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Master Builders Australia

Submission to House Standing Committee on Education and Employment

On

Fair Work Amendment Bill 2013

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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 over 30,000 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.

2 Purpose of Submission

2.1 Master Builders is responding to the House Standing Committee on Education and Employment's request for written submissions on the *Fair Work Amendment Bill 2013* (the Bill) which is currently before Parliament. The Bill will implement several of the Fair Work Review Panel's (Panel) recommendations, following the post-implementation review of the *Fair Work Act 2009* (Cth) (FW Act). However, a number of measures that the Government wishes to implement are not specifically recommended by the Panel. These measures include amendments dealing with the model consultative clause in awards/agreements (to require an employer to consult with a worker before there is a change in rostering arrangements or working hours), amending the National Employment Standards (NES) for unpaid parental leave (and safe job transfers) and creating new rights for those who allege that they have been bullied.

2.2 The Bill would make amendments which would have the following principal effects:

- introduces new measures that are labelled "family-friendly", including the right for pregnant women to transfer to a safe job, providing more flexibility for concurrent unpaid parental leave, ensuring that when an

employee takes special maternity leave it will not reduce their entitlement to unpaid parental leave and expanding the right to apply for flexible working arrangements;

- alters the modern awards objective to ensure that modern awards together with the NES provide a safety net which includes additional remuneration for those employees working overtime; shifts; on weekends or public holidays; and unsocial, irregular or unpredictable hours;

- allows a worker who has been bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying, requires the FWC to deal with an application to stop bullying within 14 days of the application being made, enables the FWC to make an order it considers appropriate to stop the bullying (other than payment of a monetary amount) and inserts a definition of "bullied at work" into the FW Act;

- introduces new right of entry provisions which give the FWC the capacity to deal with disputes about the frequency of visits to sites for discussion purposes, allow discussions and interviews by a permit holder to be held in an employer's lunch or break room if no other agreement exists, sets out new rights for unions about accommodation and transport arrangements for permit holders in remote areas and gives the FWC the capacity to deal with disputes in relation to accommodation and transport arrangements; and

- makes a number of technical amendments to the FW Act.

2.3 Whilst Master Builders supports measures to improve the operation of the FW Act, the Bill's provisions will further compound the current statutory constraints on employers to structure their workplace to suit their business. This submission highlights that the changes which would stem from the Bill are not balanced, as they work against the viability of business and strengthen the role of unions. They do not provide any measures which enhance productivity. The selection of the chosen items for priority enactment is not based on any criteria that guided the Government's processes for reviewing

the FW Act and hence, as indicated throughout this submission, the Bill should, at the least, be deferred.

2.4 The Bill should be deferred until a properly considered comprehensive, productivity focused range of reforms are placed before Parliament. At the least, a fully formulated Regulatory Impact Statement should be prepared which objectively assesses the costs and benefits of the amendments. We note that the Explanatory Memorandum for the Bill at page 13 indicates that the financial impact of the Bill will be announced as part of the 2013-2014 Budget. This step is far too little too late and reinforces Master Builders' view that the Bill's passage should be deferred.

2.5 We also note that there was mooted reform in relation to greenfields agreements and intractable disputes being included as part of the Bill. For example in a recent media release the Minister for Employment and Workplace Relations, the Hon Bill Shorten said:

> *The proposed amendments will implement a number of Review Panel recommendations to assist with bargaining for greenfields agreements, when those negotiations reach an impasse.*[1]

2.6 Master Builders believes that reform of greenfields agreement making is vital. However, we do not consider that intractable disputes and changes to greenfields agreements should be collocated, a matter that formed part of the Government's original intentions in this area and from recent media speculation still appears to be the intention of Government. In this submission, Master Builders sets out our proposals for reform of greenfields bargaining. This is a matter that requires urgent attention and which should be dealt with in the Bill.

