THE FAIR WORK BILL—AGREEMENT MAKING IN THE NEW SYSTEM

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INTRODUCTION

The Fair Work Bill, passed by the Parliament on 20 March 2009 after a tumultuous process in the Senate,[1] radically overhauls the Australian system of workplace agreement making, with an emphasis on collective bargaining. The new agreement making system begins on 1 July 2009, with all aspects of the new legislation set to be in place by 1 January 2010. The Bill has fundamentally changed the agreement making system and provides for new types of agreements, good faith bargaining, new approval processes and new content rules. The distinction between union and non union agreements is no longer recognised. Unions have a statutorily protected role in the agreement making system. Individual agreements have been discarded. This paper discusses some of the major changes, pointing out the positive and negative elements of the new system from an employer perspective, using building and construction industry examples. This paper does not comment extensively on good faith bargaining, a matter considered in detail in other conference papers.

PRODUCTIVITY

Master Builders supports genuine enterprise bargaining[2] where workplace changes to enhance productivity may be introduced into the workplace for the benefit of employees and employers. Enterprise bargaining underpinned by an appropriate safety net must become the mainstay of the Australian industrial relations system, no matter the political party in power. Adherence to this basic tenet will remove much of the 'swing' from the industrial relations pendulum:

The industrial landscape has been subject to large pendulum swings with changes of Government since Federation. This process of continual change causes lots of heart ache for the real users of our industrial system, employers and employees. Changes to the structure of the system are not always accompanied by increases in productivity.[3]

Pattern bargaining modelled on union–imposed terms and conditions that incorporate restrictive work practices is not acceptable to the Australian community. It is this practice that has damaged building and construction industry productivity.[4] Focusing on productivity, however, is important because it demonstrates that industrial relations is not an end in itself; it is an instrumental process.

It is undoubted that there is a link between productivity and workplace bargaining. For example, Tseng and Wooden found that firms where all employees were on enterprise agreements had almost 9 per cent higher levels of productivity than comparable firms where employees relied upon conditions specified in an award.[5] Bargaining works, a view shared by the Australian Council of Trade Unions:

Collective bargaining for workers is a key feature of a fair, modern, democratic society. Collective bargaining promotes improved productivity, better wages outcomes for workers and more cooperative workplaces.[6]

Bargaining has consistently delivered to workers in the building and construction industry the results promoted by the ACTU; for the December 2008 quarter construction agreements comprised 34% of the total, with construction workers enjoying a 5.6% average annualised wage increase per employee compared with the all industries figure of 4.3%.[7] This

sort of outcome is reinforced by more reliable time series data. For example, construction wage costs are currently increasing at 4.6 percent per annum (see Table 1) and workers in the building and construction industry are experiencing higher wage growth than other Australian workers.

Table 1 Construction Price Indices

	Labour Price Index		Implicit Price Deflator	
	Construction	Total Australia	Construction	Total Australia
1998–99	3.3	3.2	2.2	1.3
1999–00	2.9	2.9	4.3	1.6
2000–01	4.4	3.4	6.8	4.5
2001–02	3.4	3.3	1.4	2.5
2002–03	3.5	3.4	3.5	2.1
2003–04	3.7	3.6	5.9	1.3
2004–05	5.2	3.8	6.9	2.3
2005–06	5.0	4.1	5.6	2.7
2006–07	4.7	4.0	7.0	3.0
2007–08	4.6	4.2	5.2	2.8

Source: ABS Cat No 6345.0, 8782.0.65.001, 5206.0 Labour Price Index: Total hourly rates of pay excluding bonuses. Domestic Demand used as Implicit Deflator for Total Australia

The benefits of productivity growth have been eloquently summarised by the Productivity Commission in its 2007–2008 Annual Report:

Productivity growth is important to Australia because, through income growth, it contributes to our community wellbeing. While capital accumulation and increasing labour force participation also increase per capita income growth, productivity growth is the only way of growing the economy without necessarily requiring additional physical inputs.[8]

