



SUBMISSION BY THE  
Housing Industry Association

to the  
**Fair Work Act Review Panel**  
on the  
**Fair Work Act Review**

17 February 2012

# CONTENTS

1	Executive Summary.....	4
2	General Comments.....	5
3	Creating a competitive environment for the Australian economy .....	8
4	Safety net laws.....	9
5	Individual flexibility arrangements.....	18
6	Wage setting .....	21
7	Bargaining and agreement-making.....	22
8	General protections.....	37
9	Unfair dismissal.....	38
10	Right of entry .....	44
11	Industrial action.....	45
	Annexure – Summary of HIA’s recommendations .....	47

HIA:

Housing Industry Association  
79 Constitution Avenue  
Campbell ACT 2612

**Contacts**

David Humphrey  
Senior Executive Director –  
Business, Compliance & Contracting

Alana Matheson  
Executive Director  
OHS & Workplace Relations

Phone: 03 6245 1300

HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

# 1 Executive Summary

- 1.1 HIA welcomes the opportunity to make submissions to the Fair Work Act Review Panel (Panel) in relation to the *Fair Work Act 2009* (Act).
- 1.2 HIA have some 40,000 members operating in the residential building sector of the Australian economy. The residential building sector and HIA's membership includes builders, trade contractors, design professionals, kitchen and bathroom specialists, manufacturers and suppliers.
- 1.3 HIA notes that much commentary concerning the review has focused on industrial disputation involving big business. However, it is important that this review does not just consider the needs of large corporations that operate within highly unionised environments or include recommendations for change that restrict industrial action and collective bargaining. Small businesses comprise 85% of the residential building industry and the impacts of labour regulation upon such small businesses are equally as relevant. The impact of regulation on small business is reflected in the following comments of a HIA member who was surveyed in February 2012:

*'After 42 years of full-time self-employed continuous involvement in the residential housing industry all I can see is a dismal future for a once prosperous and healthy employment sector all because of over regulation and red tape. Everything has become too complex and needs to be simplified. There are too many rules and regulations that keep on changing which the authorities and the departments that make the rules and changes tell us is for the improvement of industry. I personally cannot see that'.*

- 1.4 The majority of responses to this survey also indicated that the Act detracted from productivity in their workplace. In fact, only 2% of respondents indicated that the Act actually improved productivity in the workplace. This data presents as strong evidence that the Act is not satisfying its objectives.
- 1.5 In HIA's view the Act requires significant change to better reflect its Objects and to provide a framework that more appropriately balances the interests of

employees and employers in the residential building sector, particularly small business employers.

1.6 Some of the key changes that HIA recommends be made to the Act include:

1. Modify the safety net so they reflect simple, flexible and fair minimum standards;
2. Return confidence to hire to business by providing genuine exemptions to small business from unfair dismissal claims;
3. Keep independent contracting out of the province of industrial law including the removal of loopholes in the bargaining laws that enable industrial parties to interfere with and restrict the engagement of independent contractors;
4. Strengthen protections for small businesses against pattern bargaining;
5. Limit payments made under industry specific redundancy schemes to cases of “genuine redundancy” only;
6. Restore individual agreements between employers and employees but subject to a no-disadvantage test.

1.7 A full list of HIA’s recommendations are **annexed**.

1.8 While the matters addressed in this submission traverse several of the questions raised in the Background Paper, this submission is not structured to provide specific answers to the questions. Rather, the structure adopted within this submission has allowed HIA to better highlight matters of primary concern to the residential building industry.

## 2 General Comments

2.1 The *Fair Work Act 2009* (Act) set out to create “a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth”<sup>1</sup>.

2.2 HIA recognises that the legislation was made against the backdrop of the Workchoices legislation. Irrespective of its goals and motivations, the Act’s re-regulation of the labour market has not resulted in promised productivity, efficiency or flexibility gains. Since the Act’s commencement, the experience of HIA members is that the Act and its related legislation have:

---

<sup>1</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth).

- Had the pendulum swinging too far in favour of employees with respect to several aspects of the Act's operation;
- failed to modernise, simplify and streamline terms and conditions of employment, with the modern awards introducing even further complexity to the regulatory framework;
- as a consequence the new complexities associated with the bargaining process, entrenchment of the role of the unions in bargaining and significant limitation of bargaining options, have discouraged enterprise bargaining and hampered the ability for businesses to flexibly structure working arrangements;
- failed to deliver productivity or efficiency improvements;
- failed to assist businesses in competing in a global market;
- negatively impacted on the cost structure and business practices of small and medium businesses;
- acted as a disincentive to employ;
- resulted in more adversarial, conflict based work environments and have undermined direct engagement strategies;
- made it too easy for unions to interfere in the workplace and hamper the exercise of managerial prerogative in decisions concerning labour engagement and workforce structure.

2.3 HIA notes that Chapter 10 of the draft findings of the Productivity Commission enquiry into the future of the Australian retail sector released on 4 August 2011 considered the effect of workplace regulation upon that industry and stated that the Government should review:

- high labour costs, the impact of awards and legislation on wage outcomes, workplace flexibility and employment;
- high minimum award wages which are said to be constraining the ability of employers to restructure employee remuneration in ways that could enhance productivity;
- provisions of the Act which are increasing the cost and complexity of negotiating enterprise agreements and are making productivity improvements more difficult to achieve.

- Fair Work Ombudsman role in assisting employers' having difficulties calculating award wage rates.

2.4 The release of the draft report has provided employers with credible independent research upon which it can base its case for general changes to the workplace relations framework.

### 3 Creating a competitive environment for the Australian economy

- 3.1 Employers in Australia have historically operated under a highly complex industrial relations and employment law framework. As noted by Michalandos:

*To date, Australia had operated one of the most convoluted labour law systems in the world. The term “system” is used with some trepidation – it is probably an inappropriate term to define an overlapping mess of laws, lores, statutes, quasi-statutes, rules, regulations collective agreements, individual agreements, case law and practice...<sup>2</sup>*

- 3.2 In an era of globalisation in which the business activities of companies span beyond the boundaries of a single state, labour market regulation is an area that affects Australian business’s ability to compete with foreign markets. The residential building industry is not immune to these trends and we have seen an increasing tendency to import building products and the growth of the prefabricated building industry, based on overseas technologies. As building methods shift toward prefabrication, it is important to see regulation support local manufacturing operations and, consequently, local jobs.
- 3.3 HIA notes that throughout much of the previous 2 decades, Australian Governments had demonstrated cognitive awareness of the competitive pressures issues facing Australian businesses and hence allowed for the momentum to shift toward a decentralised system. These changes included the ability of employers and employees to individualise employment arrangements and enable collective agreements to be negotiated without unnecessary industrial interference in the workplace.
- 3.4 Unfortunately the re-regulation of the Australian labour market under the Act has reversed many of the positive reforms of previous Governments. Pointedly this has taken place in an environment where the high Australian dollar and uncertain global economy have provided a renewed impetus to develop and adopt policy to enable Australian businesses to remain globally competitive.

---

<sup>2</sup> Michael Michalandos. ‘Law and the Employment Relationship’ in John Stafford (ed in chief) and Kate Aylett-Graham (ed), *Australian Master Human Resources Guide* (2009) 117, 118.

## 4 Safety net laws

### 4.1 The National Employment Standards

4.1.1 HIA supports the concept of a minimum set of employment entitlements which exists as a minimum safety net for all employees.

4.1.2 The 'National Employment Standard' (NES) set out in the *Fair Work Act 2009* expanded upon the minimum entitlements within the AFPCS 'Australian Fair Pay and Conditions Standard' (AFPCS) as contained in the repealed *Workplace Relations Act 1996*. The NES is comprised of the following ten minimum entitlements:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- the requirement to provide the Fair Work Information Statement.

4.1.3 These entitlements cannot be displaced unless the award sets out more generous entitlements.

4.1.4 However it is important to note that the former AFPCS existed in the context of legislation that expressly provided for matters that were 'non-allowable' and could not be included in awards or enforced to the extent that they were included. The *Workplace Relations Act 1996* had also limited awards to 15 allowable award matters in contemplation of an 'award rationalisation' process which did not commence.

4.1.5 Had the Act fostered a similar approach, the NES would play a much more significant role in providing a simple, clear and streamlined set of minimum

terms and conditions. This is explained further in the context of award modernisation.

