



SUBMISSION BY THE  
Housing Industry Association

to the  
**Productivity Commission**  
on the  
**Inquiry into the Workplace Relations Framework**

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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

- 1.1.1 HIA welcomes the opportunity to make submissions to the Productivity Commission's review of the Workplace Relations framework.
- 1.1.2 HIA is the voice of the residential building sector of the Australian economy, and represents some 40,000 members throughout Australia. The residential building industry includes both cottage construction and multi-unit apartment buildings. HIA's membership includes builders, trade contractors, design professionals, kitchen and bathroom specialists, manufacturers and suppliers.
- 1.1.3 The Terms of Reference for the Review are very broad and mention job creation, fair and equitable conditions for employees, productivity, competitiveness and business investment and the needs of small business.
- 1.1.4 In HIA's submission, a fair, balanced and productive workplace relations system would be based on the following **five** principles:
  1. The industrial relations system should be simple, flexible and provide a fair minimum standard.
  2. Business should have confidence to hire.
  3. Business must be protected from unlawfulness and business should be free to operate without fear of union interference.
  4. The ability for employers and employees to individually bargain to attain genuine flexibility.
  5. Additionally, independent contractors should be regulated by commercial law not workplace relations law.
- 1.1.5 These principles are not reflected in the current Workplace Relations framework and it is in need of urgent reform.
- 1.1.6 The *Fair Work Act 2009* (the '**Act**') has effectively re-regulated Australia's labour market, reversing many of the positive reforms from the 1980s and 1990s that were aimed at supporting productivity and efficiency assisting businesses to compete in an ever developing global economy.
- 1.1.7 The feedback from HIA members is that the current framework is too complex. The Fair Work laws have swung the pendulum too far in favour of employees. The increase in the time spent dealing with '*HR issues*' is also a common complaint. As a surveyed HIA member commented:

*'The amount of time as a small employer that I have to spend dealing with HR issues has increased 10 fold since the new Act came in'*
- 1.1.8 As a result, there is a distinct disincentive to employ.
- 1.1.9 Prescriptive employment conditions and the one size fits all approach reflected in the Modern Awards and the National Employment Standards are a specific element of concern for the residential building industry where work is cyclical and project based and workers are often transient.
- 1.1.10 As an example, the onsite building award requires that employers pay redundancy to employees who resign.
- 1.1.11 Of further concern is the fact the current framework is distorted and biased towards employment as opposed to contractors. Independent contracting is an essential and legitimate element of the Australian economy providing substantial benefits which are not available using employees alone.

- 1.1.12 Yet the extension of a number of employment “protections” to independent contractors coupled with the approval of union enterprise agreements that restrict the use and engagement of independent contractors have imposed considerable costs and uncertainties on the residential construction industry. This is far from an outcome that encourages productivity, competitiveness and business investment.
- 1.1.13 HIA have identified **eight** key areas in need of urgent reform:
- Removing the direct and indirect regulation of independent contractors under workplace relations laws.
  - Simplifying the safety net to ensure it provides flexible and fair minimum entitlements.
  - Engaging in a process of genuine ‘award modernisation’ to reflect modern industry practice.
  - Restoring individual agreements between employee and employers.
  - Outlawing pattern bargaining to enable agreements to be made to reflect enterprise needs.
  - Simplifying employment arrangements for apprentices.
  - Abolishing unfair industry specific redundancy schemes that require employers to pay severance in circumstances other than a genuine redundancy.
  - Introducing genuine small business exemptions from unfair dismissal laws.
- 1.1.14 Each of these and the supporting recommendations are expanded on in the following submission.

## 2 Economic Overview

- 2.1.1 The building industry represents an important component of the Australian economy. ABS figures show that during the three months to November 2014, there were 263,400 persons directly employed in the building construction industry, 2.3 per cent of total employment.
- 2.1.2 ABS figures also show that during the full 2014 calendar year, dwelling construction – new home building as well alterations and additions – was worth \$77.03 billion, equivalent to 4.9 per cent of GDP. Since the downturn in mining investment activity, residential construction has become a central driver of domestic demand growth. Within the housing industry, expenditure on new dwelling construction in 2014 was worth \$48.87 billion annualised, with renovations valued at \$18.16 billion.
- 2.1.3 Apart from its direct effects on economic activity, residential construction also contributes to long-term economic growth by adding to the stock of physical capital. An efficient residential building sector is one of the key requisites for achieving economic competitiveness internationally.
- 2.1.4 The residential building industry, in particular, is one of Australia’s most dynamic, innovative and highly efficient service industries and is also a key driver of employment and the Australian economy in general. The provision of an adequate dwelling stock is one of the key drivers of improved living standards, higher productivity and greater economic competitiveness.

### 2.2 Economy remains weak and the outlook has deteriorated

- 2.2.1 The ABS trend measure of unemployment was 6.3 per cent in January 2015. Overall, ABS figures show that unemployment has been rising steadily and consistently since mid-2014. The broad economic consensus on the near to medium term outlook is that of deteriorating conditions. This is reflected in the Reserve Bank of Australia’s recent

downgrading of its forecasts for the domestic economy, forecasting annual growth in Gross Domestic Product (GDP) in 2015 to be between 2.25 per cent and 3.25 per cent. Given the general weakness in domestic demand, employment growth is not expected to be sufficient to prevent the unemployment rate from increasing.

- 2.2.2 The weak economic conditions are having a disproportionate impact on young people. The unemployment rate among people aged 15 to 24 years averaged 13.5 per cent in the 12 months to January 2015. From a record-low rate of 7.4 per cent youth unemployment has now climbed by around 6 percentage points, while overall unemployment has climbed by 2 percentage points from its record-low rate.
- 2.2.3 Given the deterioration in the outlook – economic growth expected to be below trend growth for longer period than first expected, and a weaker than anticipated international environment – the RBA cut interest rates by 25 basis points on February 3 2015, with most expecting another 25 basis point cut to occur in the current interest rate easing cycle.
- 2.2.4 While unemployment may be high, the additional available labour is not necessarily compatible with labour demands. This applies to the residential construction sector, with a mismatch in the skills required by employers and the skills available. HIA data indicates that over the past 18 months, overall skilled trade labour has been in moderate undersupply. This data indicates that the strongest shortages are in the Bricklaying, Ceramic Tiling and Plastering trades.
- 2.2.5 Industry feed-back on the changes to apprentice wages – that builders are now less likely to take on apprentices – presents a further risk to the residential construction sector's future skilled labour requirements, thereby presenting a secondary risk of pressure on construction costs resulting from price pressures in trade labour rates.

## **2.3 New home building in at an all-time high**

- 2.3.1 The housing industry consists of new dwelling construction and renovations activity. Nationally, new home building is at an all-time high. HIA estimates that 195,466 new homes were commenced in 2014.
- 2.3.2 The current dynamics around new home building and the broader economy, however, are not following a typical pattern observed in previous cycles.
- 2.3.3 A new home building recovery traditionally leads to a broader recovery in domestic economic activity, this has not been the case with the current situation. With the recovery in new home building now having spanned over two years, this represents the longest upswing experienced in the last 40 years. The strength in new housing has not been replicated in other sectors of the Australian economy, with business investment, and confidence remaining weak, and only nascent signs of household consumption strengthening.
- 2.3.4 A recovery in renovations typically follows a new housing upcycle, this has not been the case in the current situation either. Investment in renovations is only 2.5 per cent higher than the decade low reached in the December 2013 quarter.
- 2.3.5 Furthermore, the current new home building recovery is quite varied across geographical markets and dwelling types. Healthy building conditions are still only evident in three out of eight markets – New South Wales, Victoria and Western Australia. Recoveries are underway in Queensland and Tasmania. Detached house construction is around 7 per cent higher than its 25 year average. Construction of semi-detached/townhouse product is running around 5 per cent above the average. Medium/high density construction, meanwhile, is at levels over 130 per cent higher than the longer term average, due to the super-charged growth of this segment over the last two years.

- 2.3.6 It is HIA's view that addressing the current efficiency constraints within the Australian Workplace Relations system would improve the residential construction sector's productivity and would have wider economic benefits.
- 2.3.7 Independent modelling by the Centre for International Economics (CIE) estimates that a 1.0 per cent total factor productivity increase for residential housing to increase national economic activity (GDP) by up to \$1.1 billion a year. The flow-on impact is \$5.10 of additional GDP per increased dollar of activity in residential housing.
- 2.3.8 In terms of employment, an extra \$1 million of construction expenditure generates 9 construction jobs. The initial effect of the additional \$1 million worth of construction is 9 positions in construction-related fields, such as carpenters, brick layers, plasterers, etc. In addition to this initial effect there are also production induced effects generating 7 jobs across those businesses manufacturing the materials needed for the additional construction, such as concrete and steel frames, and those businesses supplying and servicing the concrete and steel frame businesses, such as aggregate quarrying and raw steel production. Not all these jobs are necessarily going to be full time, but clearly the employment multiplier effect across businesses involved in construction or closely aligned to construction is considerable.
- 2.3.9 In other words, over and above the direct contribution of construction activity to the economy, the construction industry has 'flow-on' impacts on the activities of other industries.
- 2.3.10 Residential building activity also supports long-term economic growth through boosting the economy's capital stock and by contributing to greater housing affordability. This enhances the economy's competitiveness.
- 2.3.11 The residential building industry relies very strongly on consumer confidence and is particularly susceptible to economic downturn. Research by HIA Economics has found that new home building tends to suffer disproportionately large declines during economic downturns, with activity often taking several years to recover to pre-downturn levels. The industry must operate under flexible work practices and conditions that promote efficiency and productivity to help sustain employment in such periods of downturn. In light of the historically-typical levels of building falling short of population growth requirements, a more flexible operating environment would allow the industry to increase output to more appropriate level, thereby alleviating the shortfall.

### 3 The Safety Net

- 3.1.1 HIA supports a safety net which contains a minimum wage and a minimum set of entitlements for all employees comprising one set of simple, clear and easy to understand minimum terms and conditions of employment. All other matters should be the subject of outcomes agreed at the enterprise level.
- 3.1.2 It is HIA's view that the current 'safety net' has evolved to encapsulate matters traditionally outside its scope going well beyond a minimum set of entitlements.
- 3.1.3 The current safety net comprises:
- A set of guarantees – in the current form of the National Employment Standards (the '**NES**');
  - Minimum wages – in the form of both the Federal Minimum Wage and Modern Award minimum wages; and
  - Modern Awards.



- 3.1.4 Notably, throughout the development of Australia's industrial relations framework the notion of the 'safety net' has been the cornerstone of political discourse, swinging from that envisaged by then Prime Minister Paul Keating as:

*'...a framework of minimum standards provided by arbitral tribunals... a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.'*

*The safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers. Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.'*<sup>1</sup>

- 3.1.5 To the legislated Australian Fair Pay and Condition Standard of the WorkChoices era:

*'While the primary focus of the federal workplace relations system is on workplace agreements underpinned by a minimum safety net, it is not a genuine safety net. The current process for reviewing the safety net is subject to AIRC arbitration and union intervention. Unions invariably make ambit claims to raise award wages and conditions above the level which represents a real and effective safety net. The current safety net of complex and prescriptive awards can act as a disincentive to agreement making. There is still a need for establishing genuine minimum standards, over and above which employers and employees at workplace level should be free to negotiate further wages and conditions through simplified agreement making processes without the interference of third parties.'*<sup>2</sup>

- 3.1.6 Now the current Fair Work system of Modern Award and the NES which was heralded as a 'simple and fair safety net':<sup>3</sup>

*'...balance(ing) the interests of employers and employees and balances the granting of rights with the imposition of responsibilities...ensur(ing) balance and fairness in Australian workplaces'*<sup>4</sup>

- 3.1.7 Employers in the residential construction industry must comply with the safety net as set out by:

- The NES;
- The *Building and Construction General Onsite Award 2010* (the '**Onsite Award**'); and
- Individual Flexibility Agreements or Enterprise Agreements.

- 3.1.8 **Attachment A** highlights the significant overlap between matters regulated by the NES, terms and conditions which may be included within Modern Awards, terms and conditions which must be included within Modern Awards and the terms and conditions that are ultimately dealt with by the Onsite Award.

- 3.1.9 This pyramid of safety net entitlements imposes significant costs on business, particularly a small business. Of note 91% of HIA members surveyed in March 2015 expressed the view that the Act does not consider the special circumstance of small and medium businesses.

<sup>1</sup> Prime Minister Paul Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993.

<sup>2</sup> Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill* 2005 p. 4.

<sup>3</sup> Labour's '*Forward with Fairness Policy Implementation Plan*' August 2007, p. 5.

<sup>4</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008 pgs.11189-95 (J Gillard).



## 3.2 The Minimum Wage

- 3.2.1 Conventional economic theory tells us that minimum wages can cause unemployment in situations where market clearing wages in pockets of the labour market are lower than the statutory minimum wage. In such situations, minimum wage regimes cause living standards to be reduced below what would be the case in their absence.
- 3.2.2 As unemployment increases and economic growth slows, higher labour costs carry with them much greater risks. HIA Economics estimates that for every \$5,000 increase in an employer's direct costs, revenues will have to rise by some \$22,500 in order to prevent deterioration in the firm's financial position.
- 3.2.3 The current environment of sluggish growth and low price inflation is a difficult one for employers. There is little scope for the market to bear cost increases, with any such pressures likely to result in lower output and reduced labour input. This may be reflected through fewer hours worked and reductions in the employee headcount. Constraints like those around the minimum wage deprive struggling employers of room for manoeuvre with respect to their cost base.
- 3.2.4 Within the current Workplace Relations framework, the Fair Work Commission (the '**Commission**'), must in making a national minimum wage order be guided by the minimum wages objective in s.284 of the Act which states:

*The FWC must establish and maintain a safety net of fair minimum wages, taking into account:*

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and*
- (b) promoting social inclusion through increased workforce participation; and*
- (c) relative living standards and the needs of the low paid; and*
- (d) the principle of equal remuneration for work of equal or comparable value; and*
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.*

- 3.2.5 HIA is concerned that these considerations have produced unsustainably high minimum wage increases well above the level of inflation.
- 3.2.6 Such outcomes can be immediately ameliorated through an adjustment to the minimum wages objective in order to better balance economic and social considerations on an industry level.
- 3.2.7 It is clear that during the wage setting process macro-economic considerations are relied upon in a "broad brush" way, without necessarily taking account of difficulties and challenges specific to particular industry sectors.
- 3.2.8 In 2014 for instance, the impact of the increase to apprentice wages on the residential construction industry as a result the Commission's decision in *Re Modern Awards Review 2012—Apprentices, Trainees and Juniors*<sup>5</sup> (**Apprentice Decision**) was largely subsumed by the broader considerations of the Expert Panel:

*'Along with the other changes to modern awards discussed above, this circumstance is relevant to the consideration of the Panel and we have taken it into account in our overall assessment.'*<sup>6</sup>

<sup>5</sup> [2013] FWCFB 5411.

<sup>6</sup> [2014] FWCFB 3500 at [561].

- 3.2.9 The Commission overlooked compelling evidence on potential job losses as a result of an increase in apprentice wages which were estimated at a loss of between 4,600 and 9,000 apprentices in training.<sup>7</sup>
- 3.2.10 Notably data indicates a decline in apprentice trade commencements<sup>8</sup> since the Apprentice Decision which came into effect from 1 January 2014:
- September 2013: 263,000
  - December 2013: 246,000
  - March 2014: 216,000
  - June 2014: 199,000
  - September 2014: 199,000
  - December 2014: 215,000
- 3.2.11 Equally concerning is that recent annual wage reviews have had little regard for the circumstances of small businesses, particularly those operating in industries that are not performing well and who have had to flow on significant wage increases that have exceeded CPI adjustments.
- 3.2.12 HIA's submissions to the Expert Panel, particularly during the period 2010 - 2012 which highlighted the weak performance of the residential construction industry were largely not addressed in the minimum wage decisions.

### ***Structural efficiency principle***

- 3.2.13 Productivity should be an express and standalone consideration when setting the minimum wage.
- 3.2.14 This was recognised during the 1980's and 1990's when the Structural Efficiency Principle (**SEP**) was a vital component of the wage fixing mechanism.
- 3.2.15 While the development of the SEP was linked largely to the economic and industrial relations circumstances that arose during the time, it is HIA's view that this underlying approach remains relevant.
- 3.2.16 The underlying rationale of the SEP was that award increases in rates of pay (or improvements in conditions of employment) were only adopted where management and labour agreed to implement measures to improve efficiency or productivity in the enterprise or workplace such as 'multi-skilling', broadening the range of tasks that a worker performs, and ensuring that working patterns and arrangements meet the competitive requirements of industry (for example, flexibility in hours of work, or part-time or casual employment).<sup>9</sup>
- 3.2.17 Further, throughout the development of the SEP:
- 'the formal approval of enterprise agreements subject to a number of requirements including:...any wage increase had to be based "on the actual implementation of efficiency measures designed to effect real gains in productivity"'*<sup>10</sup>
- 3.2.18 While at the time the SEP was also associated with the need to restructure and modernise awards the notion of expressly considering improvements in efficiency or

<sup>7</sup> The Centre for International Economics *Increasing Apprentice and Trainee Wages and Conditions in the Building and Construction Industry* at p. 5.

<sup>8</sup> NCVER 2015, *Australian vocational education and training statistics: apprentices and trainees 2014 — early trend estimates, December quarter*, NCVER, Adelaide.

<sup>9</sup> See Encyclopedic Australian Legal Dictionary.

<sup>10</sup> 30 October 1991 [Print K0300] p. 6 (as cited in October 1993 Review of Wage Fixing Principles, 25 October 1993 p. 12 [Print 9700]).

productivity in today's economic environment is of significant import when setting the minimum wage. To a limited extent this has been recognised by the Coalitions *Fair Work Amendment (Bargaining Processes) Bill 2014* which seeks to ensure that productivity improvements at the workplace are considered during bargaining – this is discussed in further detail below.

### **Considerations of Work Value?**

3.2.19 While historically the notion of 'work value' has been considered a central tenant of wage fixation, such considerations are not a feature of the current wage setting framework and it is HIA's experience that submissions to the Commission on work value principles carry little weight.

3.2.20 Within the current framework there are two scenarios in which legislated work value principles may be taken into account, these include:

- A proposal to vary a modern award minimum wage during the 4 yearly review of Modern Awards.<sup>11</sup>
- A proposal under s.157 of the Act to vary a modern award minimum wage if the Commission is satisfied that making the determination or modern award outside the system of 4 yearly reviews of Modern Awards is necessary to achieve the modern awards objective.

