MASTER BUILDERS
AUSTRALIA

Submission to the

Senate Education, Employment and Workplace Relations Committee Inquiry

into

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Master Builders Australia Inc

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building australia

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Recommendation 1	Master Builders urges the Government to defer the introduction of the broad sweeping changes represented by the new industrial relations regime until at least 1 January 2010. (Paragraph 3.4)
Recommendation 2	Master Builders urges the Government to provide a comprehensive Regulatory Impact Statement and a Small Business Impact Statement covering the effects of this Bill and the FW Bill. (Paragraph 3.6)
Recommendation 3	Master Builders recommends that the no detriment test be a "global" test so that if an employee is better off overall there is no adjustment of the workplace agreement as against the NES. (Paragraph 6.3)
Recommendation 4	Master Builders recommends that Fair Work Australia be given the power to retrospectively vary workplace agreements to avoid double-dipping as a result of the application of the NES. (Paragraph 6.3)
Recommendation 5	Master Builders recommends that Item 5(4) of schedule 4 be modified to ensure that the exclusion from sub item 5(1) encompasses industry specific redundancy schemes. (Paragraph 7.4)
Recommendation 6	Master Builders recommends that Item 6 of schedule 5 be modified to include a requirement that a subsequent review remove archaic, inefficient or difficult to apply provisions and continue to modernise awards to this end. (Paragraph 8.6)
Recommendation 7	Master Builders recommends that any change to patterns or hours of work arising from the award modernisation process should be excluded from the consideration of take-home pay orders. (Paragraph 8.9)
Recommendation 8	Master Builders recommends that take-home pay orders should cease to have effect immediately on operation of an enterprise agreement or award individual flexibility agreement applying to the employee or an affected class of employees. (Paragraph 8.13)
Recommendation 9	Master Builders recommends that the ability of an employee to obtain a take home pay order be modified so that FWA is empowered to determine whether the reduction in take home pay occurred as a result of a need to balance employer costs against employee disadvantage. Where FWA makes such a finding, it should have discretion not to make the relevant order. (Paragraph 8.14)
Recommendation 10	Master Builders recommends that take home pay orders should not be available beyond three years from the date that a modern award or modern enterprise Award has effect. (Paragraph 9.6)
Recommendation 11	Master Builders recommends that all enterprise agreements made or varied prior to 1 January 2010 be exempt from the NES (save for wage rates) until their nominal expiry date. (Paragraph 10.15)
Recommendation 12	Master Builders recommends that parties be permitted to lodge an agreement approved after 1 July 2009 provided that the employer has provided the employees with the Employee Information Statement prior to 1 July 2009 and no changes were made to the proposed agreement after that date. This should similarly apply in the case of the variation and termination of workplace agreements. (Paragraph 11.3)
Recommendation 13	Master Builders recommends that the criteria in the proposed s137B should be extended to include reference to the conduct of the relevant organisations and the views of the employer and the effect on their business. (Paragraph 25.4)

1 INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

2 PURPOSE OF SUBMISSION

2.1 In this submission, Master Builders outlines a number of issues with the provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Bill) where improvements in the provisions or clarification of their intent are sought.

2.2 The issues are addressed by subject matter, following the headings of the Schedules to the Bill. Attention is particularly paid to the agreement making provisions of the Bill. This is because they are overly complex and will lead to a reduction in agreements being made during the time that modern awards and the National Employment Standards (NES) are not in effect.

2.3 We note that the changes proposed to the unfair dismissal laws set out in the *Fair Work Bill 2008* (FW Bill) that came about from Senate consideration of the FW Bill are not yet incorporated into the Bill. This submission does not consider these amendments.

3 OUTLINE OF THE BILL AND CALL FOR CHANGE

3.1 The Bill comprises 22 schedules that deal with different subject matters. Each subject area assists with the transition from the current workplace system to the system created by the FW Bill which passed the Parliament on 20 March 2009 but, as at the date this submission is written, has not yet received Royal Assent.

3.2 The Bill is complex. This complexity arises from the need to maintain historical industrial relations instruments. These instruments are referred to in the Bill as transitional instruments.

3.3 Further complexity is added because the FW Bill is intended to operate from 1 July 2009 but with the NES and modern awards are intended to operate from 1 January 2010. This factor means that there are special arrangements within

this six month period which for the purposes of this submission we will assume to be consonant with the definition of "bridging period" in the Bill.

3.4 It must be said that a great deal of unnecessary complexity could be eliminated (an important factor at all times but especially at times of economic stress) if the new system commenced operation on a consistent date, that is 1 January 2010. This is Master Builders' preferred position.

RECOMMENDATION 1

Master Builders urges the Government to defer the introduction of the broad sweeping changes represented by the new industrial relations regime until at least 1 January 2010.

3.5 Certainty during times of recession is sought by the community, and especially by small business. A number of the changes that will be wrought by the FW Bill are reflected in the process requirements of the Bill, especially the need to make changes to comply with the new system, encapsulated in the required comparison between the NES and current workplace arrangements as discussed in paragraph 6.3 of this submission.

3.6 From the complexity and detail of the Bill, this can be seen to be a task of Herculean proportions. The World Bank and the OECD are warning of a collapse in global trade and of a deep global recession.[1] Accordingly, change of the magnitude reflected in the new workplace relations system should be delayed so that appropriate education and understanding by employers and employees is able to be undertaken and means identified to save jobs where the Bill will increase costs to employers. The levels of complexity reflected in elements of the Bill will thus also be ameliorated.

3.7 Master Builders would welcome objective analysis of the effect of the Bill and the FW Bill from the point of view of their impact on business costs, with an emphasis on small business costs. The six month deferral period proposed by Master Builders could be used to better study the cost impacts of the new regime. This analysis will enable Government to assess the impact of the legislation on jobs which must be a priority in the current economic downturn.