3 Family-friendly measures

3.1 Schedule 1 of the Bill amends the FW Act through the introduction of new measures labelled as "family friendly".

3.2 **Special maternity leave**

3.2.1 Part 1 of Schedule 1 amends the provisions which regulate unpaid special maternity leave. Hence, any period of unpaid special

[1] http://ministers.deewr.gov.au/shorten/gillard-government-further-enhance-fair-work-act, 8 March 2013.

maternity leave taken by an eligible employee will not reduce the employee's right to unpaid parental leave under s70 of the FW Act.

3.2.2 The Explanatory Memorandum at paragraph 5 says the amendment implements the Panel's recommendation 4 which is as follows:

> *The Panel recommends that s. 80(7) be repealed so that taking unpaid special maternity leave does not reduce an employee's entitlement to unpaid parental leave under s. 70.*

3.2.3 Master Builders supports unpaid special maternity leave being granted on compassionate grounds but does not believe that the matter requires legislation. This should be a matter dealt with between employers and employees at the enterprise level.

3.3 Parental leave

3.3.1 Part 2 of Schedule 1 amends the concurrent parental leave provisions of the FW Act. The maximum period of concurrent leave available under unpaid parental leave provisions will increase from 3 to 8 weeks. These provisions also enable parents to choose to take the concurrent leave in separate periods of at least 2 weeks, or a shorter period if agreed by the employer. This leave is able to be taken at any time within the first 12 months of the birth or adoption of a child.

3.3.2 Master Builders supports proposed s74(2) in which an employee must still give 10 weeks' written notice to their employer for the taking of unpaid parental leave. If the 10 weeks' notice is not practicable, the employee must provide notice as soon as practicable. However, if the employee intends to take second and subsequent periods of concurrent leave, the employee must give at least 4 weeks' written notice.

3.3.3 Section 74(4) of the FW Act currently requires that an employee confirm the intended start and end dates of their parental leave, at least four weeks before the intended start date, unless this is not practicable. The Bill would insert a new s74(4A) which provides that these notice requirements do not apply in relation to second and subsequent periods of concurrent unpaid parental leave. This provision is not opposed.

3.4 Right to request flexible working arrangements

3.4.1 Part 3 of Schedule 1 extends the right of employees to request flexible working arrangements. This amendment is characterised in the Explanatory Memorandum as, in part, a response to the Panel's recommendation 5[2] which is as follows:

> *The Panel recommends that s65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request, unless the employer has agreed to the request.*

3.4.2 Master Builders opposes this Recommendation and the Bill's provisions. We believe that the productivity benefits that are aligned with workplaces offering flexible workplace arrangements identified by the Panel should be acknowledged as arising from voluntary arrangements. This should be an area that is governed by individual preferences as to how to manage employees. Indeed, there is nothing which would stop employers and employees from requesting or negotiating flexible workplace arrangements outside of the terms of the current FW Act provisions or the provisions of the Bill.

3.4.3 Whilst we oppose the Recommendation, we support the Panel's views expressed on page 98 of the Panel's report that a decision to refuse a request for flexible working arrangements should not be able to be appealed. We commend the Government for reinforcing this proposition in the Bill, i.e. Government has ignored calls for mechanisms to be in place to permit an employer's decision to be reviewed by the FWC.

3.4.4 New proposed s65(1) of the FW Act provides that an employee is entitled to request a change in working arrangements because of any of the circumstances specified in s65(1A). Section 65(1A) states that these circumstances are the relevant employee being:

- a parent, or has caring responsibilities, of a child who is of school age or younger;

[2] Paragraph 22 of the Explanatory Memorandum

- is a carer;
- has a disability;
- is 55 years or older;
- is experiencing violence from a family member; or
- provides care or support to a member of their immediate family or household who requires care or support because the member is experiencing violence from their family.

3.4.5 Under the current s65(5) of the FW Act, an employer may refuse this request for a change in working arrangements on reasonable business grounds. The Bill seeks to insert a new s65(5A) which sets out a non-exhaustive list of what constitutes reasonable business grounds, including:

- the excessive cost of accommodating the request;
- the inability to reorganise work arrangements of other employees to accommodate the request;
- the impracticality of the arrangements needed to accommodate the request; for example, recruiting replacement staff;
- a significant loss of efficiency or productivity would occur; or
- there would be a significant negative impact on customer service.