4.1.6 HIA has also identified areas where the NES could be improved so that it more reflective of a simple minimum safety net which promotes flexibility and encourages productivity.

## 4.2 **Maximum weekly hours**

4.2.1 Activity in the building industry is cyclical and project based and, as such, standard working patterns may not be appropriate to meet the labour needs of all businesses. HIA notes that section 64 of the Act permits employees to average hours over a 26 week period if they are agreement or award free.

4.2.2 HIA submits that the objects of the Act relating to flexibility and productivity could be better addressed within the context of such a provision by making it a mandatory requirement within agreements and awards and by extending the period over which hours may be averaged.

### **Recommendation:**

HIA recommends that the Act be amended to extended the period for averaging work hours to a 52 week period (subject to agreement in writing between the employee and employer) and make this a mandatory flexibility provision within awards and workplace agreements.

## 4.3 **Requests for flexible work arrangements**

4.3.1 HIA submits that in seeking to preserve state and territory laws relating to flexible work arrangements, section 66 of the Act creates unnecessary confusion and undermines the effectiveness of the NES as a simple, national safety net.

### **Recommendation:**

HIA recommends that section 66 of the Act be removed.

## 4.4 **Annual leave**

4.4.1 HIA submits that section 89(2) of the Act warrants amendment to improve productivity. This section provides that if the period during which an employee

takes annual leave includes a period of any other leave (other than unpaid parental leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence. Such a provision encourages absenteeism resulting in increased costs for employers.

4.4.2 HIA also submits that flexibility improvements could be affected if all employees, both award free and award covered, had the ability to cash out annual leave.

**Recommendation:**

HIA recommends that the Act be amended to:

- exclude personal/carer's leave from the categories of leave taking priority over annual leave;
- allow both award free and award covered employees to cash out annual leave, subject to agreement in writing between the employee and employer.

**4.5 Notice of termination and redundancy pay**

4.5.1 HIA submits that the requirement set out in section 117(1) of the Act for notice to be provided in writing unnecessarily creates red tape for employers and may result in the imposition of a disproportionate penalty in the event of a contravention.

4.5.2 For instance, Section 123(1)(d) of the Act provides that the notice of termination and redundancy provisions do not apply to 'an employee (other than an apprentice) to whom a training arrangement applies...'. This may be interpreted to mean that notice of termination requirements are not intended to apply to apprentices. Unlikely the redundancy provisions of the NES, apprentices are not specifically exempted from the notice requirements set out in section 123(3).

4.5.3 Confusion also results as section 15.2(c) of the Building and Construction General On-site Award 2010 Building and Construction General On-site Award 2010 provides that:

*Notice of termination and redundancy provisions do not apply to apprentices, provided that where the employment of an apprentice by an employer is*

*continued after the completion of the apprenticeship, the period of the apprenticeship will be counted as service for the purposes of the award...*

4.5.4 Of note, section 55(1) of the Act states that a modern award must not exclude the NES or any provision of the NES. This is confusing considering that the award provision does just this with respect to the notice of termination for apprentices.

4.5.5 It is likely that the legislative framework was intended to exclude the application of the notice provisions to apprentices due to the process for termination existing within state and territory training laws. In fact, regulation 1.13 of the *Fair Work Regulations 2009* provides that the following state or territory laws will not be excluded by the Act:

- (a) a law dealing with the suspension, cancellation or termination of a training contract;
- (aa) a law dealing with the suspension, cancellation or termination of a contract of employment that is:
  - (i) associated with a training contract; and
  - (ii) entered into as a part of training arrangement;
- (b) a law dealing with a period of probation of an employee that:
  - (i) is part of a training arrangement; but
  - (ii) is not a period of probationary employment...

<b>Recommendations:</b>
HIA recommends amendments to the Act to: <ul style="list-style-type: none"><li>• remove the requirement for notice to be provided in writing;</li><li>• clarify that the notice of termination provisions under the NES do not apply to apprentices.</li></ul>



## 4.6 Fair Work Information Statement

4.6.1 HIA submits that the requirement to issue a Fair Work Information Statement to new employees as set out in section 125 of the Act is of declining relevance considering that the Act has been in operation for over two years. The provisions also create unnecessary red tape for business. The Fair Work

Ombudsman's educative function will assist employees and employers in better understanding the rights and obligations set out in the Act.

**Recommendation:**

HIA recommends the removal of section 125 requiring the provision of the Fair Work Information Statement for new employees.

#### 4.7 **Miscellaneous**

4.7.1 Section 130(1) of the Act places a restriction on taking or accruing annual leave while receiving workers compensation. However this is subject to section 130(2) which states that the provision does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law. This provision creates confusion and complexity and undermines the effectiveness of the NES as a simple, national safety net.

**Recommendation:**

HIA recommends that section 130(2) be removed and that section 130(1) be improved to clarify that, regardless of the content of state and territory laws, employees do not accrue annual leave during periods of workers compensation.

#### 4.8 **Industry specific redundancy schemes**

4.8.1 Section 119 of the Act sets out a requirement to provide a redundancy payment if the employee's employment is terminated:

- at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone (except where this is due to the ordinary and customary turnover of labour); or
- because the employer is bankrupt or insolvent.

- 4.8.2 Sub-clause 119(2) specifies the scale of payment for redundancy pay that must be paid to an employee. The scale is based on the length of an employee's 'continuous service' on termination.
- 4.8.3 However section 123(4) lists a number of categories of employees not covered by the redundancy pay provisions in this Division. Within the employees not covered by the redundancy pay provisions are employees to whom an industry-specific redundancy scheme in a modern award applies. Such industry –specific redundancy schemes are defined in section 12 of the FW Act to mean 'redundancy termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme'. This captures the scheme set out in clause 17 of the Building and Construction General On-site Award 2010<sup>2</sup> and as a consequence, the redundancy entitlements contained within section 119 of the Act do not apply to employees and employers bound to this modern award.
- 4.8.4 Section 141 of the Act sets out the circumstances in which a modern award may include an industry specific redundancy scheme. The industry specific redundancy schemes that have typically been included in awards in the building and construction industry have imposed an unfair cost burden on businesses by extending redundancy entitlements to employees in circumstances that are not genuine redundancies, including resignation and termination other than in circumstances of misconduct or refusal of duty. This approach is replicated in the Building and Construction General On-site Award 2010 which, in clause 17.2, defines redundancy as 'a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty'.
- 4.8.5 Immediately prior to 1 January 2010, employees who were covered by a federal award and are now covered by the modern award were not entitled to the benefit of a payment of the nature provided for in the industry–specific redundancy scheme now contained within the Building and Construction General On-site Award 2010<sup>3</sup>

---

<sup>3</sup> See *Yirra Pty Ltd (t/as Richmond Demolition and Salvage) v Summerton* [2009] FCAFC 50.

4.8.6 The extended meaning of redundancy attaches a payment incentive to resignation. This negatively impacts staff retentions and employers should not be obliged to budget for resignation payments over which they have no control. The provision as it stands does not represent a fair minimum safety net. An HIA member surveyed in February 2012 commented:

*“The redundancy provisions in the modern award are very heavily favoured to the employee and make us think twice about employing new staff as they are very onerous.”*

4.8.7 The redundancy provision in the NES would be more appropriate.

**Recommendation:**

HIA recommends that the Act be amended to:

- limit the circumstances in which a modern award may include an industry specific redundancy scheme be limited to cases of ‘genuine redundancy’;
- limit the application of redundancy provisions (including industry specific redundancy schemes) to employers with more than 20 employees.

## 4.9 Award modernisation

4.9.1 In theory the process of award modernisation and rationalisation would have seen the creation of a simple, streamlined set of minimum conditions that would have encouraged the creation of employment opportunities as well as bargaining for customised terms and conditions to supplement the minimum safety net and to meet the needs of individual employers and employees.

4.9.2 For instance in its the ‘Forward with Fairness - Policy Implementation Plan’, Labor promised that the new system would ‘modernise the award system based on 10 basic award conditions...’. <sup>4</sup> The policy document stated:

*The 10 matters that will only be dealt with under Labor’s new modern, simple awards are:*

---

<sup>4</sup> Labor’s ‘Forward with Fairness Policy Implementation Plan’, August 2007, page 1.

