

Master Builders Australia

Submission to Senate Education, Employment and Workplace Relations Committee

On the

Fair Work Amendment Bill 2012

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1 Introduction

- 1.1 Master Builders Australia 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 122 years the movement has grown to 33,000 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.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 1.3 Master Builders estimates that the cumulative construction task over the next decade will require work done to the value of \$2.4 trillion. The residential and non-residential building sectors combined will require \$1.25 trillion worth of work and the engineering construction sector \$1.15 trillion worth. The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by 300,000 to around 1.3 million employees by 2021.
- 1.4 According to the ABS, the value of work done by the building and construction industry was \$172.9 billion in the year to September 2011, excluding around \$30 billion of smaller renovations work. Residential building work done was \$46.7 billion, non-residential building \$32.5 billion and engineering construction \$93.7 billion. At November 2011 the construction industry employed 1,039,900 people.

2 Purpose of submission

- 2.1 Master Builders is responding to the Committee's request for written submissions on the [Fair Work Amendment Bill 2012](#) (the Bill) currently before the Parliament.
- 2.2 Master Builders believes that most of the changes to be made to the *Fair Work Act 2009* (Cth) (FW Act) by the Bill would be minor but necessary. We

note that the Government has also taken the opportunity to give effect to its response to the Productivity Commission's report into default superannuation funds in modern awards.¹ However, the proposals which have been adopted do not exactly emulate the Productivity Commission's report recommendations. In that context, Master Builders has no objection to the Bill's provisions for introducing new requirements in relation to modern award terms about default superannuation or the process under which the Fair Work Commission (as it is to be known) will review default fund terms, save in respect of issues of timing discussed at section 4 of this submission.

3 Issues for consideration

- 3.1 Master Builders looks forward to the Government introducing urgently needed reform in relation to a number of the systemic defects of the FW Act. Attached to this submission is a summary table of Master Builders' responses to the Fair Work Review Panel's recommendations. A submission expanding on this table has been provided to the Government and would be made available to the committee if believed helpful.
- 3.2 In particular, we believe that the Panel's view that there needs to be more time so that the bargaining provisions of the Act are able to be assessed before any major changes are put in place is misguided. This is a limited view of the way that laws are operating. To illustrate that latter point, many of the pattern agreements which are being rolled out across the country on a "sign up or else" basis, by the CFMEU in particular, contain provisions which adversely affect the efficient operation of building sites. Greater balance in the bargaining laws is a pressing reform. In this context, the Bill contains an adverse change to the bargaining laws which we take up in this submission in section 5 below. In isolation it exacerbates problems with the current bargaining structure of the FW Act which need urgent reform.
- 3.3 Urgent reforms include amendments to encourage greenfield agreement making and stopping the capacity for unions to take industrial action before bargaining has commenced. These have been recommended by the Panel and should be introduced forthwith.

¹ Commonwealth of Australia Productivity Commission *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012)

4 Superannuation Changes

- 4.1 The general four yearly review of modern awards is due to start after 1 January 2014. The Bill inserts proposed s156A(1) into the FW Act (schedule 1, item 18 of the Bill) which requires the Fair Work Commission (as it will be known) to review default fund terms in modern awards after 1 January 2014 and each four years thereafter. This timing is consistent with the Productivity Commission's views,² in part based on a 1 July 2013 start to MySuper, and the difficulty of legislating the review process in time for that deadline but it is unclear why the four yearly review of the default superannuation term should be carried out at the same time as the general four yearly review. 1 January 2014 is also the first date that default contributions are to be made into MySuper funds and allocated into MySuper products.
- 4.2 The Further MySuper Bill inserts proposed s155A(1) into the FW Act (schedule 4, item 6) which provides that a modern award must not contain a term which permits contributions for default fund employees to a fund which does not offer MySuper. This will come into effect from 1 January 2013 but modern awards will not be varied until 1 January 2014 (which coincides with the introduction of MySuper obligations).
- 4.3 This timing itself creates some problems. It means that modern awards will continue to name funds which will not be offering MySuper up until the day that contributing into them will breach the award and superannuation guarantee legislation. In reality employers will be advised in arrears of the changed obligation. The fact that awards name funds, and thereby simplify the task for employers of selecting a default, is a major justification for naming funds in awards.³ Naming funds in awards determines employer behaviour. It is inappropriate for modern awards to potentially mislead.
- 4.4 As noted, the Bill repeals s155A of the FW Act (schedule 1, item 14 of the Bill) with effect from 1 January 2014. However, schedule 11, item 1 of the Bill inserts Schedule 3 to the FW Act and clause 2(2) of Schedule 3 continues the operation of s155A FW Act until the modern award is varied as a result of the review of default fund terms. The effect of this scheme is that modern award

² Australian Productivity Commission *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012), p 222 – 223

³ Australian Productivity Commission *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012), pp 15 – 16

terms naming funds for contributions on behalf of default fund employees will vary on 1 January 2014, and vary again as a result of the four yearly review.

- 4.5 Proposed s156H(1) (schedule 1, item 18 of the Bill) requires that after reviewing default fund terms the Fair Work Commission must remove named funds from the default fund term and specify between two and ten funds in the term. This is appropriate because it means that the appropriate funds offering generic MySuper are included in the particular modern award, but it also means that it is most likely that the review of default fund terms will again give rise to changes in the list of funds which are named in at least some modern awards, and perhaps in many.
- 4.6 The timing of the four yearly review of the default fund term in the Bill also seems to raise practical problems. Fair Work Australia is currently undertaking the two yearly review of modern awards which is required under the *Fair Work Amendment (Transitional Provisions and Consequential Amendments) Act 2009*. This transitional review was required to start after 1 January 2012. The final stage of the two yearly review is scheduled to be completed by 31 May 2013, but is likely to go on beyond that date. Award reviews require significant amounts of work and are time and resource consuming. Hence Master Builders recommends that any default fund review occur at a different time from the general four yearly review.

