MASTER BUILDERS
AUSTRALIA

Submission to

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry on the

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

February 2008

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building australia

1.0 INTRODUCTION

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

1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 30,000 members.

1.3 Master Builders is a member of the Australian Chamber of Commerce and Industry (ACCI). Master Builders provided input to the ACCI submission which is endorsed.

2.0 PURPOSE OF THIS SUBMISSION

2.1 The purpose of this submission is to provide feedback to the Senate Inquiry on the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008 (the Bill). Master Builders is committed to working co-operatively with the Government in implementing its industrial relations policy contained in the comprehensive documents "Forward with Fairness" (FWF) and "Forward with Fairness Policy Implementation Plan" (FWFPIP).

2.2 In FWFPIP it was made clear that:

> *The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.*

Master Builders commends this undertaking and in this submission highlights a specific provision where the effect of the Bill may derogate from this proposition: see paragraph 5.12 below. In addition Master Builders sets out its concerns regarding the utility of a number of provisions, particularly having regard to the perceived effects on productivity of a number of items.

2.3 We note that the Committee's Terms of Reference seek for the submissions to focus upon a potential for a wages break out and increased inflationary pressures. In this submission, Master Builders highlights that an amelioration of the building and construction industry workplace reforms will have these effects. Further, productivity has been enhanced by the workplace reforms that have been implemented in the industry. Workplace reform in the building and construction industry and the impact of new agreements in the sector that have assisted with change have generated

major economic benefits for the sector and the economy. For example, in the year following establishment of the Australian Building and Construction Commission (ABCC) construction output increased by 8.5 per cent in real terms, employment rose by 6.1 per cent, productivity rose by 2.3 per cent, and hourly rates of pay increased by 5.1 per cent. The establishment of the ABCC and related reforms, as outlined in Table 1, have provided the commercial sector of the industry with substantial productivity gains. These are highlighted in the next section of this submission.

Table 1: Building and Construction Industry Reform Measures

Reform Measure	Effective Date
Building and Construction Industry Improvement Act, 2005 administered by the Australian Building and Construction Commissioner (ABCC)	• Stricter rules re unlawful industrial action retrospective to 9 March 2005 • ABCC commenced 1 October 2005 • Other provisions took effect 12 September 2005
Building and Construction Industry Improvement Regulations 2005	• 1 October 2005, as amended
National Code of Practice for the Construction Industry Implementation Guidelines	• 1 November 2005 changes significant • June 2006 reissue took into account changes brought about by the amendments to the WRA • Further revision in November 2006 to ensure side deals do not contain prohibited content • Industry Guidelines discontinued (announced by the Government on 12 December 2006)
Independent Contractors Act 2006 *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*	• Commenced 1 March 2007
Independent Contractors Regulations 2007	• Commenced 1 March 2007

3.0 PRODUCTIVITY EFFECTS OF WORKPLACE REFORM

3.1 The 2006-07 financial year was outstanding for the building and construction industry despite continued weakness in the housing sector. The official ABS value of work done was a record $120 billion in 2006-07, an increase of 13.1 per cent on the previous year. Residential building work done was $40.8 billion (note that the ABS figures exclude about $20 billion of mainly smaller renovations work), non-residential building $27.0 billion and engineering construction $52.6 billion. Employment in the construction industry grew 5.4 per cent to reach a level of 937,000 at May 2007. In the year to June 2007, the industry contributed 0.7 percentage points to overall economic growth of 3.3 per cent and 0.5 percentage points to total employment growth of 2.9 per cent.

3.2 There cannot be a turning back of economic reforms, least of all in labour market reform where the effects are now taking hold. Master Builders considers labour market reform an imperative for the building and construction industry and critical to the underpinning of continued economic growth and prosperity.

3.3 The building and construction industry is a key driver in Australia's economy that creates wealth and adds to the well being of its citizens. In that regard Master Builders' members have been, and continue to be, at the forefront of building Australia's economic and social infrastructure.

3.4 The challenge ahead can be seen in Master Builders 10 year estimates for the building and construction industry. The cumulative construction task over the next decade will see $1.7 trillion of work done in chain volume (or constant price) terms. For the residential building sector this will involve an estimated $816 billion of work done over the same period, and for the non-residential building and construction sectors, including engineering construction, an estimated $884 billion.