3.2.21 Section 156(4) of the Act provides the following explanation of 'work value' for the two purposes outlined above:

*Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:*

- (a) the nature of the work;*
- (b) the level of skill or responsibility involved in doing the work;*
- (c) the conditions under which the work is done.*

3.2.22 The current legislative considerations are more confined in both scope and application than the work value principles that have evolved throughout industrial jurisprudence.

3.2.23 As already identified, the consideration of 'work value' only arises in the context of a variation to a modern award minimum wages, not the setting of minimum wages more broadly. HIA submit that this is problematic particularly in light of the ripple effect of minimum wage increases across modern award minimum wages.

3.2.24 Principles in relation to 'work value' in the context of wage fixing emerged from wage cases run in the 1960s.

3.2.25 However such approaches were modified following the introduction of a centralised wage fixing system between 1975 and 1981 and in 1983 we saw a "work value principle" included in the September 1983 National Wage Case.<sup>12</sup> This principle allowed for a limited provision covering "changes in work value" and can be summarised in the following terms:<sup>13</sup>

- *"Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in*

<sup>11</sup> Under s.156 of the Act.

<sup>12</sup> (1983) 291 CAR 3; 4 IR 429.

<sup>13</sup> (CAR at 52; IR at 472-3).

*the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.”*

However rather than creating a new classification, it may be more convenient to alter rates/provide for an additional allowance.

- Where new work justifying a higher rate is performed only from time to time by persons covered by the classification, a special allowance which is payable when the new work is performed is the most appropriate way of dealing with the new work.
- Work value changes are measured from the last work value adjustment under an award. Changes in work value considered in previous work value adjustments should not be reconsidered.
- Where a significant net alteration of work value is established in accordance with this principle, a monetary assessment of the alteration of work value should be made. This assessment should be based on previous work requirements, the previous wage fixed for the work and the nature and extent of the change in work. Comparisons with equivalent classifications in other awards may also be made provided the same changes to work classifications have occurred in those awards.
- The expression “the conditions under which the work is performed” relates to the environment in which the work is done.
- The commission should guard against contrived classifications and over-classification of jobs.
- Where technological or other change results in widespread change in work value across the workforce, the matter should be dealt with in a national productivity case under a different principle.

3.2.26 These principles continued to evolve over time, for example:

- in the June 1986 National Wage Case,<sup>14</sup> the commission altered the reference to “new work” to “new or changed work”;
- in the National Wage Case February 1989 Review,<sup>15</sup> the commission decided that minimum rates awards would be reviewed “to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other awards”;
- in the National Wage Case – August 1989<sup>16</sup> it was determined that structural efficiency exercises should incorporate all past work value considerations.

3.2.27 The above cases indicate that it is only circumstances where a change in the nature of the work constitutes a significant net addition to work requirements warrant an alteration of rates on the ground of work value.

3.2.28 HIA submits that the historically valuable and arguably still relevant notion of ‘**work value**’ and the principle of ‘**structural efficiency**’ should inform the elements under consideration when the minimum wage is set and evaluated.

<sup>14</sup> (1986) 301 612; 14 IR 187.

<sup>15</sup> (1989) 27 IR 196.

<sup>16</sup> (1989) 30 IR 81.

## Recommendation

- 3.2.29 The criteria against which the minimum wage is determined be reframed to explicitly consider:
- Productivity when setting the minimum wage.
  - Industry specific circumstances and how particular industries may be affected by a minimum wage increase.

## 3.3 The National Employment Standards

- 3.3.1 The NES form the first key element of the current safety net.<sup>17</sup> They are a vital component of the consideration of the Workplace Relations framework. HIA disagrees with the observation that *‘there appears to be little controversy over the NES as a whole.’*<sup>18</sup>
- 3.3.2 The NES comprise ten minimum entitlements, which when considered together represent a significant direct and indirect cost on business.

### Maximum weekly hours

- 3.3.3 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.
- 3.3.4 ABS data on dwelling commencements demonstrate the cyclical nature of the industry:<sup>19</sup>
- Between December 2003 and March 2005 dwelling commencements **decreased** by 15.3%;
  - Between June 2009 and June 2010 dwellings commencements **increased** by 52%;
  - Between June and December 2012 dwelling commencements **decreased** by 18.1%; however
  - Between March 2013 and December 2013 dwelling commencements **increased** by 30.9%.
- 3.3.5 Yet inflexibilities in managing hours of work under both the NES and the award system are not only a constant irritant for small business in the residential construction industry they directly reduce their capacity to respond to market conditions.
- 3.3.6 In addition to the NES limitation on the 38 hour working week (unless additional hours are “reasonable”) the Onsite Award imposes further requirements.
- 3.3.7 Under the Onsite Award, employers must:
- Operate according to a system of rostered days off (RDOs), providing one day off in every 20 day cycle; and
  - Ensure all working hours are between 7am and 6pm Monday to Friday – to do otherwise requires the payment of overtime rates.

<sup>17</sup> Labour’s ‘Forward with Fairness Policy Implementation Plan’, August 2007, page 9; the second aspect of the safety net being awards.

<sup>18</sup> Issues Paper 2 at p.9.

<sup>19</sup> See ABS 8752.0 - Building Activity, Australia.

- 3.3.8 Additionally, where overtime is requested an employer must consider the requirements provided in both Clause 36.1(b) of the Onsite Award and s.62(3) of the Act which impose similar but some additional requirements (see Attachment A for details).
- 3.3.9 While some permutations are available, for example, where majority agreement is obtained an early start time of 6am may be implemented<sup>20</sup> this provision is cumbersome and can require union involvement.
- 3.3.10 The inability to 'average' working hours is another common issue.
- 3.3.11 Despite the permissive nature of s.63 of the Act allowing Modern Awards to include terms providing for the averaging of hours of work over a specified period, the Onsite Award does not, the Commission so far refusing to include such a provision in the award.<sup>21</sup>
- 3.3.12 This inability to set hours of work that suits the needs of businesses exposes them to significant on-costs in the form of overtime penalty rates. This is anomalous as other awards such as the *Timber Industry Award 2010*, permits hours of work to be averaged, and, such averaging arrangements can include Saturday and Sunday.<sup>22</sup>
- 3.3.13 RDOs are also another common issue. In response to a HIA survey conducted in March 2015, the RDO system was identified one of the top three workplace relations issues of concern for members, with one member commenting that:
- 'RDO's are totally out of step with the industry. Completely unaffordable'.*
- 'RDO's need to be looked at seriously as it further cuts into the productivity of the industry'*
- 3.3.14 The changes implemented by the *Fair Work Amendment Bill 2013* which introduced the requirement that Modern Awards must include a term that requires employers to genuinely consult with employees and their representatives about changes to their regular roster or ordinary hours of work further compound the constraints on management to alter work arrangements to respond to market demand.

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

- 3.3.15 The Governments Forward With Fairness – Policy Implementation Plan envisaged these arrangements narrowly being directed towards *'flexible work for parents'*. Further the Explanatory Memorandum to the Act clearly articulated that the *'intention of these provisions [request for flexible working arrangements] is to promote discussion between employers and employees about the issue of flexible working arrangements'*.
- 3.3.16 However the adoption of the *Fair Work Amendment Bill 2013* saw the expansion of the right to request a change in working arrangements to a wider range of caring and other circumstances ignoring the practical and economic realities faced by many employers, in particular small businesses.
- 3.3.17 These measures have introduced new workplace compliance obligations and have further expanded the scope of the 'safety net'.
- 3.3.18 The laws do not contemplate the likelihood that many businesses do not have the resources or capacity to understand, apply or monitor such arrangements

<sup>20</sup> See clause 33.1(a)(viii).

<sup>21</sup> [2013] FWC 4576.

<sup>22</sup> See clause 27.



- 3.3.19 Flexible work arrangements by their very nature are subjective and usually require human resources departments dedicated to monitoring working arrangements and the employee.
- 3.3.20 Contrary to the current prescriptive statutory obligations, flexible work arrangements, by their ordinary meaning are something to be determined at the workplace level. In HIA's view the notion of *'flexibility'* in *'work arrangements'* should be directed towards the development of mutually beneficial work practices between employers and employees.
- 3.3.21 The Act also preserves state and territory laws relating to flexible work arrangements.<sup>23</sup> This creates unnecessary confusion, undermines the effectiveness of the NES as a simple, national safety net and runs counter to the intention of the Act to 'cover the field'<sup>24</sup> in relation to workplace relations matters.

### **Annual leave**

- 3.3.22 Annual leave has variously been regulated either by Awards of Federal or State Tribunals or by legislation. At the present time annual leave is regulated by the provisions of the NES. Modern Awards, including the Onsite Award also contain provisions relating to annual leave.
- 3.3.23 The purpose of annual leave for both employers and employees is well documented and HIA does not quarrel with the need for employees to have 'rest and recreation' away from the workplace.<sup>25</sup> However it is HIA's view that the current regulation of annual leave under the NES and Modern Awards is overly prescriptive inhibiting any ability to manage leave accruals and consequent contingent liabilities.
- 3.3.24 Further the treatment of annual leave within the bargaining framework and the inability to incorporate annual leave payments into an employee's wages points to the inherent inflexibility in the current Workplace Relations framework.
- 3.3.25 HIA submit that the accrual, taking and payment of annual leave should be a matter of agreement either on an individual or collective basis.
- 3.3.26 Historically this type of approach to the regulation of annual leave has been adopted. For example prior to the commencement of the NES and Modern Awards there was commonly in Federal and State legislation and awards a right to direct award covered employees to take annual leave. For example in NSW the *Annual Holidays Act 1944* provided:

*'The annual holiday shall be given by the employer and shall be taken by the worker before the expiration of a period of six months after the date upon which the right to such holiday accrues: Provided that the giving and taking of the whole or any separate period of such annual holiday may, with the consent in writing of the Industrial Registrar, or Deputy Industrial Registrar appointed under the Industrial Relations Act 1996, be postponed for a period to be specified by such Registrar in any case where he or she is of opinion that circumstances render such postponement necessary or desirable.'*

<sup>23</sup> See s.66 of the Act.

<sup>24</sup> Explanatory Memorandum to the *Fair Work Bill 2008* at [128].

<sup>25</sup> See variously Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* at [515]; Explanatory Memorandum to the *Fair Work Bill 2008* at [378].



3.3.27 During Award Modernisation, the Full Bench acknowledged the need for employers to manage leave balances:

*‘One issue that has arisen repeatedly, and is provided for in the NES, is the right of an employer to require that an employee take arrears of annual leave. We think that an employer should have the ability to reduce annual leave liability by compelling employees to take annual leave provided appropriate notice is given. While there may be different approaches to this question, in each of the awards there will be some provision which will give the employer the ability to take action to reduce arrears’.*<sup>26</sup>

3.3.28 The frustration expressed by employers at the lack of managerial prerogative in relation to annual leave was evident through both the 2012 Modern Award Review<sup>27</sup> and the current 4 yearly review of modern awards.<sup>28</sup>

3.3.29 For HIA members the payment of annual leave loading under the Onsite Award is also a significant issue. According to one HIA member:

*‘leave loading is just an additional cost that small business must cover’*

3.3.30 It is HIA’s view that annual leave loading is anachronistic and no longer justified.

3.3.31 Leave loadings first began to appear in awards in the 1970’s, and were ‘originally intended to ensure that employees were not financially disadvantaged during their annual vacation. That is, they were intended to compensate employees for their inability to obtain overtime, other penalties and allowances that contribute to their usual weekly pay.’<sup>29</sup>

3.3.32 However some now consider that:

*‘annual leave loadings have moved beyond this principle and now represent an extraneous payment, something over and above normal weekly earnings’<sup>30</sup>...the reality is that annual leave loadings today are considered to be in the nature of a bonus or extraneous payment.*<sup>31</sup>

3.3.33 There are three primary costs associated with annual leave loading:

- The direct costs of paying the additional payments while employees are on leave;<sup>32</sup>
- The administrative cost associated with annual leave loadings;<sup>33</sup> and
- The additional cost associated with increases in wages and allowances.

3.3.34 In the current workplace relations context it is HIA’s view that such costs are unjustifiable.

3.3.35 In practice many in the residential construction industry use the limited flexibility offered by Individual Flexibility Agreements to manage annual leave loading, incorporating the payment into one higher ‘all up rate’. This approach bears out the notion outlined above that the loading is simply a ‘bonus’ as opposed to a representation of any real wage losses suffered while on annual leave.

<sup>26</sup> [2008] AIRCFB 1000 at [98].

<sup>27</sup> [2013] FWCFB 6266.

<sup>28</sup> AM2014/47.

<sup>29</sup> Kelly, R, Plowman, D and Watson, R, *Flexibility In Annual Leave Loadings*, The Centre for Labour Market Research p.3.

<sup>30</sup> Ibid p.2.

<sup>31</sup> Kelly, R, Plowman, D and Watson, R above n.29, p.26.

<sup>32</sup> Kelly, R, Plowman, D and Watson, R *Flexibility In Annual Leave Loadings*, The Centre for Labour Market Research.

<sup>33</sup> Ibid.

- 3.3.36 Also problematic is the ability for an employee to take different forms of leave concurrently.
- 3.3.37 The re-crediting of annual leave where an employee is ill or required to care during a period of annual leave is a significant departure from the operation of annual and personal leave in most workplaces, and an additional new cost and point of confusion for employers. Such an outcome encourages absenteeism resulting in increased costs for employers, for example 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.

### **Cashing out**

- 3.3.38 HIA submits that flexibility improvements could be affected if all employees, both award free and award covered, had the ability to cash out annual leave.
- 3.3.39 The concept of 'cashing out' annual leave is broadly accepted and is by no means novel or untested in Australia's workplace relations system. Since the inception of formal enterprise bargaining in 1993 it has been possible for employers and employees to make statutory agreements facilitating the cashing out annual leave.
- 3.3.40 The ability to "cash out" annual leave by agreement was included in the Australian Fair Pay and Conditions Standards in the *Workplace Relations Act 1996* (the 'WRA'); the first federal statutory regime prescribing annual leave entitlements.
- 3.3.41 The concept was retained in the NES under the Act.
- 3.3.42 Section 92 of the Act permits Modern Awards to include terms about the cashing out of annual leave. Section 93 prescribes various safeguards. Sections 92 and 93, and the comparable predecessor provisions in the WRA, reflect Parliament's endorsement of the concept of employees being able to cash out a portion of their annual leave by agreement with their employer, subject to certain safeguards.
- 3.3.43 The flexibility in ss.92 and 93 of the Act was foreshadowed in the NES Discussion Paper issued in February 2008:

*'In addition, in limited circumstances, the proposed NES expressly allow a modern award to deal with a matter that could otherwise be seen as modifying or excluding an employee's NES entitlement. For example, the annual leave entitlement allows a modern award to include provisions about the cashing out of annual leave or directing employees to take annual leave in particular circumstances (such as a Christmas shut-down period).'*<sup>34</sup>

- 3.3.44 Similarly the Award Modernisation Request referred to the ability of Modern Awards to include cashing-out provisions. Despite this, the Full Bench of the AIRC adopted a cautious approach by declining to include such terms in all but one modern award, the *Seafood Processing Award 2010*.
- 3.3.45 The Full Bench's rationale for this decision is extracted below:

*'A number of employer interests sought provisions for cashing out of annual leave by agreement. Such arrangements are apparently included in many Australian Workplace Agreements (AWAs) and workplace agreements. Should cashing out of annual leave become widespread it would undermine the purpose of annual leave and give rise to questions about the amount of annual leave to*

<sup>34</sup> Commonwealth, Discussion Paper - National Employment Standards Exposure Draft, 14 February 2008 at [31].

*be prescribed. We think some caution is appropriate when dealing with this issue at the safety net level. We do not intend to adopt a model provision. Consistent with our approach to annual leave provisions generally we shall be influenced mainly by prevailing industry standards, and the views of the parties, in addressing this issue.*

*It has also been suggested that if awards do not provide for cashing out of annual leave it will not be legally permissible to make workplace agreements which provide for cashing out. In our opinion cashing out arrangements are an appropriate matter for bargaining. If, when the legislative regime is settled, it is apparent that workplace agreements cannot provide for cashing out of annual leave unless there is a relevant provision in a modern award it may be necessary to revisit the question.<sup>35</sup>*

### **Recommendation**

- 3.3.46 The current framework does not promote productivity or flexibility.
- 3.3.47 In the short term the Act should be amended to:
- Exclude personal/carer's leave from the categories of leave taking priority over annual leave.
  - Require the inclusion of 'cashing out' provisions in Modern Awards.
- 3.3.48 In the long term, employers and employees should be permitted to directly agree on all matters relating to the accrual, taking and payment of annual leave; encouraging genuine bargaining on leave related matters.

### **Notice of termination and redundancy pay**

- 3.3.49 Employers terminating an employee must comply with a plethora of obligations.
- 3.3.50 Firstly, the requirement set out in section 117(1) of the Act for notice to be provided in writing unnecessarily creates red tape for employers. It may result in the imposition of a disproportionate penalty in the event of a contravention.
- 3.3.51 An employer in the residential construction industry must additionally comply with the provisions of the Onsite Award, including the *Industry Specific Redundancy Scheme* set out at clause 17; this is discussed in detail below.
- 3.3.52 For employers of apprentices, there are further complexities, with the NES applying along with a raft of requirements imposed by state and territory training arrangements; these are discussed further below.

### **Redundancy pay in the construction industry**

- 3.3.53 The definition of redundancy under the NES is the termination of employment because the employer has determined that the employee's job no longer exists, is not needed or if the employer becomes insolvent or bankrupt.<sup>36</sup>

<sup>35</sup> [2008] AIRCFB 1000 at [99]-[100].  
<sup>36</sup> s.119 of the Act.

