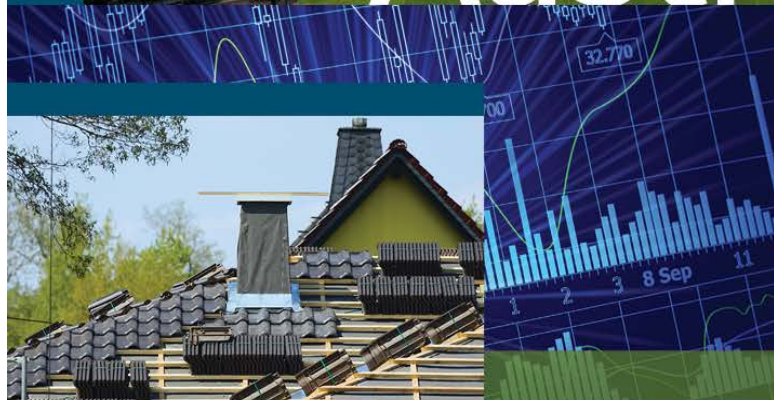




HOUSING INDUSTRY ASSOCIATION



Housing Australians



Creating a Fair and Productive Workplace

Submission to the
Productivity Commission

**Workplace Relations Framework
Draft Report August 2015**

18 September 2015



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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members’ business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



1. INTRODUCTION

HIA welcomes the opportunity to respond to the findings and draft recommendations of the Productivity Commission's Draft Report into the Workplace Relations Framework (Draft Report).

HIA considers that the draft recommendations provide a solid foundation to enable a sensible discussion on reforms to modernise Australia's workplace relations framework and restore balance between employers and employees.

Importantly and reflecting long standing concerns of the residential construction industry, the Commission has recognised the problems with industrial interference in independent contracting arrangements under the *Fair Work Act 2009 (Cth)* (the 'FW Act') and recommended outlawing clauses in enterprise agreements that restrict the engagement of contractors.

HIA is broadly supportive of many elements and recommendations of the Draft Report and in particular welcomes key recommendations to restore the no-disadvantage test, change the unfair dismissal regime to reduce the ability for dismissed employees to rely on procedural irregularities in objecting to their dismissal and the proposed overhaul of the Fair Work Commission's approach to award determination.

There are however, some elements of the Draft Report that HIA disagrees with.

At times the Draft Report understates the systemic complexity, over-regulation and rigidities built in to the current system and underplays the need for a return to genuine bargaining at the individual and enterprise level.

The suggested changes to the current 'sham contracting' provisions in the FW Act on the basis that the current laws apparently create too high a hurdle for regulators and in the absence of evidence there is a problem with those laws, is unjustified. The Commission also 'glosses over' the significant detrimental impact of industry wide pattern bargaining.

2. MATTERS NOT ADDRESSED IN THE DRAFT REPORT

In HIA's view, there are several key matters that were not canvassed in the Draft Report.

One significant lacuna in the law identified by HIA in its initial submissions to the Inquiry is the capacity for 'Industry Specific' redundancy schemes to depart from the National Employment Standards and the general understanding of what is considered a 'redundancy' for the purposes of severance payments.

The usual understanding is that an employee becomes 'redundant' when their employer no longer requires their services for reasons unconnected to the individual employee's performance. The formula which has frequently been applied is that '*a job becomes redundant when the employer no*



longer desires to have it performed by anyone.’¹ Redundancy pay is intended to compensate the employee for the hardship and inconvenience of searching for another job.

Against this backdrop, the current meaning of redundancy under the *Building and Construction General Onsite Award 2010* (the ‘Building Award’) is an affront to common sense. The award defines redundancy as:

*“...a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty. **Redundant** has a corresponding meaning”.*

This means that employers, regardless of size, must make a redundancy payment under any circumstance involving the ending of an employment relationship, be it termination for any reason (aside for misconduct or refusal of duty) or resignation.