1. *Minimum wages – This will include skill based classifications and career structures, incentive based payments and bonuses, wage rates and other arrangements for apprentices and trainees;*
2. *The type of work performed – for example whether an employee is permanent or casual, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities, including quality part-time employment and job sharing;*
3. *Arrangements for when work is performed – including hours of work, rostering, rest breaks and meal breaks;*
4. *Overtime rates for employees working long hours;*
5. *Penalty rates for employees working unsocial, irregular or unpredictable hours, on weekends or public holidays, and as shift workers;*
6. *Provisions for minimum annualised wage or salary arrangements that have regard to the patterns of work in an occupation, industry or enterprise as an alternative to the payment of penalty rates, with appropriate safeguards to ensure individual employees are not disadvantaged;*
7. *Allowances including reimbursement of expenses, higher duties and disability based payments;*
8. *Leave, leave loadings and the arrangements for taking leave;*
9. *Superannuation; and*
10. *Consultation, representation and dispute settling procedures.*<sup>5</sup>

4.9.3 Unfortunately award modernisation was not reflective of these principles or promises. Instead award modernisation consolidated a mish-mash of out-dated pre-modern instruments into one modern award. For award covered employees and employers in the building industry, the NES sits alongside a set of complex award provisions that are not reflective of flexible and modern work practices. This is a consequence of the Act's lack of jurisdiction to appropriately regulate award content in a manner consistent with the policy intent described above.

4.9.4 Prescriptive employment conditions and the one size fits all approach reflected in the modern awards and NES create impracticalities for the

---

<sup>5</sup> Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, page 16.

residential building industry where work is cyclical and project based and workers are often transient.

4.9.5 There is scope to improve the content and relationship between the modern awards and NES to provide a regulatory environment that is simple, streamlined, fair to both employers and employees and more conducive to direct employment.

**Recommendations:**

HIA recommends that the Act be amended to reflect Labor’s ‘Forward with Fairness’ policy by:

- limiting award content to simple, fair and flexible minimum terms as distinct from matters properly belonging in an agreement. Such terms were previously expressed as “allowable award matters” were appropriately identified in Labor’s ‘Forward with Fairness – Policy Implementation Plan’;
- providing a mechanism for a further simplification of the number of and coverage of awards.

4.10 Appropriately regulating award content and removal of prescriptive terms will alleviate the need for individual flexibility arrangements and will encourage bargaining for terms and conditions beyond the minimum safety net to meet the need of both individuals and enterprises.

## 5 Individual flexibility arrangements

5.1 Under the Act an enterprise agreement is required to contain a 'flexibility term' that allows for individual flexibility arrangements.<sup>6</sup> If an agreement fails to include such a clause, a 'model' term will apply.<sup>7</sup> The model flexibility term has also been included in modern awards.<sup>8</sup>

5.2 Employers, who do not want to negotiate an enterprise agreement with employees and would prefer to deal with employees on an individual basis, may utilise the term to explore the option of Individual Flexibility Agreements (IFAs) that are designed to allow for variations to the instrument to meet the individual needs of employers and employees.

5.3 HIA notes that Labor's 'Forward with Fairness – Policy Implementation Plan' stated:

*Under Labor's new system, awards will provide the parameters within which flexibility arrangements can be made under an award flexibility clause. This may include matters such as:*

- *rostering and hours of work;*
- *all up rates of pay;*
- *provisions that certain award conditions may not apply where an employee is paid above a fixed percentage as set out in the award;*  
*and*
- *an arrangement to allow the employee to start and finish work early to allow them to collect their children from school without the employer paying additional penalty rates for the early start.<sup>9</sup>*

---

<sup>6</sup> Fair Work Act 2009 (Cth) s202.

<sup>7</sup> Fair Work Act 2009 (Cth) ss145, 202(4).

<sup>8</sup> Fair Work Act 2009 (Cth) s144.

<sup>9</sup> Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, page 11.

5.4 However, in respect of the model provision, the award terms that can be vary under an IFA are not as broad as originally promised and are limited to:

- arrangements for when work is performed (such as working hours);
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.<sup>10</sup>

5.5 The employee needs to genuinely agree to vary the award under an IFA and an employer cannot ask a prospective employee to agree to an IFA as a condition of employment. An employee covered by an IFA must also be “better off overall” when the IFA is compared to the award terms.<sup>11</sup> While IFA’s are free from many of the procedural complexities associated with enterprise bargaining, they do not offer the same level of certainty and stability as they may be terminated unilaterally. A practical difficulty associated with the IFA option may exist where all of the workers do not all agree to vary hours of work. It would be impractical for a small business employer to have employees working at different times when this does not meet the labour requirements for a building site.

#### *Case study*

5.5.1 A recent prosecution by the Fair Work Ombudsman demonstrates the difficulty that small business has in tailoring working arrangements to meet the needs of the business via an IFA. In this matter, the employer (who employed only six employees at the time of the hearing) had not been subject to award regulation for some 16 years. When the modern awards came into effect, it was the employer’s understanding that it was bound to the modern award, the terms which prevented an employee from being engaged as a casual if they worked a regular pattern of work. It was on this basis that the employer sought to have its employees enter into IFAs.

5.5.2 While most employees agreed to sign an IFA, one employee did not. The agreed facts were that there was a breach involving “an application of

---

<sup>10</sup> See clause 7.1 of the Building and Construction General On-site Award 2010.

<sup>11</sup> See clause 7.3 of the Building and Construction General On-site Award 2010.

illegitimate pressure which denied him a right to exercise his freewill”.<sup>12</sup> The Court found that, in negotiating the IFAs, there was “an attempted use...of an inequality in bargaining power in relation to the continuance of regular employment”.<sup>13</sup>

5.5.3 This employer was clearly in a predicament in that the business’s working arrangements did not comply with the award and was unable to structure his working arrangements in a way that satisfied the needs of the business and all employees. The employer was found to have:

- failed to ensure the IFA was genuinely made without coercion or duress;
- contravened the general protection provisions of the Act prohibiting the taking or threatening of adverse action, coercion and the exertion of undue influence in relation to IFAs.

5.5.4 Both the small business employer and its managing director received significant fines.

5.6 IFAs were also intended to be made with ease. The then Deputy Prime Minister, Julia Gillard, in her Second Reading Speech for the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* stated:

*...a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements.*

5.7 In reality small business may have difficulty in meeting the detailed prescriptive requirements for the making of a valid IFA under the awards.<sup>14</sup>

5.8 The employer in the matter referred to above had also failed to detail how the application of each term had been varied, despite detailing the manner in which the provisions would operate as a result of the IFA.

<b>Recommendations:</b>
Considering the policy intend for IFAs to be simple, the Act should not deem an

---

<sup>12</sup> *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2001] FCA 1064 at 48.

<sup>13</sup> *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2001] FCA 1064 at 51.

<sup>14</sup> See regulation 2.08 of Schedule 2.2 of the *Fair Work Regulations 2009*.

imperfect agreement invalid if it has been freely and genuinely entered into and the employee is not disadvantaged by the agreement.

If award content is to be regulated in the manner recommended by HIA, there will be no need for IFAs. However if such rationalisation of awards does not occur, and individual statutory agreements will not be reinstated, HIA also recommends that the Act be amended to:

- require both awards and agreements to contain model provisions which would allow for the variation of any conditions within the award (excepting those matter contained within the National Employment Standards as varied in the manner recommended by HIA), provided the employee meets a re-instated 'no-disadvantage' test that would apply in place of the BOOT; allow employers to make IFAs a condition of employment at the time of engagement.;
- prevent IFAs from being able to be terminated unilaterally on 28 days' notice.;
- prevent unions and others involved in the agreement making process from restricting the terms that can be varied under an IFA.

## 6 Wage setting

6.1 HIA has concerns that the current, wage setting considerations have produced unjustifiably high increases warranting an adjustment to the minimum wages objective in order to better balance economic and social considerations on an industry level. During the wage setting process it is clear that macro-economic considerations are relied upon in gauging economic performance when the experience of individual industries might be markedly different. The recent annual wage reviews have had little regard to the small businesses in industries that are not performing well and who have had to flow on significant wage increases that have exceeded CPI adjustments.

### **Recommendation:**

HIA recommends that any wage setting mechanism and the minimum wage objective be amended to take into account the performance of the economy on an industry specific basis and in award reliant sectors.