3.4.6 Master Builders supports the inclusion of the non-exhaustive list of what constitutes 'reasonable business grounds' for the purposes of refusing a request for flexible working arrangements. The legislation thus provides guidance without closing out other legitimate reasons for refusal. However, we reiterate our main concern that this part of the Bill seeks to unnecessarily formalise matters that are currently part of the everyday expected informal exchanges between employer and employee.

3.5 Consultation about changes to rosters or working hours

3.5.1 Part 4 of Schedule 1 inserts new requirements for modern awards and enterprise agreements in relation to employers consulting

employees about changes to regular rosters or ordinary hours of work. This would be a new obligation where employers inform employees about the proposed change, with the parties discussing and considering the likely impact of the proposed change, in particular on an employee's family and caring responsibilities. Paragraph 41 of the Explanatory Memorandum describes the intention of these provisions as follows:

> *The intention of the amendments is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee's regular roster or ordinary hours of work, particularly in relation to the employee's family and caring arrangements, by requiring employers to genuinely consult employees about such changes and consider the impact of the change in making such changes raised by employees.[sic]*

3.5.2 Proposed s145A(1)(b) and the current s205(1)(a) provide that the term must allow the employee to gain representation for the purposes of consultation. This representation could be an elected employee or a union official. But in our experience it is usually the latter.

3.5.3 Whilst Master Builders supports flexible working arrangements, we are concerned that this additional obligation will increase compliance costs for employers and calcify the ordinary restructuring of site arrangements in a dynamic environment. It will also provide unions with leverage to extract higher terms and conditions of employment in the face of delays that would be threatened as a result of the necessity to consult. This is an important factor on time critical projects where a roster change may occur as a result of the progress of a project, for example.

3.5.4 This provision also has the capacity to undermine one of the fundamentals of engagement in the building and construction industry, daily hire engagement. This is in part because the term "regular roster" in proposed s145A(1)(a) is not defined. We note that at paragraph 44 of the Explanatory Memorandum the following is said:

> *It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award.*

3.5.5 However, the intention expressed in this extract is not palpable from the words of the provision. The provision is not ambiguous and hence the words in the Explanatory Memorandum should be contained in the terms of the statute because without ambiguity reference to the intention as set out in the Explanatory Memorandum is not appropriate or legally vindicated.

3.5.6 In any event, daily hire is not necessarily irregular, sporadic or unpredictable, per the criteria extracted at paragraph 3.5.4 of this submission. Daily hire engagement is a traditional form of employment in the building and construction industry. It is specifically recognised in the FW Act. The following provisions of the FW Act are relevant to this form of engagement:

- Subsection 123(3)(b), which excludes daily hire employees from the notice of termination provisions of the FW Act (see also clause 16.1 of the *Building and Construction General On-Site Award 2010* (the Award)); and

- Subsection 534(1)(e), which exempts daily hire employees from the obligation to notify Centrelink and relevant employee associations (unions) where an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature.

3.5.7 Daily hire may be either full-time or part-time (in this latter regard see clause 23.9 of the Award concerning the calculation of entitlements for inclement weather for part-time daily hire employees). Daily hire wage rates take into account a 'follow-the-job' loading, which is a factor of eight days to compensate for loss of wages for periods of unemployment between jobs (19.3(a)(i) of the

Award). It is common in the building and construction industry for daily hire employees to be disengaged and re-engaged either within or between projects but certainly to continue employment with the same employer. Master Builders believes that the Award contains sufficient protections for daily hire employees and in the context of the current provision believes that the Bill should be amended to exclude daily hire employees. Alternatively, "regular roster" should be defined to, amongst other things, ensure that this form of employment is not caught. Similar considerations apply to aspects of casual employment and a similar exemption should be set out in the Bill even if the matters set out in paragraph 3.5.5 of this submission are not implemented.