The costs associated with such arrangements are unjustifiable and out of touch with the entitlements afforded to workers in the broader economy. Simple changes to the FW Act to align the definition of redundancy in industry specific redundancy schemes to the FW Act’s definition could resolve this anomaly.

HIA submits that the Commission consider these matters in its final report.

Further, whilst the complex and overlapping regulatory arrangements across the workplace relations system were identified, the Draft Report has not addressed particular concerns in relation to the Building Award and the apprenticeship system in the construction industry.

The employment arrangement for apprentices must be simplified and not deferred to yet another review (Draft Recommendation 9.2). In the face of skill shortages across construction trades and declining apprentice commencement and completion rates, it is important that more is done now to address these matters.

3. DRAFT RECOMMENDATIONS & INFORMATION REQUESTS

3.1 INSTITUTIONS

In principle, HIA supports Draft Recommendations 3.1 – 3.5 including the proposed new process for appointing Fair Work Commissioners and introducing performance management, including five year terms.

¹ See for instance *The Queen v Industrial Commission of South Australia; Ex Parte Adelaide Milk Supply Co- Operative Ltd* (1977) 16 SASR 6 at 8 (Bray CJ).



There are systemic problems within the current structure and workings of the Fair Work Commission (the 'FWC') and whether an appointee to the FWC and its predecessors has a union or business background appears to be a significant predictor of case outcomes.²

Reforms aimed at creating a more balanced approach across all areas of the FWC's jurisdiction would go a long way to restoring business confidence in the outcomes and processes of the tribunal.

3.2 NATIONAL EMPLOYMENT STANDARDS (NES)

An underlying theme of the Draft Report is the contemplation of the 'shifting' of entitlements, i.e. moving long service leave to annual leave, trading public holidays for other forms of leave and 'trading off' the casual loading for sick leave and annual leave.

Simply re-branding entitlements does not address the fundamental inflexibility and imbalance in the NES. This is evidenced by, for example, the restrictions on working hours and the current limitations on individual agreements in relation to the accrual, taking and payment of annual leave.

HIA is concerned with any proposal that contemplates a further expansion of the NES in aggregate terms. Whilst a recalibration of the NES might be appropriate (for example, allowing victims of domestic violence to use their sick leave) there is no justification to simply extend an already generous (by international standards) entitlement of 20 days of paid annual leave on the basis it could possibly be 'cashed out' (Draft Recommendation 4.3). While arguably these types of measures could be employed in exchange for a more constrained approach to minimum wage increases, they merely amount to hidden costs and in HIA's view the cumulative impact, year after year, of such additional entitlements outweigh any tempering of minimum wage increases.

Further, the notion of 're-appropriating' the casual loading to utilise forms of paid leave overcomplicates casual engagement and defeats its purpose as an ad hoc arrangement to fulfil a business's need for labour as and when it arises. Modern Awards already allow for the 'conversion' of casual employment to full or part time arrangements.

Long Service Leave

Although the Commission has observed that the long service leave entitlements (LSL) have long since moved on from their original intent and purpose, the Commission is yet to express a view on the justification for LSL in a modern workplace relations system.

HIA re-submits that a broader approach to the consideration of LSL is necessary, particularly in light of the current social and economic circumstances that the WR framework operates within.

In recent years there has been considerable debate on whether the current rates of superannuation are adequate to properly fund a worker's retirement. Whilst the former federal Government purported to impose additional contribution burdens on employers by increasing the compulsory superannuation

² Draft Report pg. 224



contribution rates to 12% (phased in over time), in HIA's view, consideration could be given to exchanging a deferred entitlement like long service leave for higher rates of superannuation.

HIA is opposed to proposals to broaden portability schemes such as those that currently apply to the construction industry. Portable LSL is simply another tax on employment. As the Commission has observed:

*"...portability schemes are more a direct result of bargaining power by parties in select industries, than of significant evidence of the benefits of such schemes for productivity"*³

To that end, HIA would urge the Commission to fully re-consider LSL, particularly portable long service leave schemes, their impact on business and their ongoing relevance.