[1] *G20 leaders get OECD warning that global trade is in freefall* The Guardian 31 March 2009 http://www.guardian.co.uk/business/2009/mar/31/economy-oecd-recession-g20

RECOMMENDATION 2

Master Builders urges the Government to provide a comprehensive Regulatory Impact Statement and a Small Business Impact Statement covering the effects of this Bill and the FW Bill.

4 REPEALS - SCHEDULE 1

4.1 We note that the Government has determined to repeal the entire *Workplace Relations Act, 1996 (Cth) (WR Act)* save for Schedules 1 and 10 of that Act. These Schedules will form a new statute via the renaming of the WR Act to create the *Fair Work (Registered Organisations) Act 2009.* We have provided more feedback on this subject area in our comments on Schedule 22 of the Bill.

4.2 Master Builders supports the registration of organisations being regulated under a distinct and separate statute because matters of workplace relations organisational governance are often better dealt with separately from the substance of the law. A small business for example may need to access the law on unfair dismissal. However, the business is unlikely to need to access the law relating to the manner in which unions and employer associations must meet their obligations relating to accounting. Thus it makes sense to keep the comparatively straightforward provisions of the FW Bill separate from the detail of organisational regulation.

5 OVERARCHING MATTERS - SCHEDULE 2

5.1.1 This Schedule contains definitional provisions, sets out the regulation making powers about transitional matters and provides a general rule that conduct that occurred before the day of the WR Act repeal remains subject to the WR Act provisions. This general rule is subject to the specific rules in the Schedules to the Bill, for example as they relate to agreement making in Schedules 7 and 8.

6 CONTINUED EXISTENCE OF AWARDS, WORKPLACE AGREEMENTS AND CERTAIN OTHER WR ACT INSTRUMENTS - SCHEDULE 3

6.1 In summary, this schedule deals with four matters:

6.1.1 The continued operation of transitional instruments;

6.1.2 The continued operation of the Australian Fair Pay and Conditions Standard - no comment made;

6.1.3 Interaction between transitional instruments and the NES, FW Bill instruments and other provisions of the FW Bill; and

6.1.4 Preservation of redundancy provisions – no comment made.

6.2 Transitional Instruments

6.2.1 Item 2 of the Schedule provides for the continued operation of WR Act instruments as transitional instruments.

6.2.2 The same interaction rules that applied in relation to WR Act instruments immediately before the day on which the WR Act is repealed will continue to apply in relation to instruments that become transitional instruments. This will be the case during the bridging period. Master Builders supports this approach. We also support the approach where the Bill adopts a standardised approach to termination. Collective agreement-based instruments are governed by the rules in the FW Bill that apply to enterprise agreements (Item 16). The method of dealing with transitional instruments is much better than a requirement which would see all "old system" workplace arrangements expire at a specified date, colloquially a "drop dead" date (noting the exceptions in Item 20). This is because there are a very large number of agreements tailored to particular enterprises or sites that remain of high utility for those organisations. These arrangements should not be arbitrarily disturbed.

6.3 Transitional instruments and the NES

6.3.1 If a term of an award, NAPSA, workplace agreement, AWA or other WR Act instrument (ie a transitional instrument) is detrimental to an employee compared with the NES, then that term has no effect to the extent that it is detrimental when compared with the NES (Item 23). This provision therefore means that most employment contracts in operation in this country must be examined as at 1

January 2010 when the NES takes effect to ensure that they are or are not affected by the NES in relation to their terms. This is a task of some magnitude. Accordingly, the manner in which the assessment process should be undertaken must be clear. Unfortunately, this is not achieved with the wording of the Bill. Further, the Explanatory Memorandum (EM) for the Bill compounds this issue by stating that "the provision does not have practical operation during the bridging period..." (para 79). Whilst this would be legally correct, Master Builders' expert committee on industrial relations is of the view that agreement making during the bridging period should accommodate compliance with the NES (as it does for agreements presently) meaning that, in practice, the NES will operate retrospectively.

6.3.2 Note 1 to Item 23(1) of the Bill indicates that "a term of a transitional instrument that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the NES will continue to have effect." However, this proposition appears to conflict with the idea that the instrument cannot prevail over the NES "in any respect" as articulated in Item 23(1). Further, this latter more narrow interpretation appears to be reflected in the EM for the Bill. At clause 83 of the EM the statement is made that "the no detriment test applies on a line by line basis." The wording of the EM is then categorical: "the NES entitlement will continue to apply and prevail over the corresponding entitlement in the transitional instrument, if the term or entitlement in the transitional instrument is detrimental to an employee, in any respect, in comparison to the NES."

6.3.3 The example then used in the EM shows why the application of the no detriment test will be costly for employers. The EM states that 'terms in a transitional instrument about the amount of annual leave that an employee is entitled to, and the amount the employee is entitled to be paid while on leave, might continue to operate, but subject to more favourable accrual rules in the NES." This means that, despite any trade-offs made by an employer in a transitional instrument where one entitlement may not be as great as is

expressed in the NES but was reduced in exchange for, say, higher wages, that prior arrangement has the potential to be nullified. This will undoubtedly increase costs for employers and induce job shedding where those costs cannot be absorbed in recessionary times.

RECOMMENDATION 3

Accordingly, Master Builders recommends that the no detriment test be a "global" test so that if an employee is better off overall (the very test underpinning the new agreement making system) there is no adjustment of the workplace agreement as against the NES.

6.3.4 Employers would only need to show that they had undertaken the assessment and had objective evidence of the fact that the relevant employee was better off. This would be the basis on which the employee protection sought by the provisions could be maintained.