As Ken Henry has stated: productivity is the principal driver of living standards.[9]

Hence, the primary question to answer in the context of the new workplace bargaining rules in the Fair Work Bill is: will these provisions advance productivity or simply raise the cost of employment? That question is addressed in this paper especially in the light of new content rules. The mandatory involvement of third parties in the bargaining process is an area where Master Builders believes that productivity will suffer. The place of unions in the sun is guaranteed by the legislation and the administering authority has renewed and expanded powers. The manner in which the procedures of bargaining will work in practice is, in many ways, in the hands of those entities.

BROAD TIMING

The Bill provides for the making of enterprise agreements, the new form of collective workplace agreement from 1 July 2009. As stated earlier, the new system does not recognise statutory individual agreements, although ITEAs will be able to be made up to 31 December 2009. The Bill will affect the making of common law agreements by setting a new safety net standard, through the National Employment Standards (NES) combined with the effects of industry or occupation based modern Awards. The NES and modern Awards will take effect from 1 January 2010. Accordingly, the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, introduced into the Parliament on 19 March 2009 and yet to be passed, contains a number of complex provisions to deal with what is defined as the 'bridging period' or the time from when the old laws die and the new safety net arrangements are in place.[10] Let there be no mistake, however, bargaining under *the Workplace Relations Act 1996* (WR Act) will cease on 30 June 2009 and bargaining under the Bill will commence on 1 July 2009. Before 1 January 2010 enterprise agreements will be assessed by Fair Work Australia (FWA) against the no–disadvantage test using a relevant reference instrument such as an unmodernised award. Fair Work Australia is, of course, the new industrial relations 'super body' that takes over the role of the Australian Industrial Relations Commission and, in this particular context, the work of the Workplace Authority. As will be seen from the discussion which follows, FWA is given extraordinary powers under the Bill.

MAIN AGREEMENT TYPES

There is to be no distinction between union or non–union agreements. Enterprise agreements are to be made directly with employees, although the process depends very much upon the role of bargaining representatives. Employees have the right to be represented in the bargaining process by a union or by another person they nominate but, as discussed below, in certain circumstances unions have automatic rights of representation.

Enterprise agreements will be either single–enterprise agreements (clause 172(2)) or multi–enterprise agreements (clause 172(3)). Single enterprise agreements will undoubtedly form the bulk of agreements that are made. The Senate Committee Report on the Bill[11] notes that 'under the new system a single–enterprise agreement, the most common form of enterprise bargaining, will be made between a single employer and some or all of its employees. There is no requirement to seek authorisation or notify FWA when an employer and employees wish to bargain for an agreement on this basis'.[12] This is correct but to the extent that the quotation implies that 'informal' bargaining is open to the parties, this is not the case, as there are a number of formal requirements; these are touched upon in this paper.

A single enterprise agreement can involve more than one employer. Employers will be able to bargain together if they fall within the definition of a single interest employer where FWA authorises them to do so: see clauses 248–252 of the Bill. Single interest employers are two or more employers who operate similarly or share a common interest that may be best served by a single–enterprise agreement; an example used by the Senate committee is franchisees carrying out similar business activities under the same franchise.[13] The extent to which common undertakings will be treated as a single interest will be a matter that will affect the construction industry because, obviously, those companies engaged in activity on site will have the common aim of completing the building or structure. The provisions do fall short, however, of permitting project agreements, which may, however, be contemplated via the use of multi–employer agreements.