3.3 UNFAIR DISMISSAL

HIA notes Draft Recommendations 5.1 – 5.4 and is broadly supportive of the Commission's view.

However HIA does not agree with assertions that:

- There is little evidence that unfair dismissal laws are a major obstacle to employment⁴. This view is at odds with the feedback from HIA members; and
- There is no justification for a change in the small business exemption. HIA would continue to press the view that the small business exemption be expanded to apply to employers who employ up to 20 employees.

The Commission does not address the shift in the meaning of 'genuine redundancy' from one in which consideration was focused on the individual role i.e. that the job is no longer required to be performed by anyone, to one under which redundancy will only be considered legitimate where complex consultation requirements have been fulfilled and the job is no longer required to be performed due to changes in operational requirements. This approach is out of step with the needs of small business.

In response to the invitation for further information, HIA supports measures aimed at reducing frivolous and/or vexatious claims. The suggested two-tiered approach to lodgement appears reasonable, particularly in light of the current flat application fee of \$68.60.

Small Business Fair Dismissal Code (Code)

Draft Recommendation 5.4 provides:

"Conditional on the implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act."

³ Draft Report pg. 178

⁴ Draft Report pg. 27



HIA supports an immunity based approach to the unfair dismissal regime but agrees that where measures are vague or set unreasonable standards such an approach is largely useless. In that context HIA notes the comment within the Draft Report that:

‘...the basic premise of assisting small business to navigate the complexities of unfair dismissal legislation is reasonable, but the Code does not achieve that outcome and provides a false sense of security’.⁵

Whether or not it is in the form of a Code, HIA submits that the current procedural complexities involved in removing poorly performing employees needs to be simplified. Too many unfair dismissal claims succeed on mere technicalities.

3.4 GENERAL PROTECTIONS

HIA is broadly supportive of Draft Recommendations 6.1 – 6.5 particularly those that relate to the refinement of the meaning and application of a ‘workplace right’ (Draft Recommendation 6.2), the focus on dealing with frivolous and vexatious claims (Draft Recommendation 5.3) and the Draft Recommendation to introduce a cap on compensation (6.4).

The Commission however needs to go further and address the ‘design’ issues⁶ of the general protections provisions, in particular the extension of protections to non-employees.

The absurdity of the current laws were exemplified in the decision of Justice Bromberg, in the first instance, and the Full Federal Court upon appeal in *Victoria v Construction, Forestry, Mining and Energy Union (CFMEU)* where it was held that multinational construction company Lend Lease is afforded protections as an ‘independent contractor’ under section 342(1).

3.5 MINIMUM WAGES

HIA is broadly supportive of Draft Recommendations 8.1 – 9.1, particularly those that support the facilitation of temporary variations in awards in exceptional circumstances after the annual wage review has been completed.

The Draft Report focuses on the broad effect (both direct and indirect) of changes in the minimum wage. In doing so, the Commission has formed the view that the *employment impacts* should be the key focus when determining the minimum wage⁷. However, at the same time the Commission also concedes that such matters are difficult to accurately assess and determine.

Whilst agreeing with this position, HIA would also re-emphasise the need for a fulsome assessment of the current legislative framework in relation to the setting of minimum wages. Despite acknowledging the broad range of legislative factors the FWC’s Expert Panel must consider when determining the

⁵ Draft Report pg. 28

⁶ Draft Report pg. 258

⁷ Draft Report pg. 330

minimum wage, the Commission fails to express a view of the relevance and weighting of those factors when determining the minimum wage.

In HIA's submission, those factors should be amended to include an explicit consideration of productivity when setting the minimum wage.

Junior Rates of Pay

The Draft Report invites further feedback on the structure of junior pay rates.

'Junior rates' are not a feature of the construction industry. Rather, in the construction industry the focus is placed on engaging young workers in an apprenticeship. However, in light of the current rates of youth unemployment and skill shortages, HIA would support moves that have the potential to identify other pathways through which to enter the industry. The provision of junior rates of pay may facilitate such an option.