- 3.3.54 This reflects the ordinary and commonly accepted meaning of ‘genuine redundancy’ as devised by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Case (the ‘**TCR Case**’).
- 3.3.55 In the TCR case it was made clear that the right to redundancy referred to situations caused at the initiative of the employer, whether directly as a result of technological change or company restructuring or indirectly because of insolvency or liquidation. This was again confirmed in the 2004 Redundancy Case in which it was stated that the intended operation of severance pay was primarily directed at ameliorating the ‘inconvenience and hardship’ of sudden job loss and compensation for non-transferable credits.<sup>37</sup>
- 3.3.56 However, the construction industry through the Onsite Award has its own (and much broader) definition.
- 3.3.57 The ability for the award to have its own redundancy provision is through s.123(4) which includes within the list of categories of employees not covered by the redundancy pay provisions in the NES ‘*employees to whom an industry-specific redundancy scheme in a modern award applies*’.
- 3.3.58 The Onsite Award provides that a redundancy exists if employment ceases for any reason other than misconduct or refusal of duty.
- 3.3.59 This means that an employer is obliged to pay severance whether the employee is terminated by the employer, resigns, retires, loses a required qualification, becomes totally incapacitated for work, dies or is retrenched (just to name a few scenarios).
- 3.3.60 In response to a survey in March 2015 one HIA member commented:
- ‘Remove Redundancy payments for employees unless genuine redundancy occurs. Payments should not be made just when the employment ceases’.*
- 3.3.61 Further the industry specific redundancy scheme was highlighted as one of the top 3 workplace issues by HIA members who responded to the same survey.
- 3.3.62 HIA submits it is absurd that there be a payment incentive to resign. Not only does this negatively impact on staff retentions, 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.
- 3.3.63 The further consequence of this scheme is that it applies to small business – contrary to the prima facie view that redundancy obligations should **not** apply to small businesses.<sup>38</sup>
- 3.3.64 Compounding this is that under s.141 the Act imposes severe limitations on the ability of the Commission to vary such a scheme, notably, the Commission is only permitted to vary ‘*the amount of any redundancy payment in the scheme*’<sup>39</sup> or for other very limited circumstances.<sup>40</sup>
- 3.3.65 Further if the scheme is to be varied it must ‘retain the industry-specific character of the scheme.’<sup>41</sup>
- 3.3.66 The ability to impose an industry specific scheme that overrides the safety net entitlement undermines the very notion of a safety net that applies to *all* national system employers and employees and is at odds with the objects of the Act.

<sup>37</sup> AIRC Full Bench, 26 March 2004 PR032004 at [133].

<sup>38</sup> See s.121 of the Act.

<sup>39</sup> s.141(a) of the Act.

<sup>40</sup> See Subdivision B of Division 5 of the Act.

<sup>41</sup> s.141(4)(b).

## Recommendation

- 3.3.67 The ability of Modern Awards to facilitate industry specific redundancy scheme via the Act should be abolished.
- 3.3.68 To the extent industry specific redundancy schemes are retained they should be limited to cases of “genuine redundancy” only.
- 3.3.69 Redundancy obligations (including industry specific redundancy schemes) should not apply to small businesses.

## Fair Work Information Statement

- 3.3.70 Section 125 of the Act requires employers to give a Fair Work Information Statement to new employees. Given the Act has been in operation for over five years this is of little relevance and provides more unnecessary red tape for business.
- 3.3.71 In HIA's view that the Fair Work Ombudsman's educative function is already well equipped to assist employees and employers in better understanding the rights and obligations set out in the Act.

## 3.4 The Award System and Flexibility

- 3.4.1 HIA submits that “award modernisation” failed. The process for setting and varying industrial awards requires urgent real reform.
- 3.4.2 Many Modern Awards present a set of complicated and complex provisions that are not reflective of flexible and modern work practices.
- 3.4.3 The content and relationship between the Modern Awards and the NES must be improved in order to provide a regulatory environment that is simple, streamlined, fair to both employers and employees and more conducive to direct employment.
- 3.4.4 Award content should be limited to a set of simple, fair and flexible minimum terms as distinct from matters properly belonging in an agreement.
- 3.4.5 Compounding this is the limited ability for industrial parties to alter award terms and conditions before the Commission due to the inherent difficulties in satisfying the threshold considerations of the Modern Awards Objectives under s.134 of the Act.
- 3.4.6 Problematically rather than responding to, or recognising modern workplace values and needs, primacy is given to the historical context of industrial awards.

## Award modernisation

- 3.4.7 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 at the enterprise level for customised terms and conditions to supplement the minimum safety net and to meet the needs of individual employers and employees.
- 3.4.8 In contrast award modernisation simply consolidated a variety of outdated pre-modern state and federal based instruments into one modern award.
- 3.4.9 This was highlighted by VP Watson in his Minority decision in the Annual Leave Case conducted as part of the 2012 Modern Award Review:

*‘As a result of the award modernisation process, approximately 1560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards. A further 199 applications to vary modern awards were*

made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers. As the Full Bench explained on a number of occasions, the general approach was as follows:

*“[3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of the provisions based on the information provided by the parties as to current practices.”*

*It is important to note the limited nature of the task undertaken by the award modernisation Full Bench.*<sup>42</sup>

### **Modern Awards**

- 3.4.10 Award modernisation changed the role of awards - no longer are these instruments a result of a dispute settlement process but will evolve through a formal legislated process of ‘reviews’<sup>43</sup> and ‘variation applications’<sup>44</sup> presided over by the Commission.
- 3.4.11 Further, Modern Awards now form an express part of the safety net. As outlined by s.134 ‘the FWC must ensure that Modern Awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions...’ and in forming that safety net, the Act prescribes matters that the Commission must take into account.<sup>45</sup>
- 3.4.12 It is also clear that the Commission has an unprecedented legislated mandate to influence the safety net. For example, subclause 582(4) of the Act lists some of the kinds of directions that the President can give including directions about the conduct of 4 yearly reviews of Modern Awards.
- 3.4.13 This shift has not been lost on the Commission. His Honour President Ross during proceedings contemplating the insertion of a number of provisions relating to payment of and taking of annual leave into Modern Awards stated:

*‘...why shouldn't that be a standard modern award provision? Bearing in mind that the character of awards has changed. They're no longer in the settlement of a dispute. So whilst the views of the parties that might have interests in awards are relevant, they're not determinative. These are regulatory instruments, setting*

<sup>42</sup> [2013] FWCFB 6266 at [198] – [199].

<sup>43</sup> s.136 of the Act.

<sup>44</sup> ss.157 and 160 of the Act.

<sup>45</sup> s.134(1)(a)-(h) of the Act.



*minimum wages and conditions of employment. You also have an NES which prescribes across the entire federal system minimum entitlements in relation to annual leave and a range of other benefits.*

*Now, I know the shift is one that's difficult - it's difficult for the parties to let go of the responsiveness based system. This may be the first time that I've seen this desire to adhere to that. But it does seem to me that it's a fundamentally different system. There is something to be said for the proposition that, if you can standardise core provisions like annual leave, then that would make the modern award system simpler and easier to understand. That employees moving from one award to another in their employment would have largely common provisions dealing with those core entitlements, on the face of it, seems to be desirable.<sup>46</sup>*

3.4.14 There is real concern that Modern Awards will inappropriately add to the safety net and become disconnected with industry specific circumstances.

3.4.15 This approach is facilitated by the expansive permissible content of Modern Awards.

3.4.16 Section 139 of the Act provides:

*Terms that may or must be included*

*(1) A modern award must only include terms that are permitted or required by:*

- (a) Subdivision B (which deals with terms that may be included in modern awards); or*
- (b) Subdivision C (which deals with terms that must be included in modern awards); or*
- (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or*
- (d) Part 2-2 (which deals with the National Employment Standards).*

3.4.17 Further s.55(4) of the Act permits the inclusion of terms within Modern Awards that are 'incidental or ancillary' or 'supplementary' to the NES.

3.4.18 The examples provided within the Act highlight the potential complexity:

*Note 1: Ancillary or incidental terms permitted by paragraph (a)<sup>47</sup> include (for example) terms:*

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or*
- (b) that specify when payment under section 90 for paid annual leave must be made.*

*Note 2: Supplementary terms permitted by paragraph (b)<sup>48</sup> include (for example) terms:*

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or*
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a*

<sup>46</sup> AM2014/47, Transcript 16 October 2014, PN1354 - PN1356.

<sup>47</sup> Terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES.

<sup>48</sup> Terms that supplement the NES.



rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

3.4.19 HIA submit that award content should be limited to:

- Terms that were previously expressed as “allowable award matters”<sup>49</sup> and includes:
  - time hours of work and the times within which they are performed;
  - rest breaks;
  - notice periods and variations to working hours;
  - incentive-based payments and bonuses;
  - annual leave loadings;
  - public holidays;
  - ceremonial leave;
  - allowances;
  - loadings for working overtime or shift work;
  - penalty rates;
  - redundancy pay for employers with 15 or more employees;
  - stand-down provisions;
  - dispute settling procedures;
  - type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and
  - conditions for outworkers, including non-conditions provisions such as chain of contract arrangements, registration of employers, employer record keeping and inspection.

3.4.20 Further, terms of awards that do deal with the matters outlined above should generally be unenforceable.

### **Review of Awards**

3.4.21 It is HIA's view that the current process for award reviews is cumbersome and inefficient yet the legislated process of 4 yearly reviews is considered as ‘*the principal way in which an award is maintained as a fair and relevant safety net of terms and conditions*’.<sup>50</sup>

3.4.22 Again the Commission is afforded significant discretion as to how the 4 yearly reviews are conducted the only real requirements are that:

- matters must be heard by a Full Bench;<sup>51</sup> and
- any variation to modern award minimum wages must be justified by work value reasons.<sup>52</sup>

3.4.23 Whilst s.156 of the Act provides the foundational requirements of the 4 yearly review, s.134 and 138 have also been held to be relevant.<sup>53</sup>

3.4.24 The first 4 yearly review which is currently on foot has established a number of procedural and evidentiary precedents, notably:

<sup>49</sup> s.513 *Workplace Relations Act 1996*.

<sup>50</sup> Explanatory Memorandum to the *Fair Work Bill 2008* p.3; 97.

<sup>51</sup> This is in contrast to the Transitional Review under the *Fair Work (Transitional and Consequential Amendments) Act 2009* which proceedings were heard by single members.

<sup>52</sup> s.156(2) of the Act.

<sup>53</sup> 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues (AM2014/1).

- The Commission has engaged in a process of identifying 'Common Matters'. While this may be seen as administratively efficient, such a process unavoidably moves away from the express consideration of industry specific circumstances and also provides scope for an across the board expansion of the safety net.
- The discretion to make a determination varying Modern Awards is expressed in general terms.
- There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. Rather, there may be a number of permutations of a particular Modern Award, each of which may be said to achieve the modern awards objective.
- The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

- 3.4.25 It is likely these matters will inform the 4 yearly review process *ad infinitum*.
- 3.4.26 Aside from the 4 yearly review process, interested parties may apply to make, vary or revoke modern awards under s.157 and s.160.
- 3.4.27 Under s.157 the Commission may vary a Modern Award, make a modern award or revoke a modern award outside if it is satisfied that to do so is necessary to achieve the modern awards objective.
- 3.4.28 Under s.160 the Commission may vary a modern award to remove an ambiguity or uncertainty or to correct an error.
- 3.4.29 To date, employer parties have had limited success on either of these grounds.
- 3.4.30 Since the Modern Awards came into effect on 1 January 2010, a number of award variation applications have been lodged by unions, employers and their representatives who have submitted that a variation is necessary to achieve the modern awards objective.
- 3.4.31 What is clear from these decisions is that the application of s.157(1) has been limited.
- 3.4.32 This is evidenced by the following statement of Watson VP in *Integrated Trolley Management Pty Limited*:<sup>54</sup>

*'The ability to vary modern awards is limited by the terms of the Act. A variation to terms other than wages can only be made if Fair Work Australia (FWA) is satisfied that the variation outside the 4-yearly reviews of modern awards "is necessary to achieve the modern awards objective." In my view this is a significant hurdle that any applicant in a matter under s 158 is required to meet. The clear import of this provision is that award variations outside the 4-yearly reviews will be the exception. Other provisions of the Act deal with variations to*

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<sup>54</sup> [2010] FWA 3317.

*resolve ambiguities or errors. Applications to vary awards on other grounds must be shown to be necessary to meet the modern awards objective rather than desirable or justified in a general sense. In my view this means that an applicant must establish that the modern awards objective cannot be achieved unless the variation is made.*<sup>55</sup>

- 3.4.33 The matter of Simpson Personnel,<sup>56</sup> in which HIA appeared, also suggests that section 157(1) of the Act is to be narrowly applied. In particular, SDP Watson afforded regard to the 26 June 2009 comment of the Full Bench of the AIRC that:

*'Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration.'*<sup>57</sup>

- 3.4.34 Watson SDP went on to state at paragraph 49 that:

*'...The comments of the 26 June 2009 Full Bench in relation to applications to vary modern awards, soon after their making, militate against the making of a determination varying the 2010 Modern Award outside the system of 4 yearly reviews of modern awards.'*

- 3.4.35 Such decisions have stood to mitigate against the making of variations to the awards outside the formal review process. It has also meant that affected parties have had limited capacity to secure changes to the awards where they are not operating as intended by the Act.

- 3.4.36 Additionally, what has been considered as 'necessary' to meet the modern awards objective has required the prosecution of significant merit arguments and in HIA's view sets a much higher threshold than in matters before industrial tribunals of the past.

- 3.4.37 In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (SDA v NRA (No 2))*<sup>58</sup> Tracey J considered the proper construction of s.157(1). His Honour held:

*'...I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'*<sup>59</sup>

- 3.4.38 What also seems clear is the significance placed on the award modernisation process in the application of s.157 and the imposition of a requirement that there be a 'change in circumstances' that would warrant the variation.

- 3.4.39 HIA submit that this is inappropriate and is yet another barrier preventing Modern Awards from effectively meeting the modern day needs of employers and employees.

<sup>55</sup> Ibid at [10].

<sup>56</sup> Simpson Personnel Pty Ltd [2010] FWA 2894.

<sup>57</sup> [2009] AIRCFB 645

<sup>58</sup> (2012) 205 FCR 227.

<sup>59</sup> Ibid at [35]-[37] and [46].

- 3.4.40 For example, in the matter of *Australian Federation of Employers and Industries re Social, Community, Home Care and Disability Services Industry Award 2010*<sup>60</sup> in refusing to grant a variety of variations sought under ss.157 and 160 C commissioner Cribb reasoned:

*‘This matter was considered by the Award Modernisation Full Bench in the making of the modern award. AFEI has not identified changed circumstances which would warrant re-consideration of this clause’<sup>61</sup>*

- 3.4.41 It is equally concerning that the granting of applications on the basis of s.160 have generally been limited to the correction of spelling errors<sup>62</sup>, the threshold for considering if an ‘ambiguity or uncertainty’ exists being set high. As explained by Commissioner Spencer in considering a variation under s.160 in the Modern Sugar Industry Award:

*‘The Applicant’s submissions referenced the case of Tenix Defence Pty Limited, where a Full Bench of the AIRC decided that the Commission ‘must first identify an ambiguity or uncertainty’ before it can exercise the discretion to remove that ambiguity or uncertainty. This decision is referred to in other similar applications for variations before the Tribunal.*

...

*Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.*

*The first part of the process – identifying an ambiguity or uncertainty – involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox CFMEU (CSR Timber) Enterprise Agreement 1997*:*

*“The identification of whether or not a provision in an instrument can be said to contain an ambiguity requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the ‘parent’ award with which a complimentary provision is to be read.”*

*We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.*

*The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.<sup>63</sup>*

<sup>60</sup> [2010] FWA 5123 (23 August 2010).

<sup>61</sup> Ibid at [51].

<sup>62</sup> [2010] FWA 5123 (23 August 2010) at [68] – [69].

<sup>63</sup> *Sugar Industry Award 2010* [2011] FWA 7755 (8 November 2011) at [19] and [28] – [31].

3.4.42 Despite these observations, particular those in paragraph 31 cited above such an approach has not always been adopted. Notably in *Master Builders Australia Limited re Building and Construction General On-site Award 2010*<sup>64</sup> SDP Watson observed:

*‘There are rival contentions advanced by the unions and the employer associations as to the meaning and effect of clause 19.8.*

*...*

*In my view the interpretation advanced by the MBA is unsustainable when the relevant terms of the Building and Construction Award are objectively assessed.*<sup>65</sup>

3.4.43 In this matter, despite identifying ‘rival contentions’ it was held that no ambiguity or uncertainty existed.

3.4.44 Equally concerning is that the preservation of pre-modern award terms and conditions has been confirmed by the Commission in its decision considering preliminary issues associated with both the 2012 Modern Award Review<sup>66</sup> and the 4 Yearly Review of Modern Awards.<sup>67</sup>

3.4.45 In relation to the former the Commission stated:

*‘Two points about the historical context are particularly relevant. The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective. The second point to observe is that the considerations specified in the legislative test applied by the Tribunal in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective which now appears in s.136.*

*...*

*However, we accept that the award modernisation request, Part 10A of the WR Act and the award modernisation decisions of the AIRC are relevant insofar as they provide a historical context for the Review ...*<sup>68</sup>

3.4.46 And the latter:

*‘In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.*<sup>69</sup>

3.4.47 Also of concern is that the concept of the ‘critical mass’ or ‘prevailing industry standard’<sup>70</sup> is currently being relied on by unions in proceedings before the

<sup>64</sup> *Master Builders Australia Limited re Building and Construction General On-site Award 2010* [2012] FWA 62 (4 January 2012).

<sup>65</sup> *Ibid* at [40] – [42].

<sup>66</sup> [2012] FWA 5600.

<sup>67</sup> [2014] FWC 1788.

<sup>68</sup> [2012] FWA 5600 at [85] and [103].

<sup>69</sup> [2014] FWC 1788 at [60].

<sup>70</sup> [2010] FWA 5123 (23 August 2010).

Commission.<sup>71</sup> Whilst parties are yet to fully understand the weight the Commission will attribute to such arguments, it is clear that the position is being given some support.<sup>72</sup>

- 3.4.48 Notably the Explanatory Memorandum to the *Fair Work Bill 2008* stated in relation to s.157:

*‘To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances’.*

- 3.4.49 Clearly the ability to change a Modern Award outside the 4 yearly review process is incredibly constrained both in terms of legislative requirements and the evolving case law. The latter imposing a significantly high threshold on parties bringing applications, the consideration of which is heavily coloured by the award modernisation process.
- 3.4.50 The historical context of a Modern Award should not be given greater weight those matters outlined as a part of the Modern Awards Objective.