Multi–enterprise agreements will be able to be made between two or more unrelated employers and their employees without the current requirement to obtain an authorisation from the administering authority.[14] Certain protections are built in for employers including that protected action is not available where a multi–enterprise agreement is sought (clause 413(2)). Under clause 186(2) before approving a multi–enterprise agreement, FWA must be satisfied that each of the employers was not coerced and genuinely agreed to the agreement. These are useful protections for the building and construction industry where pattern bargaining has been endemic:

> *Pattern bargaining, whereby unions seek to obtain 'mirror' agreements throughout the industry or at particular projects, has been a common feature of the construction industry for many years.*[15]

If unions want to pursue multi–enterprise agreements in order to secure project agreements, they will be faced with two barriers. The first is the major impediment: the Australian Government's National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry[16] which articulate strict criteria for their use.[17] The second is section 64 of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act). Section 64 has the effect of limiting the enforceability of project agreements to where they are entered into as multiple business agreements in accordance with the current law. This provision will obviously need to be made consistent with the Bill or, Master Builders preferred position, the industry specific position is reinforced.

LOW PAID BARGAINING

Controversially, in clauses 241–246, the Bill establishes provisions for the making of multi–enterprise agreements for the low paid. In part, the criticism that has been levelled at the creation of the low paid bargaining stream is that the Bill does not define low paid employees.[18] This has alarmed employer groups because, potentially, people paid at minimum Award rates could be defined as 'low paid' in a relative sense. Does this then mean that they will be able to reach an arbitrated collective agreement? Certainly, the Bill appears to facilitate such an outcome, via low paid determinations.

In this context, another criticism made is that that low paid determinations are a dressed up form of arbitration. Clauses 260–265 kick in after clauses 241–246 which deal with obtaining a low paid authorisation which is a pre–requisite to the making of a low paid determination. Arising from these provisions, the capacity for there to be a binding outcome in respect of a class of workers that are amorphously defined imposed by a third party has engendered strong criticism:

The so–called (and misnamed) low paid bargaining stream will translate into additional costs and the elimination of scope for future agreement making and productivity improvement across highly competitive, often marginal and highly trade exposed sectors of the Australian economy.[19]

Particularly at a time of economic difficulty, reliance on a safety net of fair terms and conditions of employment should be sufficient. The concept of having arbitrated outcomes for a class as ill defined and relative as the 'low paid' is likely to harm productivity by creating uncertainty and unpredictable costs.

GREENFIELDS AGREEMENTS

One of the most substantial changes that have been made to the Bill as passed compared with its terms as initially introduced relate to greenfields agreements.

Greenfields agreements are industrial agreements covering a new project or business undertaking. They set out the terms and conditions of employment of the workforce to be engaged in the project, thus allowing the employer to get a clear picture of the labour costs involved. This adds some certainty to an area fraught with risk. Greenfields agreements are frequently used in the building and construction industry for large infrastructure projects, and they have proved a reliable projection of labour costs, especially over the first twelve months of the project. They are a vital factor in the decision about whether to invest.

They currently can be made in two ways. First they can be made by an employer lodging the agreement with the Workplace Authority and then going about engaging the people to conduct the work. This is an employer greenfields agreement and was put in place for the first time in history under the 2006 WorkChoices amendments to the workplace law. This type of agreement will be abolished when the Fair Work Bill is enacted as part of the Government's mandate to remove the WorkChoices provisions. In its submission to the Senate Education, Employment and Workplace Relations Committee, the Department of Education, Employment and Workplace Relations summarised the Government policy concerning the abolition of employer greenfields agreements, saying that this step ensures that greenfields agreements are 'true agreements' negotiated between the relevant bargaining representatives and made by more than one party.

The second way is for an employer to make a union greenfields agreement. This can be made with one or more unions which are entitled to represent the industrial interests of the workers likely to be covered by the agreement.

The initial provisions in the Bill about greenfields agreements would have killed them off. The process was much too bureaucratic and slow, including a provision that would have engendered demarcation disputes, that is a requirement for employers to notify relevant employee organisations of their intention to make a greenfields agreement. On one interpretation of the initial provisions, it was unclear that an employer could make a greenfields agreement unless it did so with all unions able to enrol an employee likely to be covered by the agreement.