3.6 Transfer to a safe job

3.6.1 Part 5 of Schedule 1 extends the current entitlement for a pregnant employee to transfer to a safe job regardless of whether she has, or will have, a right to unpaid parental leave. The effect of these amendments is that an eligible employee is entitled to be transferred to an appropriate safe job, regardless of their period of service.

3.6.2 If there is no appropriate safe job, existing entitlements still apply. Under the new s81A, an employee will be entitled to paid no safe job leave, provided that they are entitled to unpaid parental leave and have complied with the notice and evidence requirements. A new s82A is also introduced which regulates the entitlement to unpaid no safe job leave. This new provision sets out that an employee who is not eligible for unpaid parental leave, but who complies with evidence requirements is entitled to unpaid no safe job leave.

3.6.3 These new entitlements for pregnant employees should be costed and other mechanisms for social support of pregnant women considered, having regard to the cost on businesses represented by these provisions. Hence, deferral of the Bill until this process has been completed is recommended.

4 Modern awards objective

4.1 Item 1 of Schedule 2 of the Bill would insert a new s134(1)(da) into the FW Act, which amends the modern awards objective. This paragraph provides that the FWC must consider the need to provide additional remuneration for employees working:

- overtime;
- unsocial, irregular or unpredictable hours;
- on weekends or public holidays; or
- working shifts.

4.2 Master Builders opposes this amendment as being inflexible in the extreme. This measure entrenches labour cost increases and has the potential to damage the efficient operation of the labour market. The Government's decision delivers a double blow in that having set up a process that increased award penalty rates in 2010 (despite promising no labour costs rises from modern award changes), the Government now proposes a measure to prevent small employers having the ability to undo that damage. The most objectionable feature of the provision is that it tilts the balance of the award system towards the union penalty rate agenda, as if there is no counter view just a potentially increased cost burden for employers.

4.3 Whilst the modern awards governing the building and construction sector contain additional remuneration provisions for all of the contingencies noted in paragraph 4.1, increased costs flowing to the building and construction industry from other sectors, particularly those which supply materials, would add costs to the sector and our strong view is that the provision is not appropriate.

5 Anti-bullying measure

5.1 The amendments in Schedule 3 of the Bill are made in response to the House of Representatives Standing Committee on Education and Employment Inquiry report - Workplace Bullying "We just want it to stop" (the Report). A

new Part 6-4B is to be inserted into the FW Act to enable a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

5.2 Workers bullied at work

5.2.1 The Report recommended that the Government provide an individual who has been bullied at work with a means to resolve the matter quickly and inexpensively. New s789FC(1) would enable a worker who reasonably believed that they have been bullied at work to apply to the FWC for an order. The definition of a worker is extended to subcontractors, apprentices, trainees, students on work experience or even a volunteer. The extension to subcontractors opens up the dispute system to a great deal more persons than if the issue was limited to employees at work, especially in the building and construction industry.

5.2.2 Master Builders submits that there would be greater utility in having complaints first referred to an agency, such as the Fair Work Ombudsman (FWO), and for that agency to be empowered to bring any application once the case was clearly determined to be legitimate. This would prevent the lodgement of an application relating to a bullying allegation being used as a device to foster "go away money" or obtain other leverage at work or, in the case of subcontractors, getting commercial leverage.

5.3 When is a worker bullied at work?

5.3.1 New s789FD(1) provides that a worker is bullied at work if, while the worker is engaged by a constitutionally-covered business, another individual or individuals, repeatedly behaves unreasonably to the worker, and the behaviour creates a risk to health and safety. This requires that the person conducting the business or undertaking (PCBU) appropriately manage workers. If reasonable management action is carried out in a reasonable manner, s789FD(2) states that this will not result in a person being 'bullied at work'.