3.5 The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by more than 200,000 to around 1.2 million employees over the next decade.

3.6 An investment task of this magnitude, to be fully realised, can only occur in an environment of industrial harmony and rising productivity, if we are to avoid cost blow-outs and wage inflation, as well as ensuring projects are completed on time and within budget.

3.7 A flexible labour market is essential for such an outcome, as has been the case since the introduction of the building and construction industry-specific reforms and the broader workplace relations reforms that have delivered:

3.7.1 Fewer industrial disputes. Annual days lost in the construction industry fell to 15,200 in 2006. This compares to 89,400 in 2005 and an annual average well in excess of 100,000 in the previous 5 years. Working days lost per 1,000 construction employees fell from 154 in the year preceding reform to 14 in 2006-07.

3.7.2 Costs related to disputation have fallen in line with the decline in working days lost i.e. in the order of 85 per cent from previous levels.

3.7.3 Construction industry employees have increased aggregate earnings by $18 million per annum via the benefits of fewer working days lost through industrial action.

3.7.4 As mentioned earlier in this submission, in the year following establishment of the Australian Building and Construction Commission construction output increased by 8.5 per cent in real terms, employment rose by 6.1 per cent, productivity rose by 2.3 per cent and hourly rates of pay increased by 5.1 per cent.

3.7.5 Independent economic analysis of industry productivity by Econtech found building and construction reforms delivered a large dividend to the Australian community.

3.7.6 Econtech reported industry benefits via reduced construction costs, higher productivity and fewer strikes, and economy-wide benefits of lower inflation and higher economic growth.

3.8 The long period of sustained industry and economy-wide growth is currently delivering challenges in the form of capacity constraints, skills shortages and inflationary pressures. Strong demand and high oil prices will continue to put in jeopardy the Reserve Bank's inflation target.

3.9 Monetary policy continues to be tightened suggesting that Australia has not reached the peak in the interest rate cycle. There would be an increased tightening bias if there was to be a wages break out. Wage increases not supported by productivity increases would feed straight into price inflation prompting the Reserve Bank to move interest rates sharply higher, thereby increasing the risk of a slowing economy, if not a recession.

3.10 In this context, industrial relations remains a key policy area, with recent threats by building unions to "recover" pay and conditions allegedly lost under the previous Government: a direct challenge to the new Government. According to reports in the Australian Financial Review[1] the CFMEU has no intention of heeding calls for wage restraint.

3.11 Hourly rates of pay in the construction industry have been increasing by around 5 per cent per annum over the past few years, ahead of increases in other sectors. Building union claims for a $150 a week pay rise would not only be disastrous for the industry should they be gained, but would spark high wage demands on a much wider front and the risk of a concomitant inflation breakout. This is especially the case in the light of the release of recent data about average weekly earnings.[2] The average weekly wage for all sectors grew by 4.7% but in the building and construction industry that figure was 11.6% for the year ended November 2007. The increase is in part fuelled by skills shortages but the level of increase clearly shows that during a time when the industry enjoyed increased productivity, workers also benefited.

3.12 The Government must rebuff economically unsustainable union demands thereby demonstrating competency in terms of managing the economy. Master Builders does not believe that in general the Bill will detract from this process save in the ways set out below.

4.0 BROAD OUTLINE OF THE BILL

4.1 The Bill is divided into seven (7) Schedules, as follows:

Schedule 1 —Workplace agreements and the no-disadvantage test

i) Part 1—Main amendments
ii) Part 2—Transitional matters
iii) Part 3—Other amendments of the Workplace Relations Act
iv) Part 4—Amendments of other Acts

Schedule 2 —Awards

i) Part 1—Award modernisation
ii) Part 2—Repeal of award rationalisation and award simplification provisions

Schedule 3—Functions of the Australian Fair Pay Commission

Schedule 4—Repeal of provisions for Workplace Relations Fact Sheet

[1] M Skulley *Forget Wage Restraint, Says Union* AFR 20 February 2008 p13
[2] ABS catalogue 6302.0

Schedule 5—Transitional arrangements for existing pre-reform Federal agreements etc.

