Review of the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022*

Department of Employment and Workplace Relations

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Introduction

HIA refers to the joint review of the operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act), and amendments made by Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) as announced on 2 October 2024 (Review).

HIA provides this response to the Review.

The IR reforms enacted by the Secure Jobs, Better Pay Act were broad ranging. These, coupled with the more recent Closing Loopholes reforms, have impacted most aspects of the employment relationship.

Unfortunately, the cumulative impact of these reforms and the allegations against the Construction, Forestry and Maritime Employees Union (CFMEU) and other union activity, have left productivity and confidence across the construction industry at an all-time low.

The end to the pandemic boom in building activity nationally, due to the rise in the cash rate in May 2022, led to a lull in new home commencements for 2022-23. With the demand for new homes across the country accelerating due to the persistence of housing shortages, the industry is forecast to be on an upward trend into 2025.

This expected upward trend is largely due to the fact that the RBA hasn't increased interest rates for a year. This, combined with elevated population growth a low unemployment rate and the stablisation of real incomes has provided broader economic confidence to bring customers back to the table.

There is nothing in the latest IR reforms that have contributed to the movement of the residential building industry out of the latest slump in activity. In fact, employing and retaining staff has never been more difficult or complex.

Overlapping regulations and the various Federal and State jurisdictions are creating confusion. For example, changes that introduced a prohibition on sexual harassment in connection with work have resulted in overlapping, yet inconsistent duties in respect of sexual harassment across three different regulatory regimes. Business, particularly small business, simply do not have the resources and capabilities to keep up with these changes, let alone take proactive steps to ensure compliance where confusion and overlapping regulation occurs.

A key reform impacting the construction industry was the abolition of the Australian Building and Construction Commission (ABCC). This regulatory gap comes at a time during which recent media reports, allegations and subsequent investigations regarding the conduct of the CFMEU have come to light.

No one in the industry has been surprised by the reported conduct of the CFMEU. The allegations of intimidation, extortion and other illegal behaviour have been on record for decades. As recently highlighted since 2003 the CFMEU has been the subject of findings of contraventions of federal workplace laws on more than 1,500 occasions, plus 1,100 contraventions by its office holders, employees, delegates and members, resulting in over $24 million in penalties, and $4 million ordered against office holders, employees, delegates and members.[1]

[1] ABC News, 7 August 2025, *CFMEU broke the law 2,600 times, Fair Work claims in court documents*

To this end, it is difficult to provide additional 'case studies of real-life examples' as required by this Review, for the fear of retribution, and the genuine desire for business 'to get on with business'.

It is a shame that despite multiple inquires, royal commissions, the actions of an industry specific regulator (in various guises) and damning Federal Court decisions, it has taken an 'exposé' by several media outlets to draw attention to the behaviour industry has always known about.

The Federal Government's commitment to deliver 1.2 million homes through the National Housing Accord, over the next 5 years represents a pivotal milestone in government policy and direction. This announcement shows leadership to tackle Australia's housing supply and affordability challenges. However, this target cannot be achieved in a vacuum.

HIA forecasts show that to reach this goal, housing supply cannot fall below 240,000 new homes each year. While new home building activity is expected to climb from the low levels experienced in the post pandemic slump, commencements will unfortunately sit around 176,000 in 2024-25. This is a slow start to achieving the Government's goal.

To arrest the low levels of activity, policy settings must be directed at supporting the residential building industry to work in the most effective, efficient, and productive way that suits the operation of the industry.

For example, there is concern that the behaviour of the CFMEU may find its way onto building projects funded through the Housing Australia Future Fund, a fund set up to target the need for social and affordable housing. Such concerns are grounded in the revelations and allegations about the behaviour and conditions on the Victorian Big Build projects.

These reports simply confirm the industry knowledge that tendering for government funded work has always come with an obligation to enter the union Enterprise Bargaining Agreement (EBA). This is considered just the cost of doing business in the industry.

These costs spill into the broader construction industry, including the residential building industry but the indirect effects are much more insidious and difficult to quantify, for example, the actions of the CFMEU impact the competition for skilled labour and materials, and put pressure on businesses to engage in direct employment.

The actions of other unions are also adversely affecting housing supply.

HIA has received feedback from members that industrial action taken by the ETU as a part of EBA negotiations with electricity suppliers has prevented the connection of residential apartment developments, including a substantial number of social housing. HIA also understands that this approach may be as a result of provisions of the Secure Jobs Better Pay Act that provided for the arbitration of an EBA in certain circumstances.