Now, following extensive amendments in the Senate proposed by the Government, the Bill will require two matters to be satisfied before a greenfields agreement is formally approved:

There is to be no distinction between union or non–union agreements. Enterprise agreements are to be made directly with employees, although the process depends very much upon the role of bargaining representatives. Employees have the right to be represented in the bargaining process by a union or by another person they nominate but ... in certain circumstances unions have automatic rights of representation.

Despite the somewhat unclear nature of the public interest test, the fundamental change that has been achieved from the Bill as introduced will mean that greenfields agreements have a future in the agreement making landscape.

it must be made with the union party or parties entitled to represent a majority of the employees likely to be covered by the agreement, and it must be in the public interest that the agreement is approved. There will not be any requirement for an employer wanting to make a greenfields agreement to notify any other unions.

One construction company recently saved $80 million as a result of entering into an agreement with a specific union rather than its rival; under the new rules, this sort of economic good management will be far more difficult if the public interest test opens the door for other unions to bring applications challenging that finding. Despite the somewhat unclear nature of the public interest test,[20] the fundamental change that has been achieved from the Bill as introduced will mean that greenfields agreements have a future in the agreement making landscape. For this, the Government is to be commended.

AGREEMENT CONTENT

Enterprise agreements may be made which deal with what the Bill describes as permitted matters. Clause 172 provides that enterprise agreements may be made about permitted matters as follows:

(1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

The ACTU argued to the Senate Committee that the retention of the 'matters pertaining' test in Clause 172(1)(a) was counterproductive. Their argument was twofold: it has persistently proven to be difficult for parties to identify whether a matter does pertain to the relationship; and the term imports case law that developed in the context of establishing a boundary where it was appropriate for the State to interfere in management prerogative by the exercise of arbitral power. They argued that this boundary is not relevant to the making of agreements.[21] This view was supported by Professor Andrew Stewart and his comments in that regard discussed in the Senate Committee Report.[22] However, the Committee did not move away from retention of this test, merely commenting on the broadened scope of agreement content, particularly with the removal of prohibited content from the industrial landscape:

The committee majority notes the proposed framework expands the range of matters which make up an enterprise agreement. It will allow for a range of matters which were historically included in agreements (which cover the relationship between an employer and a union) which were prohibited under WorkChoices.[23]

Whilst there are arguments to the effect that the law in this area is relatively settled, the inclusion of the 'matters pertaining' test as a limiting factor does permit a great deal of argument about

the applicability of prior cases, as mentioned in the ACTU's criticism. It would be better for the statute to have established a clear boundary on what matters are permitted and what matters are prohibited to avoid uncertainty and litigation.

That factor is made more problematic as the Bill extends the concept of 'matters pertaining to the relationship between employers and employees' to 'matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations' pursuant to paragraph 172(1)(b). Matters that fall within this latter test are also 'permitted matters' for the purposes of agreement content.

The uncertainty surrounding the nature and extent of obligations encompassed by this new test are unwelcome. Although Clause 676 of the Explanatory Memorandum for the Bill provides a list of permitted matters, that is matters that the government has said will be encompassed by this new test, there does not seem to be a discernible basis to found the nature of the 'relationship' mentioned in the clause. In other words, there is little or no basis for labelling the interactions between an employer and a relevant union as a 'relationship' in a formal sense; any contract is not between the employer and a union but between employees and the union or unions of which they are a member. This lack of foundation will lead to arguments about whether or not, for example, a demand to make a one–off cash payment to the union is a matter affecting this relationship.

Unions are provided with the capacity to take protected industrial action in order to advance claims for provisions beneficial to unions—claims which are nothing to do with the relationship between the employer and its employees. The concept that industrial action can be based upon the blatant advancement of a third party interest with potential financial loss to both employers and employees is an element of the Bill that reinforces the ascendancy of unions in the new regime. It will also add nothing to productive work practices.