To that end, the mismatch between the expectations of an apprenticeship and the actual on-the-job training experience is one factor that contributes to low completion rates. A 2011 study found that:

"...about a quarter of all apprentice recruits are not well suited to the trade or to the apprenticeship experience to which they sign up, very unlikely to complete and should probably follow another path...Many of these apprentices probably shouldn't have been recruited in the first place..."⁸

The same study also concluded that a change that could impact on apprentice completion rates would be:

"...structuring stronger and more effective pre-apprenticeship opportunities that can assist young people contemplating an apprenticeship to develop realistic expectations about the apprenticeship experience and assist them to screen themselves in or out of the next step."⁹

These findings are similar to those of a 2008 report into apprenticeship completion rates in the building and construction industry that concluded:

"A major reason that apprentices leave is because they did not enjoy the work they were doing."¹⁰

Allowing a young person the opportunity to have exposure to onsite work experience at a rate of pay attractive to an employer has advantages for businesses and employees and can ultimately provide support for a successful apprenticeship model.

⁸ NSW Board of Vocational Education and Training (2011) *A Fair Deal: Apprentices and their employers in NSW Integrated Research Report*, pg. 10

⁹ NSW Board of Vocational Education and Training (2011) *A Fair Deal: Apprentices and their employers in NSW Integrated Research Report*, pg. 11

¹⁰ Building Industry Consultative Council, Industry Advisory Body (2008) *Apprenticeship completion Rates in the Building and Construction Industry* pg. 18



However, in assessing the structure of junior rates, HIA would highlight the complexity associated with 'hybrid' models as outlined within the Draft Report noting the experience of competency based wage progression in the construction industry as outlined within HIA's original submissions to this inquiry.

3.6 MODERN AWARDS

HIA supports Draft Recommendations 12.1 and 12.2 and is pleased that the Commission has addressed concerns with the current four yearly review processes and identified as a priority, a targeted award reform process to address issues that make awards complex and expensive.

The reality is that many small business employers in the residential construction industry are exclusively reliant on modern awards for the terms and conditions of employment for their employees.

The predominant industry award is the Building Award. This award is overly complex, confusing and inaccessible for small business. It is no longer "fit for purpose".

HIA is pleased that the Commission has recognised that many of these problems are because of the onerous impact of the historical context of industrial awards:

'History and precedent play too big a role in some of the FWC's key economic and social functions, particularly award determinations. In effect the past is assumed innocent unless found guilty, embedding old, but outdated, features of the WR System'.¹¹

As the Commission has accurately observed *"they [Modern Awards] remain relatively inflexible and are often ambiguous, imposing costs for employers and employees...In some instances, they are more historical relics of the relative bargaining strength of past protagonists than a carefully thought out way of remunerating employees"*¹² or the needs of employers.

Whilst in principle, HIA agrees with the concept that awards would be routinely reviewed and updated to reflect modern workplace needs, to date both the 2 and 4 year review processes have been cumbersome and time consuming and improvements have been quite modest.

However, even if recommendations 12.1 and 12.2 are adopted, more fundamental flaws in the Modern Award system require redressing. The Commission concludes that there remains a role for awards in regulating wages and conditions, but does not go further and analyse how extensive that role should be.

In HIA's view the fundamental shift from the notion that *'without a dispute there could be no award'*¹³ to a framework within which a Modern Award is a largely static, regulatory instrument¹⁴ that expressly

¹¹ Draft Report pg. 11

¹² Draft Report pg. 21

¹³ Draft Report pg. 402

¹⁴ AM2014/47, Transcript 16 October 2014, PN1354 – PN1356



forms part of the safety net is yet to be appropriately addressed, either by the Commission or within the current legislative framework.

This approach can only be redressed through legislative reform; the Modern Awards Objectives must be reviewed and amended in order to expressly require that the current circumstances (as opposed to relics of the past) are the predominate factor when assessing Modern Awards.