Schedule 6—Notional agreements preserving State awards

Schedule 7—Transitionally registered associations

4.2 The major part of this submission deals with Schedule 1 and the issue of agreement making. Bargaining should not be constrained by administrative procedures which engender delays and unnecessary complexity. Master Builders advocates that the changes suggested in this submission will assist with business certainty and the enhancement of productivity in the context of the pivotal function of the workplace relations system: the making of agreements.

5.0 WORKPLACE AGREEMENTS AND THE NO DISADVANTAGE TEST

5.1 Master Builders notes that the Government has not made the legislation retrospective and that Australian Workplace Agreements (AWAs) may be made up to the date of passage of the legislation. We support this aspect of the changes to the law. We note that Schedule 1 comprises the main part of the Bill and that there are a number of provisions which are of a highly technical nature, a matter that arises from the transitioning process. We have therefore limited our comments to some matters where we believe the Bill may be strengthened but we have also indicated continued policy support for a form of individual statutory agreement.

5.2 Whilst Master Builders supports the use of individual statutory agreements, we understand the Government's position with regard to the abolition of AWAs and the gradual phasing out of individual statutory agreements. We note the creation of Individual Transitional Employment Agreements (ITEAs) pursuant to the proposed new section 326 with repeal of the current section 326 relating to AWAs. The criteria in proposed section 326(1) and 326(2) are such that users of AWAs as at 1 December 2007 will be able to make use of ITEAs by entering into same with some categories of employees up to 31 December 2009, the nominal expiry date for this form of agreement, subject to the following criteria:

- an existing employee employed under an ITEA, an AWA, a 'pre-reform AWA', an individual preserved State agreement or an employment agreement within the meaning of section 887, or
- a new employee who has not previously been employed by that employer.

5.3 The use of ITEAs in the building and construction industry will be curtailed by the second criterion. The predominant method of employment in the industry is by daily hire. This form of employment is established in building and construction industry awards, including the *National Building and Construction Industry Award* 2000 (NBCIA). It envisages that employment may be terminated at the end of each day or shift by the employer giving the employee one day's notice and vice versa. The engagement of workers is often terminated at the end of a project and the workers engaged for another project. The restriction on use of ITEAs because of previous employment by the employer is thus more problematic for the building and construction industry than in other industries. We ask that the Bill be amended so that the requirement for no prior employment with the employer is deleted. This is consistent with FWFIP at page 6 where no mention of the restriction in question is made.

5.4 ITEAs will not be a component of the new industrial relations system that will come into effect in January 2010. Master Builders advocates that the underlying safety net is the important consideration when assessing whether or not an industrial instrument is fair. There is nothing per se unfair in the use of individual statutory agreements and, for this reason, the Master Builders' policy position is that employees and employers from January 2010 should continue to be permitted the flexibility to decide what type of agreement best suits their needs and circumstances as long as the relevant statutory safety net requirements have been met.

5.5. We note that the Bill will replace the current "fairness" test with a new no disadvantage test that operates for ITEAs and collective agreements. Whilst it is substantively different from the "fairness" test the statutory provisions for its application build upon the architecture of the fairness test. We believe that this has meant that in a number of areas improvements in process could be made.

5.6 Master Builders refers to proposed section 346C. Whilst the Explanatory Memorandum states at page 6 that the no disadvantage test to be introduced will relate to "future agreements" the broad words used in section 346(1) in particular could be taken to mean that existing agreements must meet the new test. This interpretation is derived from the use of the words "in operation" in proposed section 346C(1) Master Builders suggests that,

for the sake of clarity, the subsection specifically exclude workplace agreements made before the commencement of the legislation.

5.7 Proposed subsections 346D(1) and 346D(2) would require the Workplace Authority Director to be satisfied that an ITEA and a collective agreement respectively would not result, on balance, in a reduction in the employee's overall terms and conditions of employment under any reference instrument relating to the employee.

5.8 Reference instrument would have the meaning set out in proposed section 346E. Master Builders does not believe that the provision requires the use of the expression "would not result" as it implies the notion of a future assessment. The test is similar to the no disadvantage test that applied prior to the Work Choices amendments to the Act. Master Builders advocates that, as soon as possible, a tool similar to the Award based "calculators" be re-introduced as a basis for assessing agreements. Whilst this not a matter squarely encompassed by the Bill, this step would reinforce the idea of objective and transparent assessments which Master Builders supports.