Clause 253(1) provides that a term of an enterprise agreement has no effect to the extent that:

(a) it is not a term about a permitted matter; or

(b) it is an unlawful term.

Unlawful terms are quite different from non permitted matters. Unlawful terms are set out in clause 194 of the Bill. As well as some specific matters dealt with by subject in that provision, there is a concept introduced which is akin to specifying prohibited content. Objectionable terms are unlawful and are defined as matters that would seek to change the general protections or legal remedies under the Bill or the payment of a bargaining services fee. Because the notion of objectionable terms is advanced in this context, there would seem to be no impediment to make this a rock solid basis upon which to exclude matters that are not acceptable as a part of the reaching of an enterprise agreement. In other words, this idea of an 'objectionable term' ideally would be used to exclude some matters that, for example, obviously negatively affect productivity. To be clear, this is not what the current definition encompasses.

One such area that should have been so labelled relates to the regulation of independent contractors. Master Builders was disappointed that during the Government's consideration of Senate proposed amendments, the Government rejected the regulation of independent contractors as an appropriate unlawful term. The Government had previously indicated quite clearly that it supported independent contractors being regulated outside of the employment relationship and the surrounding laws. However, the Government held to the view that terms relating to conditions or requirements about engaging independent contractors may appropriately be included in enterprise agreements as they sufficiently and legitimately relate to employees' job security (provided such terms do not amount to a general prohibition against the engagement of such contractors). The Government refused to support the amendment making regulation of independent contractor terms and conditions an unlawful term.

Regulation of independent contractors through enterprise agreements has the potential to poorly affect productivity by driving up costs; for example one previously commonly used device of unions was to require a provision in agreements that no contractor could be engaged on terms less favourable than those offered to employees. This could mean that an employer was not only required to pay the contractor's normal hourly rate at a level at least comparable with that of an employee undertaking similar work, but to contribute to, for example, redundancy funds and other funds established for the welfare of employees.

In addition, clauses in agreements often required employers to keep detailed records of all contractors employed on their sites, and make these records available on request to the union to demonstrate compliance with an agreement that contained the 'no less favourable' provision. This

provided unions with a data base of contractors engaged and their detailed records, including about their employees, which enables campaigns to be undertaken by unions with detailed information. The additional record keeping and administration drives up cost without any benefit.

NON PERMITTED MATTERS TO APPEAR IN AGREEMENTS

Despite a particular non–permitted term being ineffective, subclause 253(2) of the Bill makes it clear that the inclusion of a term that is not about a permitted matter does not affect the validity of an enterprise agreement. FWA will not be assessing the content of an agreement, except to determine whether the terms of the agreement contravene the NES (see clause 186(2)) and the other matters set out in Clause 186 including, per Clause 186(4), that the agreement must not contain unlawful terms.

This status of a non permitted matter clause aggravates uncertainty generated by the new tests about permitted matters. For example, given the breadth of the tests set out in clause 172, how is a small business to be aware of whether or not a clause of an agreement contains a permitted matter or otherwise? FWA should either be given the power to delete non–permitted matters or they should be better clarified at law.

Employers supports the principle that matters which are not permitted should be unable to found protected industrial action but the inclusion of those provisions in published and circulated copies of workplace agreements will add to confusion and difficulty in their application in the workplace.[24] Small businesses, in particular, will find it difficult to determine whether a clause is about a permitted matter and this will be a boon for lawyers; it will not assist the process of productive agreement making.

MANDATORY CLAUSES

Clauses 202–205 require two sorts of clauses to be inserted in every enterprise agreement: a flexibility term and a consultation term. Clause 202 states that the flexibility clause must enable an employee and the employer to reach an arrangement varying the effect of the agreement for that employee 'in order to meet the genuine needs of the employee and employer.' Where no such clause appears in an agreement, there will be a model clause specified in regulations which we have not yet seen. The drafting of the model clause will be an important matter.

