



SUBMISSION BY THE
Housing Industry Association

to the
**Senate Education and Employment Legislative
Committee**
on the
Fair Work Act Amendment Bill 2014

24 April 2014

CONTENTS

1	EXECUTIVE SUMMARY	4
2	ANNUAL LEAVE.....	4
3	INDIVIDUAL FLEXIBILITY AGREEMENTS	5
4	PROTECTED ACTION BALLOT ORDERS.....	6
5	RIGHT OF ENTRY.....	6
6	FAIR WORK COMMISSION (FWC) HEARINGS AND CONFERENCES	6
7	CONCLUSION.....	7

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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 HIA welcomes the opportunity to contribute to the Senate Education, and Employment Committee on the *Fair Work Amendment Bill 2014 (Bill)*.
- 1.2 HIA supports the Government's Bill.
- 1.3 While there are many matters that still require redress, this Bill is an important 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.
- 1.4 HIA notes that this Bill largely seeks to give effect to the recommendations of the previous Government's Fair Work Act Review Panel and implements a number of commitments made in the Government's pre-election policy¹.
- 1.5 Amongst other things, the Bill:
 - Provides certainty in relation to the payment of annual leave whilst an employee is on workers compensation.
 - 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.
 - Closes the strike first, talk later loopholes.
 - Gives the Fair Work Commission power to dismiss unfair dismissal applications on certain grounds.
- 1.6 The Bill also implements workable union right of entry provisions reversing laws passed during the previous Parliament that were introduced with no consultation with the housing sector.
- 1.7 Accordingly, HIA sees this Bill as a crucial initial step towards the development of an industrial relations framework that takes into account productivity for the benefit of the broader economy.

2 ANNUAL LEAVE

- 2.1 HIA notes Part 2 of the 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.

¹ *The coalition's policy to improve the Fair Work Laws*

Annual Leave on Termination

- 2.2 While HIA is supportive of the provisions in the Bill which seek to clarify the amount payable to an employee for annual leave on termination, the provision does not fully address the situation as a result of some existing Modern Award provisions.
- 2.3 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.
- 2.4 The Bill could go further than is currently proposed to ensure that an employer is not required to pay annual leave loading on termination.

Leave Accrual while on Workers Compensation

- 2.5 HIA supports the provision that clarifies that leave does not accrue while an employee is on workers compensation.
- 2.6 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.
- 2.7 The adoption of the provision, as outlined in the 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.
- 2.8 HIA would, however further submit that, as outlined within HIA Submissions to the Fair Work Review Panel², solidifying such a position could further be 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

- 3.1 HIA notes Part 4 of the Bill which 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.
- 3.2 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.
- 3.3 HIA supports these provisions.
- 3.4 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.

² Dated 17 February 2012

4 PROTECTED ACTION BALLOT ORDERS

- 4.1 HIA notes the Bill proposes that an application for a protected action ballot order will not be able to be made until the employer is obliged to give employees notice of representational rights in bargaining.
- 4.2 HIA supports this amendment as it closes the current 'strike first, talk later' loophole in good faith bargaining rules (reversing the effect of the decision of the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297).

5 RIGHT OF ENTRY

- 5.1 HIA strongly supports Part 8 of the Bill and submits that this Bill provides workable and appropriate union right of entry provisions
- 5.2 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.
- 5.3 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.
- 5.4 HIA notes that the 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.
- 5.5 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

- 6.1 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.

7 CONCLUSION

- 7.1 HIA supports the Bill. It is an important first step towards restoring some balance into Australia's industrial relations framework.
- 7.2 Over the long term however more changes will be required to restore the building industry's confidence to hire and employ more workers.
- 7.3 The industry remains extremely concerned about the ability of unions to restrict the free enterprise engagement of small business contractors via enterprise agreements. Accordingly necessary changes are still required to ensure that the terms of enterprise agreements relate strictly to matters pertaining to the employment relationship and do not restrict the engagement of contractors.