6.3.5 Superimposing the NES on all existing workplace agreements is almost certain to have a number of unintended and unfair consequences. For example, in the building and construction industry, many employees have diverted payments from a non-interest earning redundancy pay scheme into a superannuation fund. This occurs because the payments into the redundancy fund would otherwise accumulate to create a balance in excess of the necessary amount to currently discharge redundancy obligations at law. This is clearly an unfair outcome where an employee may have the benefit of the payments into their superannuation fund while potentially arguing for NES requirements relating to redundancy to apply on relevant termination. This is only one example of a myriad of circumstances which may lead to unfair outcomes.

RECOMMENDATION 4

Master Builders recommends that Fair Work Australia be given the power to retrospectively vary workplace agreements to avoid double-dipping as a result of the application of the NES.

6.3.6 Master Builders notes that Item 23(3) will permit Regulations to be made in order to assist in determining whether terms of a transitional instrument are detrimental to an employee when compared to the NES. However, we prefer that the matter was put beyond doubt within the terms of the statute (particularly the issue of the seeming difference between the content of Note 1 and the EM referred to above) and that the relevant test be a global test as articulated in the prior paragraph. We note that an application may be made to Fair Work Australia (FWA) to resolve any difficulties about the relevant interaction, with a variation of the transitional instrument to be made by FWA. This task would be made simpler if a global test applied and the notion of what is a "difficulty" clearly comprehended the recommendation made in the previous paragraph to exclude any potential double-dipping.

7 NATIONAL EMPLOYMENT STANDARDS - SCHEDULE 4

7.1 This Schedule carries over minimum entitlement provisions from the WR Act so that they apply in the bridging period. Master Builders agrees with the manner in which the Schedule deals with these issues.

7.2 Item 5(1) provides that, as a general rule, an employee's service with an employer before the commencement of the NES counts as service for the purpose of determining entitlements under the NES.

7.3 The general rule does not apply to the calculation of redundancy pay under the NES if certain conditions are met. This has the laudable intention of not imposing an overnight liability for redundancy pay. The central criterion for alteration of the general rule is that the employee's terms and conditions of employment did not provide for any entitlement to redundancy pay before 1 January 2010. This is a necessary safeguard against increased employer costs. However, in the building and construction industry this issue is unfortunately shrouded by debate about the application of Clause 16 of the *National Building and Construction Industry Award 2000* as modified by operation of law. This matter is currently before the Full Federal Court in *Yirra Pty Ltd t/as Richmond Demolition and Salvage v Summerton* (heard 20 November 2008, but no judgment has been handed down to date).

7.4 Furthermore, this rule may not cover service in relation to accruals under "industry specific redundancy schemes" which fall outside the NES by its own terms. To put the matter beyond doubt Master Builders makes the following recommendation:

RECOMMENDATION 5

Master Builders recommends that Item 5(4) be modified to ensure that the exclusion from sub item 5(1) encompasses industry specific redundancy schemes.

8. MODERN AWARDS (OTHER THAN ENTERPRISE AWARDS) - SCHEDULE 5

8.1 Part 10A of the WR Act, dealing with the award modernisation process, will continue to apply after the repeal day, expected for 1 July 2009. (Part 2, Item 2) However, the Schedule sets out that the AIRC's power under s576H of the WR Act to vary a modern award cannot be exercised after the modern award has come into operation. (Item 2)

8.2 FWA must as soon as practicable after a modern award (other than a modern miscellaneous award) comes into operation, terminate award based transitional instruments and transitional APCSs defined in Item 3(1) as "modernisable instruments". Alternatively, if a modern award only partly replaces the transitional instrument, it may vary the coverage of the transitional instrument. As soon as practicable after all modern awards have come into operation, FWA must terminate any remaining modernisable transitional instruments. However, FWA must not terminate or vary enterprise instruments.

8.3 FWA may establish a process for making decisions to terminate or vary modernisable instruments.

8.4 A modern award made under the Part 10A award modernisation process is a modern award within the meaning of the FW Bill from the later of the day on which it is made or the FW Bill commencement day (Item 4). The modern award comes into operation on the day on which it is expressed to commence. The Regulations may deal with other matters relating to how the FW Bill applies to modern awards. (Item 4)

8.5 FWA may make a variation to a modern award to deal with minor or technical problems with a modern award. The determination may be made on FWA's own initiative, on application by an employer, employee, organisation or outworker entity covered by the award, or on application by an association entitled to represent a person covered by the modern award (ie union, industry association etc).

Review of modern awards

8.6.1 FWA must conduct a review of all modern awards, other than modern enterprise awards, after the first two years of their operation. FWA must consider whether modern awards achieve the modern awards objective and are operating effectively (Item 6) FWA may make a determination varying a modern award to remedy any issues arising from the review (Item 6). We would anticipate that this review could modify provisions of the award which are inefficient and which are historical relics, particularly the extent and range of allowances and special rates in the industries awards. For example, the brewery cylinder painters provisions which appeared at clause 22.3(l) in the draft *Building and Construction General On-site Award 2010* published by the Commission on 3 April 2009 is active. No-one on the Master Builders expert industrial relations committee could isolate the nature of the task of a painter in a stout tun which is one of the matters embraced by this provision, requiring a 15 minute "spell in the fresh air at the end of each hour worked".

RECOMMENDATION 6

Master Builders recommends that Item 6 be modified to include a requirement that the subsequent review remove archaic, inefficient or difficult to apply provisions and continue to modernise awards to this end.

Review of transitional arrangements

8.7 Similarly, FWA may review transitional arrangements included in awards, and make a determination to vary the award in light of the review (Item 7).

Part 3 Avoiding reductions in take home pay

8.8 The Bill expresses that the Part 10A award modernisation process is not intended to result in reductions in the take home pay of employees or outworkers (Item 8.1).