Clause 203 sets out the requirements to be met by a flexibility term, notably inclusive of a content rule. This rule requires that the terms of the enterprise agreement which may be varied by an individual flexibility arrangement agreed to under the flexibility term are identified or at least their 'effect'. It is difficult to see how this provision will be able mirrored in a model clause unless the model is at some high level of generality. This seems to mean that for some employers it may be strangely useful not to rely upon this specific content rule but, subject to what the model clause provides, seek to use some more general provision in that model clause to make a flexibility agreement. This area deserves close monitoring.

The flexibility agreement provisions also have a protection against third party interference, contrary to some of the other provisions that I have discussed. Clause 203(5) requires the employer to ensure that the flexibility term does not contain a provision that would make the individual flexibility arrangement subject to the consent or approval of a third party. At clause 869 of the Explanatory Memorandum the example is given as follows: 'a flexibility term could not require that an individual flexibility arrangement only be made where a union or a majority of employees in an enterprise agree.' Hence these agreements have the potential to substantially benefit the productivity of an enterprise by permitting individualised changes to an agreement absent third party involvement.

Clause 205 deals with the requirements for a consultation term. It requires the employer to consult with employees about major workplace change that is likely to have a significant effect on the employees. In this context, representation provisions are required. The Explanatory Memorandum for the Bill says that 'a person representing the employees could be an elected employee or a representative from an employee organisation.' This third party approach is the reverse of the specific provision in the flexibility clause.

Unions often press the issue of consultation terms in agreements requiring that their approval be gained or that a majority of employees approve the workplace change before it is introduced. The requirement to include a consultation term increases union power especially in the absence of a provision similar to Clause 203(5).

BARGAINING PROCESS AND SCOPE ORDERS

Bargaining will be largely unregulated where parties voluntarily bargain and reach agreement. However, there remains of course the threat of industrial action as a legitimate means of economic pressure that is able to be

applied by employees/unions to employers. The Bill creates new jurisprudence that will regulate the manner in which bargaining is conducted, that is the good faith bargaining requirements, especially adherence to the matters set out in Clause 228.

Bargaining representatives are obliged to meet the good faith bargaining requirements set out in clause 228, although the provisions of 228(2) make it clear that bargaining representatives are not required to make decisions or to reach agreement on the terms to be included in the enterprise agreement.

Clause 238 confers a right upon bargaining representatives to seek a scope order from FWA. An application for a scope order may be made if the bargaining representative 'has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.'

The making of a scope order could radically alter the coverage of the agreement from that anticipated by employers and could also cut across a majority support determination (discussed below) that is in place. Where a scope order changes the employees who will be covered by an agreement FWA should be required to void any majority support determination and the employees asked to vote again on the issue of collective bargaining.

BARGAINING PROCESS AND UNIONS

The new bargaining regime in the Bill is focussed upon the participation of unions. One employer group has said that unions are now provided with 'an automatic seat at the bargaining table'.[25] This proposition contrasts with what the Government proposed in its pre–election policy. In Forward with Fairness: Policy Implementation Plan, the ALP stated that 'under our proposed system, a union does not have an automatic right to be involved in collective enterprise bargaining'.[26]

Employers are required to bargain with a union concerning non greenfields agreements in two circumstances. The first is where an employer wants an agreement and at least one employee is a member of a union. This obligation arises because it is a requirement of clause 174(3) of the Bill that if an employee is a member of a union and the employee has not appointed another person as a bargaining representative, the union automatically becomes the bargaining representative for that employee. The amendments in the Senate inserted a new Clause 178A into the Bill to specifically provide that an employee is able to revoke the appointment of the bargaining representative in writing. This was a provision that was absent previously and meant that an employee could want the default mechanism to operate, yet be denied the possibility of changing their representative or to nominate someone other than the union once the bargaining process commenced.

