



TasBuild Limited
Trustee for the Tasmanian
Construction Industry Long Service
Scheme

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the *Fair Work Bill 2008*

Summary

TasBuild Limited supports the current provisions in the *Fair Work Bill 2008* as they relate to long service leave, in particular s 29 and Division 9. This submission will address why the *Fair Work Bill 2008* should not be subject to any amendments to these provisions and the rationale behind ensuring that modern awards and enterprise agreements do not override state and territory long service leave legislation.

The portable long service leave schemes for the construction industry were introduced in every state and territory in Australia in order to provide fair and consistent benefits to workers in the construction industry Australia wide. The purpose of the portable schemes was to provide some fairness to portable workers who had been unable to realise the benefit of long service under previous long service provisions which relied solely on continuity of service. The continuity of service provisions reduced these employees' benefits simply because they do not reflect the transferable nature of the construction industry.

It has always been TasBuild's position that clauses in agreements that purport to override the state construction industry long service legislation are invalid for constitutional reasons. Despite this, other parties have contended otherwise. The introduction of the *Fair Work Bill 2008*, and in particular s 29 and Division 9 of the Bill, will result in an important removal of any ambiguity over the power of employers in the construction industry to override state long service leave laws. It is crucial that all employees in the construction industry in Australia have the benefit of the portable long service scheme and that this entitlement is effectively preserved in federal legislation. The sooner these federal provisions are introduced, the sooner the construction industry will have clarity and certainty on this issue, and therefore it is imperative that the National Employment Standards (NES) apply to all agreements, new and existing, as of 1 January 2010.

Background to the scheme

The construction industry is well known as one in which employees often change employers in response to the supply and demand of work, and therefore employees in this industry rarely work for the one employer long enough to be eligible for long service leave under traditional long service legislation. For example, it is often the case that employment in the construction industry lasts for the duration of a particular project and once the project is complete, the employee's employment usually ends.

To overcome this problem, portable long service leave schemes were established in each State, commencing with Tasmania in 1972. The schemes were designed to provide employees in the construction industry with an entitlement to long service leave. Under the schemes, an employee's entitlement to long service leave arises because he or she works for the qualifying period in the construction industry.

In Tasmania, the portable long service scheme is called the Construction Industry Long Service Scheme (“the Scheme”) and was established under the *Construction Industry (Long Service) Act 1997* (“the Act”). TasBuild Limited is the private trustee company charged with administering the Scheme under the Act.

Tasmanian employers in the construction industry that are covered by the Scheme are required to register with TasBuild and then make a contribution on behalf of any relevant employees. The central Fund into which employer and self-employed worker contributions are deposited is managed by TasBuild Limited, with the monies being invested on behalf of TasBuild members. (Investments have included financing construction industry projects around Tasmania, therefore creating job opportunities for the scheme’s members).

A centralised fund also offers an advantage to employers in that the return on investment on Fund monies can be used to reduce the rate of contributions employers are required to make, as set out in further detail below.

Benefits of the portable scheme

The entitlement to long service leave under the portable scheme is not dependant on the employee working continuously for one employer. Statistics from TasBuild's databases indicate that over 80% of all employees who make a claim to entitlements against the fund have been employed by two or more employers.

It is the ability to continue to accrue long service despite working for different employers that gives rise to the description of these schemes as being 'portable' long service leave schemes. The schemes are linked by a National Reciprocal Agreement whereby workers moving from state to state or territory and remaining in the construction industry do not forfeit their entitlement to long service leave. This portable aspect of the scheme gives employees, and therefore employers, greater flexibility in employment opportunities.

An important benefit to the scheme is how it protects workers entitlements to long service leave in the event of the employer going into liquidation. This is a particularly sensitive issue in the construction industry.

It is TasBuild’s submission that employers and employees should not be able to use awards or agreements to override state construction industry long service laws for the following reasons:

- It is important that a level playing field in the industry is maintained, this makes a fair and equitable system for all employers operating in a competitive environment.
- Protection of employee entitlements is achieved due to the scheme being responsible for the payment of long service leave in the industry.

