



**HIA Submission
Closing Loopholes
Independent Statutory Review
Draft Report**

**Department of Employment and
Workplace Relations**

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Executive summary

The Housing Industry Association (HIA) takes this opportunity to respond to the Draft Report on the Independent Statutory Review of Closing Loopholes. In doing so we acknowledge upfront the significant volume of work undertaken by Susan Booth and her team, and their willingness to engage with HIA and other key employer bodies via two roundtables.

The Draft Report follows earlier consultation on the Closing Loopholes Bills, to which HIA responded with its [Opening Loopholes submission](#) on 3 March 2026. Regrettably, the legitimate concerns raised giving rise to a number of recommendations have not been adopted. This criticism was respectfully communicated when HIA and other employer organisations met with the Reviewer to discuss the Draft Report at the recent roundtable. Accordingly, we reiterate these concerns in our supplementary submission in responding to the Draft Report.

The Closing Loopholes reforms are not operating as intended. In fact, they have fundamentally failed to achieve their stated objectives. Rather than streamlining regulation and protecting workers, these reforms have created catastrophic unintended consequences for the industry the Government is relying upon to deliver 1.2 million homes by 2029 and to address Australia's most urgent domestic and social priority: solving the housing crisis.

The Fair Work Commission President has publicly stated the system is "unsustainable", with a 24% increase in lodgements in a single year. The regulator itself is breaking under the weight of these reforms, which begs the question, when the enforcement system cannot cope, how can businesses be expected to?

Further, the review's failure to address the appropriateness limb of the Terms of Reference leaves a gaping hole in the adequacy of the consultation process. It is not just a question of whether these reforms are ineffective - it is that they were inappropriate and that the Review has an obligation to say so.

The residential building sector's structural characteristics must be understood and properly reflected in the framework under which it is expected to operate. Supporting out workforce of predominantly small businesses and independent contractors though weather-dependent, project-based work is imperative.

The growing trend towards union deputisation through judicial interpretation is deeply problematic, extending beyond Parliament's intention and even contradicting the regulator's own decisions. This judicial activism is creating a parallel regulatory system without democratic accountability.

Simplistic recommendations to produce guidelines, monitor and review in future have the potential to do lasting damage to businesses across industry. In particular, we call for a statutory subcontracting exclusion as the minimum condition for the continued operation of the labour hire framework, and an independent inquiry is necessary into the retrospective Federal Court ruling on delegates rights. This cannot wait 2 - 3 years.

Industry data is telling us that 68% of HIA small business members have considered scaling back or closing due to red tape, 73% are not planning to hire and 56% are diverting staff to compliance administration.¹ These statistics are directly influenced by the Closing Loopholes reforms and ultimately equate to homes not being built. The Final Report must acknowledge the housing supply implications of the reforms as an unintended consequence requiring targeted rectification.

¹ HIA Small Business Conditions Survey 2026, Available: <https://hia.com.au/our-industry/advocacy/small-business-conditions-survey>



A review that overlooks a central obligation

The Terms of Reference expressly required the Reviewer to consider whether the operation of the amendments is appropriate and effective. Yet, the Draft Report has only partly discharged the effectiveness limb, while failing to engage meaningfully with whether the reforms were appropriate in the first place. HIA's position, shared by employer groups across the roundtable process, is that many of the reforms were not appropriate, should not have been enacted, and should be repealed or substantially amended.

Further, the consultation process itself is structurally deficient, with less than two weeks provided for submissions on the Draft Report, which comprises over 350 pages and the employer roundtable held only four days before submissions close.

The terms of reference mandate that the review and consultation process consider the appropriateness of the reforms.

Employment relationships and standards

Meaning of 'employee' and 'employer'

For an industry built on genuine independent contracting arrangements the amended definitions attempt to stitch together a loophole that never really existed, and its retrospective application, has instead created a Frankenstein monster for businesses which were previously compliant.

The Draft Report acknowledges ambiguity in the definitions but confusingly the Reviewer has declined to address the High Court's warning in *Personnel Contracting* that the multi-factorial approach is 'inevitably productive of inconsistency'. The 2024–25 surge in general protections applications, an increase of 57%, which directly tracks the August 2024 commencement of s15AA.

Although HIA supports the production of information and guidance to facilitate awareness and compliance; guidance does not reduce the risk of retrospective re-characterisation of contracting arrangements, nor does it protect businesses from adverse FWC or court determinations.

It is likely there is little to be lost by embedding a statutory presumption, with no reduction in protection for misclassified employees, and a lot to gain with the simple restoration of legal certainty in legitimate independent contracting relationships.