This 'default representation right' given to unions also means that where a union was a bargaining agent in respect of the agreement, it has a right to notify FWA that it wants to be covered by the enterprise agreement. So long as this notice is given before FWA approves the agreement, the union is covered by the particular agreement (Clause 183). As expressed in paragraph 753 of the Bill's Explanatory Memorandum, where a union is so covered additional rights under

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the legislation are conferred, such as the ability to enforce the agreement against the employer. Union involvement also expands the permitted matters in the agreement—matters that relate to the relationship between the employer and the union may then be contained in an enterprise agreement, as discussed earlier in this paper.

The second situation in which an employer can be forced to bargain with a union is where an employer is subject to a majority support determination—essentially where a majority of employees vote to establish an agreement. Clause 236(1) makes it clear that a bargaining representative of an employee who will be covered by a proposed single enterprise agreement may apply to FWA for such a determination where the majority of employees who will be covered by the agreement want to bargain with the employer: see Clause 237(2). This process thus means that an employer may be forced to bargain even where the employer does not want to enter into an agreement.

AGREEMENT APPROVAL—TIMING

FWA will be required to approve enterprise agreements. Section 180 and following set out the pre–approval steps and applications for FWA approval. The timing of the pre–approval steps is important. Assume that an employer wants to bargain and initiates that process by holding a meeting with the affected employees. The employer then gives notice to the employees of the right to be represented: clause 173(1). This would need to be within 14 days of the date of the meeting: clause 173(3). Before the employees can vote on an agreement, the employer must ensure that the employees have a copy of the agreement and all materials incorporated by reference in the agreement. The period during which these materials must be available is 7 days before the start of the voting process. You calculate the seven day period by first calculating the time period within which you may request the employees to vote on the agreement which is 21 days after the giving of the notice under clause 173. This is a very long period in some circumstances. Once voted upon by a relevant majority, a bargaining representative must apply to FWA for approval.

Given the requirements placed upon FWA and the history of the poor processing times we currently experience, it is difficult to understand the comment in paragraph 768 of the Explanatory Memorandum that 'it is intended that Fair Work Australia will usually act speedily and informally to approve agreements with most agreements being approved on the papers within seven days.' This is tantamount to wishful thinking. We do not want the processing of agreements to be a drag on the system, as they currently often are, where employers and employees have reached agreement but cannot implement that agreement whilst the approval time clock ticks over. One of the matters which may well slow down FWA is how it will apply the main test that regulates whether or not agreements may be approved.

AGREEMENT APPROVAL—BETTER OFF OVERALL TEST

Clause 186(2)(d) requires FWA to be satisfied that the relevant agreement passes the better off overall test.

Clause 193 of the Bill sets out when an enterprise agreement passes the better off overall test. Subclause 193(1) establishes that an agreement (other than a Greenfields Agreement) passes the better off overall test if FWA is satisfied that each award–covered employee and each prospective–award covered employee would be better off overall, if they were employed under the agreement rather than under the relevant modern award.

Following criticism, including from Master Builders, that the test was a nightmare because of the requirement that an employer was required to establish that each and every employee would be better off than under the award, the government introduced an amendment in the Senate. Clause 193(7) has been inserted. FWA is now given the power to consider the circumstances of classes of employees when satisfying itself that each employee is better off. The Supplementary Explanatory Memorandum indicates that this provision is intended to recognise that, although the enterprise agreement must pass the better off overall test in relation to each employee and prospective employee, FWA may group employees into classes in order to apply the test. This will mean that the test provides a guarantee that the agreement does not undercut the safety net yet may be applied by FWA without undue delay. It recognises that where employees are in the same classification, grade or job level they may be treated as a 'class' for the purposes of the test. With this change, the test has greater utility.