8.9 Take home pay is defined as including wages, incentive based payments, allowances, and overtime. (Item 8) We note the four criteria which operate as conditions precedent to the finding of a suffering of a modernisation-related reduction in take-home pay contained in Item 8(3). The manner in which Item 8(3)(c) is drafted is not clear. However, the EM is clear in noting that take-home pay for working particular hours includes a particular "shift pattern or spread of hours." This clarification should not remain in extrinsic material.

RECOMMENDATION 7

Master Builders recommends that these words re shift pattern or spread of hours appear in the provision itself. Alternatively, Master Builders recommends that any change to patterns or hours of work arising from the award modernisation process should be excluded from the consideration of take-home pay orders.

8.10 If FWA is satisfied that an employee or outworker, or a class of employees or outworkers to whom a modern award applies has suffered a modernisation related reduction in pay, then FWA may make any order requiring the payment of an amount or amounts to the employee or outworker. (Item 9) The order will then prevail over the award term (Item 12).

8.11 FWA may make the order on application by an employee or outworker who has suffered a modernisation related reduction in take home pay or by an organisation entitled to represent the employee or outworker (ie a union) or by a person acting on behalf of such employees or outworkers (ie a lawyer). (Item 9) FWA must not make such an order if FWA considers the reduction to be minor or insignificant or if FWA is satisfied that the employee or outworker has been adequately compensated in other ways for the reduction (Item 10).

8.12 The order must be expressed so that if the take home pay payable to the employee or outworker increases after the order has been made, there is a corresponding reduction in the amount payable to the employee or outworker under the order. (Item 10) The take home pay order continues to have effect so long as the modern award continues to cover the employee or employees, even if an enterprise agreement later starts to apply (Item 11). This latter provision will make it difficult to reach agreements that have sufficient flexibility to increase productivity. For example, a subsequent enterprise agreement may seek to reduce the complexity of compliance by allowing for an all in rate to be paid that

compensates an employee for allowances that might otherwise apply. If a take home pay order was in effect because, for example, a modern Award sought to consolidate prior allowances payable under a NAPSA which might incorporate a "remote" or "district" allowance, this provision effectively means that the all in rate could not compensate for these allowances unless the employee's take home pay increased.

8.13 Further, in the case of a take-home pay order, Item 12 appears to limit an employer from subsequently negotiating appropriate agreements with their employees as the take-home pay order will override the enterprise agreement in any respect where affected by the order. The Better Off Overall Test (BOOT) already requires FWA to be satisfied that employees are better off, and this is an appropriate measure. There is no need for the ongoing and continuing effect of the take-home pay order.

RECOMMENDATION 8

Master Builders recommends that take-home pay orders should cease to have effect immediately on operation of an enterprise agreement or award individual flexibility agreement applying to the employee or an affected class of employees.

8.14 The provisions relating to these orders correspond to the requirement of the Ministerial Award modernisation Request that set out that the process is not intended to disadvantage employees: Clause 2 (c) of the Request.[2] The Bill does not however contain a similar provision reflecting that the Award modernisation process is not intended to increase employer costs: Clause 2(d) of the Request. The process of Award modernisation has been underway for some time. The terms of the Request reflect a need to balance employee disadvantage and employer costs. This is not reflected in the terms of the Bill which may well nullify the employer cost intention because these take home pay orders provide statutory protection to employees without similar protections being extended to employers.

[2] Available at http://www.airc.gov.au/awardmod/about.htm

RECOMMENDATION 9

Accordingly, Master Builders recommends that the ability of an employee to obtain a take home pay order be modified so that FWA is empowered to determine whether the reduction in take home pay occurred as a result of a need to balance employer costs against employee disadvantage. Where FWA makes such a finding, it should have discretion not to make the relevant order.

9. MODERN ENTERPRISE AWARDS - SCHEDULE 6

9.1 An 'enterprise instrument' is an 'enterprise award based instrument' or an 'enterprise preserved collective state instrument'. An 'enterprise award based instrument' is essentially an award based transitional instrument (eg award or NAPSA) that regulates terms and conditions of employment in a single enterprise or several enterprises under the same franchise. These commonly regulate larger enterprises but they are not prevalent in the building and construction industry.

9.2 The 'enterprise instrument modernisation process' is the process of making modern awards under Division 2 to replace enterprise instruments. (Item 4, Division 2). Enterprise awards and NAPSAs that were derived from a State enterprise award are excluded from the current award modernisation process currently being undertaken by the AIRC. Schedule 6 provides for the integration of those awards into the new workplace relations system.

9.3 On application, FWA may make a modern award to replace an enterprise instrument. The application may be made only by a person covered by the enterprise instrument and during the period starting on the FW commencement day and ending on 31 December 2013. The criteria set out in the Bill that apply to the making of a modern enterprise Award are not opposed.

9.4 If the making of a modern enterprise award results in an increase in an employee's entitlements, the modern enterprise award may provide for these increases to take effect in stages. If no application has been made in relation to an enterprise agreement by 31 December 2013, the instrument will terminate on 31 December 2013 (Item 9).

9.5 These provisions are very similar to those that apply to modern awards where there is a reduction in take home pay, with similar restrictions and conditions imposed on the issuing of an order.

9.6 It is noted that in respect of both enterprise award take home pay orders and the take home pay orders mentioned in the above discussion, there is no time limit set for their expiration. The EM unsatisfactorily notes that:

> *It is not intended that there be a time limit on the making of an application, however it is expected that the ability to draw a connection between a reduction in take home pay and the enterprise award modernisation process will diminish over time.* (Clause 206 of the EM)

RECOMMENDATION 10

Master Builders recommends that take home pay orders should not be available beyond three years from the date that a modern award or modern enterprise Award has effect.

