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SUBMISSION BY THE

Housing Industry Association

to the

# House Standing Committee on Education and Employment

on the

# Fair Work Act Amendment Bill 2013

**18 April 2013**

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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 make submissions to the House Standing Committee on Education and Employment on the *Fair Work Amendment Bill 2013* (**Bill**).

***Background to the Bill***

1.2 HIA notes that this Bill is the **second** tranche of legislative amendments as a part of the Government's response to the review of the *Fair Work Act 2009* (**Act**).

1.3 While the Bill purports to implement some of the recommendations of the Fair Work Act Review Panel set out in their June 2012 report entitled - *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* (**Report**), many of the Panel's recommendations appear to have been disregarded. In fact some of the proposed amendments directly contradict the Report findings.

1.4 As HIA submitted to the Fair Work Review Panel in February 2012, and canvassed in submissions to the *Fair Work Amendment Bill 2012* (**Amendment Act 2012**) the Act in its current form requires significant change to better reflect its Objects and to provide a framework that more appropriately balances the interests of employees and employers in the residential building sector, particularly small businesses. HIA identified several areas where the Act could be improved to increase productivity and return confidence to hire for businesses in the home building industry.

1.5 Regrettably, this Bill if enacted will further shift the legislative scales against employers, in particular small business employers.

1.6 Disappointingly, there was no consultation or engagement with HIA on the Bill prior to its introduction into Parliament.

1.7 The Government has indicated that it will continue to consider the Panel recommendations going to improvements to greenfields agreement making and other intractable bargaining. HIA submit that this commitment does not go far enough to address deficiencies within the Act.

1.8 As outlined in HIA's submissions to the Amendment Act 2012, HIA encouraged the Government to further explore the following recommendations of the Panel:

1.8.1 *National Employment Standards*: providing that annual leave loading not be payable on termination of employment.

1.8.2 *Protected Industrial Action*: Allowing protected industrial action only where negotiations are on foot, so a union would not be able to take protected action to compel an employer to start negotiations.

1.8.3 *Transfer of Business*: Modifying 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.

1.8.4 *Individual flexibility arrangements*: Amending sections144(4)(d) and 203(6) to enable for individual flexibility arrangement of at least 90 days duration.

***This Bill***

1.9 This Bill ignores the practical and economic realities faced by many employers, in particular small businesses.

1.10 New rules regulating flexible working arrangements, union right of entry, roster changes, parental leave and award penalty rates will have a significant day to day impact on small business and introduce new workplace compliance obligations.

1.11 Further the Bill proposes to regulate workplace bullying, a matter that is already within the purview of state based safety laws, hence creating unnecessary duplication and regulatory overlap. The application of the proposed laws to the expansively defined "worker" clearly stretches the scope of the Act beyond its intended application so that it applies to relationships other than those of employment.

# 2 FAMILY FRIENDLY MEASURES

2.1 Schedule 1 of the Bill introduces a number of amendments which aim to introduce a series of "family friendly" industrial relations measures.

2.2 It is of note that only two of the proposed amendments are based on the recommendations of the Report.

***Expansion of the right to request***

2.3 HIA is opposed to the expansion of the "statutory" right to request a change in working arrangements to a wider range of caring and other circumstances.

2.4 The right to request provisions were the subject of a lengthy consultation process during the development of the NES and the Fair Work Act.

2.5 However the Bill proposes that the right to request flexible working arrangements be expanded to an employee:

- Who is a carer within the meaning of the *Carers Recognition Act 2010*.
- With a disability.
- Who is 55 years or older.
- Who is experiencing violence from a member of the employees family.
- Who provides care and support to a member of the employee's immediate family because the member is experiencing violence from the members family.

2.6 The Bill also expands the right of an employee to request flexible working arrangements due to that employee being a parent, or having the responsibility for the care of a child who is school age or younger.

2.7 The proposal significantly expands the scope of what was originally contemplated as falling within the ambit of this provision and extends the right to other classes of people, not necessarily only those with parental responsibilities.

2.8 The Governments *Forward With Fairness – Policy Implementation Plan* clearly envisaged these arrangements provide *'flexible work for parents'*[1]. Further the

[1] At p. 9

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'*[2].

2.9 The proposed laws do not contemplate the likelihood that much business will be unable to understand, apply or monitor arrangements based on the proposed new heads of flexible work arrangements. Small businesses, in particular, do not have sophisticated human resources departments dedicated to monitoring working arrangements and employee requests in their business.

2.10 For example, the complexity involved in determining if an employee is a *'carer'* within the *Carers Recognition Act 2010* or is a victim of domestic violence or provides care and support to a member of the employees immediate family because the member is experiencing violence from the members family is at the very least problematic.