### Recommendation

- 3.4.51 Modern Awards must be genuinely ‘modernised’, with the content of Modern Awards simplified to form a basic set of industry specific minimum employment conditions.
- 3.4.52 The Modern Awards Objectives, or the criteria against which an application to change a Modern Award is considered must expressly include a requirement that the current circumstances are a predominant factor.
- 3.4.53 A more efficient and effective award review process must be implemented. The current legislated structure for reviewing Modern Awards is overly burdensome.

## 4 Apprenticeships

- 4.1.1 The Australian apprenticeship system has a vital role to play in redressing both youth unemployment and skill shortages. However, in HIA’s view the current Workplace Relations framework adds very little to resolving these complex issues, and, in fact often adversely impacts attempts by business and industry to address them.
- 4.1.2 Current NCVER data<sup>73</sup> shows that as at 30 September 2014, there were 341,300 apprentices and trainees in-training, a decrease of 18.4% from the same time the previous year. Further when comparing the 12 months to 30 September 2014 to the same timeframe the previous year, the data shows that:
- Apprentice commencements decreased by 23.9%.
  - Apprentice completions decreased by 20.4%.
- 4.1.3 An apprenticeship is a unique form of employment. It is based on a legal contract—the contract of training— involving three parties; the apprentice, employer and a training provider.
- 4.1.4 Significantly the contract of training is but one part of the legal or regulatory framework that impinges on apprenticeships, the ‘contract of training’ which provides for a program of structured training operates within the Workplace Relations framework

<sup>71</sup> AM2014/294 18 February Submissions at [51] – [57].

<sup>72</sup> [2010] FWA 5123 (23 August 2010) at [58].

<sup>73</sup> NCVER 2015, *Australian vocational education and training statistics: apprentices and trainees 2014 –September quarter*, NCVER, Adelaide.



which does not adequately 'fit' with this form of engagement; it is like trying to fit a square peg into a round hole.

- 4.1.5 A similar view was expressed by the findings of the Expert Report - *A shared responsibility - Apprenticeships for the 21st Century* (the '**Apprenticeship Expert Panel Report**'):

*'The workplace relations system does not complement the Australian Apprenticeships system, which has created potential barriers to the system being able to deliver maximum productivity...'*

...

*'There is currently a lack of integration between the Australian Apprenticeships system and the workplace relations system. We note particularly the inconsistencies in modern awards on a range of issues related to apprenticeship and traineeship wages and conditions. ... The workplace relations framework needs to complement and support the VET system, be responsive to the needs of industry and encourage the take-up and completion of apprenticeships and traineeships.'*<sup>74</sup>

- 4.1.6 As identified the two systems should not be at odds with one another but rather, should be complimentary and designed to meet the objectives of what industry is attempting to achieve in developing a skilled workforce and in providing a structure that supports and encourages skills development and opportunity for employment.
- 4.1.7 The challenges posed by the Australian apprenticeship system are not novel yet the lack of co-ordinated and dedicated evolution in this space is a source of constant frustration posing broader deleterious consequences. For example, apprentice commencement and completions in the residential construction industry are directly impacted by workplace relations policy and legislative settings. A downturn in apprenticeships, in turn, impacts on the availability of skilled trades in the industry.
- 4.1.8 This view was shared by the findings of the Apprenticeship Expert Panel Report:
- 'The Australian Apprenticeships system will require significant improvement to performance, such as retention, completion outcomes and its impact on productivity and innovation, if Australia is to respond effectively to the challenge of competing in a global marketplace. A skilled and flexible workforce that can meet these challenges will be critical to Australia's future standard of living.'*<sup>75</sup>
- 4.1.9 The confusion and complexity of the Australian Apprenticeship system was also highlighted by the Australian Apprentices Taskforce Final Report, which supported the need for simplification of the Australian Apprenticeships system.
- 4.1.10 At the time HIA submitted that *'there is actually no such thing as a national Australian Apprenticeships system'*. Each state and territory has its own system for the delivery of apprenticeships and traineeships with its own governing legal structure and administrative rules creating complexity and confusion for employers, especially those who operate nationally.
- 4.1.11 HIA has identified the following areas where the divergence between the training arrangements and employment arrangements creates tension:

<sup>74</sup> *A shared responsibility - Apprenticeships for the 21st Century*. Final Report of the Expert Panel, 31 January 2011 p.9-10.

<sup>75</sup> Ibid p. 8.



- changes to wages and conditions for apprentices (including adult apprentices), trainees and juniors as a direct consequence of award modernisation.
- Ways to achieve flexibility with respect to the engagement of junior employees and employees to whom training arrangements apply to ensure that flexible arrangements are available to support their employment and training arrangements. The modern awards and their classification structures should not be used to prevent the development of more relevant and timely training avenues and the development of skills.
- Unnecessary procedural complexities and duplication with regard to the interaction between the training contract and industrial relations system, including but not limited to the process for terminating trainees and apprentices.
- A lack of support within Modern Awards to support employment opportunities for young people and people who wish to develop new skills.

## 4.2 Background

4.2.1 The express consideration of apprentice terms and conditions of employment within the Workplace Relations framework originated during the award modernisation process.

4.2.2 In the Award Modernisation decision of 18 December 2008, the Full Bench described the approach taken in relation to junior and apprentice rates as follows:

*'The federal awards and NAPSAs with which we are dealing contain a very wide range of rates for junior employees and apprentices. The relevant instruments fix percentages of the adult wage for juniors and apprentices based on a host of historical and industrial considerations, most of which can only be guessed at. It is not possible to standardise these provisions on an economy-wide basis, at least not at this stage. We have adopted the limited objective of developing new rates which constitute a fair safety net for each of the modern awards based on the terms of the relevant predecessor awards and NAPSAs. We have attempted to strike a balance as between, in some cases, wildly varying provisions...'*<sup>76</sup>

4.2.3 In a later decision the Full Bench also noted that:

*'...it would be desirable to develop a unified national system of training and employment conditions for apprentices. We note in this respect that Fair Work Australia is required to set national minimum wages for award/agreement free employees to whom training arrangements apply in either its first or second annual wage review ... It is highly likely that this process will require a review of wages and conditions for apprentices nationally.'*<sup>77</sup>

4.2.4 These comments provided an impetus for consideration of the issue by the Minimum Wage Panel, which, in its decision in the Annual Wage Review 2009-2010<sup>78</sup> considered a separate review of apprentice wages and conditions to be informed by a report completed by an Expert Panel.<sup>79</sup>

4.2.5 On 31 January 2011, the Expert Panel released the Apprenticeship Expert Panel Report.

<sup>76</sup> [2008] AIRCFB 1000 at [71].

<sup>77</sup> [2009] AIRCFB 800 at [51].

<sup>78</sup> [2010] FWAFB 4000.

<sup>79</sup> Ibid at [356], [408]-[409], [412]-[413].

- 4.2.6 In light of this and various union applications, the Commission determined that the 2012 Modern Award Review would consider apprentice wages and conditions of employment, placing weight on the following comments of the Expert Panel:

*'We encourage and endorse a broad review conducted by Fair Work Australia (FWA) into apprenticeship and traineeship wages and conditions. We note that a large number of Australian Apprentices appear to be receiving above award rates of pay, which likely means that Australian Apprenticeship wage rates contained in awards do not reflect the current market for those wage rates. Whilst many Australian Apprentices receive above award wage rates, the safety net (or minimum wage rates in modern awards) should reflect the changing demographics of Australian Apprentices. This includes more mature age people, many from diverse backgrounds and with a range of experiences choosing to enter into an Australian Apprenticeship compared to the past.'*<sup>80</sup>

- 4.2.7 It is HIA's view that the review of apprentice terms and conditions of employment during the 2012 Modern Award Review was inappropriate. HIA advanced this position during the consideration of the scope of the review.
- 4.2.8 The changes made to Modern Awards as a result of the Apprentice Decision have *selectively* addressed matters of concern; this approach has exacerbated the complexity of the current framework adding significant costs.
- 4.2.9 The foreshadowed *broad review* of the Australian apprenticeship system did not occur and while there have been some efforts towards the solidification of a *National Custodian*<sup>81</sup> for Australian Apprenticeships, this has not gone far enough to resolve the current complexities.
- 4.2.10 The lack of support provided by the Workplace Relations framework is articulated when Recommendation 7 of the Apprenticeship Expert Panel Report is examined.
- 4.2.11 Recommendation 7 was focused on how to maintain the training and employment of apprentices and trainees during an economic downturn noting that support should be provided for the following measures:
- Reduction of work hours offset by additional training.
  - Increased off – the – job training placement with other employers in the industry.
  - Increased mentoring and support.
- 4.2.12 Within the current 'safety net' framework these measures could not be implemented. For example, the restrictive hours of work provisions of the Onsite Award<sup>82</sup> do not permit a reduction in on the job training, nor a reduction in the wages payable as a result of less hours on the job.

<sup>80</sup> Final Report of the Expert Panel, above n 74, p.13 (cited in the Apprentice Decision).

<sup>81</sup> Final Report of the Expert Panel, above n 74, Recommendation 1 pgs. 41-44.

<sup>82</sup> See Clause 33.1.

## 4.3 The Regulatory Framework

*'The current system suffers from administrative confusion as governance structures, responsibilities and custodianship of the system remain unclear to many users.'*<sup>83</sup>

### **The Act**

- 4.3.1 The Act creates a national workplace relations system that expressly seeks to balance Commonwealth, State and Territory regulation of workplace relations and is intended to cover the workplace relations field by excluding the application of State and Territory industrial laws, however, it preserves State and Territory laws that the Commonwealth considered outside the *'central areas of workplace relations'*.<sup>84</sup>
- 4.3.2 Sections 26-30 of the Act create a regulatory framework within which the interaction between the Act and state and territory laws is addressed.
- 4.3.3 Section 26 of the Act operates to exclude the operation of State and Territory industrial laws that might otherwise apply in relation to employees and employers covered by the Act.
- 4.3.4 Despite s.26, s.27 operates to preserve certain State and Territory industrial laws, of relevance, s.27(1) excludes from the operation of s.26:
  - laws prescribed by the *Fair Work Regulations 2009 (Regulations)*; and
  - laws dealing with any non-excluded matters which are set out in s.27 (2).
- 4.3.5 Also of relevance is that s.27(2)(f) provides that a *'non-excluded matter'* includes:
 

*'...training arrangements, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by the National Employment Standards or may be included in a modern award...'*
- 4.3.6 *Training Arrangements* are defined in s.12 of the Act as:
 

*'...a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees'.*
- 4.3.7 As indicated by s.27(1) the Regulations provide further detail as to how State and Territory laws interact with the federal workplace relations system.
- 4.3.8 Specifically, Regulation 1.13 expressly excludes from the operation of s.26 State and Territory laws dealing with *'suspension, cancellation or termination of training contracts'* and employment contracts associated with training contracts.
- 4.3.9 The combined effect of these provisions is that State and Territory laws that deal with training arrangements continue to have force and effect outside the national workplace relations framework subject to the Act applying in relation to training arrangements in regards to the NES or matters that may be included in a modern award.
- 4.3.10 Further s.29 of the Act operates to resolve any conflict between a modern award or enterprise agreement and a law of a State or Territory; subsection (1) operates to give primacy to a modern award or enterprise agreement over a State or Territory law.
- 4.3.11 However, s.29(2) of the Act provides that a term of a modern award or enterprise agreement does not prevail where the term relates to non-excluded matters (which includes *'training arrangements'*).

<sup>83</sup> Final Report of the Expert Panel, above n 74 p. 9.

<sup>84</sup> Explanatory Memorandum to the *Fair Work Bill 2008* at [129].

- 4.3.12 The complexity of the current regulatory framework of apprenticeships was highlighted by the Apprentice Decision. This leads to a discussion of the matters that a Modern Award can include as they relate to training arrangements.

### **Regulation by Modern Awards**

- 4.3.13 During the hearing of the Apprentice Decision<sup>85</sup> the Full Bench was asked to consider the interaction of Modern Award terms and conditions, ss.26-30 and s.139(1) as they related to the permissibility (or otherwise) of a number of proposed variations relating to apprenticeships, ranging from the insertion of probationary provisions to supervision requirements.<sup>86</sup>

- 4.3.14 The Full Bench took a broad approach to s.139(1)(b), which provides that a Modern Award may include terms about:

*‘...type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities’*

- 4.3.15 In determining that an apprenticeship was a ‘type of employment’ contemplated by s139(1)(b) the Full Bench stated:

*‘We are not persuaded that the term “type of employment” in s.139(1)(b) should be constrained or read down in the manner that some employers contend.*

*In our opinion, “type of employment” in s.139(1)(b) is to be read as describing different kinds or classes of employment that may be arranged into categories based upon the incidents, terms or conditions of the employment in question. Each type of employment will take its character from the rights, duties, obligations and privileges that attach to it. In the case of apprenticeship, which we accept is a type of employment, the rights, duties and obligations will involve the existence of a training contract and obligations on an employer associated with the provision of training to the employee. There can be no real or legal category of apprentice employment if the provision of training is not involved. Award clauses dealing with the circumstances in which training is to be provided to apprentices, and will continue, are terms about that type of employment. ... it is open to us, in the sense we have jurisdiction, to consider the subject matters referred to in the common claims. As we have earlier indicated, those common claims deal with the need for a training contract and provision of appropriate training and other obligations of both parties under it, disputes about the training contract, suspending, limiting or extending the training contract and probation of an apprentice’.<sup>87</sup>*

- 4.3.16 Additionally, the Full Bench rejected submissions that ss.26-29 of the Act and regulations 1.13 to 1.15 (discussed above) operated to constrain or limit the terms which the Commission is empowered to include in Modern Awards:

*‘We are not persuaded that they operate in such a manner. They do not limit either the jurisdiction or the power of the Commission to include the terms in an award as sought by the unions.’<sup>88</sup>*

<sup>85</sup> [2013] FWCFB 5411.

<sup>86</sup> Ibid.

<sup>87</sup> [2013] FWCFB 5411 at [96] –[97].

<sup>88</sup> Ibid at [106].

#### 4.3.17 The Full Bench further noted:

*'The effect of ss.29(1) and 29(2) is that a modern award prevails over State and Territory legislation to the extent of any inconsistency. However, State and Territory legislation dealing with suspension, cancellation or termination of a training contract; or with the suspension, cancellation or termination of a contract of employment associated with a training contract and entered into as part of a training arrangement; or with or a period of probation under a training arrangement, is not excluded and **therefore can operate alongside modern awards. Modern awards can therefore supplement the laws of a State or Territory insofar as the laws deal with those matters.** The explanatory memorandum describes the effect of ss.27 and 29(2) as being "that a modern award or enterprise agreement is subject to any of the State or Territory laws that are saved by clause 27, as well as any State or Territory laws prescribed by the regulations. This means that a modern award or enterprise agreement cannot diminish, but may supplement, rights and obligations under these laws.*

*...We observe however that despite our finding that the interaction rules do not operate to preclude jurisdiction or power to entertain the subject matters of the variations sought by the unions, we acknowledge the force of the employers' submissions that these provisions require attention be given to significant discretionary considerations. We also accept that a cautious approach should be taken before including new terms concerning apprentices in a modern award which may have the effect of overriding State and Territory legislation.<sup>89</sup>*

*(our emphasis added)*

- 4.3.18 While the unions were, to some extent, unsuccessful in relation to a number of variations that related to training arrangements the comments by the Full Bench outlined above clearly confirm the jurisdiction of the Commission to deal with matters pertaining to an apprenticeship; not just aspects of that relationship as it relates to employment but also to matters generally considered to fall squarely within the training spheres of the State and Territory Governments.

## 4.4 Interaction between regulatory schemes

- 4.4.1 Outlined below are some specific examples of the problematic nature of overlapping regulation of apprenticeships including:

- Competency Based Wage progression.
- Termination, suspension and cancellation of a training arrangement.

### **Competency Based Wage Progression (CBWP)**

- 4.4.2 As a result of the Apprentice Decision, CBWP was inserted into the Onsite Award.<sup>90</sup>
- 4.4.3 HIA does not oppose the principle that apprenticeship wages progress correspondingly with training progression, however the insertion of CBWP provisions into the Onsite Award was premature and did not address the relative complexity of introducing this concept across all training jurisdictions via the Onsite Award.
- 4.4.4 By and large, CBWP must be pursued as a cultural shift, in concert with industry bodies and employers. As recommended by the Apprenticeship Expert Panel Report:

<sup>89</sup> Ibid at [117] and [119].

<sup>90</sup> See Clause 15.9.



*'Promote a culture of competency based progression in apprenticeships and traineeships, in partnership with industry bodies and employers. Additionally, a greater acceptance and achievement of competency- based wage and training progression should be supported by all stakeholders.'*<sup>91</sup>

4.4.5 For example the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)* provides for CBWP. Under this award progression is based on the completion of certain percentages of the competency points as opposed to the completion of percentages based on competency standards.

4.4.6 Notably this system is characterised by:

- Agreement between industry groups as evidences in the document entitled *'National Metal and Engineering Industry Competency Standards Implementation Guide'*<sup>92</sup> (**Implementation Guide**).
- Agreement at a national level as to the use and implementation of competency based progression through each of the states.
- The use of a points system on which to base the progression of an apprentice through competencies. This points system reflects that not "all skills are equally complex, so it is unrealistic to develop competency standards in which each competency unit represents an equal 'amount' of competence"<sup>93</sup>. Further to this Table 1 and Table 2 of the Implementation Guide sufficiently highlight the intricate nature of measuring and weighing competencies in order to ensure true progression through and apprenticeship based on the attainment of competence.

4.4.7 The Implementation Guide also notes that the system is complex:

*'The competency standards for the metal and engineering industry consist of nearly three hundred separate competency units which identify the elements of skill and performance criteria necessary to perform a vast range of jobs in the industry.'*<sup>94</sup>

4.4.8 The move to competency based progression in the metal trades and manufacturing industry did not only occur through changes to industry awards there was also a change in mindset focusing on a structure that was based on skills and the system was tested and trialled through Model Implementation Programs.<sup>95</sup>

4.4.9 The development of competency based progression under the Manufacturing Award demonstrates a process that involved significant consultation, agreement at an industry level, agreement at a national level and agreement at a state level to implement and support the system.

4.4.10 In contrast to the approach taken within the Manufacturing Sector CBWP has been thrust upon the residential construction industry, without appropriate consultation; the industry, State Training and the Workplace Relations regulator are ill-equipped to implement what is now contained within the Onsite Award and in HIA's view this is far from what was contemplated by the Award Modernisation Full Bench, the Minimum Wage Expert Panel and the Apprenticeship Expert Panel when considering a review of apprentice wages and conditions.

