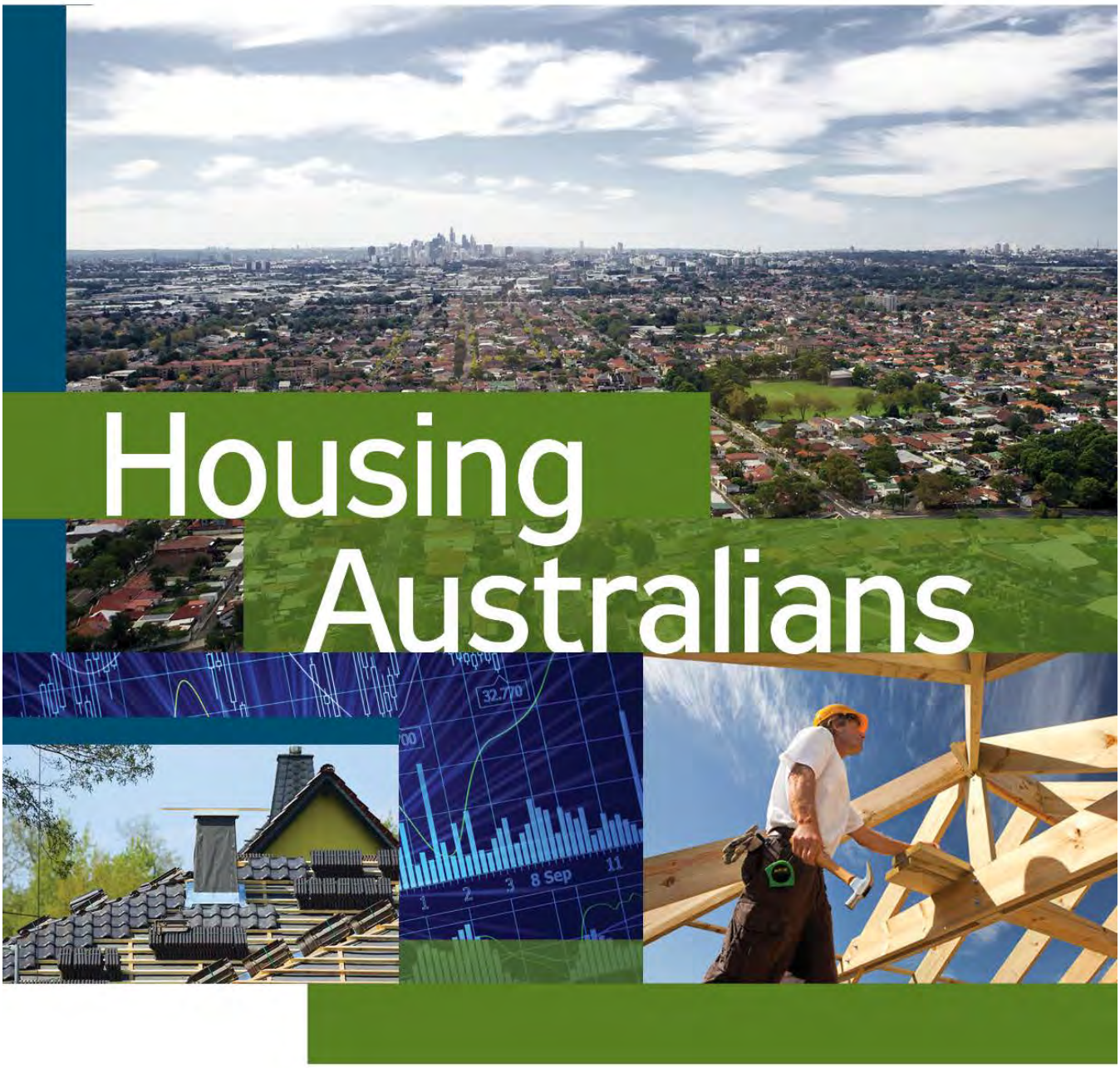
HOUSING INDUSTRY ASSOCIATION



Submission to the
Senate Standing Committee on Education and Employment

Fair Work Amendment (Remaining 2014 Measures) Bill 2015

22 December 2015

HOUSING INDUSTRY ASSOCIATION

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1. INTRODUCTION

HIA welcomes the opportunity to contribute to the Senate Education, and Employment Committee on the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (**2015 Bill**).