2.11 In the case of the former, Section 5 of the *Carers Recognition Act 2010* defines carer as:

> *(1) … an individual who provides personal care, support and assistance to another individual who needs it because that other individual:*
>
> *(a) has a disability; or*
> *(b) has a medical condition (including a terminal or chronic illness); or*
> *(c) has a mental illness; or*
> *(d) is frail and aged.*

2.12 It is of note that the object of this Act is to *'increase recognition and awareness of carers and to acknowledge the valuable contribution they make to society'*[3]. Further the Explanatory Memorandum makes it clear that *'it is not intended that the bill establish carers' rights or create enforceable obligations binding carers, entities affected by this legislation, or the Commonwealth'*.

2.13 It is clear that it was never intended that this provision would be implanted for use in other legislative frameworks or the employment relationship.

2.14 Small businesses are ill-equipped to assess a request on this basis.

2.15 HIA also notes the Report of the ALRC *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (**ALRC Report**) which amongst other things highlighted the complexity and difficulties associated with enabling society to better support victims of domestic violence.

2.16 The ALRC Report recommended a five phase implementation approach:

- Phase One: coordinated whole-of-government national education and awareness campaign; research and data collection; and implementation of government-focused recommendations.
- Phase Two: continued negotiation of family violence clauses in enterprise agreements and development of associated guidance material.
- Phase Three: consideration of family violence in the course of modern award reviews.
- Phase Four: consideration of family violence in the course of the Post-Implementation Review of the Fair Work Act 2009 (Cth).

[2] At p. 44
[3] At section 3

- Phase Five: review of the NES with a view to making family violence-related amendments to the right to request flexible working arrangements and the inclusion of an entitlement to additional paid family violence leave.

2.17 In HIA's submission, the ALRC report raises a number of serious social and policy issues, such as the interrelationship of work and home life and what role or responsibility an employer should have in accommodating the needs of employees who are victims of family violence. These are important matters that should be the subject of extensive debate and consultation.

2.18 On balance, the amendments undermine the ability of employers to have certainty in the productive operations of their business. As regulation in relation to employment increases the confidence of businesses to engage in employment arrangements decreases ultimately acting as disincentive to employ people. Such an outcome is undesirable. . Employees who do not have a formal entitlement can of course still make a request for flexible work arrangements.

***Identification of 'Reasonable Business Grounds'***

2.19 The Bill proposes the implementation of a *'non-exhaustive list'* of what might constitute reasonable business grounds for the purposes of refusing a request for a change in working arrangements.

2.20 HIA notes the decision of the Panel in the Report not to recommend the inclusion of a definition of 'reasonable business grounds'

> *'The Panel was not persuaded by arguments that a definition of reasonable business grounds' for refusing a request for flexible working arrangements should be included in the legislation. We note the government's clear decision that 'the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made'. The EM further provides examples of what reasonable grounds may be and notes that 'it is envisaged that FWA would provide guidance on the issue'. While the Panel is not certain that the interpretation of reasonable business grounds has been unreasonable or out of alignment with the Government's intention, it may be appropriate for FWA to provide further guidance on the issue if this emerges as an issue[4].*

2.21 While HIA is not opposed to further guidance on this issue there is little evidence justifying the need for legislative provisions; the proposed law simply adds red tape and prevents a proper assessment of the *'reasonableness of the grounds …to be assessed in the circumstances that apply when the request was made'[5].*

***Consultation about changes to rosters or working hours***

2.22 HIA opposes Part 4 of Schedule 1 of the Bill which proposes 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. The provision applies to employees whose working arrangements are *'regular and systematic'* regardless of their employment status i.e. full time, part time or casual.

2.23 HIA submits that the proposed law undermines the ability of businesses to alter their work arrangements in order to respond to market demand and substantially increases regulatory burden especially for small businesses.

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[4] At p. 99

[5] Explanatory Memorandum to the *Fair Work Bill 2009* at p. 44-45

2.24 For example entering into formal consultation with a casual employee in relation to a change in their working hours is in stark contradiction to the very nature of casual employment.

2.25 This additional regulation also makes decisions that should largely fall within the confines of managerial prerogative susceptible to unwarranted union interference.

# 3 MODERN AWARDS OBJECTIVES

3.1 HIA opposes Schedule 2 of the Bill which proposes to amend the modern awards objectives so that the Commission must take into account the need to provide additional remuneration for:

- Employees working overtime;
- Employees working unsocial, irregular or unpredictable hours;
- Employees working on weekends or public holidays; or
- Employees working shift work.