10 ENTERPRISE AGREEMENTS AND WORKPLACE DETERMINATIONS MADE UNDER THE FW ACT - SCHEDULE 7

10.1 Schedule 7 outlines modifications and transitional provisions with respect to enterprise agreements and workplace determinations made and varied in accordance with the FW Bill during and after the bridging period. The modifications are necessary as the NES and modern awards will not operate until 1 January 2010. This Schedule encapsulates the complexity associated with the time gap between the commencement of the FW Bill and the NES and modern Awards referred to earlier in this submission.

10.2 Firstly, the Schedule provides for making and varying enterprise agreements during the bridging period. These enterprise agreements must pass the no-disadvantage test rather than the better off overall test. Secondly, the Schedule modifies certain provisions of the FW Bill in relation to enterprise agreements, variations of enterprise agreements and workplace determinations made during the bridging period.

10.3 Thirdly, the Schedule contains transitional provisions relating to the application of the BOOT should the award modernisation process not be completed at the end of the bridging period. Finally it contains transitional provisions in relation to the

application of the AFPCS during the bridging period.[3] The provisions in Schedule 7 are complex and technical. We make the following comments to provide an overview of key elements of the Schedule.

Enterprise agreements and variations to enterprise agreements made during the bridging period

10.4 The Bill provides that the no-disadvantage test applies to enterprise agreements and variations to enterprise agreements made during the bridging period, instead of the BOOT. The BOOT operates from 1 January 2010 when modern awards and the NES commence operation.[4] An enterprise agreement is defined in the FW Bill as a single enterprise agreement or a multi-enterprise agreement.[5]

10.5 An enterprise agreement passes the no-disadvantage test if FWA is satisfied that an enterprise agreement would not result in a reduction in the employees' overall terms and conditions of employment under an applicable reference instrument.[6] This is the same test that applied to the approval of workplace agreements under the WR Act[7], and Master Builders submits that it is appropriate that it continues to apply during the bridging period.

10.6 A reference instrument is any relevant general instrument (i.e an award based transitional instrument that applies or could apply), or a designated award.[8] The Bill enables FWA to designate an award in relation to an employee or class of employees (as a reference instrument) before or after an application for FWA approval is made under the FW Bill. An enterprise award cannot be a designated award.[9]

10.7 The Bill requires FWA to disregard any individual flexibility arrangement that has been agreed to by the affected employee and employer when determining whether an enterprise agreement to be varied passes the no-disadvantage test.[10]

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[3] Explanatory Memorandum to Fair Work (Transitional provisions and Consequential Amendments) Bill 2009 p 41, paragraphs 321 and 322.
[4] Ibid, p 49 at paragraph 324
[5] Section 12 *Fair Work Act 2009 (Cth)*
[6] A reference instrument is defined in sub item 5(1). Op cit p 50, paragraph 326.
[7] Ibid, p 50 paragraph 326.
[8] Ibid, p 51 paragraph 332 and 333.
[9] Item 6 and 7, referring to FWA approval under clause 185 of the FW Bill, Ibid, p 51 paragraphs 335 and 336.
[10] Sub item 4 (5) in Ibid, p 50 paragraph 330.

10.8 The Bill provides that, for the purpose of applying the no-disadvantage test, FWA must consider an enterprise agreement as it was at the time the bargaining representative made an application for FWA approval under the FW Bill.[11] This is directed to the fact that a reference instrument is likely to be different following the bridging period.

10.9 When performing these functions, FWA may inform itself in any way it considers appropriate. This includes contacting the employer, one or more employees, or a union or employer representative in relation to the agreement.[12]

10.10 The FW Bill requirement (in section 186(2)(c)) that the agreement does not contravene the NES, does not apply to an enterprise agreement, or a variation to an enterprise agreement made during the bridging period, because the NES does not commence operation until 1 January 2010.[13] However it would appear that an enterprise agreement made during the bridging period will have to comply with the NES from 1 January 2010. Item 11 of the Bill notes that:

> *Paragraph 186(2)(c) of the FW Act (which deals with terms that contravene section 55 of that Act) does not apply in relation to:*
> *An enterprise agreement made during the bridging period; or*
> *A variation of an enterprise agreement, if the variation is made during the bridging period.*

10.11 A note to that Item then sets out that:

> *Section 55 of the FW Act (which deals with the interaction between the National Employment Standards and enterprise agreements etc.) will apply after the end of the bridging period. Section 56 of that Act provides that a term of an enterprise agreement has no effect to the extent that it contravenes section 55.*

10.12 Section 186 of the FW Bill establishes the general requirements for FWA to approve an enterprise agreement. If an agreement meets the specified requirements, FWA must approve the enterprise agreement.

10.13 Section 55 deals with the interaction between the NES and an enterprise agreement. It notes that an enterprise agreement must not exclude the NES or any provision of the NES. An enterprise agreement may also include other terms providing these are not detrimental to an employee when compared to the NES.

[11] Item 6, Ibid p 51, paragraph 334.
[12] Ibid p 52, paragraph 339.
[13] Item 11 referring to the application of paragraph 186(2)(c) of the FW Bill, Ibid p 52 paragraph 340.

Section 56 then provides that a term of an enterprise agreement contravening section 55 will have no effect.

10.14 The combined effect of these provisions is that an enterprise agreement made or varied during the bridging period will have to comply with the NES from 1 January 2010. In other words, employers will have to draft enterprise agreements so that they can comply with the NES from 1 January 2010, even if they operate for only part of the bridging period. (This will require two sets of clauses, or more likely one set of clauses that comply with the NES from the outset.) Agreements could be legitimately in effect for a matter of weeks with a requirement that the NES does not apply yet, despite their terms, be modified as a matter of law on 1 January 2010.

10.15 Master Builders submits that there is a palpable disincentive to make an agreement during the bridging period; the law is unnecessarily complex.