## 7 Bargaining and agreement-making

### 7.1 General comments

7.1.1 The current model of bargaining under the *Fair Work Act 2009* fails to provide productivity, flexibility and efficiency gains for a small business employer in the building industry. This is as a consequence of the expanded role of the unions, limited resources and bargaining power of the small business, the limited bargaining options available and the complexity of agreement making processes.

7.1.2 A survey of HIA members in February 2012 indicated that of those survey respondents who had entered an enterprise agreement, only 20 per cent believed that the agreement had improved productivity, with a further 33 per cent indicating that the agreement had actually detracted from productivity and 47 per cent indicating that the agreement had no effect on productivity. This raises some serious questions surrounding what benefits enterprise agreements are actually delivering in the context of the current bargaining framework.

7.1.3 Respondents to the survey who indicated that they would not consider negotiation (an (or another) enterprise agreement with employees indicated that as a primary reason:

- they don't have sufficient resources to negotiate an enterprise agreement (37 per cent of survey respondents);
- the bargaining laws are too complex (29 per cent of survey respondents);
- they are afraid of union interference (18 per cent of survey respondents).

7.1.4 Under the current model, small businesses that do decide to implement an enterprise agreement are at high risk of failing to meet the procedural requirements and having their agreements rejected. This can be costly and resource intensive and the public nature of such applications and their subsequent rejections may also expose small businesses to regulatory or union intervention.

7.1.5 In order to make bargaining a more attractive option for small business, changes to the system are necessary to minimise the paperwork burden and

streamline the procedural and administrative requirements. Furthermore, failure to satisfy paperwork and procedural requirements should not exist as a barrier to the approval of an agreement where it can be established that there is no detriment to employees on account of the non-compliance.

7.1.6 A revision of the better off overall test may be beneficial in addressing the practical difficulties associated with attaching a compensatory benefit to non-monetary award entitlements. There is merit in an approach that would displace the awards as the basis for the test in favour of clear and simple minimum statutory standards, particularly in light of the process of award modernisation merely flowing on the content of the pre-modern instruments as we have seen in the case of the *Building and Construction General On-site Award 2010*.

## **7.2 The impact of the Act's bargaining provisions on small business**

7.2.1 The Act presents significant challenges for small businesses in the residential building industry that are seeking to secure more flexible terms and conditions of employment to support a productive and efficient work environment. Employers in the residential building industry had previously benefited from a decentralised system that encouraged individual agreement as the industry is characterised by direct engagement with workers.

7.2.2 Individual bargaining had been an attractive option for small business employers who sought greater flexibility with respect to terms and conditions of employment in order to meet the needs of individual and the business. .<sup>15</sup>

7.2.3 The option of individual agreements has now been removed following the introduction of the Act and those who were covered by such agreements have been required to revert back to complex, burdensome and inflexible award conditions that, for the building industry, are largely reflective of the conditions of the pre-modernised instruments.

7.2.4 Whilst collective bargaining has traditionally served to address the power imbalance between employers and employees when negotiating wages and

terms and conditions of employment.<sup>16</sup> it is not always the case that the employer has greater bargaining power during negotiations. For small businesses in the building industry, two factors work to ensure that this is not the case. The first of those is the existing skills shortages within the industry that give the upper hand to skilled trades who can demand market rates for their labour. The other factor is the militancy of the union and a strengthening of union rights following the introduction of the Act.

7.2.5 The Act's provisions relating to workplace bargaining inappropriately limit options for real flexibility to collective bargaining. They have resulted in an increased union presence at the bargaining table and indirectly represent a shift toward compulsory unionism. Union recognition and expanding the role of the union during bargaining has been a notable feature of the *Fair Work Act 2009*.<sup>17</sup>

7.2.6 The Act further provides that the union will automatically be the default bargaining representative for its members.<sup>18</sup>

7.2.7 For the small business employer in the building industry, this mean a greater risk of exposure to the union in bargaining negotiations in what were prior to bargaining, non unionised workplaces. The effectiveness of the CFMEU in furthering its bargaining agenda should not be underestimated as the power imbalance is reversed when the union becomes involved in negotiations with small business. This is problematic for small businesses that are pressured to commit to terms that may be unsustainable.

7.2.8 The introduction of good faith bargaining requirements also represents significant regulatory change.

7.2.9 For small businesses, the complex and formal nature of the good faith bargaining provisions is intimidating. In small business environments, workers literally work alongside their employer in a necessarily collaborative

---

<sup>16</sup> R Welch, 'Into the twenty-first century – the continuing indispensability of collective bargaining as a regulator of the employment relation' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation*, 2000, Kluwer Law International, The Hague p 585, 619.

<sup>17</sup> Rae Cooper and Bradon Ellem, 'Fair Work and the Re-regulation of Collective Bargaining', (2009) 22 *Australian Journal of Labour Law* 284 [27].

<[http://www.lexisnexis.com.ezproxy1.library.usyd.edu.au/au/legal/results/docview/docview.do?docLinkInd=true&risb=21\\_T9631960687&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T9631960690&cisb=22\\_T9631960689&treeMax=true&treeWidth=0&csi=267868&docNo=4](http://www.lexisnexis.com.ezproxy1.library.usyd.edu.au/au/legal/results/docview/docview.do?docLinkInd=true&risb=21_T9631960687&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T9631960690&cisb=22_T9631960689&treeMax=true&treeWidth=0&csi=267868&docNo=4)> at 21 June 2010.

<sup>18</sup> *Fair Work Act 2009* (Cth) s 176.

environment. They communicate regularly and become very aware of each other's personal circumstances and the circumstances of the business. The boss is a colleague and a co-worker at the coal face. However the changes to bargaining laws are eroding this collaborative approach by burdening it with overly prescriptive compliance obligations and by encouraging the involvement of in the "middle man" in negotiations who is seeking to pursue a largely pre-determined agenda that has little consideration for the needs of the business or the individuals working within that business.

### **7.3 Pattern bargaining**

- 7.3.1 The construction industry is comprised of a complex contracting structure. Where collective bargaining occurs, it is usually initiated between the principal contractor and a union and may be instigated by a particular project. Unions and the principal contractor will then attempt to have those provisions flowed on to other businesses in the chain of contracting who are working on site. For the union, their objective is to reach out to potential members and serve the interests of their current members by negotiating favourable terms and conditions of employment. The principal contractor, bound by their contractual obligations to the client and investors to complete the project by a particular time, to a particular standard and for a fixed price, see the agreement as a means of reaching consensus as to what wages and conditions will apply and also feel that it is necessary for their contractors to enter into a similar arrangement to minimise the risk of industrial action or disruption that may create a contractual liability.
- 7.3.2 Although flexibility and productivity are referred to in the objects of the Act, this does not appear to be reflected in agreement making processes or content.
- 7.3.3 The difficulty with this situation is that the terms and conditions of the agreement that are intended to be flowed on down the chain of contracting have been negotiated based on the needs and bargaining position of the principal contractor's workplace and, to a greater extent, the default bargaining position of the union.

7.3.4 This conduct may be described as “pattern bargaining”. The Act provides that a course of conduct by a person is pattern bargaining if:

- (a) the person is a bargaining representative for two or more proposed enterprise agreements; and
- (b) the course of conduct involves seeking common terms to be included in two or more of the agreements; and
- (c) the course of conduct relates to two or more employers.<sup>19</sup>

---

<sup>19</sup> *Fair Work Act 2009* (Cth) s 412(1).

- 7.3.5 However it is important to note that the Act clarifies that a bargaining representative does not engage in pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with an employer.<sup>20</sup> The Act does not prevent bargaining representatives from making common claims and engaging in pattern bargaining (according to the ordinary understanding of that term) provided that they are 'prepared to genuinely reach agreement with each individual employer'.<sup>21</sup>
- 7.3.6 Despite the attempted limitation on pattern bargaining via the requirement to genuinely try to reach agreement, pattern bargaining remains a prominent feature of bargaining in the building and construction industry. The Construction Forestry Energy and Mining Union (CFMEU) is public about the common terms that exist within the agreements it negotiates, stating that over 90 per cent of its enterprise agreements are identical, with a small number containing either higher or lower benefits, depending on the sector/trade.<sup>22</sup> This is not only indicative of strong evidence of pattern bargaining in the building industry but may also demonstrate the power imbalance between the employers and the union in negotiations.
- 7.3.7 The additional cost associated with the terms of union negotiated agreements should not be underestimated. The CFMEU publishes the following summary of benefits of CFMEU EBAs for the period 2009 to 2011:
- Superannuation is to be paid into the union's preferred industry fund, Cbus. In some EBAs the superannuation rate will be the greater of a fixed amount (e.g. \$95) or 9%.
  - The employer must pay a company productivity allowances, usually \$3.50 per hour, for each hour worked.
  - The employer must pay a minimum contribution of \$75 into the ACIRT redundancy fund each week and are also encouraged to donate \$2.00 to the Building Trades Group of Unions for drug and alcohol counseling, referrals and safety prevention programs in the industry.