4.4.11 The complexity of accessing a level of 'competence' is well reported.

<sup>92</sup> <http://www.mskills.com.au/DownloadManager/downloads/Competency%20standards%20implementation%20guide.pdf> <accessed 110315>.

<sup>91</sup> Recommendation 12 at p.94.

<sup>93</sup> Implementation Guide, p.14.

<sup>94</sup> Implementation Guide, p. 2.

<sup>95</sup> Implementation Guide, p. 8.

- 4.4.12 For example, a report by the University of Sydney for Group Training Australia highlighted that in order to deliver competency based progression ‘a disaggregation of skills must occur which is ‘modularised’, ‘flexible’ and ‘atomised.’<sup>96</sup>
- 4.4.13 Further a report by NCVER articulated that ‘on the surface, competence seems to be a simple concept. However as this review will show (the) simplicity melts away to reveal something which is conceptually far more complex.’<sup>97</sup>
- 4.4.14 To add to this complexity it is generally accepted that ‘competency based progression can only be achieved through collaboration of all stakeholders in the apprentice and trainee education and development process.’<sup>98</sup>
- 4.4.15 Consequentially of central importance to the effectiveness of competency based progression is co-operation from the state training authorities. However, over 12 months on, there is no evidence that the individual states have a consistent and reliable means of assessing competence for the purposes of wage progression.
- 4.4.16 If the apprenticeship system is to be based on competency based wage progression, it must be genuinely competency based and as such requires a comprehensive, well-structured framework within which the competencies of apprentices can be accurately assessed; such a system does not currently exist.
- 4.4.17 Queensland has also operated a form of CBWP for some time however in practice the system largely relies on the time-based default mechanism for progressing further into the apprenticeship. Wage progression is determined by reference to points or a percentage system which purports to equate with the “competencies” achieved under the ATQF training package.
- 4.4.18 However the experience from Queensland suggests that the time of progression is simply reduced, by around 3 months. This is due to the very structure of the apprenticeship incorporating on and “off the job” training which takes the same amount of time regardless of the progression structure in place.
- 4.4.19 In a similar vein to that found in the Manufacturing sector, the Queensland System is unique and underpinned by detailed arrangements to ensure that the system can effectively be implemented such as the use of Supervising Registered Training Organisations (**SRTO**) who are responsible for delivering the training under an established training plan.
- 4.4.20 It is also significant that there are a range of assessment strategies in place to ensure that the attainment of competence is adequately measured including:
- SRTO complete the assessment off-the-job and verifies the on-the-job competence by working in partnership with workplace supervisor.
  - By agreement, the SRTO provides full simulated assessment in an off-the-job setting that mirrors workplace requirements.
  - Assessment through recognition of prior learning by SRTO where apprentice/trainee presents with appropriate knowledge and skill (any point throughout training contact period).
  - Workplace assessment where qualified workplace assessor attends the workplace to observe practical tasks, together with off-the-job assessment of underpinning knowledge and skills.

<sup>96</sup> A step into the breach: Group Training initiatives and innovations using competency based progression The University of Sydney prepared for Group Training Australia, June 2012 p.32.

<sup>97</sup> Guthrie, H (2009) *Competency and competency-based training: What the literature says*, NCVER p.18.

<sup>98</sup> The University of Sydney, above n 96, p.16.



- Co-assessment where assessor negotiates with and provides appropriate resources for employer to conduct the assessment on behalf of SRTTO, this is because:
  - The SRTTO assessor has the assessment competencies and the workplace supervisor has the vocational competencies.
  - The SRTTO assessor has both competencies but has negotiated workplace assessment as an effective strategy for the parties.
  - The workplace has a qualified assessor to conduct the assessments on behalf of the SRTTO.

- 4.4.21 Again, there was a comprehensive framework underpinning the system of CBWP which does not consistently exist across the country. As such outcomes in other states may vary when transferred to jurisdictions with different training frameworks.<sup>99</sup>
- 4.4.22 Problematically, the uncertainty of the assessment of 'competence' under the CBWP is further complicated by the linkage with wage progression, a report by CIE identifying the problematic nature that part of the rationale for competency based progression is to advance faster through the apprenticeship and therefore achieve higher wages.<sup>100</sup>
- 4.4.23 The application of CBWP is further complicated when considering the crediting of a Certificate II qualification towards a Certificate III, and the interaction of this with competency progression and wage fixation.

### ***The case of Skills Tasmania***

- 4.4.24 In seeking to address this issue on 30th September 2014, Skills Tasmania and the Tasmanian Training Agreements Committee (**TTAC**) approved a new policy, Policy 17 – Competency-based Wage Progress in the Building Industry.
- 4.4.25 The background to the policy states:

*Section 15.9 of the Building and Construction General On-site Award 2010 enables TTAC to require apprentices to demonstrate competency and any minimum necessary work experience for the purposes of progressing to the next apprentice wage level.*

*Students graduating with a Certificate II in a building-related trade may be significantly disadvantaged in attaining an apprenticeship as they would ordinarily be entitled to second year apprentice wages in their first year. This policy is aimed at balancing the competency attainment of a student and the value placed on this attainment by a prospective employer by giving six months' time credit to a new apprentice in the first year of their apprenticeship.*

*This policy is aimed at supporting the notion of competency progression in the Award and does not cut across the functions and powers of the Fair Work Ombudsman in administering the provisions of the Award. Therefore, the decision of **TTAC is now to provide 6 months credit for any apprentice entering** into an apprenticeship in a Certificate III qualification from the Plumbing and Services Training Package (CPC) if the apprentice has previously completed a Certificate II qualification in Construction. The two qualifications mentioned in*

<sup>99</sup> Centre for International Economics (2013) *Increasing Apprentice and Trainee Wages and Conditions in the Building and Construction Industry* p.18.  
<sup>100</sup> Ibid.



the policy are CPC20112 and CPC20211. **This effectively means that once the apprentice has served 6 months of their apprenticeship they will progress to 2nd year wages.**<sup>101</sup>

(our emphasis added)

- 4.4.26 The challenge that confronted Skills Tasmania seems to have been resolved by relying on 'time served', which is at odds with the underlying principles of CBWP.
- 4.4.27 In HIA's view this is an unsatisfactory outcome and raises questions as to how such matters are being dealt with in other states. HIA understands that aside from Tasmania the issue is largely unresolved.

***The notice of termination provisions of the NES apply to apprentices.***

- 4.4.28 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. Unlike the redundancy provisions of the NES, apprentices are not specifically exempted from the notice requirements set out in section 123(3).
- 4.4.29 During the 2012 Modern Award Review, confusion as a result of clause 15.2(c) of the Onsite Award was addressed. The previous 15.2(c) provided 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...'*

- 4.4.30 As a result of the Apprentice Decision the Onsite Award was varied to insert clause 15.2 (d) was now provides:

*'The notice of termination provisions of the NES apply to apprentices'*

- 4.4.31 Relevantly the Full Bench stated:

*'The NES are contained in Part 2-2 of the Act. Notice of termination and redundancy pay are in Division 11 of that Part. There is no contest that the Act excludes apprentices from an entitlement to payment for redundancy under the NES, but it is submitted that an award should not exclude them from minimum notice or payments to be made upon termination of employment and to do so is contrary to the Act. We agree with this submission. Section 123 excludes a number of employees from the entitlements under Division 11 but it is clear from s.123(1)(d) that in respect to the notice and termination provisions apprentices are not excluded. Any variation seeking to amend a provision of an award in this respect is granted.'*<sup>102</sup>

- 4.4.32 Whilst it is now clear that the notice of termination provision as provided for by the NES apply to the termination of the employment of an apprentice, what has not been explored is the impact of this on the training arrangement. HIA deals with this below.

***The cancellation, suspension and termination of a training contract***

<sup>101</sup> [TTAC Policies and Guidelines](#) <accessed 170315>.

<sup>102</sup> Apprentice Decision at [416] – [417].

- 4.4.33 The interaction between the Workplace Relations framework and training arrangements is particularly problematic when it comes to an employer ascertaining their rights and obligations in relation to the cancellation, suspension, and termination of a training contract.
- 4.4.34 In the course of terminating an ordinary employee's employment, employers are required to consider the relevant award conditions, and as well the Act, so as to comply with their obligations.
- 4.4.35 However, when considering the termination of an apprentice an employer must consider a further 'layer' of legislative requirement as the training contract must also be 'cancelled'. This is regulated by the relevant state or territory training legislation.
- 4.4.36 The term 'cancellation' is not recognised in the industrial relations sphere however the effect of taking these actions may have ramification in the workplace relations space.
- 4.4.37 While the training contract and employment contract must operate 'hand in hand' throughout the apprenticeship, in practice, there is a clear disconnect between the cancellation of the training contract and the termination of an employment contract; the relevant legislative instruments do not interact in a cohesive manner.
- 4.4.38 By way of example, in New South Wales, the *Apprenticeship and Traineeship Act 2001* (the '**NSW Apprentice Act**'), requires an employer and an apprentice to terminate a contract of training by mutual consent. The NSW Apprentice Act imparts obligations on both parties to lodge for cancellation of the apprenticeship, or otherwise provides for a dispute resolution process where the parties do not consent to the cancellation.
- 4.4.39 The competing instruments fail to acknowledge the conflicting timeframes for notice of termination for the purposes of the employment contract, and the time frames involved for the purposes of cancelling the training contract.
- 4.4.40 The cancellation of the training contract can take a significant period of time. Where an application for cancellation is made by only one party and not by consent, the other party is given 21 days to respond. Where the cancellation is disputed the matter is dealt with by the Vocational Training Tribunal of New South Wales, by a conciliation process and thereafter arbitration, in contrast the termination of employment, is by clear notice (or payment in lieu of notice) as provided for within the Award and/or the Act.
- 4.4.41 Effectively the inconsistent timeframes can result in the training contract being at an end while the employment contract is on foot raising questions as to whether the apprentice is classified as an 'apprentice' for the purposes of engagement, or the employment contract being at an end while the training contract is on foot raising questions as to whether the apprentice should be gainfully employed during this period.
- 4.4.42 This situation is not unique to NSW and such difficulties are faced by employers across the country.
- 4.4.43 Difficulties are also faced by employers and apprentices when trying to reconcile the ability to 'suspend' a training contract, with Award conditions and obligations arising under the Act.
- 4.4.44 Taking NSW again, under the NSW Apprentice Act 'suspension' refers to placing an apprenticeship or traineeship "on hold" temporarily. This option is available to allow a degree of flexibility in training arrangements to assist both parties to fulfil the training contract.
- 4.4.45 An employer may seek a suspension if:
- they are closing their business temporarily; or
  - there is a seasonal lack of work.

- 4.4.46 Apprentices and trainees can seek a suspension if:
- they are recovering from an illness;
  - participating in a sporting event; or
  - going on an exchange program.
- 4.4.47 Application can be made individually or by consent.
- 4.4.48 The concept of suspending a training contract is not contemplated by the Act, which only allows for employment to be 'paused' in a limited number of circumstances.
- 4.4.49 Section 524 of the Act provides that an employee may be 'stood down' without pay in the following scenarios:
- industrial action;
  - a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; or
  - a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
- 4.4.50 As such, an employer or an apprentice seeking to suspend a training contract must continue to be paid for fear of breaching the Act; this outcome is at odds with the underlying policy intent of enabling a training contract to be suspended.

## 5 The Bargaining Framework

- 5.1.1 The current model of bargaining under the Act fails to support 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;
  - limited bargaining options available; and
  - complexity of agreement making processes.
- 5.1.2 Problematically 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.
- 5.1.3 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.
- 5.1.4 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>103</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 second being the militancy of the union and a strengthening of union rights following the introduction of the Act.
- 5.1.5 The Act's provisions relating to workplace bargaining inappropriately limit options for real flexibility to collective bargaining. They have also resulted in an increased union presence at the bargaining table and indirectly represent a shift toward compulsory unionism

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<sup>103</sup> R Welch, (2000) *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*, Kluwer Law International, The Hague p. 585, 619.

## 5.2 The Bargaining Process

- 5.2.1 For those small businesses that attempt to address of workplace flexibility issues, 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.
- 5.2.2 The current system of bargaining does not contemplate the lack of resources and expertise available to business.
- 5.2.3 The Act has introduced processes and steps that an employer must follow to make an enterprise agreement that are highly prescriptive. In order to make bargaining a more attractive option for small business, changes to the system are necessary to minimise the paperwork burden and stream line the procedural and administrative requirements.
- 5.2.4 In addition 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.
- 5.2.5 The new good faith bargaining requirements (discussed in further detail below) 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 in of itself creates a paperwork burden for businesses. Employers need to carefully document the discussions and provide carefully considered written responses to claims.
- 5.2.6 In addition to the rules that regulate negotiations, there are a number of prescriptive administrative requirements, including the requirement:
  - to provide employees with notification of their bargaining representation rights as soon as practicable and no later than 14 days of initiation of bargaining;
  - to 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; and
  - 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.
- 5.2.7 Case law indicates that the Commission will not approve an agreement if the pre-lodgement requirements have not been complied with, despite the approval of the agreement by a majority of employees and notwithstanding that the requirements regarding content may have been met.<sup>104</sup>
- 5.2.8 This is in contrast to the former WRA under which agreements could still become effective and registered if the pre-lodgement procedure had not been strictly adhered to.
- 5.2.9 The Act further provides that the union will automatically be the default bargaining representative for its members.<sup>105</sup> Union recognition and expanding the role of the union during bargaining has been a notable feature of the Act.<sup>106</sup> HIA submits that in the short term ensuring that bargaining agents are not automatically appointed on the

<sup>104</sup> *Jillcar Pty Ltd T/A Semaphore Hotel* [2010] FWA 2715.  
<sup>105</sup> s.176 of the Act.

<sup>106</sup> Cooper, R and Ellem, B, (2009) *Fair Work and the Re-regulation of Collective Bargaining*, 22 Australian Journal of Labour Law 284 at [27]

<<http://www.lexisnexis.com.ezproxy1.library.usyd.edu.au/au/legal/results/docview/docview.do?docLinkInd=true&risb=21>



basis of union membership but, rather, are elected by a majority vote of all employees to be covered by the agreement may assist in alleviating some of the reservations of businesses to bargain.

- 5.2.10 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.
- 5.2.11 In *Ostwald Bros Pty Ltd v Construction, Forestry, Mining and Energy Union*<sup>107</sup> the notice of representational rights given to employees omitted the whole of the default bargaining representative provision. The majority held:

*‘Properly construed, in the broader context of the Act, s 188(1)(b) of the Act requires the giving of notice of employee representational rights 21 days prior to a request to approve an enterprise agreement under s 181 in the terms required by s 174 of the Act, which includes advice of default representation in s 174(3). The notice given in this case, which omitted the information to employees required by s 174(3) was not a notice as required by s 188(1)(b).’<sup>108</sup>*

- 5.2.12 Of significant relevance are the comments of VP Watson’s in dissent:

*‘For the reasons above I would grant permission to appeal, allow the appeal and subject to satisfaction of the other statutory tests not dealt with in the decision, approve the Agreement. The defects in the Notice did not lead to its invalidity on a proper application of the approach of the High Court in Project Blue Sky. Nor was any test for approval not satisfied by virtue of the defects. There were no reasonable grounds for believing that the Agreement had not been genuinely agreed.’<sup>109</sup>*

### 5.3 Good Faith Bargaining (GFB)

- 5.3.1 The introduction of GFB represented a significant regulatory change. Further, it is clear that GFB is central to the bargaining framework adopted by the Act.
- 5.3.2 Section 3(f) provides that one of the ways in which the legislation is to achieve its objective of providing a ‘balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’ is by:

*‘achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action’*

- 5.3.3 The centrality of the concept to the scheme of the Act is further articulated in s.171 which sets out the objects of Part 2-4:

*The objects of this Part are:*

- (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and*
- (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:*

<sup>107</sup> [2012] FWA 9512; followed in *Veolia Environmental Services (Australia) Pty Ltd v The Australian Workers Union* [2013] FWCFB 269.

<sup>108</sup> Ibid at [88].

<sup>109</sup> [2012] FWA 9512 at [157].



- i. making bargaining orders; and*
- ii. dealing with disputes where the bargaining representatives request assistance; and*
- iii. ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.*

5.3.4 Section 228 of the Act provides:

*Bargaining representatives must meet the good faith bargaining requirements*

*(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:*

- a. attending, and participating in, meetings at reasonable times;*
- b. disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
- c. responding to proposals made by other bargaining representatives for the agreement in a timely manner;*
- d. giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;*
- e. refraining from capricious or unfair conduct that undermines freedom of association.*

*(2) The good faith bargaining requirements do not require:*

- a. a bargaining representative to make concessions during bargaining for the agreement; or*
- b. a bargaining representative to reach agreement on the terms that are to be included in the agreement.*

5.3.5 In HIA's observation, the vast majority of small businesses in the residential building industry simply do not enter into enterprise agreements; the complex and formal nature of the GFB provisions is intimidating. In small business environments, workers literally work alongside their employer in a necessarily collaborative environment, communicating regularly.

5.3.6 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 a "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.

5.3.7 Judicial consideration of what is considered to be 'bargaining in good faith' creates further hurdles for small business as the expectations on an employer are far from clear.

5.3.8 In the case of Endeavour Coal<sup>110</sup> the Federal Court considered the GFB requirements, Flick J observing:

- The outer limits of the conduct which falls within s.228 is dependent upon factual matters which will undoubtedly vary from one situation to another.
- It is neither possible nor prudent to attempt any exhaustive statement as to what will constitute compliance with the GFB requirements.

<sup>110</sup> *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764.

- If a Majority Support Determination is made, the company must approach bargaining with the union with a genuine (or “good faith”) objective or intention of concluding an “enterprise agreement” – if possible.
- The manner in which the company approaches bargaining is largely a matter for it to determine, s.228(1) does not require a party to bargain in any particular manner and the company is not required to put self-interest to one side.
- The putting of a proposal or counter offer, or the suggestion of terms for the purpose of bargaining or advancing bargaining does not irrevocably commit the company to ultimately agree to the proposal or to the those terms and limit bargaining solely to matters which have not yet been agreed upon.