The Commission's recommendation that the process for determining awards should be reformed¹⁵ by adopting a more analytical approach based on a proactive research agenda enabling the identification of 'hot-spots' to target within Modern Awards will not overcome the FWC's current approach to considering what must be satisfied to justify that the change is necessary to meet the Modern Awards Objectives.

As an example in the decision of the FWC of 16 July 2015¹⁶ a Full Bench granted the insertion of time of in lieu (TOIL) of payment of overtime into a number of Modern Awards.

In its Decision the Full Bench expressed general support for TOIL arrangements:

"[279] Our provisional view is that the variation of modern awards to incorporate the model term is necessary to ensure that each modern award provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant), and would also be consistent with the object of the Act. This is so because of the various safeguards provided within the term itself and because it facilitates the making of mutually beneficial arrangements between an employer and employee.

[280] As mentioned earlier, we accept that flexible working arrangements, such as TOIL, may encourage greater workforce participation, particularly by workers with caring responsibilities. We also accept that increasing workforce participation can result in increased economic output productivity. The available evidence also supports a general finding that regardless of the industry employees work in, the most important aspect of determining employee satisfaction with their current job is the flexibility to balance work and non-work commitments."

However, in contrast to the general principle outlined above, at paragraph [307] of the Decision the Full Bench stated that:

"Given the unusual arbitral history and the particular features of the industry covered by the two construction awards (including the operation of daily hire) we think the most expeditious course is to deal with any application to insert a TOIL provision in these awards during the award stage rather than in the settlement of any orders which may arise from our further consideration of the provisional modern term."

¹⁵ Draft Report pg. 21

¹⁶ 4 yearly review of modern awards – Common Issue – Award Flexibility [2015] FWCFB 4466

The issues identified by the Commission in the Draft Report are actively playing out during this 4 yearly review of modern awards. Of further note is that the approach of the FWC in this case sits in stark contrast to the recommendation of the Commission that:

“...the MSD promotes consistency in how conditions and entitlements are applied in awards, but only to the extent that any streamlining would not ignore industry or occupation-specific requirements or unique situation that warrant (as verified through the assessment process) different entitlements or conditions...Nor is differentiation for the sake of precedent and tradition a good enough reason not to.”¹⁷

3.7 ENTERPRISE BARGAINING

HIA is broadly supportive of the Draft Recommendations in relation to Enterprise Bargaining outlined within Chapter 15 of the Draft Report, particularly in relation to agreement content, the replacement of the ‘Better Of Overall Test’ (BOOT) with a ‘No – Disadvantage Test’ (NDT) and the addition of some parameters to restrain unions as the default bargaining agents.

There are two matters HIA wishes to make specific submission on: Pattern Bargaining, and agreement content.

Pattern Bargaining

True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ.

In HIA’s submission by, in effect, equating pattern bargaining to another form of standard form contracting, the Commission has underplayed the deleterious and anti-competitive impact of industry wide pattern bargaining agreements.

In 2003, Commissioner Cole succinctly identified the significant arguments against pattern bargaining:

Firstly, it is, by its nature, imposed compulsorily. Inherent in pattern bargaining is the notion that neither the employer nor the employees have input into the essential terms of the agreement covering their employment relationship. That is decided by others, usually the union, head contractors or employer associations. It is no answer to say that such an agreement can only be registered once it is approved by the employer and a majority of its employees. In truth, they have no option, for without a union-endorsed EBA, it is virtually impossible to obtain work on major sites in the CBD and major centres around Australia. Freedom of bargaining is non-existent.

Second, it denies to the employers the capacity for flexibility, innovation and competitiveness in a major aspect of contract cost. In economic terms, it is inefficient.

Third, it denies to the employees the capacity to determine their own employment conditions including those relating to annual leave, hours of work, productivity bonuses and general flexibility.

¹⁷ Draft Report pg. 458



Fourth, it assumes that all businesses and their employees in a given sector operate in the same fashion, have the same objectives, adopt common attitudes and approaches to working arrangements and are content with uniformity with the rest of the industry. There is no basis for that assumption.