An opportunity exists for the Reviewer to consider the actual cost and opportunity associated with a statutory presumption.

Casual employment

Prior to the conflict in the Middle East, 73% of HIA small business members surveyed indicated they were not planning to hire. This is indicative of the ambiguity and complexity of employment requirements even under normal trading conditions, as a result of the Closing Loopholes regime. This is reflected in the near-guarantee of permanency and the excessive administrative burden on employers associated with the casual conversion changes, which serve to further drive down employment opportunities, stifle growth and skew the labour market.



Road transport industry minimum standards

The devastating impacts of the broad definition of 'contractual chain participant', which captures every residential builder who receives a materials delivery by truck, include an estimated cost of \$58,894 per business, and \$403.8 million in average annual wage increases across the contracting chain over a decade. The Regulatory Impact Statement acknowledged yet dismissed the 'flow-on impacts' and this critical error has been repeated in the Draft Report. A review will simply see the anticipated impacts crystallise.

HIA demands a statutory exclusion or the narrowing of the supply chain for businesses whose sole connection to the road transport industry is receipt of material deliveries.

Sham contracting defence

The Draft Report recommends a checklist to address concerns regarding the complexity and significant consequences associated with what could be a genuine mistake. This is a flippant response to a change that has created an inflexible and ambiguous criminal-adjacent standard which puts even the most sophisticated of businesses at risk despite their best efforts.

We reiterate our calls for a reversion to the threshold of 'recklessness', and recognition for businesses having sought legal advice or support from an industry organisation in making their determination

Unfair contract terms jurisdiction

The FWC has no expertise in construction contract risk allocation, which include delay and weather risk, defects liability, and cost variations - none of which are appropriate for adjudication against an award employee comparator. Although the Contractor High Income Threshold clarification is supported and necessary, it remains a partial and inadequate response to HIA's core objections about institutional competence and regulatory duplication.

Right to disconnect

Although we do not oppose recommendation 19 in principle, it lacks the necessary nuance.

The application of a uniform standard is fundamentally unworkable for the residential building industry, which operates under a range of sector-specific conditions, including weather-dependent, safety-critical, project-sequenced work that is not constrained to office hours. Clause 16A.3 of the Building and Construction General On-site Award 2020 is untested and far too narrow to address these issues, covering only 'emergency roster changes' due to weather.

Frustratingly these conditions are acknowledged in the Draft Report, but necessary action is deferred to a future review and our call for a sector-specific clause has been ignored.

Now is the time for government to commit to award variation proceedings before the FWC in advance of the 2-3 year review.



‘Same Job, Same Pay’ and the bargaining framework

Regulated labour hire arrangement orders

Although we continue to support greater intervention into genuine labour hire avoidance of enterprise agreement obligations, there are no recommendations included in the Draft Report that address HIA’s concerns regarding the inappropriate interaction of these provisions with genuine independent subcontracting arrangements.

We again demand the insertion of a clear distinction between labour hire and subcontracting, and explicit exclusion criteria as a condition of the framework’s ongoing operation, rather than deferral to a future review.

Intractable bargaining / workplace determinations

The addition of ‘guardrails’ under recommendations 22 and 23 does not address the core issue of disincentivising genuine negotiation and resolution of disputes prior to escalation and instead upholds the perverse incentive for better-resourced unions to hold out for arbitration. This a structurally unsuitable approach for building work that is weather-dependent, project-based and involving small-crew operations, which will not be properly understood by FWC arbitrators who lack the necessary specialised industry knowledge.

FWC preparing enterprise agreement model terms

We reiterate that enterprise bargaining should be sufficiently flexible to ensure it reflect enterprise-specific circumstances, yet we note the risk of the de facto mandatory application of model terms remains unaddressed in the Draft Report.

FWC model terms must be legislatively confirmed as optional guidance, such that departure does not constitute grounds for denial.

Protecting Workers and Strengthening Enforcement

Criminalising wage theft

The Draft Report’s response to HIA’s most serious concern provides for better guidance and a future review. This is wholly inadequate.

Additional guidance does little to protect businesses against the consequences of genuine errors in the immensely complex and multifaceted calculation of wages under the On-site Award. A digital calculator or software does not detract from this risk – it simply automates the process unless it is able to be used as evidence of compliance. Given the criminal threshold of ‘intentional’ underpayment does not distinguish between deliberate exploitation and good-faith complexity errors, this issue is not a guidance problem - it is a legislative design problem that requires legislative correction.

The Reviewer also overlooks the real risk of constitutional double jeopardy, for example, with respect to state-based wage theft criminal laws in Queensland, Victoria, and Western Australia.