5.3.2 This provision will require employers to establish procedures which demonstrate that reasonable management action has taken place and that it has been applied in a reasonable manner. The cost to employers of establishing these procedures in a sufficiently formal

manner to stand as proof in the tribunal has not been considered and costed and the Bill should be deferred until that has occurred.

5.4 The FWC to deal with applications promptly

5.4.1 New S789FE(1) provides that once a bullying application is made, the FWC will be required to begin dealing with the matter within 14 days. This may involve contacting the employer or other parties to the application, conducting a conference or a formal hearing. If necessary and appropriate, the FWC may also refer the matter to a work health and safety (WHS) regulator or another regulatory body.

5.4.2 Screening of applications by a third party, such as the FWO, would mean that the burden on the FWC would be reduced and prior conciliation or discussion facilitated. It would mean fewer but more cogent cases would be before the FWC.

5.5 The FWC may make orders to stop bullying

5.5.1 If the FWC is satisfied that the worker has been bullied and there is a risk that the bullying will continue, the FWC may make an order to prevent the worker being bullied at work. Orders will not necessarily be limited or apply to the bullied worker, but may also apply to others, such as co-workers or even visitors to the workplace, such as union officials, a matter supported.

5.5.2 Once an order applies, new s789FG provides that the person must not contravene a term of their bullying order. If a person fails to comply with an order they may face a civil penalty of up to $10,200 for an individual or $51,000 for a corporation.

5.6 Actions under WHS laws permitted

Proposed s789FH states that s115 of the *Work Health and Safety Act 2011* (WHS Act) and corresponding WHS laws do not apply in relation to an application for an order to stop bullying. This means that a worker is still able to access remedies under the WHS Act or the FW Act where they have made an application to the FWC to stop bullying. Master Builders' preferred position is that the States and Territories continue to regulate bullying and that it is not a matter dealt with by the FWC or, if jurisdiction is vested in the FWC, the

right to bring the action is within the power of a third party agency, not the worker.

5.7 These overall amendments are intended to ensure that bullied workers have access to a quick and cost-effective individual remedy, in addition to the WHS and criminal bullying legislation. Although Master Builders supports measures to reduce bullying, we consider that workplace bullying should continue to be regulated by the States and Territories, not the Commonwealth. This will ensure that health and safety issues are kept separate from industrial relations issues. This is particularly the case having regard to the fact that the WHS code "Preventing and Responding to Workplace Bullying" (the Code) is still in draft form and the cogency of the provisions it will introduce is untested. Much of the material in the Bill links to the Code and it is premature to proceed with the Bill whilst the Code remains in draft form.

5.8 In addition the Consultation Regulation Impact Statement for the Code was only released on 18 March 2013 and, in Master Builders' view, needs further work to better isolate the costs of introducing a risk management approach to a mainly psychological hazard. This will require a concerted and potentially costly change in procedures by employers as, especially in the building and construction industry, the risk management focus is principally on physical hazards and risk.

5.9 The added cost of introducing a stand-alone cause of action for bullying should be quantified, particularly if it is used by disgruntled employees as a measure to garner "go away" money. Employers are hit with the consequences of non-compliance at both the State and Territory level with WHS and the potential requirement to document performance and conduct discussions and decisions in the context of the Bill. These discussions and decisions will apply to a much broader range of individuals than employees in the traditional sense and in the building and construction industry could apply to a large number of subcontractors. Employers will also be required to properly document and address all complaints, particularly where they comprise bullying, even as a small component, where they are made by both employees and non-employees. The cost impact of having multiple compliance regimes that is under WHS laws, anti-discrimination laws, workers' compensation and criminal laws in a range of jurisdictions should all

be costed and the reforms better coordinated. Hence, in this context, we also recommend a deferral of the passage of the Bill

5.10 A concern in relation to the decision to enable FW to deal with bullying complaints is whether or not Commission members have the requisite knowledge of health and safety, and more specifically psychological hazards, to be able to objectively identify whether they have a role in intervening in a complaint. Hence, our recommendation earlier for a "screening" process.