We have reached a point where the (known) actions of the CFMEU (and it would now appear the ETU) are putting pressure on housing affordability exacerbating the current cost of living crisis. This is unacceptable and must be responded to.

The current business environment under which the CFMEU can conduct its activities lacks the accountability and transparency required of the rest of Australian businesses. It should surprise no one that the clandestine business environment afforded to the CFMEU is an enabler to corruption and poor business

practices. The current situation, while difficult, is an opportunity for widespread and meaningful reform, accountability and transparency.

To make the improvements to housing affordability that Australia desperately needs the costs imposed on the residential building industry must be reduced and governments at all levels have the power to help reduce these costs.

Systemic and comprehensive action must be taken to ensure a sustainable, productive, cost-effective building and construction industry and to improve housing affordability across the country.

Recommendations

Re-establish the ABCC

HIA recommends the re-establishment of the ABCC. Additionally, HIA recommends the re-introduction of a revised Code for the Tendering and Performance of Building Work, developed in conjunction with industry.

This move has been most recently supported by the Senate Select Committee on Cost of Living Final Report that recommended:

> *'that the Australian Government reinstate the Australian Building and Construction Commission to address lawlessness in the Construction, Forestry and Maritime Employees Union and reduce the cost of building new homes for Australians'*

Targeted compliance and enforcement arrangements

In the alternate HIA recommends consideration of:

- An industry specific regulator whose powers expand beyond industrial relations matters to deal with, for example:
    - 'menacing conduct' as identified by the CFMEU administrator,
    - anti-competitive conduct in breach of the Competition and Consumer Act (CCA), and
    - other illegal activity.
- Expanding the powers of the Fair Work Ombudsman (FWO). This would include empowering the FWO:
    - To establish a dedicated construction industry 'unit', and
    - This dedicated unit should be given the full range of powers previously bestowed on the ABCC including, for example prohibitions against unlawful picketing, coercion, compulsory examination and investigation powers and increases in penalties for such conduct occurring in the building and construction industry.
- Amendments to the Registered Organisations Act to ensure registered industrial organisations – both unions and employer associations – be properly regulated and subject to the same degree of transparency and accountability as companies.
- Holding union office holders and union members accountable in the same way directors are held accountable under the Corporations Act 2001 (Corporations Act) such that the governance and financial prudential duties should mirror those of company directors and that the same penalties apply to company directors and other officeholders under the Corporations Act also apply to them.

Part 16A of Schedule 1 of Closing Loopholes Act

The removal of the requirement for union officials to hold a Fair Work entry permit to assist a Health and Safety Representative undermines the very integrity of the right of entry permit system.

The right of entry permit system puts in place checks and balances to ensure those coming on site have been 'vetted'. Doing away with this requirement gives union officials unfettered access to workplaces, a reality that in the current environment is a particularly dangerous precedent to set.

HIA recommends that this right to enter to assist a HSR be narrowed. If the true intention of the amendment is to provide HSRs assistance by ensuring they have access to appropriate expertise then this should be specified and confined to the matters identified, for example, if there is a particular issue with a piece of plant or equipment, the assistant to the HSR should have expertise with that particular piece of plant or equipment.

Prohibiting Sexual Harassment in Connection with Work

HIA questions the effectiveness and appropriateness of these amendments. Unfortunately the laws in relation to sexual harassment represents a fragmented and overlapping regulatory framework.

Sexual harassment is addressed by Work Health and Safety legislation, and associated regulations, including two codes of practice which take a preventative approach. Further the Fair Work Act, includes this latest prohibition as well as empowering the FWC to make sexual harassment orders and to conciliate, mediate and arbitrate and finally the Sex Discrimination Act overseen by the Australian Human Right Commission imposes a series of obligations in relation to sexual harassment and has a range of powers. In practice, the regulatory standards, rights, process and procedures, enforcement measures and remedies open to complainants are very different under each jurisdiction.

Further, and as a result of the passage of the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* the issue of how costs are dealt with under the various regulatory frameworks appears to be influencing behaviour. As highlighted by the FWC that has suggested that further amendments to align the cost provisions of the AHRC, are being considered given the limited uptake of sexual harassment applications via the Commission.[2]

Businesses, in particular small businesses, are required under these provisions to comply with a plethora of similar obligations in respect of the same, or similar, conduct, noting that the approach to be taken to mitigate liability for such conduct is not the same under each regime. This presents serious challenges for businesses when determining the appropriate approach to take in respect of these obligations.