Fifth, it denies the close relationship which exists in small business arrangements between an employer and a small number of employees. It assumes that third parties understand better than either the employer or the employees what the business model of the business is and what the wishes and desires of employees are. There is no basis for that assumption.

Sixth, it assumes that employees are not capable of negotiating satisfactorily on their own behalf.

Seventh, in areas other than the major centres, where pattern bargaining does not occur, there is nothing to suggest that the industry operates either inefficiently or that the working conditions are not to the satisfaction of either the employers or the employees.¹⁸

Accordingly the only regulatory change that should be advanced is one that strengthens the protections against pattern bargaining including that a person cannot be considered as “genuinely trying to reach agreement” if they are pattern bargaining. In HIA’s view any changes to the ‘test’ to better reflect “*an examination of the competitive circumstances of the industry and the relative leverage of each bargaining party*”¹⁹ is ill-conceived; there is nothing redeemable about pattern bargaining.

Agreement Content

HIA strongly supports Draft Recommendation 20.1 that provides:

‘Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).’

Such moves are in line with the Harper Competition Policy Review Draft Report which has recommended the resolution of the conflict between the anticompetitive provisions of the *Competition and Consumer Act 2010 (Cth)* (CCA) and content of enterprise agreements approved under the FW Act which restrict the engagement of contractors.²⁰

3.8 INDIVIDUAL AGREEMENTS

HIA notes that the Draft Report identifies a number features of Individual Flexibility Agreement’s (IFA) which may contribute to their low take up. One matter not addressed is the limited flexibility offered through an IFA.

¹⁸ See Royal Commission into the Building and Construction Industry, Final Report of the Royal Commission into the Building and Construction Industry, Vol 5, AGPS, Canberra, 2003, at pg 53.

¹⁹ Draft Report pg. 563

²⁰ See Draft Recommendation 33



On balance, the potential flexibilities that can be secured through an IFA are usually outweighed by the additional administrative and compliance burden associated with managing and securing these arrangements.

The draft recommendations aimed at redressing the “*main regulatory impediments*”²¹ to the creation of an IFA, particularly the move to a NDT, are supported by HIA. However, the current framework remains skewed against individual contracts and bargaining. Coupled with the strictures of the NES and the Modern Awards, particularly the inflexible and outdated provisions of the Building Award, flexibilities achievable under an IFA remain largely superficial.

Despite their clear economic and productivity benefits, HIA understands that a return to statutory Australian Workplace Agreements (AWAs) remains problematic given outstanding community concerns with protections for vulnerable workers when conditions are traded off and exchanged for one another.

In HIA’s submission, the perceived lack of transparency with the trade-off of conditions that took place when former AWAs were approved could be addressed by the public release of a no disadvantage test calculator. This type of approach was previously used by the Workplace Authority to allow conditions in the form of monetary values to be entered in a double ledger arrangement, with the AWA on one side and the conditions of the relevant award on the other side, it was only an internal working tool.

Such a tool, if publicly available, could allow the parties to assess the positives and negatives of any bargained arrangement before agreeing to it.

3.9 ENTERPRISE CONTRACT

There are currently few agreement options available to employers and employees apart from award based employment or enterprise bargaining agreement approved by the FWC.

HIA appreciates that the Commission’s proposed ‘Enterprise Contract’ may be a form of agreement that can fill the ‘gap’.

HIA is concerned that in reality many small businesses may not take up this opportunity due to the fact that under the proposal regulated templates would be used, agreements would need to be lodged with the regulator and there would be ‘opt-outs’ for employees after 1 year.

Further, while HIA is supportive of measures which can increase flexibility in the workplace, to some extent, the Enterprise Contract merely represents yet another form of collective bargaining.

²¹ Draft Report pg. 591



It remains HIA's view that genuine flexibility is best achieved through providing employers and employees the ability to bargain or negotiate on an individual basis. This particularly applies to small businesses.

However an important element of the Enterprise Contract proposal that HIA expressly supports is that the terms of such contracts could be offered to prospective employees as a condition of employment. This proposition should also be adopted in relation to IFA's.