5.10.1 Following the Café Vamp OHS prosecution in Victoria in 2010 the volume of claims of bullying from workers to WorkSafe Victoria rose to more than 6,000 complaints in a year.[3] WorkSafe Victoria quickly realised that many of the complaints were from workers who were not happy with their employment position, actions of their employer (e.g. counselling, discipline) or did not get on with their co-workers.

5.10.2 If the FWC is to be involved in resolving bullying complaints that involvement must be subject to not only a complaint being made but also verification of a risk to the psychological wellbeing of the individual.

5.10.3 Every matter in which the FWC would be involved must require the FWC to be satisfied that the complaint being made constitutes bullying and that there existed a risk to the psychological wellbeing of the individual making the complaint, i.e. the necessary finding that there was a risk to health and safety. FWC's involvement in dealing with bullying matters must ultimately accord with the complete definition of bullying – not just the allegation. Bullying complaints, often manifested through workers compensation claims, require comprehensive investigations that can take weeks and which can often only be determined following independent psychiatric examination and confirmation of a psychiatric/psychological illness. Hence, we reinforce our recommendation for a "screening" process such as the involvement

[3] R Wells *Most workplace bullying claims fall short* http://www.theage.com.au/small-business/managing/most-workplace-bullying-claims-fall-short-20110725-1hw1c.html

of a third party agency or the better integration of current laws before the Bill proceeds.

5.11 An additional issue arises as has been pointed out by Norton Rose.[4] The following is said by Norton Rose:

> *Further, the making of a bullying complaint to the FWC will likely be the exercise of a 'workplace right' by an employee for the purposes of the adverse action provisions of the FW Act. The interplay between these two issues has not been addressed in the Bill and it therefore appears possible for an employee to bring both an adverse action application and bullying application concurrently.*

This issue of the interplay between adverse action and the bullying provisions of the Bill should be given urgent attention or reconsidered upon deferral of the Bill. The issue must be resolved before the Bill is passed.

6 Right of entry

6.1 Part 3-4 of the FW Act allows officials of organisations who hold entry permits to enter premises for discussion and investigation purposes and exercise certain powers while on these premises. Schedule 4 of the Bill makes amendments to Part 3-4 regarding the location of discussions and interviews, along with changes to transport and accommodation arrangements to facilitate entry to premises in remote areas. Amendments would also be made to the FWC's dispute settlement powers in relation to transport and accommodation costs and the frequency of entry for discussion purposes.

6.2 **Interviews or discussions in a particular location**

6.2.1 Proposed s492(1) allows permit holders to conduct interviews or hold discussions in rooms or areas agreed by the occupier of the premises. However, if no agreement exists, the default location for interviews or discussions will be any room or area where one or more of the persons interviewed or involved in discussions usually take their meal or other breaks. With this favourable default arrangement in place, we apprehend that disagreements on the issue will increase.

[4] Norton Rose, *Proposed Workplace Bullying Reforms*, March 2013

6.2.2 Master Builders does not support changes which gives unions the ability to use an employer's lunchroom to hold meetings. Lunchrooms are places where employees are able to take a spell from their job and enjoy their meal time in peace. Union meetings and activities should not be forced upon non-union workers enjoying their meal breaks, especially as 82 per cent of Australian workers are not members of a trade union. This "default" position would also enable unions with a small membership at a site to expose non-members to discussions and hence aid recruitment into the rival union. It pushes the balance of arrangements too far in favour of unions, in an environment where union rivalry is already adversely affecting productivity.[5]

6.3 Travel and accommodation expenses

6.3.1 The new Division 7 of Part 3-4 deals with circumstances in which permit holders and/or an organisation and occupiers have been unable to agree on accommodation and transport arrangements in remote areas, although that term is not defined. Proposed s521C(2) and s521D(2) requires an occupier to provide accommodation and transport for the purposes of assisting a permit holder exercise their rights under Part 3-4 in "remote areas". This obligation applies where:

- accommodating or transporting the permit holder would not cause 'undue inconvenience' to the occupier;
- the permit holder, or their organisation, requests the occupier to provide accommodation or transport;
- the request is made within a reasonable period before the accommodation or transport is required; and
- the permit holder, and their organisation, have been unable to enter into an accommodation or transport arrangement with consent.