HIA would emphasise that a regulatory response that places a heavy responsibility for the management of these matters on business is not always the most appropriate.

On issues that require a systemic and community wide change in behaviour the best approach is to focus on education and support tailored to the needs of, and risks prevalent in, particular industries or community cohorts. A 'one-size-fits-all' approach through the industrial relations framework is inappropriate and duplicative.

[2] Workplace Express, 11 November 2024, 'Fuss about multi-bargaining overblown: Hatcher'

Abolition of the ABCC

The recent investigations, allegations and appointment of an administrator to the CFMEU clearly demonstrate the toxic culture that underpins and undermines the efficient operation of the industry.

As noted above, while the actions of the union may not directly impact the residential building industry, there are certainly flow on effect. The same reasoning applies to the operation and activity of an industry specific regulator.

Although the jurisdiction of the ABCC applied to the construction of 5 single dwelling houses or more, many HIA members work across both the commercial, public works and residential sectors. These include builders and developers of multi-unit apartments, mixed-use buildings and social housing sites. Additionally, many HIA trade contractors work for both commercial and residential builders.

Many have posed the question - Why does the construction industry need a specialist industry specific regulator?

Most importantly, a stand-alone specialist statutory agency for the building industry can respond quickly and effectively to unlawful activity on site. The reasoning of the 2002 the Cole Royal Commission remains relevant. The Cole Royal Commission found an entrenched level of lawlessness in the building and construction industry. Example of inappropriate practices and conduct include:

- widespread disregard of, or breach of, the enterprise bargaining provisions of the *Workplace Relations Act 1996*;
- widespread disregard of, or breach of, the freedom of association provisions of the *Workplace Relations Act 1996*;
- widespread departure from proper standards of occupational health and safety;
- widespread requirement by head contractors for sub-contractors to have union-endorsed enterprise bargaining agreements before being permitted to commence work on major projects in State capital central business districts;
- widespread requirement for employees of sub-contractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;
- widespread disregard of the terms of enterprise bargaining agreements once entered into;
- widespread application of, and surrender to, inappropriate industrial pressure;
- widespread use of occupational health and safety as an industrial tool;
- widespread making of, and receipt of, inappropriate payments; unlawful strikes, and threats of unlawful strikes; threatening and intimidatory conduct;
- underpayment of employees' entitlements;
- disregard of contractual obligations;
- disregard of federal and State codes of practice in the building and construction industry; and
- disregard of the rule of law.[3]

[3] Commonwealth, Royal Commission into the Building and Construction Industry, ***Final Report*** (2003) Vol 3,4-5.

It is quite clear that aggressive and unlawful industrial action persists in the industry. The findings and serious body of evidence presented before the 2015 Heydon Royal Commission, the 2002 Cole Royal Commission and the number of cases determined by the Fair Work Commission (FWC) and the Federal Court demonstrate the need for building industry specific laws.

To quote Commissioner Heydon:

> *'the argument that there is no need for an industry specific regulator cannot be sustained."*[4]

As identified in its final report, the *'systemic corruption and unlawful conduct'*[5] of the CFMEU is not new; over the last 40 years a number Royal Commissions have reported the same.

There is, according to Commissioner Heydon:

> *'a long standing malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that the CFMEU officials habitually show contempt for the rule of law."*[6]

The building industry still needs an effective deterrent and enforcer of the rule of law.

One way this can be carried out is through unrestricted coercive powers similar to the investigatory powers held by other Australian law enforcement agencies, including the Australian Taxation Office, Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, which are necessary and appropriate.

The Heydon Royal Commission concluded that *'there is a strong case for the building industry regulator to have information gathering powers that are equal to those of other major statutory regulators*[7] recommending that:

> *'…legislation be enacted conferring the building and construction industry regulator with compulsory investigatory powers equivalent to those possessed by other civil regulators."*[8]

The ABCC had been doing a sound and effective job of law enforcement, clamping down on unions and others for illegal industrial behaviour and right of entry breaches. Clearly, its work was far from finished.

Importantly the industry specific regulator was just one part of the regulatory framework, the Code for the Tendering and Performance of Building Work (in its various forms, known as the Building Code) was key to influencing behaviour and outcomes.

In HIA's view, the Building Code and the industry specific regulator worked "hand in glove".

The 2016 Code and Guidelines, although an administrative burden for some members, alongside the ABCC, was responsible for much of the cultural improvements in the industry. In effect the Building Code was a licensing regime for commercial building projects funded by the Commonwealth Government.

