Master Builders Australia

Submission to the Senate Education and Employment Standing Committee

on

Fair Work Amendment (Remaining 2014 Measures) Bill 2015

22 December 2015

MASTER BUILDERS AUSTRALIA

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1 Introduction

1.1 This submission is made on behalf of Master Builders Australia Ltd.

1.2 Master Builders Australia (Master Builders) 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 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

1.3 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 On 3 December 2015, the Senate referred an inquiry into the provisions of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (the 2015 Bill) to the Senate Education and Employment Legislation Committee (the Committee) for inquiry and report by 4 February 2016. The closing date for submissions to the Committee's inquiry is 22 December 2015**.**

2.2 Previously, on 6 March 2014 the Senate referred the provisions of the Fair Work Amendment Bill 2014 (2014 Bill) for inquiry and report by 5 June 2014 to the Senate Education and Employment Legislation Committee. Master Builders provided a submission to the inquiry. This inquiry covers the same ground as that inquiry.

2.3 The 2015 Bill contains the elements of the 2014 Bill that were not legislated (even though in a number of instances in a form different from the original text of the 2014 Bill). The *Fair Work Amendment Act, 2015* (Cth) (Fair Work Amendment Act 2015) was given Royal Assent on 26 November 2015 with its substantive provisions commencing on 27 November 2015.

2.4 As with the 2014 Bill, the 2015 Bill makes amendments to the *Fair Work Act 2009* (FW Act) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws.*[1] The 2015 Bill also responds to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*[2] review report (Review Panel Report) into the operation of the *Fair Work Act* 2009 (FW Act) by the Fair Work Review Panel (Panel), although it is not confined to those recommendations, nor does it take up all of those recommendations.

2.5 Just as Master Builders supported the 2014 Bill, we support the 2015 Bill.

2.6 This submission sets out Master Builders' views on the provisions of the 2015 Bill. Whilst the direction of reform is strongly supported, the Bill represents only a very small proportion of the necessary reform agenda required to overhaul the flawed FW Act. Master Builders has elsewhere set out in some detail its view of the range of reforms required, particularly in its submissions to the Productivity Commission on that Commission's reference on the workplace relations framework.[3]

2.7 Despite the support expressed for the changes set out in the 2015 Bill, more industrial relations reform is needed to restore balance to the industrial relations system. Specific reforms for the building and construction industry are, in particular, vital to restore the rule of law in the industry. It is imperative that the Parliament passes the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 as well as any appropriate law reform measures recommended by the Royal Commission into Trade Union Governance and Corruption.

2.8 This submission contains discussion under the headings set out in Schedule 1 of the 2015 Bill and Schedule 2 transitional provisions. Master Builders continues to rely on the submission dated 24 April 2014 (2014 Submission) on the 2014 Bill which is attached at Attachment A. This submission revisits some of the issues raised in the 2014 Submission but, for the sake of

[1] http://www.liberal.org.au/improving-fair-work-laws

[2] http://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation

[3] http://www.pc.gov.au/__data/assets/pdf_file/0011/188192/sub0157-workplace-relations.pdf

simplicity, emphasises the substantive points that need to be updated from that submission or where particular matters fall well short of required reform. The 2015 Bill, whilst welcomed, represents a minor step towards workplace reform.

3 Payment for Annual Leave

3.1 Part 1 of Schedule 1 to the Bill amends section 90 of the Fair Work Act to provide that on termination of employment, untaken annual leave is paid out at the employee's base rate of pay. The amendment implements the Panel recommendation 6.

3.2 Importantly, Item 3 in Part 1 would substitute a new subsection 90(2). As expressed in the Explanatory Memorandum for the 2015 Bill (EM), new subsection 90(2) provides that if an employee has a period of untaken paid annual leave at the time when the employment of the employee ends:

- the employer must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and
- that hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

3.3 Again as expressed in the EM, the amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.

3.4 Master Builders submits that the reform does not go far enough. There is no policy justification for a variable safety net in relation to this issue. Having a different standard in different awards just adds needless complexity to modern awards and adds to the litigation burden of the modern award review process. That process is slow and adds unnecessary complexity to the safety net. The policy position established by this sensible amendment should be applied across the safety net without modification for the purposes of efficiency and simplicity.

3.5 As with Master Builders' comments on the 2014 Bill, we recommend that the amendment be changed so that the new standard established is mandated for all industrial instruments with a grandfathering period should that reform disadvantage employees currently governed by a different standard.

4 Taking or Accruing Leave Whilst Receiving Workers' Compensation

4.1 As set out in the EM, Part 2 of Schedule 1 to the Bill repeals subsection 130(2) of the FW Act. The effect of this is that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the FW Act during the compensation period. The amendment in this Part implements Panel recommendation 2 and should be uncontroversial. In effect, the amendment would restore fairness. If a worker is not at work because of being injured, then entitlements relating to attendance at work should not be payable.