Further, the prospect of a future review does nothing for a small business, that may be irreparably damaged as a result of the changes as soon as they apply.

At a minimum, we call on government to include an explicit safe harbour for good-faith complexity errors in the most technically demanding award environments. Recognition of industry accredited payroll tools and software with evidentiary compliance status.

Changes to civil penalties framework

While Recommendation 32 may be viewed as a reduction in penalties, it simply corrects three technical anomalies. It does not address the fundamental problem: \$939,000 per contravention, without size-scaling or an aggregate cap, is a business-ending proposition for most businesses.

In conjunction with the lowered 'serious contravention' threshold, criminal exposure is expanded without evidence-based justification. The impacts of the changes have the potential to extend well beyond the limits of the business and will have a disproportionate personal impact for small business owners.

Right of entry for suspected underpayments

The amendment to Form 2 as recommended in the Draft Report is a minor technical correction with no bearing on the core problem: the lowered threshold makes warrantless entry routine, not extraordinary. This amendment represents a troubling, and ever-increasing level of influence, by an organisation with a demonstrated history of criminal conduct that is under administration. The Draft Report entirely overlooks these systemic issues.

The FWO's equivalent investigatory powers are adequate and appropriate to manage the seemingly minimal risk of systemic underpayment and are accompanied by necessary procedural safeguards and accountability.

The previous standard for entry without notice must be reinstated to ensure entry is permitted only where there are reasonable grounds to suspect records being concealed or destroyed.

Enhancing delegates' rights

Another oversight in the Draft Report is the Federal Court ruling regarding the FWC's own delegate rights clause implementation, which exposed employers operating in good faith on FWC guidance to retrospective breach. This is not a manageable compliance environment - it is an environment that is legally impossible to navigate. The Reviewer's response of 'monitor and wait' is inadequate.

Recommendation 36 provides a narrow technical fix that does not resolve the accountability gap HIA has identified, yet there are no recommendations in the report with respect to conduct standards, oversight mechanisms, or penalties equivalent to those applicable under the entry permit system. Again, a recommendation for future monitoring is grossly insufficient given the structural shift in the legislation.

HIA urges Government to commission an independent inquiry into the full impact of the delegates' rights expansion, with particular attention to the Full Federal Court's finding and FWC retrospective rewrite of the clauses.



Safe Workplaces

Workplace health and safety is properly and appropriately provided for under the Work Health and Safety (WHS) framework, comprising a predominantly consistent set of state and federal laws. There is no place for overlap or duplication of workplace safety matters in employment laws. The alarming recent trend of regulatory creep is only leading to further ambiguity, confusion, and erosion of the ability for businesses to meet their obligations, which ultimately undermines safety in the workplace.

This practice must stop.

Industrial manslaughter

The Draft Report overlooks the proposition that industrial manslaughter is better dealt with through established criminal laws. Given there have been so few successful prosecutions to date, there appears to be no evidence base to support the recommended increase in existing penalties, which sits at odds with every employer submission.

We reiterate our calls for conclusive data to support the effectiveness of existing industrial manslaughter penalties in reducing workplace fatalities and improving workplace health and safety, and for proportionality in their application.

Entry to assist Health and Safety Representatives

This circumvents the right of entry process with potential for safety to be used as a guise for broader industrial relations agendas. The CFMEU's history of right of entry abuse is a matter of judicial record. This behaviour is not a result of misunderstanding the limitations of their rights and obligations under the framework, on the contrary, it is only as a result of permit holders' intimate knowledge of the extent to which the system will tolerate their contraventions. As a result, the expanded entry rights and approach to simply 'monitor and educate' will only provide a further veil under which abuse can continue. This provision must be repealed.

HSR assistant access be repealed in favour of existing right of entry provisions and safety regulator support.

Union Deputisation

HIA's Opening Loopholes submission identified a glaring five-stage pattern of power accumulation that now operates without the accountability obligations applicable to the FWO. Yet, there is not a single recommendation in the Draft Report addressing the systemic accumulation of quasi-regulatory power by unions through the combined effect of expanded right of entry, unlimited workplace delegate access, HSR assistant entry, and judicial expansion beyond even FWC interpretation.

Silence on the accumulation of quasi-regulatory power is not a neutral position; it is a determination that the current accountability asymmetry is acceptable. This is a governance failure that must be addressed in the Final Report.



Paid family and domestic violence leave

We reiterate our support for the existing paid family and domestic violence leave provisions, which to date have been demonstrated to be operating as intended.

At this time, no further changes appear to be warranted until further data is available to ensure any further reforms, if determined necessary, can be properly assessed and deemed effective, particularly with respect to small business and privacy.