[5] See for example P Durkin and J Massola Bechtel loses bid to keep out MUA Australian Financial Review 15 April 2013 p3 and M Stevens Absurdity in union access laws Australian Financial Review 16 April 2013 p34

6.3.2 The meaning of the term 'undue inconvenience' is not defined in the Bill. This will likely to lead to disputation. There will be an additional administration cost in relation to these provisions, a cost which appears not to be able to be recovered per s521D(1) of the Bill. Master Builders does not support amendments to the FW Act that are not clearly articulated and which place an additional and unwarranted cost on employers. This forced cost is inappropriate and will be a burden on those in the building and construction industry who are already facing difficult trading conditions.

6.4 Dispute settlement powers

6.4.1 Proposed s505A enables the FWC to deal with a dispute regarding the frequency of entry to hold discussions. The FWC is able to deal with the dispute if a permit holder or permit holders from the same organisation enter under s484 and the employer or occupier of the premises disputes the frequency of the entry.

6.4.2 This section would allow the FWC to make any order it considers appropriate to resolve a dispute. These include:

- an order to suspend, revoke or impose conditions on entry permits; or
- the future issue of entry permits.

6.4.3 FWC may only make an order if it is satisfied that the frequency of entry requires an unreasonable diversion of the occupier's critical resources per proposed s505AC(4). Proposed s505(5)(b) also states that the FWC is able to take action under this section of its own motion or by application of the persons listed in paragraph 6.4.1 of this submission, provided that the dispute relates to them.

6.4.4 Master Builders considers recognition of the problem welcome. The FWC should deal with disputes regarding the frequency of union visits to worksites for discussion purposes. However, we have concerns about what amounts to "an unreasonable diversion of an occupier's critical resources". This term appears to place a high threshold on the FWC making an order, although that proposition is entirely uncertain until a test case occurs. The Government should not introduce opaque expressions into the FW Act. This is

exemplified in the notion of a 'critical resource'. Even defining that term will lead to disputes about the application of the provision and at the least the word "critical" should be deleted.

7 Greenfields Agreements

7.1 As stated earlier, the Bill should contain provisions which reform aspects of the law about making greenfields agreements. The FW Act provides for the creation of a 'greenfields agreement' where a genuine new enterprise, project or undertaking is to be established, and none of the employees who will work on the project have been engaged.[6] The current drafting of the FW Act reflects several of Master Builders' recommendations about greenfields agreements, such as the removal of the requirement to notify all relevant unions when negotiating such an agreement[7] and amendments allowing for their execution without requiring the consent of every union with potential coverage over the prospective employees.[8] Those changes to the original Bill were designed to ensure that greenfields agreement negotiations focussed on the genuine needs of a particular enterprise and its future employees, rather than to provide a platform for the rival interests of various unions (often via costly demarcation disputes).

7.2 Nevertheless, it is clear that the FW Act continues to be unduly permissive in relation to demarcation disputes (which most often occur in the context of bargaining for new construction projects) as the decision in *Alfred v Construction, Forestry, Mining and Energy Union*[9] demonstrates. Such cases highlight just one of the dangers of unbalanced enterprise bargaining provisions, in which unions are given mandatory rights to negotiate. One of the fundamental (and in Master Builders' view misguided) presumptions of the FW Act is that union participation in bargaining is necessarily beneficial to employees. While non-greenfields agreements obviously require the involvement of employees (who can either reject a union agreement and/or

[6] FW Act s172(2)(b) and s172(3)(b).

[7] Under the (now removed) proposed section 175 of the FW Bill.

[8] FW Act s12, definition of 'relevant employee organisation'; s182(3).