5.9 Master Builders also advocates that the note concerning the function of the Australian Fair Pay and Conditions Standard that appears as note 1 to proposed section 346D should be elevated to a statutory provision. This is because the wage rates contained in Pay Scales are obviously a necessary component of applying the new test. Without specific reference to their interaction with the relevant reference instrument, there is doubt as to the ability of the Workplace Director to make the assessment that agreements which contain grossed up rates of pay have overall not disadvantaged an employee or group of employees when looking at the interaction of wage rates and any penalty rate provisions contained in a particular reference instrument.

5.10 Most workplace agreements will come into operation 7 days after the date of the issue of a notice by the Workplace Authority that the agreement or variation has passed the no disadvantage test. The limited number of agreements which operate from date of lodgement are set out in proposed section 346S. Master Builders is concerned that there is no time scale for the approval process and that a large number of agreements that employers and employees may believe have concluded may need to be re-opened at a substantial period beyond their negotiation or, that employers

and employees will have to wait a substantial period of time before the new agreement, negotiated say months prior, in fact takes effect. Accordingly, Master Builders advocates that there be a maximum specified time period within which the Workplace Authority Directory must discharge the function of notifying compliance or otherwise with the no disadvantage test. If no such period is set out in the legislation then it should be imposed by Regulations. Master Builders believes that business efficiency will be enhanced if the required maximum period for assessment against the no disadvantage test is thirty days, the period espoused in the Master Builders' 2007 Workplace Relations Blueprint entitled *Working Together*, a copy of which is attached as a separate document at Attachment 1.

5.11 In the context of providing the necessary business certainty to employers and employees, Master Builders also proposes that registered organisations should be provided with the opportunity of a mechanism for certifying the fact that, in their opinion, any agreement lodged with the Workplace Authority passes the no disadvantage test. The relevant agreement or agreements can then be fast tracked. If the registered organisation makes a mistake more than a particular number of times, their right to certify may be taken away, with an intermittent audit of the certification process. This will alleviate the current difficulties which the Authority has in processing agreements, albeit noting the recent comments of the Director where she said that her agency had sufficient resources to process agreements within three months after they were lodged.[3] This period is obviously three times longer than the period proposed by Master Builders: hence the suggestion concerning registered organisation certification.

5.12 Master Builders refers to proposed section 346G which deals with designated Awards. Master Builders does not consider that proposed section 346G is a provision that is needed especially given the short duration of transition. This permits the Workplace Authority director, subject to the specified criteria, to later change the award designation. This change may potentially have an adverse impact on employers if, for example, the subsequent award had higher casual rates of pay with all of the difficulties that may arise from the point of view of underpayment of wages claims and the like.

[3] Steven Scott *Scrappy Fight Over AWAs* Australian Financial Review 22 February 2008 p20

5.13 We refer to proposed section 346J. This provision sets out matters to be taken into account by the Workplace Authority Director when assessing agreements. Proposed section 346J(1)(a) stipulates that the Director must have regard to the "work obligations" of the employee or employees under the particular agreement. Whilst the Explanatory Memorandum to the Bill seems to limit this phrase to rostering arrangement and shift patterns, the phrase is not a term of art in industrial relations. The phrase carries with it the need to assess the entire range of duties placed upon an employee and is thus confusing in the absence of the more specific words used in the Explanatory Memorandum. The phrase should be replaced with the idea conveyed by the Explanatory Memorandum that is the patterns or hours of work of the employee or employees.

5.14 Master Builders notes the provisions of proposed section 347A. The Explanatory Memorandum makes plain the effects of this provision. An employer will contravene a civil remedy provision where, amongst other things, there has not been employee approval in strict accordance with Division 4 of Part 8 of the Act. There should be some amelioration of this position, especially for small business. For example, if a small builder enters into a collective agreement with its workforce and there is a vacancy, say, in one skilled trade then on one interpretation of this provision the agreement cannot be approved until that vacancy is filled. Where there is a category of work that an employer intends to fill, and documentary or other evidence of that intention is available, there should be a discretion vested in the Workplace Authority to waive the strict terms of Division 4. This problem is compounded when the issue of employees in specialist occupations is noted. Previously they may have been engaged on AWAs but the employer may no longer have the capacity to enter into ITEAs because, for example, of the issues raised in paragraph 5.3 of this submission.