---

<sup>20</sup> *Fair Work Act 2009* (Cth) s 412(2).

<sup>21</sup> Cooper and Ellem, above n 10, [48].

<sup>22</sup> Construction Forestry Energy and Mining Union, *CFMEU EBA Summary 2009-2011* (2009) <<http://www.cfmeu-construction-nsw.com.au/cfmeuebasummary.htm>> at 22 June 2010.

- The employer must pay a fares allowance (which compensates the employee for the mobility requirements of the industry) of \$27.00 per day.
- The employer must pay extra insurance to provide extra workers compensation benefits and income protection for non-work related injuries as well as mortality insurance. This will cost an employer at least \$80 per month for each worker.
- The employer must pay a meal allowance of \$20.00 (an amount well in excess of award entitlements) for working 1.5 hours overtime after 8 hours work.
- Workers will accrue 0.8 of an hour pay for each day worked Monday to Friday. This means that employees will only work a 36 hour week.
- The agreement prohibits works on weekends, public holiday, rostered days off that are adjacent to identified public holidays and the union picnic day.
- It is stated that “all workers are required to be financial members of the CFMEU”. This would appear to breach freedom of association provisions if the agreement was proposed to cover non-members.
- The agreement provides for a 2.5% wage increase every six months.
- In addition to the minimum wages the agreement will require the payment of other allowances.

7.3.8 In addition to this, the following table represents a comparison of the CFMEU's published base rates for agreements<sup>23</sup> with the rates in the pay scale summary published for the Building and Construction Industry (State) Award NAPSA [AN120089], which, at the time of the CFMEU publishing the standard EBA rates, are the minimum wages for most employees of constitutional corporations in the building industry in NSW.

<b>CLASSIFICATION</b>	<b>EBA RATE</b>	<b>PAY SCALE RATE</b>	<b>DIFFERENCE</b>	<b>%</b>
CW1	\$22.43	\$17.18	\$5.25	23.40615
CW2	\$23.45	\$17.55	\$5.90	25.15991
CW3 (non trade)	\$24.43	\$18.05	\$6.38	26.11543
CW3 (trade)	\$25.27	\$18.69	\$6.58	26.03878
CW4	\$26.52	\$18.62	\$7.90	29.78884
CW5	\$27.76	\$19.19	\$8.57	30.87176
CW6	\$29.02	\$19.57	\$9.45	32.56375
CW7	\$30.31	\$19.99	\$10.32	34.04817
CW8	\$31.58	\$20.62	\$10.96	34.70551

---

<sup>23</sup> Figures in the table below are derived from the CFMEU website and are applicable as at 1 March 2010  
<<http://www.cfmeu-construction-nsw.com.au/pdf/ebasydneyratesofpay.pdf>> at 22 June 2010.S

7.3.9 As demonstrated above, the extent of the above award payments is significant. This is problematic because if the union has a pre-determined agenda in the lead up to negotiations and does not consider the individual business needs in that negotiations, there is a risk that employers will commit to agreements that provide for conditions that are either impractical or are unsustainable. For example, some building businesses carry out insurance work that demands emergency remedial work to address problems such as leaking roofs and other emergency situations on weekends and out of hours. The CFMEU enterprise agreement as described above would prohibit work on weekends and this may have a negative financial impact upon the business and its goodwill.

7.3.10 The notion of pattern bargaining also neglects to consider the competitive environment in which small businesses operate, particularly considering that the effects of employment regulation and wage increases are strongly felt by these small businesses. They have a much more limited capacity to absorb wages increases and the subsequent effects on employment on-costs such as workers compensation, superannuation and payroll tax.

7.3.11 Small business warrants protection from pattern bargaining that is beyond what currently exists within the Act.

<b>Recommendation:</b>
HIA recommends that the Act be amended to provide strengthened protection against pattern bargaining and to provide that a person cannot be considered as 'genuinely trying to reach agreement' if they are pattern bargaining.

## 7.4 Procedural complexities

- 7.4.1 For those small businesses that who do decide to address the lack of flexibility via bargaining, the inability of employers and employees to enter into individual agreements has resulted in employers being forced into procedurally complex, costly and sometimes very public negotiations relating to collective agreements. The current system of bargaining does not contemplate the lack of resources and expertise available to business.
- 7.4.2 The cost of bargaining for small business is another impediment. As discussed earlier, with large majority of businesses in the building industry being small businesses, margins are tight and competition is fierce. This takes its toll on the profitability of the business and small businesses are, as a consequence, much more limited in the concessions that can be made during bargaining and may not be able to fund the engagement of external consultants to represent them during discussions.
- 7.4.3 The Act has introduced processes and steps that an employer must follow to make an enterprise agreement that are highly prescriptive. There are new good faith bargaining requirements to attend and participate in meetings at reasonable times; disclose relevant information (other than confidential or commercially sensitive information) in a timely manner; respond to proposals made by other bargaining representatives in a timely manner; give genuine consideration to the proposals of other bargaining representatives and provide reasons for responses to those proposals. This in itself creates a paperwork burden for businesses as they will need to carefully document the discussions and provide carefully considered written responses to claims.
- 7.4.4 In addition to these rules that regulate negotiations, there are a number of prescriptive administrative requirements. including the requirements:
- for an employer to provide employees with notification of their bargaining representation rights as soon as practicable and no later than 14 days of initiation of bargaining;

- that an employer not conduct a vote to approve an enterprise agreement until at least 21 days have passed since the notification of the right to representation during bargaining has been distributed;
- that employees be given at least seven days' notice of the vote to approve the enterprise agreement. The employees must also be given a copy of the agreement and any material referenced in the agreement.

7.4.5 So what happens if these requirements are not met? Under the *Workplace Relations Act 1996* agreements could still become effective and registered if the pre-lodgement procedure had not been strictly adhered.

7.4.6 However case law indicates that FWA may not to approve an agreement if the pre-lodgement requirements have not been complied with, despite the approval of the agreement by majority of employees and notwithstanding that the requirements regarding content may have been met.<sup>24</sup>

7.4.7 It is not just small businesses that struggle with the complexities of the pre-approval requirements.

7.4.8 However, procedural rules aside, the content requirements for agreements and administration of the better off overall test can be equally as problematic. For example, a number of entitlements under the *Building and Construction General On-site Award 2010* are not connected with a monetary entitlement and it may be difficult to demonstrate a benefit from a change in conditions without an examination of the individual circumstances of employees to be covered by the agreement. Agreement to vary hours of work to displace the rostered day off system under the award is one example of this.

<b>Recommendations:</b>
HIA recommends a revision of the criteria and assessment of an agreement for small business employers seeking to access greater flexibility. This may involve a reassessment of the minimum statutory criteria that cannot be compromised via bargaining or for which compensation must be provided, with this criteria existing

<sup>24</sup> *Jillcar Pty Ltd T/A Semaphore Hotel* [2010] FWA 2715.

independently of complex award provisions.

In order to make bargaining a more attractive option for small business, changes to the system are necessary to minimise the paperwork burden and streamline the procedural and administrative requirements. Furthermore, failure to satisfy paperwork and procedural requirements should not exist as a barrier to the approval of an agreement where it can be established that there is no detriment to employees on account of the non-compliance.

## **7.5 Individual agreements**

7.5.1 Employers who have no alternative but to comply with the burdensome and inflexible provisions of an award may be deterred from negotiating above award conditions in exchange for productivity offsets and may in fact be deterred from employing more staff to help them grow their business and meet their productivity targets.

7.5.2 Prior to the introduction of the Act, employers had access to a range of agreement making options, including:

- union collective agreements;
- employee collective agreements;
- Australian Workplace Agreements (and Individual Transitional Employment Agreements);
- union greenfield agreements;
- non-union greenfield agreements.