HIA supports the 2015 Bill.

The 2015 Bill comes after the release of the Productivity Commissions Draft Report into the Workplace Relations Framework (**Draft Report**) which has identified that Australia's workplace relations system is in need of *repair*[1]. The 2015 Bill is a crucial first step in fixing the *Fair Work Act 2009* (**FWA**) to restore balance to Australia's industrial relations framework and increase productivity in the economy.

This Bill seeks to re-introduce a number of amendments to the FWA sought by the *Fair Work Amendment Bill 2014* (**2014 Amendment Bill**) (as introduced) implementing a number of commitments made in the Government's pre-election policy and which were largely reflective of the recommendations of the previous Government's Fair Work Act Review Panel.

Of note, recently the Government was able to secure the passage of a number of measures including:

- Closing the strike first, talk later loophole that arose in *JJ Richards*[2]; and
- Enabling employers to take their proposed greenfields agreements to the Fair Work Commission for approval if no deal had been reached within a "negotiating period" of six months.

The above amendments, whilst important for larger employers exposed to the caprices of collective bargaining, unfortunately did not address issues particular to small business employers that were included in the 2014 Bill.

HIA notes that the Opposition opposed the 2014 Amendment Bill (including the measures passed above), despite the majority of the reforms seeking to implement the findings of the then Labor Governments own review of the FWA.

HIA submits that the 2015 Bill seeks to introduce a variety of sensible measures aimed at redressing a number of matters that are a constant source of frustration for businesses, particularly small business. The provision of certainty and clarity in relation to compliance obligations gives business confidence to hire, which is beneficial for employees, employers and the economy as a whole.

Similar to the 2014 Amendment Bill, the 2015 Bill:

- Provides certainty in relation to the accrual of and payment for annual leave whilst an employee is on workers compensation.

[1] Pg. 3
[2] *J.J. Richards & Sons Pty Ltd and Australian Mines and Metals Association Inc. v Fair Work Australian and Transport Workers' Union of Australia* [2012] FCAFC 53.

- Modifies the transfer of business provisions where the employee transfers to a related company at their own initiative, so they will not take their awards and enterprise agreements with them.
- Amends provisions in relation to Individual Flexibility Agreements (IFA's) to clarify the status of 'non-monetary' benefits.
- Gives the Fair Work Commission power to dismiss unfair dismissal applications on certain grounds.

The 2015 Bill also implements workable union right of entry provisions reversing laws passed during the previous Parliament that were introduced with little to no consultation. It is important to restore integrity to these laws particularly in the light of the revelations of the Heydon Royal Commission into Trade Union Corruption.

2. ANNUAL LEAVE

Part 1 of the 2015 Bill seeks to implement recommendations of the Fair Work Review Panel which would:

- Clarify an employers' obligations in relation to the payment of annual leave on termination; and
- Provide certainty in relation to the accrual of annual leave while an employee is on workers compensation.

2.1 ANNUAL LEAVE ON TERMINATION

HIA supports the provisions which seek to clarify the amount payable to an employee for annual leave on termination. In HIA's submission, the provision however does not fully address the matter of leave loading.

For example, under the *Building and Construction General Onsite Award 2010* it is clear that an employer is required to pay annual leave loading on termination. This is an unreasonable cost burden placed on businesses which often has debilitating effects on small businesses.

The 2015 Bill could go further than is currently proposed to ensure that an employer is not required to pay annual leave loading on termination.

2.2 LEAVE ACCRUAL WHILE ON WORKERS COMPENSATION

HIA supports the provision that clarifies that leave does not accrue while an employee is on workers compensation.

Under the current FWA provisions, differing state and territory workers compensation laws create such uncertainty to the extent that, in some states, there is simply no clear position on this issue.

The adoption of the provision, as outlined in the 2015 Bill would provide much needed certainty for industry, particularly small businesses in relation to their obligations regarding the accrual of leave while an employee is on workers compensation.

HIA would however repeat submissions it made to the Fair Work Review Panel that these reform measures could be simply achieved by amending section 130(1) of the FWA to specifically state that, regardless of the content of state and territory laws, employees do not accrue annual leave during periods of workers compensation.

3. INDIVIDUAL FLEXIBILITY AGREEMENTS

Part 3 of the Bill seeks to implement a number of recommendations of the Fair Work Review Panel to make an Individual Flexibility Agreement (**IFA**) a more effective source of flexibility for businesses, particularly for small businesses.