5.3.9 Further a Full Bench of the Commission has observed:

*‘Whether a party observes or fails to observe the good faith bargaining requirements set out in s.228(1) is to be determined in light of all of the relevant circumstances. While at one level this is stating the obvious, it is appropriate in view of the submissions in the appeal to indicate that the question will rarely be decided by reference to one action or series of actions. Equally it would be undesirable to read into the legislation concepts which do not already appear in it for the purpose of explaining its operation. That approach is likely to lead to error in the construction and application of the provisions.’<sup>111</sup>*

5.3.10 The consequences of being considered to not be bargaining in good faith are numerous and include:

- The imposition *bargaining orders*<sup>112</sup> the breach of which may result on a serious breach determination.<sup>113</sup>
- Majority Support Determination.<sup>114</sup>
- Scope orders.<sup>115</sup>
- The Commission can refuse to approve an enterprise agreement.<sup>116</sup>
- The potential to have an impact of the notion of ‘genuinely trying to reach agreement’ for the purposes of taking protected industrial action.<sup>117</sup>

5.3.11 The combination of overly prescriptive GFB requirements, the risks of being accused of not bargaining in good faith and the invitation for union interference into the bargaining process all act as a significant disincentive for an employer within the residential construction industry to enter into enterprise agreements.

## 5.4 Pattern bargaining

5.4.1 HIA strongly opposes pattern bargaining. It is a longstanding blight on the building and construction industry and is a direct drain on productivity.

5.4.2 HIA does not accept the view, taken by some groups, that such arrangements are simply ‘the cost of doing business’, simplify the enterprise bargaining process and reduce transactional costs.

<sup>111</sup> *Construction, Forestry, Mining and Energy Union-Mining and Energy Division v Tahmoor Coal Pty Ltd* [2010] FWA 3510 (5 May 2010) at [24].

<sup>112</sup> s.229(1) of the Act.

<sup>113</sup> s.234 and 235 of the Act.

<sup>114</sup> s.237 of the Act.

<sup>115</sup> s.238 of the Act.

<sup>116</sup> s.186 of the Act.

<sup>117</sup> s.413 of the Act.

- 5.4.3 The notion of ‘pattern bargaining’, which is often presented to an employer on a “take it or else” basis undermines the principle purpose of an enterprise agreement, that is, an agreement which is one negotiated based on the specific circumstances of an employer and their employees.
- 5.4.4 The use of pattern bargaining also imposes terms and conditions that have specifically 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 on parties down the chain of contracting who are largely ill-equipped to manage them.
- 5.4.5 As highlighted by the FWBC head Nigel Hadgkiss:
- ‘...there are plenty of ways in which these agreements (pattern agreements) restrict efficiency and flexibility – for example, industry-wide RDOs, shutdown weekends and restrictions on using subcontractors and labour hire...These clauses reduce productivity and stifle competition and need to be consigned to the past where they belong.’<sup>118</sup>*
- 5.4.6 Under the Act a course of conduct is pattern bargaining if: the person is a bargaining representative for two or more proposed enterprise agreements; and
- the course of conduct involves seeking common terms to be included in two or more of the agreements; and
  - the course of conduct relates to two or more employers<sup>119</sup>.
- 5.4.7 However a bargaining representative does not engage in pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with an employer.<sup>120</sup>
- 5.4.8 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 are ‘prepared to genuinely reach agreement with each individual employer.’<sup>121</sup> Despite this attempted limitation, pattern bargaining remains a prominent feature of bargaining in the building and construction industry.
- 5.4.9 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>122</sup> For example, in 2013, the Commission approved ten construction industry enterprise agreements based on the CFMEU’s Queensland template.<sup>123</sup>
- 5.4.10 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.
- 5.4.11 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.

<sup>118</sup> Nigel Hadgkiss, Director, Fair Work Building and Construction, Address to the MBAV (March 20, 2014) <accessed 090315>.

<sup>119</sup> s.412(1) of the Act.

<sup>120</sup> s.412(2) of the Act.

<sup>121</sup> Cooper, R and Ellem, B, (2009) *Fair Work and the Re-regulation of Collective Bargaining*, 22 Australian Journal of Labour Law 284 [48].

<sup>122</sup> Construction Forestry Energy and Mining Union, *CFMEU EBA Summary 2009-2011*, <http://www.cfmeunsw.asn.au/member-services/wages-information/eba> <accessed 050315>.

<sup>123</sup> Construction, Forestry, Mining and Energy Union [2013] FWC 5033 (7 August 2013).

- The employer must pay a company productivity allowances<sup>124</sup>.
- 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.
- The employer must pay a fares allowance (which compensates the employee for the mobility requirements of the industry) of \$27.00 per day<sup>125</sup>.
- 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. For example the Victorian EBA effective from March 2015 requires ‘Incolink payments’ of \$74.50 per week.

5.4.12 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.

5.4.13 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.

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

### **Recommendation**

5.4.15 The Workplace Relations framework should provide strengthened protection against pattern bargaining including that a person cannot be considered as ‘genuinely trying to reach agreement’ if they are pattern bargaining.

<sup>124</sup> For example, effective 1 November 2013 in WA requires payment of \$1.62/hour.  
<sup>125</sup> Under the Victorian EBA effective 1 March 2015, travel allowance is \$39.30 per day.

## 5.5 Agreement Content

- 5.5.1 The content requirements of enterprise agreements are problematic for three principle reasons.
- 5.5.2 Firstly, the safety net cannot be compromised via bargaining and which restricts the breadth of negotiations.
- 5.5.3 Secondly, the application of the BOOT imposes significant limitations on agreement content, for example notwithstanding agreement between the parties the Commission determining will not approve enterprise agreements that pay annual leave progressively as a loading or incorporate it into hourly rates of pay.<sup>126</sup>
- 5.5.4 Contrastingly an expansive approach has been taken in respect of clauses that relate to the engagement of independent contracting.
- 5.5.5 We discuss this further at Section 7.3.

## 5.6 Individual agreements

- 5.6.1 Under previous workplace relations regimes individual bargaining had been an attractive option for small business employers and employees who sought greater flexibility with respect to terms and conditions of employment.
- 5.6.2 Following the introduction of the Act the option of individual agreements was removed. 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.
- 5.6.3 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; and
  - non-union greenfield agreements.
- 5.6.4 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.
- 5.6.5 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.
- 5.6.6 The collective bargaining emphasis in the Act is not appropriate in the context of a private sector workforce in which only 12 per cent of employees choose to join a trade union.<sup>127</sup>
- 5.6.7 A decentralised workplace relations system should provide for the ability to enter into:
  - 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;

<sup>126</sup> *Canavan Building Pty Ltd* [2014] FWCFB 3202 (29 May 2014).

<sup>127</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6310.0> <accessed 230315>.



- union greenfield agreements, only if the employer wishes to involve the union in such discussions;
- non-union greenfield agreements; and
- pre-Work Choices style individual agreements, such as those that were permitted from 1996 onwards and supported by a no-disadvantage test.

### **Individual Flexibility Agreements**

- 5.6.8 Under the Act an enterprise agreement is required to contain a 'flexibility term' that allows for individual flexibility arrangements.<sup>128</sup>
- 5.6.9 If an agreement fails to include such a clause, a 'model' term will apply.<sup>129</sup>
- 5.6.10 The model flexibility term has also been included in Modern Awards.<sup>130</sup>
- 5.6.11 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 (IFA) that are designed to allow for variations to the instrument to meet the individual needs of employers and employees.
- 5.6.12 HIA notes that Labour's '*Forward with Fairness – Policy Implementation Plan*' stated:
- Under Labour'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>131</sup>
- 5.6.13 However, in respect of the model provision, the award terms that can be varied 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>132</sup>
- 5.6.14 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.
- 5.6.15 An employee covered by an IFA must also be "better off overall" when the IFA is compared to the award terms.<sup>133</sup>
- 5.6.16 There are a number practical difficulties associated with the IFA option including:

<sup>128</sup> s.202 of the Act.  
<sup>129</sup> ss.145, 202(4) of the Act.  
<sup>130</sup> s.144 of the Act.

<sup>131</sup> Labour's '*Forward with Fairness Policy Implementation Plan*', August 2007, p.11.

<sup>132</sup> See clause 7.1 of the Onsite Award.

<sup>133</sup> See clause 7.3 of the Onsite Award.



- Uncertainty in relation to the requirement that an employee needs to genuinely agree to vary the award under an IFA.
- An employer cannot ask a prospective employee to agree to an IFA as a condition of employment.
- A lack of clarity as to the assessment of the BOOT generally and more specifically in relation to the provision of 'non-monetary benefits'.

5.6.17 In HIA's view outcomes that can now only be achieved through an IFA should form part of a flexible workplace relations system. For example, employers should be exempt from award coverage when they are paying an employee an amount that is significantly above the minimum wage prescribed by the award and 'all in rates' should simply be permitted without the need to enter into an IFA or equivalent.

## 5.7 The Better Off Overall Test

- 5.7.1 The BOOT prevents working arrangements that would mutually benefit employers and employees, or in other ways limit worthwhile flexibility in workplace arrangements.
- 5.7.2 A revision of the better off overall test is needed in order to address 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 Onsite Award.

## 5.8 Requirements to consider productivity improvements

- 5.8.1 Historically productivity improvements or considerations of productivity were always an expected feature of enterprise bargaining, as highlighted by the AIRC:

*'In our view the essence of enterprise bargaining designed to achieve increased efficiency and productivity also requires the parties to demonstrate that they have considered a broad agenda in their enterprise negotiations. We do not intend that that agenda be limited only to matters directly related to normal award prescriptions. It should cover the whole range of matters that ultimately determine an enterprise's efficiency, productivity and continuing competitiveness.*

*These could involve such things as:*

- *short and long term plans for the enterprise including plans for future investment, product or service development, restructuring and greater emphasis on the needs requirements of suppliers and needs of customers;*
- *the current and future operational needs of the enterprise including requirements for improved performance in relation to quality, cost, delivery reliability and cycle time; and*
- *the needs of employees including skills development, job satisfaction and improved employment opportunities.*<sup>134</sup>

- 5.8.2 Overtime, the prominence of such considerations in the bargaining framework has all but evaporated.

<sup>134</sup> Review of Wage Fixing Principles, 25 October 1993 (Print K9700), [http://www.airc.gov.au/safetynet\\_review/decisions/K9700.htm](http://www.airc.gov.au/safetynet_review/decisions/K9700.htm) <accessed 030315>.

- 5.8.3 Whilst the Coalitions *Fair Work Amendment (Bargaining Processes) Bill 2014* seeks to amend Part 2-4 of the Act to provide a new requirement that will ensure that the Commission must be satisfied that productivity improvements at the workplace were discussed during bargaining is a step in the right direction without an underlying shift in the content of the safety net and the application of the BOOT (or similar) such measures will have a largely superficial effect.

### **Recommendation**

- 5.8.4 It is HIA's view that the bargaining framework must be comprehensively reviewed with a view to the providing for a greater range of agreement making options, at the individual employer/employee level, including individual statutory agreements underpinned by a no-disadvantage test.

## **6 Employee Protections**

### **6.1 Unfair Dismissal**

- 6.1.1 HIA frequently receives requests for assistance from HIA members in managing unfair dismissal claims.
- 6.1.2 Notably the Act significantly expands 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.
- 6.1.3 In a survey conducted in February 2012, 76% of HIA members surveyed expressed the view that the unfair dismissal provisions do not fairly balance the interests of employees and businesses. A more recent survey of HIA members conducted in March 2015 identified unfair dismissal as within the top 3 workplace relations matters of most concern, with 62% of surveyed members indicating that the current unfair dismissal laws interfere with their ability to manage their business and employees.
- 6.1.4 The unfair dismissal provisions have had an adverse impact on a business's willingness to employ, with 70% of HIA members survey indicating that they are less willing to take on employees as a result of unfair dismissal laws.<sup>135</sup>
- 6.1.5 One HIA member commented that 'unfair dismissal laws make me hesitant to employ'.
- 6.1.6 The frustrations experienced by members can be described as a mix of a clear failure to efficiently adhere to and apply jurisdictional limitations, combined with clear wrong doing on behalf of employees that is largely ignored when compared to an inadvertent failure on the part of the employer to adhere to procedural requirements.
- 6.1.7 For example, a HIA member with less than 15 employees dismissed an employee, with warning, within 12 months of employment. Despite the clear jurisdictional limitations the employee lodged an unfair dismissal claim.
- 6.1.8 Fortunately, the hearing date was withdrawn however, the claim was then re-lodged; the employee claimed that there were more than 15 employees despite the HIA member providing various documents to prove that there were, in fact, less than 15 employees.
- 6.1.9 The member spoke to the Fair Work Ombudsman, who was unsure how the unfair dismissal claim had progressed to this point noting that the HIA members was clearly a small business, and the employee had clearly been dismissed within 12 months.

<sup>135</sup> February 2012.



- 6.1.10 HIA advised the member to provide a statutory declaration outlining the number of employees and the relevant dates that the claimant had been employed, with supporting documentation to demonstrate that there was no jurisdiction for the claimant's unfair dismissal claim.
- 6.1.11 The HIA member was extremely frustrated at the entire process, as the employee did not have jurisdiction to make the claim in the first place. The member's attempts to demonstrate that they were a small business did not appear to be considered.
- 6.1.12 In another example it was clear that an application had been brought out of time, yet the matter proceeded to hearing. At hearing the HIA member was asked why they did not respond to the unfair dismissal allegations in the relevant Form. The HIA member responded that they did not receive the application in time. The presiding member asked the Applicant if they had a reason why the application was submitted late. The applicant had no reason and the matter was dismissed.
- 6.1.13 Yet in another example a HIA member terminated an employee on the basis of genuine redundancy; the business was a small business employer. The unfair dismissal application was lodged outside the required timeframes yet the matter was listed for conciliation. The ex-employee failed to attend.
- 6.1.14 The matter was re-listed for conference/hearing some three months later which meant the member had to prepare submissions should the jurisdictional argument not be upheld. The Applicant failed to provide any further submissions in relation to the matter and failed to attend on the day of the hearing. Consequently the Commissioner dismissed the matter.
- 6.1.15 In these three cases, HIA members should not have been required to attend hearings – the Commission had no jurisdiction to hear the matters from the outset.
- 6.1.16 There has also been a spate of unfair dismissal decisions since the commencement of the Act's operation which beg the question as to whether the Act is operating as intended and the potential impact of the unfair dismissal provisions upon small business.
- 6.1.17 Although small businesses are exempt from unfair dismissal claims if they can show they have complied with the Code, there is evidence that it is not working.
- 6.1.18 While the Labour Government's 'Forward with Fairness – Policy Implementation Plan' acknowledged that small businesses warranted special consideration and 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. The matters subject of the Code are still subjective and capable of challenge.
- 6.1.19 For instance the Code provides:

*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 (emphasis added)..*

- 6.1.20 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 s.387 of the Act which is relevant to all businesses.
- 6.1.21 Rather than provide an exemption for small businesses the current unfair dismissal regime simply imposes further compliance requirements.
- 6.1.22 The Commission has taken the approach that, in order to possess ‘reasonable grounds’ for its belief an employer at least needs to have carried out ‘a reasonable investigation into the matter’<sup>136</sup> and compliance may require that the employer discuss the allegations with the employee<sup>137</sup>. Further:
- ‘It would usually be necessary for the employer to establish what inquiries or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the employee...failure to make inquiries or to put the accusation to the employee in many circumstances may lead to a view that there were no reasonable grounds for the belief to be held.’<sup>138</sup>*
- 6.1.23 Despite the claim that there will be no ‘go away money’, this has not been the experience of business to date. A HIA member surveyed in February 2012 commented:
- ‘The Fair Work Act allows for the virtual blackmail of employers and can result in go away having to be paid to employees who are losing their jobs because it costs them nothing to lodge an unfair dismissal claim’*
- 6.1.24 A similar sentiment was expressed by a HIA member who, while not filling out the Code, terminated an employee for failing to turn up at work and not responding to the member’s calls and text messages. The employee lodged an unfair dismissal claim and the matter went to conciliation. The member said he ‘felt pressure from the conciliator to settle the matter because if it went further he would lose because of poor records’. The member eventually agreed to pay approximately \$5,000 to put the matter to rest.
- 6.1.25 The Commission 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.

### **Genuine redundancy**

- 6.1.26 Section 385(d) of the Act provides that a person has been unfairly dismissed if the Commission is satisfied that the dismissal was not a case of genuine redundancy.
- 6.1.27 Genuine redundancy is defined in s.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*

<sup>136</sup> *Pinawin v Domingo* [2012]FWAFB 1359 at [29].  
<sup>137</sup> *Saif v Jokar Holdings Pty Ltd* [2011] FWA 977 (15 February 2011) at [43-45], upheld on appeal: *Jokar Holdings Pty Ltd v Saif* [2011] FWAFB 2628 (6 May 2011).

<sup>138</sup> *Harley v Rosecrest Asset Pty Ltd* [2001] FW.A 997 (21 June 2011) at [9].

- (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.*

- 6.1.28 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.
- 6.1.29 Consultation provisions within Modern Awards are complex for an under resourced small business employer and do not change the fact that an employee's position is no longer available.

### **Recommendation**

- 6.1.30 A small business exemption for employers who employ 20 or fewer employees be reinstated.
- 6.1.31 Procedural deficiencies or irregularities should not amount to a finding that the termination is unfair.
- 6.1.32 The imposition of fines for frivolous and vexatious claims, would help remove the perception of bias against employers.
- 6.1.33 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.

## **6.2 Anti – Bullying Laws**

- 6.2.1 While HIA recognises the dangers associated with bullying and the existence of bullying at the workplace, HIA opposed the regulation of bullying through the industrial relations framework, such regulation is more suitably contained within workplace health and safety legislation.
- 6.2.2 This was recognised within the Workplace Bullying Report<sup>139</sup> which overwhelmingly recommended the implementation of the regulation of bullying through Safe Work Australia<sup>140</sup> and considered workplace bullying as *'primarily a work health and safety issue because it poses risks to the health and safety of those workers targeted.'*<sup>141</sup>
- 6.2.3 The Workplace Bullying Report also highlighted that there are several legislative avenues that an alleged victim of workplace bullying can take, including the Act.
- 6.2.4 The provisions encourage forum shopping enabling the bringing of multiple, concurrent actions on the basis of alleged bullying in different jurisdictions. This is in contrast to the specific recognition under Work, Health and Safety legislation of the problematic nature of allowing a person to initiate multiple actions in relation to the same matter under two or more laws.<sup>142</sup>
- 6.2.5 The potential outcome being that an employer may have to defend the same allegation in multiple jurisdictions.