RECOMMENDATION 11

Master Builders recommends that all enterprise agreements made or varied prior to 1 January 2010 be exempt from the NES (save for wage rates) until their nominal expiry date or, as previously recommended, that the operation of the FW Bill be deferred for six months.

10.16 We are particularly concerned that an agreement negotiated during the bridging period could involve cashing out of leave entitlements but these would need to be reviewed when the NES came into effect. Some existing arrangements that benefit all parties may not be able to continue: for example where cashing out of annual leave occurs over an extended period. This should be compared with section 94(3) FW Bill which requires each agreement to cash out annual leave to be separate and in writing.

Transitional provisions to apply if after the end of the bridging period award modernisation is not yet completed

10.17 Master Builders also notes that the Bill contains transitional provisions to apply the BOOT test after the end of the bridging period if award modernisation is not completed prior to 1 January 2010. This part of the Bill provides for the application of the BOOT test to the making of enterprise agreements that cover unmodernised award covered employees. This includes enterprise agreements which are greenfields agreements and 'non greenfields' agreements. The Bill

also provides for the application of the BOOT test to the variation of enterprise agreements that cover unmodernised award covered employees. Master Builders supports provisions that are inserted in the Bill in the event that the Award modernisation process is not completed within the tight timetable set by the Request.

Priority Rules

10.18 The AFPCS during the bridging period prevails over an enterprise agreement or a workplace determination that applies to an employee to the extent to which the AFPCS provides a more favourable outcome for the employee in a particular respect.[14]

10.19 Any dispute about the application of the AFPCS is to be resolved using the model dispute resolution process in the WR Act.[15] Disputes about the application of the AFPCS may be adjudicated by FWA.[16]

10.20 Terms dealing with settling disputes about the NES only apply after the end of the bridging period. The application of the model dispute resolution process to the dispute does not affect any right of a party to take court action to resolve the dispute.[17]

10.21 Any term of an enterprise agreement or workplace determination is invalid to the extent to which it purports to exclude the AFPCS.[18]

11. WORKPLACE AGREEMENTS AND WORKPLACE DETERMINATIONS MADE UNDER THE WR ACT - SCHEDULE 8

11.1 Schedule 8 contains transitional and consequential provisions relating to workplace agreements and workplace determinations made under the WR Act. Firstly, it includes provisions allowing for the lodgement of workplace agreements (and variations of workplace agreements) made before the WR repeal day. This includes provisions relating to their assessment against the no

[14] Item 27(1), Ibid p 56 paragraph 362
[15] Ibid Item 27(2), p 56 paragraph 363, referring to the model dispute resolution process in Part 13 of the WR Act
[16] Ibid
[17] Item 27, Ibid, p 57 paragraph 364
[18] Item 27, Ibid p 57 paragraph 367

disadvantage test and continued operation. Secondly, it includes provisions relating to the termination of workplace agreements where some, but not all, of the steps relating to termination occurred before the WR Act repeal day. Thirdly, it contains provisions allowing for the making and lodgement of ITEAs during the bridging period. Fourthly, it includes provisions dealing with the way in which the no disadvantage test operates with respect to workplace agreements that operate from lodgement if there is a transmission or transfer of business. Finally, it contains provisions relating to the continued application and termination of workplace determinations under the WR Act.

Transitional provisions relating to collective agreements and variations of collective agreements made before the WR Act repeal day

11.2 These items preserve and modify various provisions of Part 8 of the WR Act that allow for the lodgement of collective agreements and variations of collective agreements and their assessment against the no-disadvantage test. The rules governing the content of collective agreements are preserved by these items and related items of the Bill.[19] They provide that where a collective agreement or variation of a collective agreement has been made but not lodged as at the WR Act repeal day, it may still be lodged with the Workplace Authority following that day. However, it must be lodged before the end of the period of 14 days after:

- It is approved, in the case of an employee collective agreement, union collective agreement or variation; or
- It is made, in the case of a greenfields agreement.[20]

11.3 Where an agreement or variation is lodged within this time, the Workplace Authority Director must consider whether the agreement or agreement as varied passes the no-disadvantage test. If the agreement or variation is not lodged within this time, the Workplace Authority Director must not consider whether the agreement or the agreement as varied passes the no-disadvantage test. However, late lodgement will not give rise to a civil remedy. In this circumstance, if the employer(s) and employees covered by the

[19] EM, p 59 Item 8
[20] Ibid, p 59 Item 8

collective agreement or the agreement as varied wish still to implement the agreement or variation they would need to make an enterprise agreement under the FW Bill.[21] This requirement appears to impose a significant cost impact on parties who have completed their workplace bargaining but not yet had the agreement approved due to practical issues involved in the workplace. This is commonly encountered in the building and construction industry when employees are working across a variety of geographical locations.

RECOMMENDATION 12

Master Builders recommends that parties be permitted to lodge an agreement approved after 1 July 2009 provided that the employer has provided the employees with the Employee Information Statement prior to 1 July 2009 and no changes were made to the proposed agreement after that date. This should similarly apply in the case of the variation and termination of workplace agreements.

Transitional provisions relating to pre-WR Act repeal day terminations of collective agreements

11.4 This Division applies to pre-WR Act repeal date terminations of collective agreements. It preserves and modifies various provisions of Part 8 of the WR Act that allow for the termination of collective agreements either through lodgement of terminations with the Workplace Authority or by application to the AIRC.[22]

11.5 Certain items[23] provide that where a collective agreement has been terminated as at the WR Act repeal day but the termination has not been lodged it may still be lodged with the Workplace Authority following the WR Act repeal day. However, it must be lodged before the end of the period of 14 days after the termination was approved.