Of significant importance is the recognition within the Bill that non-monetary benefits are to be taken into account when considering if an employee is 'better off overall' for the purposes of an IFA.

HIA supports these provisions.

HIA is also supportive of ensuring consistency between the FWA and modern awards by amending the legislation to reflect current modern award provisions that provide for a 13 week notice period for the unilateral termination of an IFA.

The Draft Report also recommended changes to IFA's noting that:

> *'IFAs provide flexibility and could be more widely adopted if awareness was higher and risk lower.'*[3]

The Draft Report recommended that:

> *'The Australian Government should amend s. 203 of the Fair Work Act 2009 (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.'*[4]

> *'The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.'*[5]

These recommendations further highlight the need for these amendments to the FWA.

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[3] Pg. 591
[4] See Draft Recommendation 15.4
[5] See Draft Recommendation 16.1

4. TRANSFER OF BUSINESS

Part 4 of the 2015 Bill seeks to amend the FWA so that there will not be a transfer of business under Part 2-8 of the FWA when an employee becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee's employment with the old employer.

HIA supports the amendment and would highlight that two reviews of the FWA have identified this as an area in need of change.

Firstly, the amendment implements the recommendation of the Fair Work Act Review Panel and, secondly, the Draft Report has also identified this as an area in need of reform stating that:

> *'Applying transfer of business provisions to voluntary switches ignores three considerations. These are that voluntary employee movements between associated employers are not uncommon, applications for exemptions involve costs to all parties and that barriers may make it less likely for employers to consent to any switch'*[6]

Further the Draft Report has recommended that:

> *'The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.'*[7]

5. RIGHT OF ENTRY

HIA strongly supports Part 5 of the 2015 Bill and submits that this Bill provides workable and appropriate union right of entry provisions.

In submissions to the Senate Education, Employment and Workplace Relations Committee in response to the *Fair Work Amendment Bill 2013* (**2013 Bill**) HIA strongly opposed the right of entry provisions contained within the 2013 Bill.

Those provisions, now incorporated into the FWA, have diluted a business's ability to direct where interviews or discussions with union officials take place and essentially enable unions to conduct recruiting missions for prospective members at non-unionised workplaces.

The Draft Report has also recognised the need for reform in this area stating that:

> *'…there is a case for:*
>
> - *modifying the threshold for the Fair Work Commission (FWC) to deal with disputes about the frequency of entry by employee representatives,*

[6] Pg. 758
[7] Pg. 759

- *limiting union entry for discussion purposes where a union is not covered by an enterprise agreement or does not have members at the workplace.'*[8]

HIA notes that the 2015 Bill reverses the amendments made by the 2013 Bill and further:

- 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.

The recommendations of the Productivity Commission in its Draft Report[9] also signal that change is absolutely necessary to restore balance to the ability of a union to enter a workplace.

HIA strongly supports these provisions. Unions should be subject to the same non-solicitation restrictions as every other business in the economy.

6. FAIR WORK COMMISSION (FWC) HEARINGS AND CONFERENCES

HIA supports the proposed amendments that would allow the FWC to dismiss an unfair dismissal application on certain grounds without a hearing where the unfair dismissal application was frivolous or vexatious or had no reasonable prospects of success or where the applicant has unreasonably failed to attend a conference or hearing; comply with an FWC direction or order; or discontinue an application after a settlement agreement has been concluded.

The deficiency identified by the 2015 Bill is reflected in the Draft Report which recognised concerns with the *'absence of an effective filter at the front end of the unfair dismissal claims process'*[10] and recommended that:

> *'The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes'.*[11]

7. CONCLUSION

HIA supports the Bill.

HIA understands that any changes to the Fair Work laws will necessarily attract debate and potential controversy but the FWA has now be in place for nearly 6 years and this legislation requires update

[8] Pg. 649
[9] See Draft Recommendation 19.7 and 19.8
[10] Pg. 232
[11] Pg. 233

and revision to more appropriately balance the rights and obligations of employer, employees and unions.

Further, most of the measures simply reflect recommendations of the 2012 Expert Panel review of the Fair Work Act appointed by the previous government.

HIA urges the 2015 Bill's swift passage through both Houses of Parliament.