[9] [2011] FCA 556 (unreported, Tracey J, 2 June 2011). As detailed in the judgment, in that dispute, when one of the subcontractors who was suffering significant economic loss as a result of the industrial conflict asked how long it would continue, they were told by a union organiser: 'It's a CFMEU site. It will go on for as long as we say it will go on' (at para 34).

appoint non-union bargaining representatives),[10] greenfields agreements by their nature exclude these possibilities, given that no employees can have been employed at the time of bargaining and that the agreement cannot be made without the participation of a relevant union with coverage over the prospective employees.[11]

7.3 There are real concerns about the level of power in practice granted to relevant unions under the FW Act greenfields process. In marginal ways, it may be true that union agreements benefit employees, but Master Builders' experience is that non-union enterprise agreements in the building and construction industry largely match the terms and conditions of union agreements and provide for much greater flexibility to employees (given that they are not 'pattern' agreements). However, greenfields agreements cannot be executed without the signature of at least one relevant union[12] (which is often a default choice by virtue of the prospect of demarcation disputes). Unions wield power over not only the terms and conditions on new projects, but even over unrelated negotiations for non-greenfields agreements (by demanding 'side-deals' prior to the execution of the greenfields agreement in question).

7.4 Master Builders calls for penalties for demarcation disputes to be bolstered and for non-union (employer) greenfields agreements to be reintroduced, as were previously available under section 330 of the *Workplace Relations Act 1996* (Cth). Employer greenfields agreements in the construction industry typically included generous terms and conditions, consistent with those paid on similar projects. They also required unions to adopt a more reasonable approach in greenfields agreement negotiations. Importantly, under the FW Act, such employer greenfields agreements would not be able to be detrimental to employees in relation to the safety net (under the NES and modern awards) as the employer would need to comply with the 'better off overall test'.[13]

7.5 The current exclusion of employer greenfields agreements under the FW Act grants unions a secure position from which to demand extravagant terms and conditions. Although greenfields agreements are subject to a 'public interest

[10] FW Act s176(1)(b); s176(1)(c); s178 and s178A.

[11] FW Act s172(2)(b); s172(3)(b) & s182(3).

[12] FW Act s182(3).

[13] FW Act s193(3).

test',[14] this is focussed on the needs of the employees to be covered by the agreement,[15] to the exclusion of the views of affected third parties. The weakness of this test was demonstrated in the failed appeal against the decision to approve the *Victorian Desalination Project Greenfields Agreement 2009*,[16] brought by two persons local to where the desalination plant was being built, on the basis that the conditions under the agreement would distort the local market. The appeal was rejected on the basis that these parties did not have standing.[17] Whilst technically correct, the impact of decisions of this type is to skew local market conditions to such an extent as to place inordinate wage pressures on other industries within the region. The impact on productivity is plain; it is negatively affected. It is for these reasons that Master Builders considers that prevailing community standards must be able to be addressed when approving a greenfields enterprise agreement.

7.6 Master Builders commends these reform proposals to the Committee for development of measures under the Bill or in the context of considering future workplace reform.

8 Conclusion

8.1 The Government's proposed reforms are not balanced. Master Builders does not support the amendments stemming from the Bill which strengthen the role of unions, at an unquantified cost to business.

8.2 At the least the Bill should be deferred until a comprehensive reform package focussing on productivity, including the issue of greenfields agreements, is assembled.

8.3 Deferral of the Bill will enable proper costings of measures, via a RIS, which have far reaching effects, many of which are only able to be speculated about at this point.

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[14] FW Act s187(5)(b).

[15] Supplementary Explanatory Memorandum, *Fair Work Bill 2008* (Cth), states that: 'In assessing the public interest, it would be expected that FWA would take into account the objects of the Act, and the need to ensure that the interests of the employees who are to be employed under the agreement are appropriately represented (clause 118).

[16] [2010] FWAA 85.

[17] Under s604 of the FW Act: *Schinkel v Thiess Degrémont Joint Venture and Ors* [2010] FWAFB 2279.