.

2. What were the reasons for dismissal?

[Using numbered paragraphs, briefly specify the reasons for dismissing the Applicant. Attach any letter of dismissal and/or separation certificate.]

*** 2.1 The Applicant's role was redundant. Consequently, the Applicant's employment was terminated on the ground of redundancy.

2.2 On this basis, the Respondent denies that Fair Work Australia has jurisdiction to hear the Application for the reasons outlined in section 4 below. *So Taylor Woodrow could take over & charge \$110,000/month !!*

3. What is your response to the Applicant's contentions?

[Using numbered paragraphs, briefly set out your response to the Applicant's contentions as to why the dismissal was unfair.]

3.1 The Receivers deny that Fair Work Australia has jurisdiction to hear the Application for the reasons outlined in section 4 below.

3.2 In any event, the Receivers deny that the termination of the Applicant's employment by the Company was harsh, unjust or unreasonable, whether on the basis alleged by the Applicant or at all, for the reasons set out below.

Prior to receivership

3.3 Prior to the receivership, the Applicant was employed by the Company in the role of Managing Director.

Following receivership – Redundancy of role

- 3.4 The Receivers were appointed by Bank of Western Australia Limited with a view to realising the property of the Company and liquidating the debt owing by the Company to the bank. In these circumstances, the Applicant's role was no longer required by the Company and the Applicant's employment was terminated by way of letter dated 23 September 2011.
- 3.5 The Receivers consider that the reason for the termination of the Applicant's employment (ie, the redundancy of his role) was self evident in the circumstances and in light of the ongoing correspondence and discussions between the Receivers and the Applicant about the winding up of the Company.

Following receivership – Performance concerns

- 3.6 Separately, the Applicant's conduct and performance in the period following the appointment of the Receivers was unacceptable and, despite being raised with him on a number of occasions, did not improve. On this basis, even if the Applicant's role had been required following the appointment of the Receivers, the Receivers would have considered terminating his employment because of his unacceptable conduct and performance.

TOTALCY MATURE

They have never been able to support this

- 3.7 In this context, in a letter dated 18 August 2011, from Minter Ellison to the Applicant's solicitors, the following concerns about the Applicant were raised:

- (a) that the Applicant had caused \$10,500.00 to be withdrawn and/or transferred from the Company's bank account for his personal use on 18, 19 and 20 July 2011 (after the appointment of the Receivers to the Company). The Applicant was asked to repay this amount by 24 August 2011. The Applicant did not do so. In a meeting on 31 August 2011, the Applicant was again asked to repay the amount. The Applicant did not do so. The Receivers will seek to have this debt set off against the amounts claimed by the Applicant;
- (b) that the Applicant engaged, contacted or solicited (or attempted to engage, contact or solicit) employees of the Company in potential breach of his duties under the *Corporations Act 2001* (Cth) (**Corporations Act**);
- (c) that the Applicant engaged with the media in relation to the receivership of the Company (despite requests from the Receivers not to do so);
- (d) that the Applicant failed to discharge certain 'information providing', reporting and co-operation obligations imposed on him, in his capacity as director, by the *Corporations Act*; and
- (e) that the Applicant generally acted in a manner adverse to the efficient conduct of the receivership of the Company. In this context, in the letter dated 18 August 2011, the Applicant was asked to provide an undertaking that he would not interfere any further with the receivership of the Company. No such undertaking was provided.


MY PAY!!

Untrue

untrue

untrue.

In the Australian region, the Company has approximately 52 employees.

Date:	1 November 2011
Signature:	
Name:	Richard Johnson
Capacity/Position:	Solicitor for the Respondent
<i>[If not signed by the Respondent or the Respondent is not a natural person.]</i>	

Service requirements

This form must be lodged with FWA within the time specified or directed in correspondence from FWA and served on the Applicant as soon as practicable after it is lodged with FWA.

Note: Rules 9 and 10 deal with service.

External Research

From time to time Fair Work Australia undertakes research with participants in unfair dismissal matters to ensure a high quality process. As some research may be undertaken by external providers on behalf of FWA, your contact details may be provided to an external provider for the purposes of inviting you to participate in research. Please mark the box below if you object to being contacted for the purposes of FWA research.

I object to being contacted for the purposes of FWA research