3.10 No Disadvantage Test

HIA supports the replacement of the current BOOT with a NDT. Specifically, HIA would support a move to a test similar to that which applied pre-Work Choices.

HIA also supports the use of a NDT across all forms of regulated agreements.

However, HIA maintains its concern that the use of a NDT cannot overcome:

- The difficulties associated with attaching a compensatory benefit to non-monetary award entitlements;
- The inherent inflexibilities in the current system.

In relation to the latter, it is HIA's view that in order to effectively advance a case for flexible work arrangements on an individual basis 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, however the Draft Report does not address such a proposition.

3.11 Right of Entry

HIA disagrees with the observation that the current union right of entry provisions are “*broadly sound*”²². The expansion of union rights of entry was an underlying feature of the policies of the previous Government, commencing with the *Forward with Fairness – Policy Implementation Plan* through to the amendments introduced through the *Fair Work Amendment Bill 2013* (2013 Bill).

The Draft Recommendations of the Commission appear aimed at curtailing vexatious and/or unwarranted union interference. For example, the Commission recommends placing some limit on unions that do not have members employed at a workplace and are not covered by an enterprise agreement to enter a workplace for discussion purposes on up to 2 occasions every 90 days (Draft Recommendation 19.8). In HIA's submissions some unions will simply create rosters to respond to this prescriptive approach.

In HIA's view the *Fair Work Amendment Bill 2014* (2014 Bill) which reverses the amendments made by the 2013 Bill is the preferred way to curtail the current overly expansive union right of entry. The Commission should recommend its adoption by Parliament.

²² Draft Report pg. 42



The 2014 Bill:

- abolishes the obligations on an employer or occupier to organise transport and accommodation arrangements for union entry at work sites in remote areas;
- restores former rules relating to the default location of interviews and discussions;
- broadens the power of the FWC to deal with disputes including those concerning the frequency of visits by permit holders; and
- limits the union's entry rights to hold discussions to premises where:
 - the organisation is covered by an enterprise agreement; or
 - an 'invitation certificate' is issued.

Unions should be subject to the same non-solicitation restrictions as every other business in the economy.

3.12 SHAM CONTRACTING

HIA is preplexed that the approach of the Commission towards sham contracting is to characterise such arrangements as:

'...the practice of misclassifying employees as independent contractors'.²³

As HIA submitted in its earlier submissions, this is not sham contracting. Sham contracting is the **misrepresentation** of an employment arrangement as a contract for service.

This confusion of what precisely is being regulated through the sham arrangement provisions of the FW Act demonstrates a clear need for a statutory definition of an independent contractor.

HIA understands that there remains a preference for the common law, but to the extent there is little appetite for an explicit statutory definition, HIA strongly contends that a statutory "safe haven" could be available for those businesses engaged in accordance with the Alienation of Personal Service Income test. This does not remove the common law but would provide a rebuttable presumption with the onus on the regulator to prove otherwise.

HIA does not support the Draft Report's view that there is merit in replacing the 'recklessness' test with a 'reasonableness' test. In fact, the Commission's misunderstanding as to what is sham contracting lends against any changes to the current provisions.

Notwithstanding the lack of evidence that sham contracting is rife or endemic, the Commission inopportunately observed:

'There do[es] no[t] appear to be any obvious disadvantages from switching to a 'reasonableness' test given that such tests are frequently applied in many other civil contests without much concern. This shift would address the weaker incentives under the current regime. It may also help regulators to rectify sham arrangements out of

²³ Draft Report pg. 711



*court because any infringing business would be awarded that it would have a lower probability of winning the matter in courts.*²⁴

A shift of this nature would see circumstances in which an employee has been misclassified as an independent contractor turned into significant breaches of the FW Act. Such an approach is unjustified for many reasons, including:

- It is at odds with the basis on which sham contracting provisions were inserted; that being to prevent an employer from seeking to avoid taking responsibility for legal entitlements by disguising that relationship as a contractor relationship as opposed to an employment arrangement.
- Where an employee has been misclassified as a contractor, there are a raft of penalties and provisions aimed at rectifying this situation, such as claims for the underpayment of wages.
- To impose a further penalty in circumstances that are void of a positive intent to deceive turns sham contracting provisions into something more akin to a strict liability offence.