Benefits to employers

As mentioned earlier, the benefits to employers who fall under the portable scheme are financial. For example, Tasmanian employers who provide information and pay invoices on time are currently required to only pay 0.3% of their employee’s ordinary weekly wage rate in long service leave contributions. This is compared to the real cost of long service leave to employers which is approximately 2.5% of an employee’s wages.

Therefore, TasBuild is able to offer employers in the industry a heavily subsidised contribution rate meaning that the cost of long service leave to employers in the industry is a small percentage of what it would cost them should they have to fund the leave direct; the liability and administration of such leave is therefore taken out of their hands.

Definition of construction industry

The portable long service schemes apply to members of the construction industry as defined in each state and territory. The definition of the construction industry is set out in each state and territory Act as passed by the particular parliament. Each state and territory portable long service leave scheme is unable to accept long service leave payments from employers who are outside the construction industry as defined, and each scheme must apply the definition and tests established under legislation in determining the applicability of the regulations.

The negative effect of overriding state and territory long service leave legislation

The ability to override state long service laws would carry a significant disadvantage for workers. The main disadvantage would be where an employee remains with a single employer for limited or short period, as is the common work practice in the construction industry, these employees will never be entitled to long service leave.

Examples of how workers would be disadvantaged by agreements that override state laws are:

- It is unlikely that anything more than a very small percentage of workers under the agreement will ever be able to take long service leave;
- the workers' time working for that particular employer will therefore not be counted towards their service in the construction industry under the portable scheme; and
- the workers' time working for that employer may result in a break of service with the portable scheme of four years and as such any previous service will be lost from that worker's record.

Another disadvantage is that should employers attempt to override state long service leave laws in agreements they would place workers in an invidious position by exerting pressure on them to serve a period of continuous employment before becoming entitled to long service leave.

If such agreements were allowed to override state long service leave laws employees under such agreements would be greatly disadvantaged when compared to their colleagues in the construction industry who accrue the benefits under the portable schemes.

Consistent application of NES from 1 January 2010

The *Fair Work (Transitional and Consequential Amendments) Bill 2009* should not be amended to allow agreements in force on 1 January 2010 to override state long service leave legislation.

Unlike the WorkChoices legislation, the *Fair Work Bill 2008* has been introduced over a relatively lengthy period of time which has allowed for significant public and stakeholder consultation. Australian employers have therefore been presented with the opportunities to educate themselves on the new changes, and make submissions where appropriate. By 1 January 2010 employers within the construction industry will have had ample time to prepare for this legislation which will create more uniformity and clarity for employees within the construction industry. Nothing is to be benefited by delaying the application of the NES to certain agreements, and indeed employees under these existing agreements will only be disadvantaged should the agreements be allowed to override state legislation.

The introduction of the *Fair Work Bill 2008* will result in clarity and consistency in the approach to long service leave and remove any ambiguity about the potential of employers to override state long service leave laws. It is therefore important that this legislation is introduced and applied to employers in a consistent manner.

Conclusion

Portable long service leave has been successfully established for the construction industry in Australia for a number of years – in Tasmania in excess of 35 years. Whilst there are differences between aspects of the state and territory schemes, these are generally minor and all states and territories work together co-operatively providing a valuable service to employers in the industry and portable benefits to workers in the industry.

It is vital that all employees in the construction industry in Australia have the benefit of the portable long service scheme. If agreements were allowed to override the portable schemes the employees under these agreements will have their long-term benefits diminished. To permit agreements to override state long service laws would undermine the purpose of the portable scheme which provides benefits to workers by recognising the nature of the industry and allowing workers and employers to maintain flexible working arrangements and thus creating a level playing field for all employers in the construction industry.

The construction industry is in need of clarity and consistency on a federal level on these issues. If the NES is excluded from applying to existing agreements as of 1 January 2010 this would result in a confusing and inconsistent situation and one that is unfair.

Des Hodgman
CHAIRMAN
TASBUILD LIMITED BOARD OF DIRECTORS

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