5 No enterprise agreements with a single employee

- 5.1 Schedule 4 of the Bill introduces s172(6) of the *Fair Work Act*. It states: "an enterprise agreement cannot be made with a single employee." Master Builders disagrees with this proposed change. Master Builders recognises that this provision implements Recommendation 26 of the Panel's report. We have communicated to Government that we disagree with this recommendation.
- 5.2 We do not understand how the recommendation may be objectively pressed from the text of the [Panel's report](#) at page 168 as follows:

It is clear from our review of the policy material underlying the development of the FW Act that the scheme introduced by it expressly excluded the capacity to make a statutory individual contract. An enterprise agreement with one employee appears to us to be just that. In addition, the mechanism for individual flexibility associated with enterprise agreements and awards was

intended to be individual flexibility arrangements. With the benefit of considering this broader range of policy material, in our view enterprise agreements should not be permitted with only one employee.⁴

- 5.3 How it could be clear from its review of the policy material that the scheme of the FW Act expressly excludes the capacity to make a statutory vindicated enterprise agreement with one employee is startling. An enterprise agreement and a statutory individual agreement are not of the same kind. An enterprise agreement is not akin to a statutory individual contract. This is in part because of the capacity of the employer, normally a small employer, to expand its operations to accommodate other employees who might be engaged within classifications set out in the enterprise agreement. In addition, having an agreement with one employee could accommodate the ability to obtain work in, for building and construction companies, say the mining sector, where a requirement to have an enterprise agreement in place could be a condition of obtaining the particular construction work at the mine site. Smaller companies may only have one employee, for example, a site supervisor, and subcontract out other work at the mining site until their business in the particular area grows sufficiently to engage other employees.
- 5.4 The simple proposition in opposition to the proposed amendment is that if an agreement has passed the better off overall test (BOOT) and the fairly chosen test, there should be no impediment to the making of an enterprise agreement despite the size of the employer's enterprise including the number of employees. There is no evidence that this practice is currently being used to exploit employees in any way. Rather, it is used to assist small business. Thus small business will be damaged by the enactment of the proposed provision.

6 Conclusion

Master Builders looks forward to the opportunity of commenting on more substantive reform along the lines of the recommendations for change which would bring about necessary more favourable conditions for employers especially in relation to bargaining. For the most part the Bill contains provisions which may be supported.

⁴ Commonwealth of Australia Fair Work Review Panel Report 15 June 2012, *Towards more productive and equitable workplaces, An evaluation of the Fair Work legislation*, p 168

Attachment

Summary Table of Master Builders' Response to Panel's Recommendations

Recommendation	Short Response
1	Master Builders supports this Recommendation and believes the Government is in the best position to implement this Recommendation in respect of the building and construction industry
2	Master Builders strongly supports this Recommendation
3	Master Builders supports this Recommendation, with qualifications
4	Master Builders supports this Recommendation
5	Master Builders opposes this Recommendation
6	Master Builders supports this Recommendation
7	This Recommendation is noted
8	Master Builders supports this Recommendation
9	Master Builders supports part of this Recommendation
10	Master Builders opposes this Recommendation
11	Master Builders supports this Recommendation with a qualification
12	Master Builders supports this Recommendation with qualification
13	Master Builders opposes this Recommendation
14	Master Builders supports this Recommendation
15	Master Builders supports this Recommendation
16	Master Builders supports this Recommendation

17	Master Builders opposes this Recommendation
18	Master Builders opposes this Recommendation
19	Master Builders supports this Recommendation
20	Master Builders opposes this Recommendation
21	Master Builders supports this Recommendation
22	Master Builders opposes this Recommendation
23	Master Builders opposes this Recommendation
24	Master Builders supports this Recommendation
25	Master Builders supports this Recommendation with qualification
26	Master Builders opposes this Recommendation
27	Master Builders opposes this Recommendation
28	Master Builders opposes this Recommendation
29	Master Builders opposes this Recommendation
30	Master Builders opposes this Recommendation
31	Master Builders supports this Recommendation
32	Master Builders opposes this Recommendation with qualifications
33	Master Builders opposes this Recommendation
34	Master Builders opposes this Recommendation
35	Master Builders supports this Recommendation
36	Master Builders opposes this Recommendation
37	Master Builders opposes this Recommendation

38	Master Builders supports this Recommendation
39	Master Builders opposes this Recommendation
40	Master Builders opposes this Recommendation
41	Master Builders opposes this Recommendation.
42	Master Builders supports this Recommendation
43	Master Builders supports this Recommendation
44	Master Builders supports this Recommendation
45	Master Builders supports this Recommendation
46	Master Builders supports this Recommendation
47	Master Builders supports this Recommendation
48	Master Builders opposes this Recommendation
49	Master Builders supports this Recommendation
50	Master Builders supports this Recommendation
51	Master Builders supports this Recommendation
52	Master Builders supports this Recommendation
53	Master Builders supports this Recommendation

Summary of Master Builders' Responses

Supports the Recommendation	Supports the Recommendation with Qualification	Opposes the Recommendation	Opposes the Recommendation with Qualification	Neutral
25	5	21	1	1