The current legislative approach remains appropriate. HIA understands some are concerned with the use of “reckless”. Whilst HIA does not agree with these concerns, they could be addressed by the inclusion of a definition of this term in the FW Act.

3.13 COMPETITION LAWS

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

At the same time, free enterprise and improved productivity essentially depends on effective competition in all markets, including the employment market.

The prevalence of pattern bargaining and the inclusion of terms in enterprise bargaining agreements that restrict or prevent the engagement of independent contractors are fundamentally at odds with principles of competition. In the building industry they drive up costs and reduce productivity.

Despite the Commission’s hesitation to interfere in the area of overlap between the regulatory frameworks, HIA submits that reforms are required to both the FW Act and the CCA to outlaw such clauses and better address the use of anti-competitive conduct in an employment context.

The debate about the crossover of competition and labour laws is not new.

²⁴ Draft Report pg. 728



In 1999 the then National Competition Council (NCC) undertook a review of the so-called “employment exemption” from trade practice law.

In its submissions to the NCC, which the NCC failed to adopt, the then Department of Employment (DEWRSB) submitted that the exemption would be revocable in certain circumstances in particular where the anti-competitive detriment of the particular arrangements in question outweighed the labour law policy objectives.

HIA supports this approach and proposes that the ACCC (and FWBC in the building industry) be conferred with a broad discretion to review pattern enterprise agreements that are anti-competitive.

Specifically on the issue of secondary boycotts, HIA notes that Section 45DD says that if conduct relates to employment matters, a person’s activity is not deemed to fall under the illegal secondary boycotting provisions.

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

HIA also notes that last year in his Interim Report of the Royal Commission into Union Corruption and Governance, Commissioner Heydon observed that:

“The current secondary boycott provisions in the CC Act were ineffective to deter illegal secondary boycotts by trade unions”.

Commissioner Heydon was specifically referring to allegations surrounding alleged ‘black banning’ of building products manufacturer Boral by the CFMEU.

Whilst the ACCC has now issued Federal Court proceedings, their intervention was belated and well after the conduct had occurred.

As an interim reform measure, and to give to give more targeted and timely attention to such conduct in the future, HIA considers that the Fair Work Building and Construction (FWBC) (and any successor) should hold joint powers in conjunction with the ACCC to enforce secondary boycott provisions in the building industry.

4. CONCLUSION

By and large, the Commission has addressed a range of matters of concern with the current workplace relations framework. The Draft Report provides a good basis on which to engage in a constructive dialogue as to the design of the Australian workplace relations framework

There are however some matters that require further consideration and will require much more than simple ‘repair’.

Modern Awards must be truly modernised. For this to occur, outdated and largely irrelevant provisions must be reviewed unencumbered by arbitral history. **Of note is the industry specific redundancy**



scheme which must be removed. More than a structural and /or cultural change to the FWC is required to redress this; the legislative framework must be considered and amended. The same applies to the way the minimum wage is determined.

Similarly, fundamental changes must be made to the current bargaining framework so that it supports employers and employees bargaining to attain genuine flexibility. To that end, while seeming to create efficiency and simplicity, the reliance on 'template agreements' undermines the interrelated notions of 'bargaining' and 'genuine flexibility'.

In HIA's view, the Commission can do more to address the unfair dismissal regime, particularly the inadequate Small Business Fair Dismissal Code. A further measure the Commission should focus on is the overlap between industrial relations and competition laws; too often are the legislative gaps and ideological differences exploited.

The Commission's recognition of the place of independent contractors is welcomed; however a consistent definition would go 'leaps and bounds' towards curtailing and targeting sham arrangements, while protecting those in legitimate contracting arrangements.