11.6 If the termination is not lodged within this time it cannot come into operation. However, late lodgement does not give rise to a civil remedy. In this circumstance, if the employer(s) and employees covered by the collective agreement still wished to implement the termination, they would need to do so in accordance with the termination provisions that apply under Schedule 3.[24]

[21] Ibid, p 59 Item 8
[22] Ibid, p 60 paragraph 378
[23] Ibid, p 60 Item 11
[24] Ibid, p 60, Item 11

11.8 Other items[25] preserve provisions in the WR Act[26] that allow for the termination of collective agreements:

11.8.1 Where a person lodges a declaration to unilaterally terminate a collective agreement in a manner provided for in the agreement before the WR Act repeal day;

11.8.2 Where a person[27] has made an application to the AIRC before the WR Act repeal day to terminate a collective agreement (in this case, the AIRC may terminate the agreement if it is satisfied that it would not be contrary to the public interest to do so).[28]

11.9 The Bill provides that ITEAs can be made during the bridging period. The Bill preserves various provisions of Part 8 of the WR Act in relation to ITEAs made during the bridging period.

11.10 However, ITEAs cannot be lodged after the end of the bridging period (sub item 21(3)). If an employer lodges an ITEA after the end of the bridging period, the ITEA cannot come into operation.

11.11 The Bill modifies provisions of Part 8 of the WR Act that are preserved under item 21. This item provides that enterprise agreements and workplace determinations made under the FW Bill are taken to be instruments for the following purposes:

- Applying the no-disadvantage test to ITEAs made during the bridging period;
- Determining the instrument that will cover the employer and employee where an ITEA ceases to operate because it does not pass the no-disadvantage test.

11.12 The Bill provides that where an ITEA is made during the bridging period that operates from approval and does not pass the no-disadvantage test an employer can lodge a variation to enable it to pass the no-disadvantage test, subject to certain modifications.

[25] Ibid, p 61 Item 13
[26] Part 8 of WR Act
[27] That is, a person specified in subsection 397A(2) of the WR Act
[28] EM, p 61 Item 13

11.13 Item 24 preserves the operation of subsection 400(5) of the WR Act, which prohibits a person applying duress to an employer or employee in connection with an ITEA.

Applying the no-disadvantage test where there is a transmission or transfer of business

11.14 The Bill preserves and modifies provisions of Division 7A of Part 11 of the WR Act which deals with the application of the no-disadvantage test to workplace agreements that operate from lodgement where there is a transmission of business or transfer of business while the agreement is still to be assessed against the no-disadvantage test.

11.15 The items provide that Division 7A of Part 11 of the WR Act continues to apply subject to certain modifications so that it applies to transfers of business and reflects the new instruments that may be made under the FW Bill.

11.16 Where there is a transmission or transfer of business, and a workplace agreement which operates from lodgement (certain ITEAs and greenfields agreements) ceases to operate because the Workplace Authority Director decides that it does not pass the no-disadvantage test, the Bill specifies what instrument will apply.

11.17 An instrument is defined in sub item 27(5). If there is no such instrument, the designated award covers the new employer and the transferring employee or employees.

12. MINIMUM WAGES – SCHEDULE 9

12.1 This Schedule sets out matters relating to minimum wage setting. In particular Part 4 Item 13 of the Schedule establishes that when the NES and modern awards are in place all employees are entitled to at least the relevant safety net minimum wage derived from either the relevant modern award, a transitional APCS or, if an employee is award or agreement free, the national minimum wage order. This provision in the Bill reflects the substance of clause 206 of the FW Bill. Essentially that provision states the base rate of pay under an enterprise agreement must not be less then the modern award rate or the national minimum order rate.

12.2 Master Builders makes no other comments on schedule 9, save to note that in the same way that all employers must check that their agreements contain provisions

consistent with the NES as of 1 January 2010, they must check relevant wage levels. This means that the various rates must be readily accessible on a publicly available website.

13. EQUAL REMUNERATION – SCHEDULE 10

13.1 Master Builders makes no comment on this Schedule.

14. TRANSFER OF BUSINESS – SCHEDULE 11

14.1 Schedule 11 sets out transitional and consequential provisions relating to transmissions of business and transfers of business.

14.2 Part 2 of the Schedule deals with transmissions of business that occur where a new employer becomes the successor, transmitter or assignee of the whole or part of a business of the old employer where the time of transmission was before the WR Act repeal day. The time of transmission is calculated by reference to the WR Act provisions.

14.3 Master Builders notes that there are specific rules in relation to redundancy. A preserved redundancy provision continues to apply to a new employer per Item 3(4). However, this rule is overridden where an industry specific redundancy fund in a modern Award (as with the building and construction industry) is in place and the other redundancy provisions are detrimental to the transferring employee (Item 4(4)). No rationale for continuing the unacceptable cost burden that will be placed upon the industry in relation to the application of the industry specific redundancy scheme is given. This provision will add costs to the industry and emphasises the concerns we have expressed earlier about the building and construction industry specific scheme as currently proposed by the Commission. Furthermore, it appears that this could allow an employee to, for example, receive a higher amount of severance pay based on a different definition of redundancy if the current provisions in the *Building and Construction General On-site Award* are retained.

14.4 We also note that Items 10, 11 and 12 of the Schedule create notification obligations for new employers in respect of transferred preserved redundancy provisions. The effect of the provisions is to require a new employer to inform the transferring employee about the continued operation of the preserved

redundancy provision, and to lodge a notice with FWA. This is an unnecessary red-tape burden and given that a failure to notify is a civil remedy provision (Schedule 16 Item 4) employers will be forced into obtaining highly complex advice in any transmission situation without any concomitant benefit to employees.

14.5 We note that Item 7 of the Schedule provides for the application of the transfer of business provisions in the FW Bill in relation to transferring employees covered by transitional instruments.

14.6 It is clearly established that the FW Bill applies regardless of whether:

- The transferring employee's employment was terminated by the old employer before, on or after the WR Act repeal day; or
- The transferring employee was employed by the new employer before, on or after the WR Act repeal day.