7.5.3 Australian Workplace Agreements in particular represented a popular option for residential building industry employers and employees in response to industrial awards that evolved to become highly complex, prescriptive and inflexible instruments.

7.5.4 Under the Act, these options have effectively been reduced to union collective agreements (due to the default bargaining position of the union) and union greenfield agreements. The entrenchment of the union role in agreement making has stifled productive agreement making. In a survey of members conducted by HIA in February 2012, 72 per cent of respondents indicated that

they would be less likely to initiate bargaining with employees for an enterprise agreement if there was to be union involvement.

- 7.5.5 The collective bargaining emphasis in the Act is not appropriate in the context of a private sector workforce in which only 14 per cent of employees choose to join a trade union. As noted by an HIA member surveyed in February 2012
- The “fair work act” has made us reluctant to engage full time employees. We would require more flexible arrangements, effectively AWAs with a no disadvantage test.*

**Recommendations:**

HIA recommends that the Act be amended to:

- ensure that bargaining agents are not automatically appointed on the basis of union membership but, rather, are elected by a majority vote of all employees to be covered by the agreement;
- provide for a greater range of agreement making options, including individual statutory agreements underpinned by a no-disadvantage test. In particular, HIA recommends the re-instatement of provisions to include the following:
  - union collective agreements, with unions to act as bargaining agents on behalf of employees only if a majority of employees in the workplace request this;
  - employee collective agreements;
  - union greenfield agreements, only if the employer wishes to involve the union in such discussions;
  - non-union greenfield agreements;
  - pre-Work Choices style individual agreements, such as those that were permitted from 1996 onwards and supported by a no-disadvantage test.

## 7.6 Permitted matters and prohibited content – an attack on contracting

7.6.1 Independent contracting is an essential characteristic of the housing industry and has particular concerns with recent decisions of Fair Work Australia that impinge upon the freedom to engage independent contractors.

7.6.2 This is contrary to the Government's commitment that independent contracting is a matter for commercial not industrial law.

7.6.3 HIA notes in the wake of the *Electrolux* decision, the Howard Government amended the *Workplace Relations Act 1996* to include a prohibition against certain content within agreements that did not properly relate to the employment relationship. This importantly included right of entry matters and terms restricting the engagement of independent contractors and requirements relating to their conditions of engagement.

7.6.4 The Fair Work Act on the other hand expands upon the matters that could be included in enterprise agreements. While non-permitted matters include clauses that contain a general prohibition on engaging labour hire employees and contractors or on employing casuals, unions have been exploiting loopholes in the new laws and are pursuing matters that were previously considered prohibited content.

7.6.5 A summary of the problematic decisions that allow union to pursue claims for clauses restricting the engagement of contractors is provided below.

### ***Asurco Contracting Pty Ltd v CFMEU* [2010] FWAFB**

In this matter the Full Bench upheld a decision that various clauses relating to the engagement of contractors and supplementary labour were permitted matters. The clauses imposed:

- A requirement to consult with employees and their unions prior to the engagement of contractors or supplementary labour;
- A requirement to afford contractors and on-hire employees terms and conditions no less favourable than those which apply to employees under the agreement.

It was found that the obligation in the agreement requires contractors to be paid, as a minimum, the amounts in the agreement applicable to employees and that the

existence of another enterprise agreement with higher or lower terms did not prevent an employer from observing the obligation and did not amount to a breach of the general protections provisions of the Act.

**ADJ Contracting Pty Ltd (AG2011/364)**

The Full Bench found that the following clauses were “*permitted matters*” :

- Where the Employer makes a decision that it intends to engage contractors or labour hire companies to perform work covered by the Agreement, there is a requirement to consult with employees and their representatives.
- The Employer is required to inform employees and their representatives of:
  - The name of the proposed contractor(s)/labour hire company;
  - The type of work to be given to the contractor(s)/labour hire company;
  - The number of persons and qualifications of the persons the proposed contractor(s)/labour hire company may engage to perform the work;
  - and
  - The likely duration.
- The Employer is required to consult with employees and their representatives in relation to:
  - Safety; and
  - Inductions and facilities for contractor and labour hire employees.
- The Employer is only permitted to engage contractors and employees of contractors if the wages and conditions are no less favourable than that provided for in the Agreement. An exception is where the head contractor/client requires the Employer to engage a nominated contractor to do specialist work.
- If there is a dispute about consultation, the employee or Union may refer the matter to the Disputes Board for a final and binding determination.
- The Employer is not permitted to affect redundancies whilst labour hire employees, contractors and/or employees of contractors are engaged by the Employer.

7.6.6 With unions taking advantage of the current interpretation of the law to pursue pattern bargaining the inclusion of clause within enterprise agreements

restricting and discouraging the use of contractors impacts upon on the flexibility, efficiency and productivity of the housing industry.

**Recommendations:**

HIA submits that it is necessary to amend to the *Fair Work Act 2009* to include a provision stating that a term of a workplace agreement is unlawful and unenforceable to the extent that it deals with restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement.

## 8 General protections

- 8.1 The new adverse action provisions expand the rights of persons, both before and after they are hired and fired.
- 8.2 This includes independent contractors and relate to action on account of a 'workplace right' or because they have engaged in industrial action. 'Workplace rights' are very broad under the Act which provides that:

*(1) A person has a workplace right if the person:*

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
- (c) is able to make a complaint or inquiry:*
  - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or workplace instrument; or*
  - (ii) if the person is an employee – in relation to his or her employment.*

- 8.3 In HIA's view, these provisions unnecessarily overlap with existing employee protections from unlawful workplace discrimination or victimisation.
- 8.4 The general protection provisions are having an increasing impact with the number of claims increasing from 1,188 in 2009-10 to 1,871 in the last financial year. The breadth of these laws is seeing them increasingly favoured over unfair dismissal laws as an avenue for employees to challenge disciplinary measures or termination. The reverse onus of proof means an employee can refer a claim to FWA without evidence linking the adverse action to the alleged reason. There are also limited jurisdictional obstacles associated with these claims. Accordingly, there is a real risk of these provisions being utilised as ambit claims and it may be difficult for an employer to discharge the onus in the absence of documentary evidence. This creates an unfair and untenable situation for employers on the receiving end of such claims, particularly small businesses who may not have the resources or skills to defend them, and tips the balance of the regulation too far in favour of employees.

#### **Recommendations:**

HIA recommends that the Act be amended:

- to provide that in determining the reason for a particular action, only the sole or dominant reason should be taken into account;
- to limit the meaning of workplace right;
- to require applications involving dismissal to be brought within 14 days;
- to ensure that legitimate disciplinary action in relation to the behaviour of union members as employees does not amount to a breach of the Act;
- to remove the reverse onus of proof;
  - to cap damages to 26 weeks' pay in line with unfair dismissal laws to discourage 'forum shopping'.

## **9 Unfair dismissal**

- 9.1 The Act has significantly expanded the reach of unfair dismissal protection, removing the small business exemption and extending protections to all award-covered employees who have achieved a minimum employment period.
- 9.2 The latest Fair Work Australia Annual Report confirms that the total number of termination of employment matters in 2010-11 was 14,897, an increase of 14

per cent over the previous year's figure of 13,054. There has been a spate of unfair dismissal decisions since the commencement of the Act's operation which prompt a consideration of whether the Act is operated as intended and the potential impact of the unfair dismissal provisions upon small business. 76 per cent of respondents to HIA survey of members in February 2012 indicated that they believed the unfair dismissal provisions were not fair for employers. 70 per cent of respondents to the same survey indicated that they were less willing and/or able to take on employees as a consequence of the unfair dismissal provisions.