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[4] Chapter 8 at paragraph 97
[5] Chapter 8 at paragraph 1
[6] Chapter 8 at pparagraph 23
[7] Chapter 8 at paragraph 142
[8] See Recommendation 62

With the abolition of the ABCC the Building Code was repealed and the following requirements no longer applied on construction sites carrying out federally funded projects:

- Restriction on enterprise agreement content.
- Code obligations regarding:
    - Sham contracting or collusive practices;
    - Compliance with security of payment laws;
    - Coercion to make above-entitlement payments in respect of building work;
    - Ensuring freedom of association – this includes there being no restriction on union paraphernalia such as flags being displayed on site;
    - Ensuring right of entry is strictly in accordance with relevant legislation;
    - Dispute settlement outcomes being consistent with the 2016 Code;
    - Taking steps to prevent or bring an end to unprotected industrial action, and reporting industrial action to the ABCC;
    - Drug and alcohol policies.
- A requirement for a code covered entities to require and monitor compliance by its subcontractors on Commonwealth-funded building work.
- A requirement to notify breaches of the Code to the ABCC, and further entitlement for the ABCC Commissioner to refer matters to the Minister with recommendations for sanctions.
- A requirement for tendering documents to require respondents to confirm compliance with the Building Code, other laws etc or for certain projects to have a Workplace Relations Management Plan approved by the ABCC.

While HIA supports the appointment of an administrator to the CFMEU, it is disappointing that no moves have been made to replace the ABCC with a dedicated construction industry regulator, as was the approach taken in 2012 at which time the Gillard Labor Government replaced the ABCC with the Office of the Fair Work Building Industry Inspectorate under the *Fair Work (Building Industry) Act 2012* (FWBC).

Although HIA did not support the reduced remit of the FWBC, there remained some (limited) recognition of the need for a focus on the action of industry participants in the sector.

These moves reduce the disincentives to engage in such behaviour and are being pursued despite the fact that current penalties are apparently insufficient to deter union misconduct[9].

National Construction Industry Forum

While HIA is supportive of mechanisms that assist the Government in addressing a broad range of issues relating to work in the building and construction industry (including safety, workplace relations, skills and training, industry culture, diversity and gender equity, and productivity), for reasons noted above it must be highlighted that this is no replacement for an industry specific regulator.

[9] See for example ABCC Media Release 12 September 2022 *CFMMEU and representatives penalised $495,000 over work stoppages at Melbourne University Veterinary School project site*, ABCC Media Release 29 August 2022 Full Federal Court upholds ABCC appeal – imposes higher penalties, ABCC Media Release 5 August 2022 $114,000 in penalties ordered against CFMMEU and two officials after disrupting works on the Pacific Hwy upgrade

Notwithstanding this since HIA's appointment to the Forum we have worked collaboratively with other members and, will continue to do so. Additionally, HIA would recommend the Forum has a place in being involved in the re-establishment of the ABCC, and any revised Code for industry.

Other comments

Workplace relations have been largely excluded from the reach of competition and trade practices laws. This broad exclusion is found at section 51(2)(a) of the CCA and has historically been based on the notion that labour is a different market to other goods and services and should be regulated discretely.

At the same time, free enterprise and improved productivity essentially depends on effective competition in all markets, including the employment market. However, the prevalence of pattern bargaining and the inclusion of terms in enterprise bargaining agreements that restrict or prevent the engagement of different forms of labour are fundamentally at odds with principles of competition. They drive up costs and reduce productivity.

While a line remains between these complex areas ignoring their interplay continues to have consequences.

For example, on the issue of secondary boycotts, section 45DD of the CCA states that if conduct relates to employment matters, a person's activity is not deemed to fall under the illegal secondary boycotting provisions.

In HIA's view whilst this might exempt legitimate strike activity, it should not cover or enable aggressive picketing that prevents material suppliers entering or leaving premises or subcontractors entering site.

In the Interim Report of the Royal Commission into Union Corruption and Governance, Commissioner Heydon observed that:

> *'The current secondary boycott provisions in the CC Act were ineffective to deter illegal secondary boycotts by trade unions.'*

Commissioner Heydon was specifically referring to allegations surrounding alleged 'black banning" of building products from manufacturer Boral by the CFMEU. Whilst the ACCC issued, ultimately successful Federal Court proceedings, their intervention was belated and well after the conduct had occurred, impacting the supply of product to the market.

The Harper Competition Review, also recommended repealing these provisions of the CCA in addition to:

- Amending sections 45E and 45EA of the CCA so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.
- Removing the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal.
- Applying the maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.