CONCLUSION

From the analysis that has been made of the new agreement making regime, it can be seen that there will be an elevated place in the system for unions and for the FWA. The manner in which the procedures of bargaining will work in practice is, in many ways, in the hands of those groups. Employers have been given an opportunity to use individual flexibility agreements and these

could assist productivity but it is difficult to adjudge that the new powers provided to third parties will lead to employers and employees reaching agreements that better suit their mutual ends. There seems to be no means by which productivity is to be advanced and, in fact, there are a number of measures that will have the opposite effect.

REFERENCES

1. For summary of the process see Senate Passes Fair Work Bill Workplace Express 20 March 2009

2. For the purposes of this paper enterprise bargaining is defined as 'the process of negotiation between an employer and employees (or their representatives) in order to reach an agreement regulating the terms and conditions of employment within a particular enterprise or workplace': Nygh P and Butt P, Concise Australian Legal Dictionary, 2nd Ed, Butterworths, 1998, Sydney.

3. C Platt Forward with Fairness: Has the Pendulum Stopped Swinging? Address to Australian Labour Law Conference 14 November 2008 at p 2.

4. Cth of Australia Final Report of the Royal commission into the Building and Construction Industry 2003 esp at Vol 11 Chapter 1 http://www.royalcombci.gov.au/hearings/reports.asp

5. Y. P Tseng and M Wooden, Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey, Melbourne Institute Working Paper No. 8/01, July 2001, p 28

6. ACTU A Fair Go At Work: Collective Bargaining for Australian Workers Media Brief 13 September 2006

7. Cth of Australia, DEEWR, Trends in Federal Enterprise Bargaining December Quarter 2008 table 5

8. http://www.pc.gov.au/annualreports/annualreport0708 at p 1

9. K Henry, Secretary to the Treasury, Address to the Australian Industry Group Annual National Forum, 14 August 2006

10. Schedule 8 of the Bill sets out transitional and consequential provisions relating to workplace agreements and workplace determinations made under the WR Act.

11. Senate Education Employment and Workplace Relations Committee Fair Work Bill 2008 [Provisions] http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/report/index.htm

12. Id at para 4.9

13. Above note 9 at para 4.10

14. Section 332(1) Workplace Relations Act 1996 (Cth)

15. Forsyth et al 'Workplace Relations in the Building and Construction Industry' Lexis Nexis Butterworths 2007 at p 68

16. http://www.workplace.gov.au/workplace/Organisation/Industry/BuildingConstruction/

17. Section 8.4 of the Implementation Guidelines

18. For example, see Submission to the Senate Committee Inquiry into the Fair Work Bill made by the Restaurant and Catering Association at page 20. http://www.aph.gov.au/Senate/committee/EET_CTTE/fair_work/submissions.htm submission number 72

19. Australian Chamber of Commerce and Industry submission to the Senate Committee Inquiry Part II Detailed Response at para 477

20. Clause 118 of the Supplementary Explanatory Memorandum for the Bill says 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. See also Greenfields Changes Worse Than Original Bill: AMMA WorkForce 1671 13 March 2009 where the uncertainty in the public interest test is attacked.

21. ACTU submission to the Senate Education, Employment and Workplace Relations Committee http://www.aph.gov.au/Senate/committee/EET_CTTE/fair_work/submissions.htm submission 13 at p 70

22. Above note 9 esp at para 4.56 et seq

23. Id at para 466

24. Clause 409(1)(a) specifies that 'employee claim action' is industrial action which is organised or engaged in for supporting or advancing claims in relation to the agreement that are about or are reasonably believed to be about, permitted matters (and which complies with the other requirements of that clause.) Employee claim action is protected industrial action under the terms of clause 408(a). Master Builders considers that this clause is too broad at present (see italics) and this could be remedied if Recommendation 7 is implemented.

25. Comment attributed to Steve Knott CEO of Australian Mines and Metals Association WorkForce 1673 23 March 2009

26. Australian Labor Party August 2007 Forward with Fairness: Policy Implementation Plan, p 13

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