- 9.3 Although small businesses are exempt from unfair dismissal claims if they can show they have complied with the 'Small Business Dismissal Code' (Code), there is evidence that the Code is not working. FWA data indicates that very few complaints by employees are struck out because the employer had followed the Code.
- 9.4 The Labor Government's 'Forward with Fairness – Policy Implementation Plan' acknowledged that small businesses warranted special consideration and that that they would be protected from a legally complex and easily exploitable unfair dismissal system. Unfortunately the Code does not provide businesses with the certainty they need and does not prevent the bringing of unfair dismissal claims and the matters subject of the Code are still subjective and capable of challenge.
- 9.5 Take for example, the following statements:
- *It is fair for an employer to dismiss an employee without notice or warning when the employer believes on **reasonable grounds** that the employee's conduct is sufficiently serious to justify immediate dismissal (emphasis added).*
  - *In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a **valid reason** based on the employee's conduct or capacity to do the job (emphasis added).*

- *The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a **reasonable chance** to rectify the problem, having regard to the employee's response.*

- 9.6 Terms such as 'reasonable grounds', 'valid reason' and 'reasonable chance' are all matters that need to be determined on the facts, as discoverable in evidence. The Code also sets out procedural requirements that, if not adhered to, will be fatal to an employer's ability to rely on the Code. While the Code may serve as helpful guidance for a small business, the reality is that the requirements of the Code are not dissimilar to the criteria set out in section 387 of the Act which is relevant to all businesses.
- 9.7 Unfortunately the concessions the Act extends to small business, including the Code, do not go far enough.<sup>25</sup> Despite the claim that 'Under Labor's policy there will be no 'go away money'', this has not been the experience of business to date.<sup>26</sup>
- 9.8 FWA also appears to attach significant weight on procedural deficiencies in arriving at decisions, which is problematic for small businesses without sophisticated resources or processes for managing cases involving misconduct or underperformance. A comment from an HIA member surveyed in February 2012 highlights the impact of the provisions on business:

*The Fair Work Act has made us apprehensive about employing new staff. There is unease about our ability to terminate an under-performing employee or to make staff members redundant if there is no more work for them. There are serious concerns for us in the current market where margins are very tight and competition is high – we simply cannot afford to carry staff who are not going to pull their weight and fulfill their role...*

*Further, as a small business we have very limited resources available to address IR issues. It is not possible for us to have a dedicated HR manager, or to obtain legal advice for each adjustment to our staffing levels. As a result we are apprehensive about employing new staff in case we need to make someone redundant sometime in the future and instead of making practical adjustments to our workforce, being forced to incur the expense of 'training' a*

<sup>25</sup> Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, page 18.

<sup>26</sup> Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, page 18.

*redundant labourer to take on an office based administration role irrespective of how suitable or unsuitable the employee may be.*

*If the government wants small business to employ more people, they need to make it less risky to do so...*

- 9.9 There are numerous decisions where FWA found that dismissals for misconduct have breached unfair dismissal laws. For example, a manager at a transport company was summarily dismissed for stealing from his employer to fund social events. FWA found that the employee had been ‘deliberately dishonest’ and that he had ‘conspired to defraud’ his employer. Nevertheless, an inadequate and inequitable investigation meant that the dismissal, while ‘inevitable’, was unreasonable. The employer was criticised for failing to take action against two other employees who were involved in the misappropriation of fund and conducting a cursory investigation that relied heavily on the information provided by the other employees implicated in the misconduct.
- 9.10 An employee’s repeated failure to wear safety glasses, and his abusive response to managements’ directions to do so was found to amount to ‘relatively serious misconduct’ but that the resultant dismissal was found to be harsh. The decision focused heavily on the employee’s personal circumstances and the ‘disastrous’ effect that the dismissal would have on his life. In this regard, the tribunal noted that he was 44 years of age, had no qualifications, two young children and a mortgage, and that his wife suffered from depression and did not earn a large income. The employee was reinstated.
- 9.11 A senior member of staff at a leagues club with 33 years of service was summarily dismissed for emailing documents containing clearly commercially sensitive information to her husband, who worked for a competitor. FWA found that the action was deliberate misconduct, a breach of the employer’s policies, and had the potential to cause serious harm to the business. However in finding that the conduct was not serious misconduct, the Commissioner noted that the employee had not intended to harm her employer but was attempting to assist her husband with his work. Accordingly, given the employee’s length of service, the dismissal was harsh and the employer was ordered to pay 12 weeks’ pay as compensation.
- 9.12 These decisions also stand to demonstrate that the laws have the capacity to produce outcomes that would be unfair and unsustainable for all businesses, small, medium and large.
- 9.13 **Genuine redundancy**

9.13.1 Section 385(d) of the Act provides that a person has been unfairly dismissed if FWA is satisfied that the dismissal was not a case of genuine redundancy.

9.13.2 Genuine redundancy is defined in section 389(1) of the Act as a dismissal where:

*(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and*

*(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.*

9.13.3 The Act has the effect that a failure to meet technical procedural requirements may result in a claim for unfair dismissal, even in the case of a position genuinely being made redundant because the job is no longer required to be performed by anyone. Consultation provisions within the award are complex for an under resourced small business employer and do not change the fact that an employee's position is no longer available.

9.13.4 With unfair dismissal claims rising by more than 10 per cent a year since the commencement of the Act in 2009, modifications to the Act are required to better protect small business.

<b>Recommendations:</b>
<p>HIA recommends:</p> <ul style="list-style-type: none"><li>• reinstatement of a small business exemption for small business employers, providing an exemption for employers who employ 20 or fewer employees;</li><li>• an amendment to clarify that if there is a finding of gross misconduct by FWA, procedural deficiencies or irregularities should not amount to a finding that the termination is unfair;</li><li>• the imposition of fines for frivolous and vexatious claims;</li><li>• a narrowing of the definition of genuine redundancy to circumstances where a person's employer no longer requires the person's job to be performed by anyone.</li></ul>

## 10 Right of entry

10.1 Labor's 'Forward with Fairness – Policy Implementation Plan' had promised that the new laws would 'maintain right of entry laws.'<sup>27</sup>

10.2 This was reiterated by the then Opposition Leader Kevin Rudd who stated:

10.3 The laws that we have in Australia concerning union right of entry, if we're elected to form government, will be identical to those which currently exist under this Government...<sup>28</sup> However this promise was not fulfilled with the Act providing significantly expanded rights of entry for unions.

10.4 Unions are now able to enter work sites without union members or coverage of an enterprise agreement and without an invitation from workers or management because there is at least one person site who is 'eligible' to be a member under the union's rules. Such a provision may result in unnecessary disruption on sites where there are no union members and inappropriately supports membership recruitment drives.

10.5 The Act has also introduced the ability to include right of entry clauses in enterprise agreements. A survey of HIA members in February 2012 indicated that 68% of respondents did not believe that the union right of entry provisions balanced the right of unions to meet with employees to investigate breaches and the right of employers to go about their business without inconvenience.

### **Recommendation:**

HIA recommends that the Act be amended to restrict union right of entry to circumstances where:

- the union has employees at the workplace;
- those members have requested that the union attend the site to represent them;
- the union is a party to an enterprise agreement covering the employees who are union members.

<sup>27</sup> Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, page 23.

HIA also recommends that the Act be amended to prohibit right of entry clauses in agreements, beyond the legislated provisions.

## **11 Industrial action**

- 11.1 The 2002 Cole Royal Commission detailed systemic lawlessness in the Australian building industry including illegal strikes, pattern bargaining, right of entry infringements and the coercion of non-unionised subcontractors. Although the ABCC has played an effective role in addressing this endemic culture of industrial lawlessness, its work is far from finished and it is important that a strong industrial framework is in place as a deterrent to such behaviour.
- 11.2 Whilst residential building has traditionally been insulated from many of the industrial issues confronting civil and commercial construction, this has largely been due to the engagement of specialist contractors by builders rather than employees, the decentralised nature of the industry and relatively small scale of construction for single, detached dwellings. However, broadened rights of entry that give unions to access to sites where there are no union members present have meant that businesses in the residential building industry have a heightened fear of union interference. HIA has also seen a rise in industrial disputation within manufacturing sector of the residential building industry.
- 11.3 Unions have historically used the threat or actual taking of, protected industrial action to advance their bargaining position. Industrial action may have a highly detrimental effect of an enterprise and can severely hamper productivity and the ability to deliver projects in accordance with the terms of a contract. The Act has broadened employees' access to protected industrial action and there are fewer legislative impediments to the taking of such action.
- 11.4 Despite the Act containing complex and prescriptive good faith bargaining requirements, the provisions have not prevented the taking of industrial action prior to the holding of discussions for an enterprise agreement. In particular, the Act has permitted unions to circumvent these processes and initiate protected industrial action without seeking a Majority Support Determination.
- 11.5 HIA is particularly concerned that JJ Richard's decision that undermined the key limitation on protected industrial action, that is, the requirement that such

action be endorsed by a majority of employees under a protected action ballot order promotes a mentality of 'strike first, talk later'.<sup>29</sup>

11.6 Coupled with the unjustified abolition of the Australian Building and Construction Commission, HIA is concerned with a return to unnecessary onsite militancy in the construction sector.