<sup>139</sup> Workplace Bullying – We just want it to stop.

<sup>140</sup> See recommendations 3, 4, 5, 6, 7, 8, 18, 20 and 21.

<sup>141</sup> Workplace Bullying – We just want it to stop at p.32.

<sup>142</sup> s.115 Work, Health and Safety Act 2011 (Cth).

- 6.2.6 While the number bullying claims lodged is reportedly less than expected and the Commission has made very few stop bullying orders,<sup>143</sup> businesses are still required to respond to illegitimate and arguably vexatious claims.<sup>144</sup>
- 6.2.7 Industrial parties have already seen an expansive approach being taken to the jurisdiction; the Commission deciding that it can consider bullying behaviour which occurred prior to the commencement of the new jurisdiction in deciding applications for stop-bullying orders<sup>145</sup>, and the ability of the Commission to assess internal company policies and procedures as they relate to the investigation of complaints when considering the concept of 'reasonable management action'.
- 6.2.8 While case law is still developing industrial parties are already getting a sense of the Commission approach towards the defence to a bullying claim.
- 6.2.9 In rejecting a manager's claim that she had been subjected to repeated unreasonable treatment by two of her subordinates<sup>146</sup> the Commission considered the employers investigation of their employees bullying complaints.
- 6.2.10 Whilst finding that the company's receipt and investigation of the complaints was not unreasonable Commissioner Hampton said that in "hindsight" the company should have provided more support including mentoring and management training<sup>147</sup>.
- 6.2.11 Further in considering whether the management action was reasonable, the Commissioner observed:

*'Determining whether management action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time. Without limiting that assessment, the considerations might include:*

- *the circumstances that led to and created the need for the management action to be taken;*
- *the circumstances while the management action was being taken;*  
*and*
- *the consequences that flowed from the management action.*

*The specific 'attributes and circumstances' of the situation including the emotional state and psychological health of the worker involved may also be relevant.*

*The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'. In general terms this is likely to mean that:*

- *management actions do not need to be perfect or ideal to be considered reasonable;*
- *a course of action may still be 'reasonable action' even if particular steps are not;*

<sup>143</sup> See for example Applicant v Respondent, PR548852 (21 March 2014); Order - Applicant v Respondent; Mr Bove Ulysse PR555329 (10 September).

<sup>144</sup> Peter Hankin v Plumbers Supplies Co-Operative Ltd T/A Plumbers Supplies Co-Op; Ben Ridgeway; Simon Ballingal; Chris Henry; David Power; Grant Crawford; Stephen Wells [2014] FWC 7923 (18 November 2014); Paul Hill v L E Stewart Investments Pty Ltd t/a Southern Highlands Taxis and Coaches; Laurie Stewart; Robert Carnachan; Nick Matinca [2014] FWC 4666 (25 July 2014).

<sup>145</sup> Kathleen McInnes [2014] FWC 1440 (6 March 2014).

<sup>146</sup> [2014] FWC 2104 (12 May 2014).

<sup>147</sup> Ibid at [83] - [88].



- *to be considered reasonable, the action must also be lawful and not be 'irrational, absurd or ridiculous';*
- *any 'unreasonableness' must arise from the actual management action in question, rather than the applicant's perception of it; and*
- *consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.*<sup>148</sup>

6.2.12 In applying the test outlined above a business's internal policies and procedures are destined to come under significant scrutiny; such was the case in that matter despite the engagement by the business of AiG's law firm, Ai Group Legal, to conduct an investigation; a step most small businesses within the residential construction industry would not have the resources to embark on.

### ***Independent Contractors and Workplace Bullying***

6.2.13 The use of the term "worker" is significantly problematic. The definition comes from Work, Health and Safety laws (such as the *Work Health and Safety Act 2011* (Cth)) and extends to any person who carries out work in any capacity for a person conducting a business or undertaking.

6.2.14 This will include will include independent contractors and subcontractors as well as employees.

6.2.15 The application of the Act beyond the regulation of the employment relationship has inappropriately imposed industrial relations regulation on other forms of legitimate work arrangements.

## **6.3 General Protections and Adverse Action**

6.3.1 The adverse action provisions have expanded the rights of persons, both before and after they are hired and fired.

6.3.2 This includes independent contractors and relates to action on account of a 'workplace right' or because they have engaged in industrial action.

6.3.3 '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*

6.3.4 These provisions overlap with existing employee protections from unlawful workplace discrimination or victimisation.

<sup>148</sup> [2014] FWC 2104 (12 May 2014) at [49] – [51].

- 6.3.5 The general protection provisions are having an increasing impact with the number of claims increasing from 1,871 in 2010 – 11 to 2,879 in the last financial year.
- 6.3.6 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.
- 6.3.7 The reverse onus of proof means an employee can refer a claim to the Commission 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, tipping the balance of the regulation too far in favour of employees.
- 6.3.8 HIA is often contacted by members for assistance in responding to adverse action claims.
- 6.3.9 The cases outlined below demonstrates the real risk to employers posed by the current expansive provisions.

### **Case Study**

- 6.3.10 A HIA member employed an apprentice who was under 18 through an Apprenticeship Centre.
- 6.3.11 During a meeting of the Member, the apprentice and his mother, the employment arrangements were discussed, including rules relating to smoking, working on Saturdays and that training would be on site rather than at TAFE. During the meeting the apprentice's mother indicated her preference that her son go to trade school, however it was made clear that the agreement would be for training on site and not at TAFE.
- 6.3.12 Despite this the apprentice's mother constantly expressed the view that she wanted her son to go to TAFE. After 5 weeks of employment given this constant source of conflict the Member sought advice from the state training authority, who instructed the member to dismiss the employee which the member did.
- 6.3.13 The employee then made an adverse action claim. The HIA member did not completely understand the grounds for the claim however the member assumed it was due to requests to attend a trade school rather than carry out training on-site.
- 6.3.14 The matter proceeded to conference at which the member agreed to pay \$5,000 to the apprentice to settle the matter

### **Case Study**

- 6.3.15 A HIA member contacted HIA for assistance with a General Protections application made by an ex-employee. The Member is a small business employer located in a regional area.
- 6.3.16 The member offered the employee a role in Administration/Drafting/Estimator which involved relocation. The employment contract did not contemplate relocation costs.
- 6.3.17 Unfortunately due to poor work attendance and poor performance in line with the probationary clause of the employment contract less than 6 weeks into the role the member terminated the employees' employment. There had been some verbal conversations regarding performance prior to termination. The Member provided payment in lieu of 2 weeks' notice.

- 6.3.18 The employee alleged that the termination of employment was linked to the questioning of a provision within his employment contract that related to the use of a company vehicle.
- 6.3.19 The employee was provided a vehicle for work use in accordance with his employment contract, while a monetary value was mentioned in preliminary salary emails; that value had not been incorporated into the employment contract. The Member claimed that the use of the vehicle was this value. The termination of employment occurred the day following the questioning of this entitlement.
- 6.3.20 As a result of the 'unlawful termination' the employee attempted to recoup relocation costs (\$6500 Government Grant which has to be repaid), and outlays in relation to the relocation (\$3000).
- 6.3.21 The employment contract did not provide for reimbursement of relocation costs in the event of termination during the probation period, however does note in clause 1.1(e) *'the employees family will locate to [INSERT PLACE] after the probation period (or unless otherwise agreed with Company)'*. The member did not agree to the relocation in the probationary period, and the employee and his family organised this without consultation or agreement with the member.
- 6.3.22 The member made his response to the General Protections without seeking advice, given the very short window of response, 7 days.
- 6.3.23 The Member offered the former employee a monetary settlement, however the employee wanted to proceed with the full claim.
- 6.3.24 Despite urging of the Commission member that the employee settle and not proceed with the claim, the employee was adamant in proceeding for the full amount. A certificate was issued by the FWC member; however the matter has not proceeded further.
- 6.3.25 The HIA member commented that 'the biggest problems for small business in relation to responding to these matters is the time spent, as well as costs', and 'if I hadn't done my preparation, I would have been in trouble'.
- 6.3.26 The HIA member also commented that the cost of defending the general protections claim was in excess of \$15,000, a big impost for a small business.

## 7 Other Workplace Relations Issues

### 7.1 The Fair Work Ombudsman

- 7.1.1 Under the Act, the Fair Work Ombudsman (the '**FWO**') is empowered to

*promote "harmonious, productive and cooperative workplace relations" and "compliance with this Act and fair work instruments" including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;*

- *to monitor compliance with this Act and fair work instruments;*
- *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*
- *to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;*
- *to refer matters to relevant authorities;*

- to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument

- 7.1.2 HIA acknowledges that in more recent times, the FWO has taken a more transparent and proactive approach. However it is HIA's view that the FWO can further improve their performance in relation to their key deliverables of advice, and assistance.
- 7.1.3 As part of the *Coalition's Policy to Improve the Fair Work Laws* in 2013 the Government introduced the *Small Business Helpline* as a further service to be provided by the FWO in recognition of the particular needs of small business.
- 7.1.4 Of note are comments by Senator Abetz when the small business infoline hit 50,000 calls:
- 'Small business operators don't want to wait on hold, they want quick and reliable advice so that they can get back to running their businesses.'*<sup>149</sup>
- 7.1.5 Unfortunately in the case of HIA members, small business operators don't always receive 'quick and reliable advice' from the FWO.
- 7.1.6 Quite often through conversations with HIA members, it is evident that there has been reliance upon inaccurate advices of the FWO Infoline. These advices are often received as a result of a 'quick' phone call, without any reference number or evidence to prove the information source.

### **Industry or occupational divisions**

- 7.1.7 HIA notes that during 2013 – 2014 the construction industry accounted for 11% of the FWO Infoline calls.
- 7.1.8 To ensure:
- accuracy in the provision of information;
  - consistency in the advice provided; and
  - the retention and the development of historical knowledge.
- HIA submit that there would be significant value in the FWO Infoline having industry/occupational divisions for the handling of queries.
- 7.1.9 This will enable callers to access FWO practitioners who are well versed in their respective industry and occupational award issues and complexities.
- 7.1.10 It is HIA's view that such an approach would assist in the provision of quick, consistent and reliable advice.

## **7.2 Competition Laws**

- 7.2.1 To avoid repetition HIA refers to its submissions dated 20 June 2014<sup>150</sup> and 24 November 2014<sup>151</sup> to the Competition Policy Review Panel on the interplay between workplace relations laws and competition laws and current problems with that interplay.

<sup>149</sup> <https://abetz.com.au/news/fair-work-s-small-business-helpline-hits-50-000-calls> <accessed 170315>.

<sup>150</sup> [Competition Policy Review - Housing Industry Association – Submission to the Issue Paper.](#)

<sup>151</sup> [Competition Policy Review – Housing Industry Association – Submission to the Draft Report.](#)

## 7.3 Independent Contracting

- 7.3.1 A decade ago the Department of Employment and Workplace Relations (DEWR) stated in their submission to the House of Representatives enquiry on labour hire and independent contracting that contract arrangements are essential to Australian businesses as they enable them to compete more effectively in Australian and international markets and adapt to changing economic conditions.
- 7.3.2 Residential housing particularly benefits from the efficiency and flexibility of independent contracting.
- 7.3.3 Contracting provides substantial benefits to subcontractors, head contractors/ builders, consumers and the economy generally which are not available using employees alone. These benefits include:
- Higher levels of productivity;
  - Guaranteed higher quality of work;
  - Payment by results which leads to stable costs at greater rewards for productivity; and
  - Capacity to organise work to suit themselves.
- 7.3.4 Independent research has shown that the housing industry is significantly more efficient than commercial construction. The Productivity Commission first analysed the effects of restrictive work practices in the commercial sector in 1999.<sup>152</sup>
- 7.3.5 In 2003, Econtech conducted a thorough analysis of the different cost structures applying in the housing and commercial construction sectors.<sup>153</sup> Econtech found that the same tasks cost an average of 10 per cent more in the commercial sector than in the residential sector. Labour costs were on average 19 per cent higher in the commercial sector. This analysis understated the actual cost differential by excluding site allowances which are a considerable additional cost for commercial projects. Industry estimates suggest that the impact of site allowances for large projects in Victoria, for example, is an additional 3 to 4 per cent of total project costs. This data has been regularly updated, the latest being in 2013.<sup>154</sup>
- 7.3.6 In those jurisdictions most affected by restrictive work practices, namely Victoria and Western Australia, the cost difference between the sectors is even greater. In Victoria, standard tasks such as laying a concrete slab cost 19 per cent more in the commercial sector than in the residential sector; in Western Australia, the difference is 14 per cent. These states also have much higher rates of industrial disputation, with an annual average of more than 500 working days lost per thousand employees.
- 7.3.7 The 2003 Royal Commission into the Building and Construction Industry has confirmed that restrictive work practices imposed by unions have stunted productivity growth in the commercial sector.
- 7.3.8 Independent contracting is based on a choice of work options, for both the hirer and the contractor.

### ***Current legislative impediments to the efficient mix of independent contractors and ongoing workers***

- 7.3.9 Deciding whether to engage independent contractors or employees is a primary operational decision of the hiring firm:

<sup>152</sup> Productivity Commission, 1999, *Work Arrangements on Large Capital City Building Projects*. Canberra, AusInfo.

<sup>153</sup> Econtech, 2003, *Economic Analysis of the Building and Construction Sector*. Canberra, Econtech.

<sup>154</sup> <http://www.masterbuilders.com.au/InformationSheets/kpmg-econtech-economic-analysis>.



*‘Before a contract is entered into, managers who are considering the ‘make or buy’ decision need a framework for analyzing how and when to contract. The first step is assessing organizational goals and the capacity to meet those goals. When organizations lack the capacity to meet their goals, purchasing that capacity from another organization is certainly an appropriate option.’ Or, where capacity exists, but another organization or person may have a better or cheaper means of providing that capacity, contracting may be a good idea”<sup>155</sup>*

- 7.3.10 Conceptually, all work can be performed by either an employee or contractor.
- 7.3.11 However no builder should be forced to employ any employee or engage any contractor. It is a choice, one which is made on economic grounds. While productivity is a major factor in that choice, it is not the only factor – ability to control, reliability, and flexibility are also relevant factors.
- 7.3.12 In a number of ways the current framework is distorted or biased towards employment as opposed to contractors in turn disturbing the efficient mix of contractors.
- 7.3.13 Of most concern is the ability for union enterprise agreement to be used to restrict the engagement of independent contractors who may be competing with union employees to perform particular work or tasks.
- 7.3.14 The cases of *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* and *AiG v ADJ Contracting Pty Ltd* are disturbing because they effectively undermine the choice of an business to engage a contractor on the terms and conditions that the market allow, namely competitive forces and relative bargaining power.

#### ***Asurco Contracting Pty Ltd v CFMEU*<sup>156</sup>**

- 7.3.15 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.
- 7.3.16 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)*<sup>157</sup>**

- 7.3.17 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.

<sup>155</sup> Cohen, S, Eimicke W and Heikkila T, *The Effective Public Manager*. San Francisco: Jossey-Bass, 2008. Print. at 175, 176 cited in Cohen, S, Eimicke W, (2013), *Independent Contracting Policy and Management Analysis*, Columbia University, New York at 9.

<sup>156</sup> [2010] FWAFFB.  
<sup>157</sup> [2011] FWAFFB 6684.



- 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.

7.3.18 Additionally the adverse action provisions and workplace bullying laws purport to extend "workplace rights" to independent contractors.

7.3.19 Independent contractors are a creature of commercial law not industrial relations law.

7.3.20 The *Competition and Consumer Act 2010* regulates the abuse of market power and prohibits a range of unfair practices including collusive bargaining, price-fixing and resale price maintenance, but accepts that not all or even most contracts have to be equally beneficial to both parties.

7.3.21 This Act and the common law/equity should be the appropriate source of rights for independent contracting businesses, not labour law. "Protecting" contractors undermines the whole basis of contracting.

### ***General concerns about the WR system as it applies to independent contractors***

7.3.22 In many ways, the current workplace relations system and as indicated in earlier paragraphs has encroached on and eroded the independent contracting model.

7.3.23 A builder cannot be forced to take on a worker as an employee, nor can a worker insist they work as an employee. Industrial action aimed at reversing this position, and forcing builders to use employees rather than contractors, is an attempt to reverse fundamental laws of economics.

## **7.4 Sham Contracting**

### ***Discouraging Sham Contracting***

7.4.1 The concept of sham contracting is found in the "sham arrangement" provisions of the Act (ss.357-359), which is where an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

#### 7.4.2 These provisions prohibit an employer from:

- Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (s.357(1)).
- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (s.358).
- Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (s.359).
- Under subsection 357(2) a defence is available to an employer if at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship i.e. whether contract was a contract of employment.

#### 7.4.3 Failure to comply with the sham arrangement provisions attracts potential penalties of up to \$51,000 per breach for corporate entities and up to \$10,200 per breach for involved individuals.

#### 7.4.4 In 2006, the then Minister described the purpose of these provisions. They are:

*'aimed at preventing employers from entering into 'sham contracting arrangements ...where an employer seeks to avoid taking responsibility for the legal entitlements due to employees by seeking to disguise as an independent contracting relationship what is in reality an employment relationship.'*<sup>158</sup>

#### 7.4.5 Unfortunately, previous attempt to assess the effectiveness of the existing statutory framework has been side-tracked because of confusion about what precisely “sham contracting” is and attempts to expand the current legal definition.

#### 7.4.6 As noted above, sham contracting is misrepresenting an employment arrangement as a contract for services.

#### 7.4.7 However consistently the trade unions and others who think contracting is an aberration, misleadingly misuse the term ‘sham contract’ and use it as pejorative label to describe all that is undesirable when work is performed by contractors as opposed to unionised labour. Sham contracting is also often confused with unrelated concepts such as ‘hybrid employees’, ‘dependent contractor’, ‘quasi-contractor’ and ‘labour only contractor’.

#### 7.4.8 The academic construct of the so-called “dependent contractor” is particularly erroneous. The concept was devised by a Canadian academic over 50 years ago<sup>159</sup> but still is not an accepted legal category. The general thesis is that if a self-employed person provides their services to only one, or predominantly only one, organisation they require regulation under the workplace relations framework, whether the ‘dependent contractor’ wants such regulation or not.