4.2 As Master Builders indicated in section 5 of the 2014 Submission:

> *Master Builders considers that the manner in which s130 currently interacts with State and Territory workers' compensation laws and with modern awards/enterprise agreements is overly complex and difficult. Importantly, currently s130(2) sets out that s130(1) does not prevent an employee from taking or accruing leave if this is permitted by state and territory workers' compensation laws. Accordingly, currently under the FW Act an examination of the terms of State and Territory workers' compensation regimes is required to answer the question as to whether or not an employee on a compensated absence is entitled to accrue leave. This is not a simple exercise. State and Territory law does not in a number of instances clearly address this matter, adding to current confusion.*

4.3 The complexity of this area of the law as expressed in the extract at paragraph 4.2 has recently been reinforced by the decision in *NSW Nurses and Midwives Association v Anglican Care*[4] (*Anglican Care*). Under the provision the subject of the proposed amendment, section 130 FW Act, an employee is prevented from taking or accruing leave when the employee is absent from work because of a personal illness or injury and for which they are receiving compensation payable under a law regarding workers' compensation. However, where a specific compensation law permits an

[4] [2014] FCCA 2580

employee to take or accrue leave, then the FW Act exemption does not apply. In those circumstances, an employee will be permitted to take or accrue leave under the FW Act whilst receiving workers' compensation.

4.4 In *Anglican Care*, the judge construed the relevant statute beneficially so that the employee was able to accrue leave whilst receiving workers compensation. The interpretation could be construed as specific to the NSW statute or be applied more generally, although no definitive answer to whether or not the decision is to be confined to NSW is able to be made until it receives further consideration by other courts. Master Builders has raised this question with the Fair Work Ombudsman because of the manner in which the judge reached her conclusions. We indicate that Judge Emmett in *Anglican Care* accepted that the NSW workers' compensation statute did not create an express right to receive annual leave payments during receipt of workers' compensation, but that the section expressly provided the opportunity for the worker to receive both workers' compensation and accrue annual leave. Therefore, Her Honour held that a 'beneficial construction' of the relevant provision permits the accrual of annual leave payments while on workers' compensation and that the FW Act therefore gives permission for the worker to accrue annual leave whilst on workers compensation under the NSW statute.

4.5 This broad interpretation may or may not be accepted by courts in other jurisdictions. Accordingly, the necessity of the change in the law proposed in the 2015 Bill is emphasised by the decision in *Anglican Care*. Its passage is made more important as a means of clarifying the law.

5 Individual Flexibility Arrangements (IFAs)

5.1 Master Builders supports the concept and rationale for IFAs. At present under the FW Act, every modern award and enterprise agreement must contain a flexibility term that allows an employer and an individual employee to make an individual flexibility arrangement that varies the effect of certain terms of the modern award or agreement to meet their genuine needs. During the course of hearings on the 2014 Bill, a number of submissions were made that IFAs presented an opportunity for employees to be exploited by way of "trading away" their terms and conditions. In Part 4 of Chapter 2 of the Committee's

Report on the 2014 Bill,[5] the evidence from the Department was that the FW Act's protections do not permit exploitation, a matter that Master Builders endorses.

5.2 The scope of an enterprise agreement flexibility term is a matter for bargaining but in the building and construction industry, with the CFMEU's pressure tactics, the IFAs permitted to be implemented have been narrowed to insignificant, trivial matters. This underlines the need for industry specific legislation.

5.3 As expressed in the EM, the amendments in Part 3 of Schedule 1 respond to recommendations 9, 11, 12 and 24 made by the Panel. The Government's intention is that the changes will provide clarity and certainty for employers and employees, whilst maintaining the current protections in the FW Act. Master Builders submits that the changes are straight forward and that there is no intention or facilitation of "exploitation" of employees. The Panel ignored the lack of genuine flexibility of IFAs that form part of enterprise agreements, especially those with unions as a party. As a result, the reforms set out in the 2015 Bill are a worthwhile step in the right direction but fall short of the level of required change. All of the points made in the 2014 Submission remain relevant.

6 Transfer of Business

6.1 As Master Builders mentions in the 2014 Submission, the Panel per its Recommendation 38 recommended that the FW Act be amended to make it clear that when employees, on their own initiative, seek to transfer to an associated entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer. Items 19 and 20 of the 2015 Bill implement that recommendation.