5.15 Master Builders notes that section 355 of the Act is to be repealed. However, part of the rationale for this provision is a matter that is of great importance to the building and construction industry. Paragraph 1010 of the Explanatory Memorandum to the original WorkChoices Bill sets out the vital rationale for the prohibition. This is highly relevant for efficiency and certainty. The paragraph, amongst other things, stipulates that:

It is not intended that parties be able to 'call up' awards or agreements that were in operation at a much earlier date eg a 2006 agreement attempting to 'call up' an award made in 1988.

5.16 This prohibition was part of the industrial armoury which prevented the calling up of the 1990 NBCIA or the calling up of prior agreements that had as a part of their terms adherence to pattern agreements such as the Victorian Building Industry Agreement. Master Builders therefore proposes that the repeal of current section 337(6) and its replacement with the requirement that there be "ready access" to the called up award or agreement should be modified to proscribe the calling up of pre-simplified Awards or agreements that would constitute the basis for a pattern agreement. In FWFIP it is stipulated at page 10 that an employer and an employee may agree to include some or all provisions from a **relevant** award into a common law agreement or may agree to choose to make a collective agreement. The current transitional or pre-reform Awards should be considered relevant, not a version of an Award that was made a considerable time ago and which is intended to be used as an instrument to stifle flexibility. Accordingly, the relevant proscription would not offend the Government's policy but would substantially assist with productivity by not permitting employers to be bound to outmoded workplace relations instruments. The current provision has assisted markedly in the productivity effect mentioned earlier and we are concerned that its repeal flags a trend away from such provisions. This move increases the risk of an amelioration of reform.

6.0 AWARDS

6.1 Master Builders fully supports the process of Award modernisation as well as the terms of the modernisation request. Master Builders does, however, believe that the National Employment Standards (NES) should contain some matters that facilitate flexibility, an issue that we will be communicating in the Master Builders' response to the discussion paper about the NES. In the past, Awards in the building and construction industry have prevented respondents from operating flexibly and they have been instruments of constraint. This is not a situation that should occur in the future, as it will severely affect productivity. This issue is especially important for the housing sector where issues of affordability are reaching crisis proportions.

6.2 Master Builders notes that in the Award modernisation request published in the Explanatory Memorandum to the Bill, paragraph 28 states that a provision of a modern Award cannot operate inconsistently with a term of the proposed NES. In a literal sense, for example, an averaging of hours over 12 months is inconsistent with the hours provision of the NES. Accordingly, the NES by its terms should recognise the potential for flexibility where that notion would enhance productivity. We will expand upon this argument in our submission on the NES discussion paper.

6.3 Master Builders notes that proposed section 576T would permit state and territory differences for a period up to 5 years from the creation of a modern award. Master Builders commends this provision in providing sufficient time for the regularisation of Award terms, especially those provisions relating to apprentices and trainees where a large variance between states and territories currently exist.

7.0 FUNCTIONS OF THE AUSTRALIAN FAIR PAY COMMISSION

7.1 Master Builders previously called for the publication of Pay Scales in a form where minimum wage rates were legally certain. Controversy about wage rates in the building and construction industry remains, given that differences still exist between the authorities and Master Builders relating to the calculation of rates of pay and what has or has not translated to the idea of a base periodic rate of pay and what remains as an Award allowance.

7.2 In this context, Master Builders believes that the allocation of sufficient resources to properly publish Pay Scales under the authority of the Australian Fair Pay Commission would be beneficial for business certainty and would prevent potential litigation. We recommend that this function be required to be fulfilled by the Commission.

8.0 CONCLUSION

Master Builders has sought to highlight areas where the highly complex transitional legislation may be improved to enhance productivity and business certainty. This is especially the case with agreement making. In this submission, we have highlighted the issues of the importance of certainty for employers, the need for flexibility in agreement making, transparency in process and the fundamental notion of productivity improvement, particularly in the context of

containing union demands and hence inflation. We would be happy to elaborate upon these matters in oral hearings.

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ATTACHMENT 1

(refers to separate attachment in email)