#### 7.4.9 In a recent article for the Melbourne University Law Journal academic Shae McCrystal has mused:

<sup>158</sup> Workplace Relations Minister's Second Reading Speech on the IC Bill 2006.  
<sup>159</sup> See Arthurs, HW, (1965) *The Dependent Contractor: A study of the legal problems of countervailing power*, University of Toronto Law Journal 89.

*'While their ranks include genuinely entrepreneurial workers, increasingly also they include low paid, low status workers, who may be 'dependent' on one engager (so-called 'dependent contractors'), or who may work for a number of engagers (independent contractors) but are entirely reliant on their own labour to support themselves and their families ...*

*There is general agreement amongst scholars that self-employed workers who most resemble standard employees —dependent contractors— should be treated like employees and provided with access to mainstream collective bargaining statutes. It is relatively straightforward to consider the contractual arrangements of such workers as a 'sham' or as an indication of avoidance of labour law protections.'*<sup>160</sup>

- 7.4.10 This argument is however flawed on a number of levels.
- 7.4.11 If a person is in businesses in his or her own account then they are offering a "contract for services" regardless of whether or not all of their income comes from only one source.
- 7.4.12 Further it is also a gross over-simplification to conclude that if a contractor works a whole year for a single principal or builder that they are really an employee and hence should be treated like one. Economic and bargaining power in contracting relationships will vary with supply and demand, and is not necessarily always with the head contractor or builder.
- 7.4.13 Far from it; the head contractor may be much more reliant on the continued good work of the so-called 'dependent contractor' than vice versa. A builder who cannot get good reliable tradespersons is at the mercy of clients pointing to completion dates and damages clauses. Once a builder has found such tradespersons, the builder naturally wants and needs to hang on to them.
- 7.4.14 The terms on which the contractor performs work may and normally do vary greatly over time, and the way in which the work is performed is still at the contractor's discretion. Unlike an employee, the contractor still needs to work productively and effectively if they are to make a profit.
- 7.4.15 Nor does working for only one head contractor necessarily make a person 'dependent' in any pejorative sense. An employee must adhere to their employment or resign – a contractor can come and go and has a choice of where they work. If the contractor at any particular time cannot negotiate acceptable rates and terms, they are free to work elsewhere.
- 7.4.16 The fact that they do not indicates, not that they are 'dependant' or 'employee-like' and require the law's protection, but that they are happy within a mutually beneficial business relationship.
- 7.4.17 The idea that working for a single head contractor is 'dependent contracting' and a bad thing which should be discouraged by law is wholly wrong, and would merely lead to the break-up of many happy and efficient long-standing business relationships, for no valid reason.
- 7.4.18 The FWO in their 2011 report *"Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries"* importantly distinguished contraventions of the FWA sham arrangements provisions with the misclassification of employees as independent contractors.

<sup>160</sup> McCrystal, S, (2014) *Collective Bargaining beyond the Boundaries of Employment: A Comparative Analysis* [MelbULawRw 4; 37(3) Melbourne University Law Review 662]

- 7.4.19 To avoid conflating them into the one term, the FWO used the term “sham arrangements” to describe behaviour that contravenes the sham arrangements provisions of the Act and “misclassification” to describe a situation where the worker is considered an employee but no deliberate falsehood is apparent.
- 7.4.20 Against this backdrop HIA considers that the current provisions provide sound and effective protections measures against sham contracting.
- 7.4.21 Further the current legal definition in the Act is the correct approach to the issue.

***To the extent that the current provisions are insufficient, what changes could be made to strengthen the Act?***

- 7.4.22 The legislation does not require amendment nor strengthening.
- 7.4.23 In recent years, significant penalties have been levied against a number of companies found to be in breach of the law.<sup>161</sup>
- 7.4.24 HIA particularly opposes suggestions that the current defences available under s.357(2) be watered down and recklessness no longer be an element of the defence.<sup>162</sup>
- 7.4.25 HIA notes that there are a number of cases where significant fines have been levied.

***The prevalence of sham contracting?***

- 7.4.26 Independent contractors are found in nearly every industry and across all sectors. HIA acknowledges that there are widely divergent views about whether sham contracting is in fact a widespread problem but insofar as the home building sector is concerned, ‘sham contracting’ is neither rife nor a major problem.
- 7.4.27 In November 2011, the then Australian Building and Construction Commissioner released a Report of his inquiry into Sham Contracting into the building industry. The Report found that ‘sham contracting’ is not rife in the industry or even ‘widespread’ (contrary to claims by the CFMEU) and also rejected proposals for radical action such as changes to legislation.
- 7.4.28 Of interest, CFMEU claims made in its ‘Race to the Bottom’ publication are said in the Report to be unsubstantiated and involving a misuse of statistics.

***A statutory definition of independent contracting***

- 7.4.29 Although in a practical sense, the differences between an employee and a contractor, are well understood in the building and construction industry, an ongoing issue of concern is the differing treatment and definitions of ‘employee’, ‘independent contractor’ and ‘employer’ across Commonwealth and state jurisdictions.
- 7.4.30 For workplace relations purposes, the Act relies on the common law approach.
- 7.4.31 HIA supports the common law. It is relatively clear about who is an employee and who is a contractor. Under the common law, employees are engaged under a “contract of service” whereas independent contractors are engaged under a “contract for service”.
- 7.4.32 As the Australian government stated in their 2005 Discussion paper ‘*Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*’ unlike many of the statutory definitions noted below, the common law:

<sup>161</sup> See for instance <http://www.fairwork.gov.au/about-us/news-and-media-releases/2013-media-releases/july-2013/20130729-happy-cabby-penalty> and <http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/march-2015/20150302-global-penalty>.

<sup>162</sup> See for instance Fair Work Act Review Panel (2012) *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Department of Education Employment and Workplace Relations p.242.

*'does not 'deem' classes of workers to be one or the other, but looks to the individual circumstances involved. It does not recognise the 'half-way house' notion of 'dependent contractors' which can serve to blur the distinction between commercial relationships and employment relationships. The common law affords greater flexibility than legislation and provides an effective mechanism to address 'sham arrangements'. If a statutory definition were adopted, it may be possible to subvert the legislature's intention using legal artifices. In contrast, a common law based approach will look to the substance of the arrangement.'*

- 7.4.33 The Commonwealth superannuation guarantee laws unfortunately move beyond the common law providing that if a person works under a contract that is wholly or principally (more than half) for the labour of the person, the person is deemed to be an employee of the other party to the contract.
- 7.4.34 Whilst subsequent case law and SGR Rulings have elucidated a contract for a result was outside the scope of the description 'a contract that is wholly or principally for the labour of the person', there remains considerable uncertainty about who is an employee and who is a contractor for superannuation purposes.
- 7.4.35 The income tax legislation adopts the Alienation of Personal Services Income Test (**APSI**). This test differentiates independent contractor arrangements in relation to taxation from PAYG employees.
- 7.4.36 Contractors who satisfy the APSI test qualify to utilise the business tax deductions and income splitting regime.
- 7.4.37 The APSI rules were introduced in 2000 as a tax anti-avoidance measure. They were intended to protect the integrity of the taxation system by preventing individuals who generate income from their personal services from reducing their liability to taxation by diverting income through a company, partnership or trust, and to clarify the work-related deductions available to the individual and interposed entity.
- 7.4.38 There are 2 main elements to the APSI test.
- 7.4.39 Firstly individuals may self-assess against the "results test".
- 7.4.40 If the results test is passed, the taxpayer is not affected by the alienation measures regardless of the proportion of their income derived from a single source.
- 7.4.41 The results test in particular is based on the traditional criteria used to distinguish independent contractors from employees. To satisfy the 'results test' the individual must:
  - work to produce a result; and
  - provide plant and equipment or tools of the trade (if required); and
  - be liable for rectification of any defects in work performed.
- 7.4.42 At a state level, a contractor can be separately defined under payroll tax laws, workplace health and safety laws, workers compensation laws, long service leave:
  - workplace health and safety legislation imposes duties on beyond the traditional concept of the employment relationship applying obligations on "person as carrying out a business or undertaking" regardless of whether or not they are an employer;
  - workers' compensation legislation applies benefits to certain workers under a "contract for service";
  - harmonised payroll tax provisions covers contractors performing work other than pursuant to a trade or business which they carry on and do not subcontract to anyone else;



- anti-discrimination legislation applies to both contractors and employees; and
- construction industry long service leave in some jurisdictions extends to “labour only” subcontractors.

7.4.43 Because of the differing legislative approach at a state and Commonwealth levels, uncertainties about the status of contractors, have imposed considerable costs on industry and progressively eroded the independent status of subcontractors.

7.4.44 For these reasons, HIA considers that the *Independent Contractors Act 2006* could be amended to provide a statutory definition of a contractor based on the current APSI criteria. This is a proven, workable definition that reflects and codifies the common law.

7.4.45 The advantage of the APSI “results” test, is that instead of defining ‘employee’ the APSI rules merely identify who is an independent contractor. This leaves the common law untouched, and does not require forming additional definitions in the legislation.

## 7.5 Right of Entry

7.5.1 Labour’s *‘Forward with Fairness – Policy Implementation Plan’* had promised that the new laws would ‘maintain right of entry laws.’<sup>163</sup>

7.5.2 However this promise was not fulfilled with the Act now providing significantly expanded rights of entry for unions.

7.5.3 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 on 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.

7.5.4 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.

7.5.5 In moves largely at odds with the ALP’s Forward with Fairness policy the *Fair Work Amendment Bill 2013* which further expanded unions right of entry was passed on 28 June 2013.

7.5.6 As a result of this the Act now provides that where no agreement on the location of the discussions is reached, the permit holder may conduct the interview or hold the discussions in any room or area in which one or more of the persons who may be interviewed or participate in discussions ordinarily take their meal or other breaks which is provided by the occupier for taking such meal or breaks.

7.5.7 All employees, irrespective of whether they wish to be interviewed or participate in discussions with the union will be exposed to such discussions during their meal break.

## 7.6 Long Service Leave

7.6.1 The Productivity Commission Issues Paper questions whether a uniform national long service leave standard should be adopted.

7.6.2 Before considering whether a uniform or national scheme is appropriate, HIA submits that a broader approach needs to be taken by considering the merits and ongoing utility of long service leave (**LSL**) in its entirety.

<sup>163</sup> Labour’s *‘Forward with Fairness Policy Implementation Plan’*, August 2007, p. 23.



- 7.6.3 LSL has its origins in the colonial public services of South Australia and Victoria. Historically, it was awarded to employees who had provided long service in the colonies to enable them sufficient time to visit the United Kingdom. As a consequence, Australia is the only country where there is a legislated right to LSL.
- 7.6.4 A number of rationales have developed over time to underpin the provision of LSL, these being:
- To provide employees with an extended leave of absence in order to renew their energies;
  - To reward long and faithful service with an employer; and
  - To reduce labour turnover.
- 7.6.5 Of interest is comments by Senior Deputy President Lacy who questioned the relevance of long service leave in today's environment. The following extract is relevant:
- 'It seems that the rationale for a period of respite from a long period of service is no longer a valid assumption. The world today is a much smaller place than it was in colonial times. People are inclined to be far more mobile now than then. In addition to the fading of the tyranny of distance there has been significant change in the pattern of work that raises some questions about the relevance of long service leave as a benefit in employment.'*
- 7.6.6 Participants in the residential construction industry must also adhere to a portable long service leave (**PLSL**) scheme.
- 7.6.7 PLSL Schemes were established to recognise the unique nature of employment in the construction industry, whereby employees are typically engaged on a project basis and move from employer to employer as one project is completed and another starts. The rationale for PLSL schemes does not exist in areas where traditional employment arrangements are the norm (e.g. where the employees are engaged on an ongoing basis with the one employer).
- 7.6.8 Key factors that led to the introduction of the relevant PLSL schemes have included:
- The strategic nature of the industry;
  - High union density and industrial strength;
  - A well-established industry focus; and
  - Patterns of employment in the industry.<sup>164</sup>
- 7.6.9 HIA have concerns relating to construction industry PLSL in that the scheme:
- Amounts to a tax on employment:
    - Operating in a manner which is contrary to the purpose of long service leave;
    - Requiring employers to grant leave to employees with short periods of service, simply because the employee has worked in the industry for several years;
    - Resulting in substantial cost increases for employers due to:
      - The much larger proportion of employees who become entitled to long service leave;

<sup>164</sup> Discussion Paper 14 (2002) *Long Service Leave in the Building and Construction Industry*, Royal Commission into the Building and Construction Industry.

- The need to cover employees absent on long service leave (e.g. overtime costs, training costs, casual labour costs, etc.); and
  - Impact upon an employer's cash flow where the upfront contributions are required.
- There is no evidence to indicate whether long service entitlements are taken during times of low building activity (to replace wages during unemployment), as a retirement entitlement, or progressively during the worker's employment.
  - In recent times, there have been attempts in some jurisdictions to broaden the scope of the schemes. This has included attempts to extend the schemes beyond onsite workers and tradespeople up to managerial type employees, such as supervisors.
  - There have also been moves to broaden the notion of construction to include offsite prefabrication and delivery drivers who, although they have little interaction with onsite work, happen to be employed by the one employer. There have been similar moves to incorporate new trades and occupations such as carpet installers into the schemes.

Term or Condition of Employment	National Employment Standards	s.139 of the <i>Fair Work Act 2009</i> Terms that may be included in modern awards		<i>Building and Construction General Onsite Award 2010</i>	OTHER – including provisions of the <i>Fair Work Act 2009</i>
		What must be included	What may be included		
Minimum Wages			Minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and: <ul style="list-style-type: none"> <li>• Skill-based classifications and career structures; and</li> <li>• Incentive-based payments, piece rates and bonuses.</li> </ul>	Clause 19 - Wages	Annual wage setting process (Part 2-6)
Hours of Work	Maximum Weekly hours (s.62)	Ordinary hours of work		Clause 33 - provides for 'Ordinary Hours of Work' and an RDO system	
Additional Hours of Work	<p>Hours of Work – reasonable additional hours (s.62(2)&amp;(3))</p> <p>Employee may refuse to work unreasonable additional hours</p> <p>2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.</p> <p>Determining whether additional hours are reasonable</p> <p>3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:</p> <p>a) any risk to employee health and safety from working the additional hours;</p> <p>b) the employee's personal circumstances, including family responsibilities;</p> <p>c) the needs of the workplace or enterprise in which the employee is employed;</p> <p>d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;</p> <p>e) any notice given by the employer of any request or requirement to work the additional hours;</p> <p>f) any notice given by the employee of his or her intention to refuse to work the additional hours;</p> <p>g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;</p>		Overtime rates	<p>Clause 36.1 Requirement to work reasonable overtime:</p> <p>a) Except as provided in this clause, an employer may require any employee to work reasonable overtime.</p> <p>b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:</p> <p>(i) any risk to employee health and safety;</p> <p>(ii) the employee's personal circumstances including any family responsibilities;</p> <p>(iii) the needs of the workplace or enterprise;</p> <p>(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and</p> <p>(v) any other relevant matter.</p>	

Term or Condition of Employment	National Employment Standards	s.139 of the <i>Fair Work Act 2009</i> Terms that may be included in modern awards		<i>Building and Construction General Onsite Award 2010</i>	OTHER – including provisions of the <i>Fair Work Act 2009</i>
		What must be included	What may be included		
	h) the nature of the employee's role, and the employee's level of responsibility; i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64; j) any other relevant matter.				
<b>Weekend Work</b>			Penalty rates, including for any of the following: <ul style="list-style-type: none"><li>Employees working unsocial, irregular or unpredictable hours.</li><li>Employees working on weekends or public holidays.</li><li>Shift workers.</li></ul>	Clause 37	
<b>Working on Public Holidays</b>	Public Holiday (ss.114-116)				
<b>Work Arrangements</b>	Requests for Flexible Working Arrangements (Division 4)  Parental leave and related entitlements	Flexibility terms  Consultation about changes to rosters or hours of work	Type of employment, such as: <ul style="list-style-type: none"><li>Full-time employment.</li><li>Casual employment.</li><li>Regular part-time employment.</li><li>Shift work.</li><li>The facilitation of flexible working arrangements, particularly for employees with family responsibilities.</li></ul> Arrangements for when work is performed including: <ul style="list-style-type: none"><li>Hours of work.</li><li>Rostering.</li><li>Notice periods.</li><li>Rest breaks.</li><li>Variations to working hours.</li></ul>	Clause 10 – Types of Employment Clause 7 – IFA Clause 15 –Apprentice employment Clause 12 Clause 14 Clause 13 Clause 34  Clause 33 – Ordinary Hours of Work Consultation about changes to rosters or hours of work.  Clause 35.3	Other State and Territory regulation.
<b>Leave</b>	Annual leave  Personal/carers leave and compassionate leave Community service leave  Long service leave		Leave, leave loadings and arrangements for taking leave.	Clause 38 <ul style="list-style-type: none"><li>Annual Leave Loading</li><li>Payment for leave in advance</li><li>Annual Close Down</li></ul>	State and Territory based regulation.
<b>Termination</b>	Notice of termination				

Term or Condition of Employment	National Employment Standards	s.139 of the <i>Fair Work Act 2009</i> Terms that may be included in modern awards		<i>Building and Construction General Onsite Award 2010</i>	OTHER – including provisions of the <i>Fair Work Act 2009</i>
		What must be included	What may be included		
Redundancy	Redundancy			Industry Specific Redundancy Scheme	ss.123 and 141 of the Act
Provision of information	Fair Work Information Statement			Clause 5 - Access to the award and the National Employment Standards.	
Award Coverage		Coverage terms			s.47/48 of the Act.
Dispute Resolution		Terms about settling disputes	Procedures for consultation, representation and dispute settlement.	Clause 8 & 9 Clause 15.9(b) – Competency Based Wage Progression	Part 6-2 of the Act
Payment of Wages			Annualised wage arrangements that: <ul style="list-style-type: none"> <li>• Have regard to the patterns of work in an occupation, industry or enterprise.</li> <li>• Provide an alternative to the separate payment of wages and other monetary entitlements.</li> <li>• Include appropriate safeguards to ensure that individual employees are not disadvantaged.</li> </ul>	Clause 31	s.323 of the Act
Allowances			Allowances, including for any of the following: <ul style="list-style-type: none"> <li>• Expenses incurred in the course of employment.</li> <li>• Responsibilities or skills that are not taken into account in rates of pay.</li> <li>• Disabilities associated with the performance of particular tasks or work in particular conditions or locations.</li> </ul>	See Clauses 20 – 22; 24-25	
Superannuation		Superannuation		Clause 32	s.23A