6.2 This is one minor reform in an area that is fundamentally flawed. The sensible reform should be undisputed. Master Builders believes that the notions of simplicity, ease of understanding and practical application have

[5] *Fair Work Amendment Bill 2014 [Provisions]* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Work_Amendment/Report/index

been set aside in this area of the law. It is anticipated that the Productivity Commission will recommend broad changes.

6.3 As Master Builders said in its submission to the Productivity Commission:

> *Transfer of Business rules under the FW Act are dense and difficult to apply. This particular part of the legislation has proved disappointing as it overturned the long established and well understood laws regarding transmission of business. The preexisting laws operated on the simple premise that a person could not transfer a business and thereby avoid their industrial obligations. The FW Act has expanded the reach of these laws to circumstances where it cannot reasonably be said that a business has actually been transferred. Moreover, it creates a framework that delivers absurd outcomes and which are unfair to employers and which have restricted opportunities for employees.*[6]

6.4 Master Builders would also recommend that, in keeping with section 580(4) of the former *Workplace Relations Act 1996* (Cth), the transmission period be limited to a period of 12 months as follows:

> *The period of 12 months after the time of transmission is the transmission period for the purposes of this Part.*

6.5 This proposed amendment is congruous with recommendation 26.3 of the Productivity Commission's recent report into the Workplace Relations Framework. [7]

7 Right of Entry (ROE)

7.1 As expressed in the EM, the 2015 Bill will have the following effects on ROE law:

- repeal amendments made by the Fair Work Amendment Act 2013 that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
- provide for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting

[6] Above note 3 at page 68

[7] http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf at page 841

interviews with one or more employees or Textile, Clothing and Footwear award workers;

- repeal amendments made by the Fair Work Amendment Act 2013 relating to the default location of interviews and discussions and reinstating pre-existing rules; and

- expand the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

7.2 Section 10 of the 2014 Submission deals with this issue. We maintain the arguments of the submission. As expressed, this area of the law requires reform. RoE is the subject of frequent abuse by the CFMEU, particularly on false safety grounds.

7.3 Master Builders in the main submission made to the Productivity Commission on this issue (noting that the position with the Queensland legislation mentioned in this extract has now been reversed) said:

> *Union officials can lawfully enter construction sites under both the FW Act and model WHS legislation. Respectively, the FW Act allows for industrial organising or discussions with employees or investigations about employment law breaches, while model WHS legislation allows for safety consultations with workers or investigations about safety breaches. The most common rights of entry exercised by unions in the construction industry are investigative rights of entry under model WHS legislation, which provide for an extremely broad entry regime. Unlike the FW Act, which requires 24 hours advance written notice prior to entry, other than in Queensland, the model WHS legislation does not require any advance notice prior to investigative entry (and the wide powers entailed). This severely limits an employer's ability to manage any illegitimate disruption. Similarly, unlike the investigative regime under the FW Act (which limits investigations to breaches relating to actual union members) the WHS Act entitles union officials to enter a workplace where any potential union member (rather than an actual union member) might perform work. This provides unions with virtually industry-wide rights to enter workplaces, regardless of whether they actually represent employee-members in the workplace concerned.*[8]

7.4 Master Builders' Board has a policy on right of entry that is at Attachment B. It contains a number of recommendations for reform in this area of the law which exceed those currently set out in the 2015 Bill. Having said that, the

[8] Ibid at page 70

reforms contained in the 2015 Bill, with the rationale for their introduction as set out in the 2014 Submission, would be a good start to necessary reform. Master Builders agrees with the conclusion set out in the Committee's report on the 2014 Bill at paragraph 2.85 that the proposed reform creates an appropriate balance bounded by "the ability of employees to participate in and be represented by trade unions, but also the ability of employers to conduct their businesses without unnecessary or inappropriate burdens."[9]

8 FWC Hearings and Conferences

8.1 Part 6 of Schedule 1 of the Bill would change the law so that, subject to certain conditions, the FWC would not be required to hold a hearing or conduct a conference, when determining whether to dismiss an unfair dismissal application under section 399A or section 587 FW Act. The amendments would implement the Panel recommendation 43.

8.2 As stated at section 11 of the 2014 Submission these sensible changes are supported.

9 Application and Transitional Provisions

9.1 Schedule 2 would insert a new Schedule 5A at the end of the FW Act to make application and transitional provisions.

9.2 Master Builders supports these provisions and submits that they provide the required certainty about the commencement of the reforms in the 2015 Bill.

10 Conclusion

10.1 Reform of workplace relations in Australia is a necessity if the balance in the FW Act is to be restored. The reforms proposed by the 2015 Bill are merely a good start to the reform process rather than a fundamental change to workplace law.

10.2 Master Builders strongly recommends that the Committee endorse the passage of the 2015 Bill.

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[9] Note 5 above