14.7 This provision has the capacity to affect some existing arrangements that are in existence but where the parties were, obviously, unaware of this rule. For example, if there has been a delayed transfer of a minor asset that will occur after the repeal of the WR Act, a connection will have occurred that would qualify as a connection for the purposes of the transfer of business rules. Accordingly, if any employees of the old business subsequently join the new company within the three month period set out in section 311 FW Bill, then a transfer of business will have occurred with a transferable instrument applying at the new company, an instrument that was not known to the new employer. This provision therefore reinforces Master Builders prior position on the transfer of business rules in the FW Bill: they send a message to new employers to not engage any employees of the old business or of a business from which they purchase assets. This is especially the case as Item 8 of the Schedule makes it clear that the definition of transferable instrument in subclause 312(1) of the FW Bill is extended to cover transitional instruments.

15. GENERAL PROTECTIONS – SCHEDULE 12

15.1 Master Builders notes that during the bridging period, a reference in the FW Bill to the NES is taken to include a reference to the AFPCS (item 2); and a reference to a modern award or an enterprise agreement is taken to include a reference to an

award-based transitional instrument or an agreement-based transitional instrument respectively (item 3). This will ensure that the general protection provisions apply to existing workplace arrangements.

16. BARGAINING AND INDUSTRIAL ACTION - SCHEDULE 13

16.1 Following on from the repeal of the WR Act, this Schedule reinforces that those involved in bargaining for a collective agreement will generally need to start the bargaining and industrial action processes afresh. They will need to follow the FW Bill procedures in relation to entering into an enterprise agreement. The Schedule covers the situations that differ from this general rule as well making provision for transitional instruments as they affect bargaining and industrial action.

16.2 The Bill takes an appropriately conservative approach to these issues. For example, in Part 4 of the Schedule it is made clear that even if protected industrial action has taken place prior to the WR Act repeal day, bargaining representatives will need to apply afresh for protected action ballots after that day. Industrial action is damaging to employers and the economy and these provisions are supported.

16.3 Master Builders in particular agrees that as set out in Item 18 of this Schedule FWA may take into account the conduct engaged in by bargaining representatives when bargaining for a collective agreement before the WR Act repeal day when making decisions under the FW Bill for example for the purposes of industrial action whether a bargaining representative is genuinely trying to reach an agreement.

17. TRANSITIONAL PROVISIONS RELATING TO RIGHT OF ENTRY - SCHEDULE 14

17.1 Master Builders has no concerns with the transitional provisions in relation to this subject area.

18. STAND DOWN - SCHEDULE 15

18.1 Master Builders supports the default stand down provision under subclause 524(1) of the FW Bill applying where a transitional instrument does not deal with a circumstance allowing stand down under the FW Bill, or does not deal with stand down at all.

19. COMPLIANCE – SCHEDULE 16

19.1 Apart from the comments raised in paragraph 14.4, above, we make no comment in relation to this Schedule.

20. AMENDMENTS RELATING TO THE FAIR WORK DIVISIONS OF THE FEDERAL COURT AND THE FEDERAL MAGISTRATES COURT – SCHEDULE 17

20.1 We make no comment in relation to this Schedule.

21. INSTITUTIONS – SCHEDULE 18

21.1 We make no comment in relation to this Schedule.

22. DEALING WITH DISPUTES – SCHEDULE 19

22.1 We make no comment in relation to this Schedule.

23. WR ACT TRANSITIONAL AWARDS ETC – SCHEDULE 20

23.1 We make no comment in relation to this Schedule.

24. CLOTHING TRADES AWARD 1999 – SCHEDULE 21

24.1 We make no comment in relation to this Schedule.

25. REGISTERED ORGANISATIONS – SCHEDULE 22

25.1 Master Builders has particular concerns about demarcation disputes in the building and construction industry which led to lobbying of the Government to include provisions of this kind in the legislation. The representation orders proposed as a means to assist to resolve demarcation issues are supported. These orders will be used by building and construction industry participants. The *Fair Work (Registered Organisations) Act* 2009 will provide expanded powers to FWA to make orders to resolve disputes over representation rights, an essential matter given the FW Bill's new agreement making framework.

25.2 It will be possible for a representation order to specify that a union has the exclusive right to represent the employees in a particular 'workplace group', defined in Item 86 of the Schedule to mean:

A class or group of employees, all of whom perform work:

(a) For the same employer; or

(b) At the same premises or workplace; or

(c) For the same employer and at the same premises or workplace

25.3 Whilst Master Builders agrees that this definition is appropriately wide for most cases, we are concerned that there may be some categories of employees who may be excluded and therefore FWA should be given discretion to issue orders in respect of any other category of employee which serves the objects of preventing, reducing and stopping demarcation disputes.

25.4 The proposed s137B outlines the factors which must be considered by FWA when making its determination. Master Builders supports these criteria save that the criteria do not include reference to the conduct of the organisations leading up to the making of the order nor do they include reference to the views of the relevant employer and the effect on the business.

RECOMMENDATION 13

Master Builders recommends that the criteria in the proposed s137B should be extended to include reference to the conduct of the relevant organisations and the views of the employer and the effect on their business.

25.5 In addition, the proposed s137B refers to other factors to be included by Regulation. These factors should be the subject of further consultation.

26. CONCLUSION

26.1 Master Builders renews its call for the repeal date to be delayed until 1 January 2010. In this submission, we have highlighted the unnecessary complexity associated with, in particular the agreement making provisions of the Bill caused by the staggered implementation of the new workplace relations regime. It beggars belief that ordinary working Australians would be in a position to understand the legislation. Industrial relations experts have grappled with this legislation.

26.2 We commend the recommendations in this submission to Senators as a means to improve the Bill.