**Recommendation:**

The Act should be amended to make clear that Fair Work Australia cannot grant a protected action ballot application where bargaining hasn't commenced, unless the employees or union involved have first obtained a majority support determination. As part of the Fair Work Act Review the panel should recommend the re-establishment of the Australian Building and Construction Commission.

---

<sup>29</sup> See *JJ Richards & Sons Pty Ltd v Transport Workers Union of Australia* [2011] FWA 3377, 1 June 2011.

## Annexure – Summary of HIA’s recommendations

Safety net
<p>1. HIA recommends that the Act be amended to extend the period for averaging work hours to a 52 week period (subject to agreement in writing between the employee and employer) and make this a mandatory flexibility provision within awards and workplace agreements.</p>
<p>2. HIA recommends that section 66 of the Act (preserving state arrangements for flexible work arrangements) be removed.</p>
<p>3. HIA recommends that the Act be amended to:</p> <ul style="list-style-type: none"> <li>• exclude personal/carer’s leave from the categories of leave taking priority over annual leave;</li> <li>• allow both award free and award covered employees to cash out annual leave, subject to agreement in writing between the employee and employer.</li> </ul>
<p>4. HIA recommends amendments to the Act to:</p> <ul style="list-style-type: none"> <li>• remove the requirement for notice to be provided in writing;</li> <li>• clarify that the notice of termination provisions under the NES do not apply to apprentices.</li> </ul>
<p>5. HIA recommends the removal of section 125 requiring the provision of the Fair Work Information Statement for new employees.</p>
<p>6. HIA recommends that section 130(2) be removed and that section 130(1) be improved to clarify that, regardless of the content of state and territory laws, employees do not accrue annual leave during periods of workers compensation.</p>
<p>7. HIA recommends that the Act be amended to:</p> <ul style="list-style-type: none"> <li>• limit the circumstances in which a modern award may include an industry specific redundancy scheme be limited to cases of ‘genuine redundancy’;</li> <li>• limit the application of redundancy provisions (including industry specific redundancy schemes) to employers with more than 20 employees.</li> </ul>
<p>8. HIA recommends that, as promised by Labor’s ‘Forward with Fairness’ policy, the Act be amended to regulate minimum standards by:</p>

- limiting award content to simple, fair and flexible minimum terms as distinct from matters properly belonging in an agreement. Such terms were previously expressed as “allowable award matters” under the repealed Workplace Relations Act 1996 and have been appropriately identified in Labor’s ‘Forward with Fairness – Policy Implementation Plan’;
- providing a mechanism for a further simplification of the number of and coverage of awards.

9. Considering the policy intend for IFAs to be simple, the Act should not deem an imperfect agreement invalid if it has been freely and genuinely entered into and the employee is not disadvantaged by the agreement.

10. If award content is to be regulated in the manner recommended by HIA, there will be no need for IFAs. However if such rationalisation of awards does not occur, and individual statutory agreements are not reinstated, HIA also recommends that the Act be amended to:

- require both awards and agreements to contain model provisions which would allow for the variation of any conditions within the award (excepting those matter contained within the National Employment Standards as varied in the manner recommended by HIA), provided the employee meets a re-instated ‘no-disadvantage’ test that would apply in place of the BOOT;
- allow employers to make IFAs a condition of employment at the time of engagement. There is no rationale for the current restriction to apply when there are statutory protections in place to protect employees (both current and prospective) from being disadvantaged and if they are agreeable to the terms of the offer;
- prevent IFAs from being able to be terminated unilaterally on 28 days’ notice. Some forms of IFA may result in business having to affect changes within their workplace, e.g. making payroll adjustments or adjustments to working arrangements to accommodate the terms of an IFA. It would be inefficient and a disincentive to entering into an IFA if an employer had to make such changes frequently and there will be interference in an employer’s capacity to plan effectively in the absence of a guarantee that IFAs will remain in place for a certain length of time;

- prevent unions and others involved in the agreement making process from restricting the terms that can be varied under an IFA. The current capacity and inclination for unions to do so in negotiations undermine the intent of the provision as even non-union members bound to an enterprise agreement will be denied flexibility.

11. HIA recommends that any wage setting mechanism and the minimum wage objective be amended to take into account the performance of the economy on an industry specific basis and in award reliant sectors.

### **Bargaining**

12. HIA recommends that the Act be amended to provide strengthened protection against pattern bargaining and to provide that a person cannot be considered as 'genuinely trying to reach agreement' if they are pattern bargaining.

13. HIA recommends a revision of the criteria and assessment of an agreement for small business employers seeking to access greater flexibility. This may involve a reassessment of the minimum statutory criteria that cannot be compromised via bargaining or for which compensation must be provided, with this criteria existing independently of complex award provisions.

14. In order to make bargaining a more attractive option for small business, changes to the system are necessary to minimise the paperwork burden and streamline the procedural and administrative requirements. Furthermore, failure to satisfy paperwork and procedural requirements should not exist as a barrier to the approval of an agreement where it can be established that there is no detriment to employees on account of the non-compliance.

15. HIA recommends that the Act be amended to:

- ensure that bargaining agents are not automatically appointed on the basis of union membership but, rather, are elected by a majority vote of all employees to be covered by the agreement;
- provide for a greater range of agreement making options , including individual statutory agreements underpinned by a no-disadvantage test. In particular, HIA recommends the re-instatement of provisions to include the following:
  - union collective agreements, with unions to act as bargaining agents on behalf of employees only if a majority of employees in the workplace request this;

<ul style="list-style-type: none"> <li>○ employee collective agreements;</li> <li>○ union greenfield agreements, only if the employer wishes to involve the union in such discussions;</li> <li>○ non-union greenfield agreements;</li> <li>○ pre-Work Choices style individual agreements, such as those that were permitted from 1996 onwards and supported by a no-disadvantage test.</li> </ul>
<p>16. HIA submits that it is necessary to amend to the Act to include a provision stating that a term of a workplace agreement is unlawful and unenforceable to the extent that it deals with restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement.</p> <p>(a)</p>
<p><b>Transfer of business</b></p>
<p>17. HIA recommends amendments to the Act so that:</p> <ul style="list-style-type: none"> <li>• employers are not burdened by the industrial arrangements of previous employers beyond 6 months from the transfer of business;</li> <li>• the transfer of business rules are limited to circumstances where a business has actually been transferred.</li> </ul>
<p><b>General protections (adverse action)</b></p>
<p>18. HIA recommends that the Act be amended:</p> <ul style="list-style-type: none"> <li>• in similar terms to the approach within section 798(8) of the repealed Workplace Relations Act 1996, provide that in determining the reason for a particular action, only the sole or dominant reason should be taken into account;</li> <li>• to limit the meaning of workplace right;</li> <li>• to require applications involving dismissal to be brought within 14 days;</li> <li>• to ensure that legitimate disciplinary action in relation to the behaviour of union members as employees does not amount to a breach of the Act;</li> <li>• to remove the reverse onus of proof;</li> <li>• to cap damages to 26 weeks' pay in line with unfair dismissal laws to discourage 'forum shopping'.</li> </ul>
<p><b>Unfair dismissal</b></p>
<p>19. HIA recommends:</p>

- reinstatement of a small business exemption for small business employers, providing an exemption for employers who employ 20 or fewer employees;
- an amendment to clarify that if there is a finding of gross misconduct by FWA, procedural deficiencies or irregularities should not amount to a finding that the termination is unfair;
- the imposition of fines for frivolous and vexatious claims;
- a narrowing of the definition of genuine redundancy to circumstances where a person's employer no longer requires the person's job to be performed by anyone.

### **Union right of entry**

20. HIA recommends that the Act be amended to restrict union right of entry to circumstances where:

- the union has employees at the workplace;
- those members have requested that the union attend the site to represent them;
- the union is a party to an enterprise agreement covering the employees who are union members.

21. HIA also recommends that the Act be amended to prohibit right of entry clauses in agreements, beyond the legislated provisions.

### **Industrial action**

22. The Act should be amended to make clear that Fair Work Australia cannot grant a protected action ballot application where bargaining hasn't commenced, unless the employees or union involved have first obtained a majority support determination.

23. As part of the Fair Work Act Review the panel should recommend the re-establishment of the Australian Building and Construction Commission.