

Master Builders Australia

Submission to the Senate Education and
Employment Legislation Committee

on

Fair Entitlements Guarantee Amendment Bill 2014

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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 124 years the movement has grown to over 32,000 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

On 4 September 2014, the Senate referred the Fair Entitlements Guarantee Amendment Bill 2014 (the Bill) to the Senate Education and Employment Legislation Committee (the Committee) for inquiry and report. The time frame for the inquiry is short. The closing date for submissions is 12 September 2014 with a report date of 24 September 2014. This submission responds to the Committee's terms of reference on the Bill. The Bill will amend the *Fair Entitlements Guarantee Act 2012* (the Act). Master Builders supports the changes proposed.

3 Changes to the Act – Cap on Redundancy

- 3.1 The Act provides financial assistance to cover certain unpaid employment entitlements for eligible employees who lose their job due to the liquidation or bankruptcy of their employer. Relevant for the building and construction industry is the exclusion of contractors, subcontractors and agents (note section 10 of the Act sets out the conditions for eligibility generally for financial assistance known in the Act as "an advance"). The statutory scheme provides, amongst other things, assistance for up to 13 weeks of unpaid wages, unpaid annual and long service leave; up to five weeks' payment in lieu of notice; and redundancy pay, which is currently capped at four weeks per full year of service.

- 3.2 The Bill, per Item 6 affecting s23(b) of the Act, will have the effect of changing the Act so that the maximum redundancy pay entitlement under the statutory scheme aligns with the maximum set by the National Employment Standards (NES) contained in the *Fair Work Act 2009 (Cth)* (FW Act). The new maximum redundancy pay entitlement will be 16 weeks' pay. We make two points about this provision: first that the general redundancy standard for the building and construction industry remains out of step with the general community standard and this reinforcement of the community standard brings the matter into sharp relief. Secondly, we note that the provision deals with the problem of moral hazard.
- 3.3 The redundancy scheme for most building and construction industry workers differs from the general community standard for redundancy. The provisions that apply for the industry are expressed in the *Building and Construction General On-Site Award 2010* (On Site Award). Clause 17 of the On-Site Award contains an 'industry specific redundancy scheme'.¹ This displaces the general redundancy scheme provided for under the NES.² A Full Bench of the Australian Industrial Relations Commission made it clear that 'an industry-specific redundancy scheme can deviate from the NES redundancy prescription in relation to both the circumstances in which the benefits arise and the amount of the benefits'.³ The small business exemption to redundancy under the NES does not apply to employers covered by the On-Site Award: this was made clear in the 2012 Modern Award Review proceedings.⁴
- 3.4 The industry-specific redundancy scheme under the On-Site Award applies much more widely than the scheme set out in the NES. This is because under subclause 17.2 of the On-Site Award a 'redundancy' will be deemed to have occurred whenever an 'employee ceases to be employed... other than for reasons of misconduct or refusal of duty.' Accordingly, even if an employee resigns, they will still be entitled to a redundancy payment.
- 3.5 Master Builders supports the change proposed in the Bill, particularly as it reduces the moral hazard associated with those operators of businesses

¹ FW Act, section 12 & subsection 123(4)(b).

² FW Act, sections 119-123.

³ *Re Award Modernisation* (2009) 181 IR 19; [\[2009\] AIRCFB 345](#), at para 81.

⁴ See [2013] FWC 4576 at para 204.

which might seek to liquidate a company without paying employees in respect of redundancy because of the existence of the safety net. However, in this context, the terms on which redundancy will be paid under the Act's safety net highlight the ongoing inequity of having a separate definition for redundancy in the building and construction industry that is not aligned with the concept of redundancy as generally accepted in the community.

- 3.6 In addition, as stated, the moral hazard point is palpable: redundancy payments attract concessional tax treatment.⁵ Employers who are in financial difficulty will likely not hesitate to fail to pay monies where they are aware (and perhaps share this information with employees) that employees will receive a generous redundancy payment backed by a statutory scheme if a company is liquidated or a business becomes bankrupt. We agree with the comments of the Minister for Education, Mr Christopher Pyne in introducing the Bill where he said that the current payment regime provides:

*an incentive for employers and unions to sign up to unsustainable redundancy entitlements safe in the knowledge that if the company fails the fair entitlements guarantee and the Australian taxpayer will pay for it.*⁶

4 Other Issues

- 4.1 Master Builders supports the other provisions of the Bill which:

- clarify that where a claimant is eligible for an advance under the scheme their initial entitlement will be calculated without reference to amounts required to be withheld by law;
- establish a funding source for certain legal costs associated with applications to the Administrative Appeals Tribunal for review of decisions made by the Department of Employment (the Department);

⁵ See <https://www.ato.gov.au/Individuals/Working/Leaving-a-job/Redundancy-payments/>

⁶ See L. Taylor *Capping redundancy payments fixes 'moral hazard', says Christopher Pyne* <http://www.theguardian.com/world/2014/sep/04/capping-redundancy-payments-fixes-moral-hazard-says-christopher-pyne>

- clarify that the death of a person does not prevent the person being eligible for financial assistance, to enable the next of kin or estate to pursue a claim;
- allow the Secretary of the Department to reduce a claimant's entitlement by the amount of any debts owed prior to the insolvency event happening that they did not take reasonable steps to be paid; and
- clarify that where a debt owed by a claimant to their employer is greater than the employment entitlement to which it relates, it can be offset proportionally against any of the claimant's other employment entitlements that are payable under the scheme.

4.2 Master Builders supports these changes as necessary to inform the efficiency of the scheme established by the Act.

5 Conclusion

As indicated in this submission Master Builders is fully supportive of the changes introduced by the Bill.