3.2 The Explanatory Memorandum explains that these additional requirements *"promote the right to fair wages and in particular recognise the need to fairly compensate employees who work long, irregular, unsocial hours that could reasonably be expected to impact on their work/life balance and enjoyment of life outside work"*.

3.3 These additional requirements are unnecessary and will further erode employer confidence in the modern award system.

3.4 The current modern award objectives already adequately contemplate the factors outlined at 3.1 above and address the matters raised in the Explanatory Memorandum. Relevantly section 134 of the FWA provides:

> *(1) 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, taking into account:*
>
> *(a) relative living standards and the needs of the low paid; and*
> *(b) the need to encourage collective bargaining; and*
> *(c) the need to promote social inclusion through increased workforce participation; and*
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
> *(e) the principle of equal remuneration for work of equal or comparable value; and*
> *(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
> *(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
> *(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

3.5 The proposed expansion of the modern awards objectives direct attention away from the need to consider the effect of modern awards on businesses, particularly small

businesses and has the potential to entrench certain award entitlements irrespective of the merits and/or lead to the introduction of entitlements such as penalty rates into modern awards that do not currently contain them.

3.6 The current two yearly review of modern awards, while ongoing, provides insight into the scope of the modern awards objectives. HIA submit that it is clear from the Penalty Rates Decision[6] that the items proposed for inclusion are already accounted for within the current modern awards objectives, of note is the specific consideration of the impact of 'unsociable hours on employees'[7].

# 4 RIGHT OF ENTRY

4.1 Under the Act businesses are already subject to expansive rights of entry for unions.

4.2 HIA is opposed to any legislative change that would dilute a business's ability to direct where interviews or discussions with union officials take place.

4.3 HIA notes the Bill 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.

4.4 As the Act already provides that permit holders may only enter premises during working hours and may only hold discussions during mealtimes or other breaks, the amendment if enacted, will in effect mean that all employees, irrespective of whether they wish to be interviewed or participate will be exposed to such discussions during their meal break.

4.5 HIA are supportive of the provisions in the Bill which would give the FWC capacity to deal with disputes about the frequency of visits to premise for discussion purposes.

# 5 ANTI-BULLYING MEASURES

5.1 Schedule 3 of the Bill proposes changes to give effect to the Governments response to the House of Representatives Standing Committee on Education and Employments report *Workplace Bullying – We just want it to stop* (**Workplace Bullying Report**).

5.2 While HIA recognises the dangers associated with bullying and the existence of bullying at the workplace, HIA oppose the regulation of bullying through the industrial relations framework and submit that such regulation is more suitably contained within workplace health and safety legislation. As much was recognised within the Workplace Bullying Report which overarching recommended the implementation of the regulation of bullying through Safe Work Australia[8] 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"*[9].

[6] [2013] FWCFB 1635
[7] Ibid., paragraph 156-160
[8] See recommendations 3, 4, 5, 6, 7, 8, 18, 20 and 21
[9] Workplace Bullying – We just want it to stop. p. 32

5.3 The Workplace Bullying Report also highlights that there are several legislative avenues that an alleged victim of workplace bullying can take, including the Act.[10]

***The use of the term 'worker'***

5.4 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, 'This will include independent contractors and subcontractors as well as employees.

5.5 HIA submit that the application of the Act beyond the regulation of the employment relationship to include independent contractors inappropriately imposes industrial relations regulation on other forms of legitimate work arrangements.

***When is a worker 'bullied at work'***

5.6 The Bill defines being bullying at work as a situation where a "worker" is subjected to repeated unreasonable behavior at work by an individual or group of individuals and that behavior creates a risk to health and safety.

5.7 The Explanatory Memorandum indicates that this definition reflects the definition of workplace bullying recommended in the Workplace Bullying Report[11].

5.8 HIA submits that this is a misrepresentation of the proposed provision. The proposed legislation does not define 'unreasonable behavior' thereby imposing a subjective test. On the other hand, the Workplace Bullying Report clearly intended that the definition be based on the assessment of the behavior by a reasonable person i.e. an objective test.

5.9 The use of a subjective test will inevitably create a flood of litigation as unintended examples are tested. .

5.10 Further, whilst the proposed amendment provides that a reasonable management action carried out in a reasonable manner will not result in a person being 'bullied at work' other exemptions suggested in the Workplace Bullying Report have not been proposed such as 'reasonable performance management by an employer'[12] or 'reasonable disciplinary action by an employee'[13].

***Stop Bullying Orders***

5.11 The Bill provides for a "worker" who reasonably believes they have been bullied at work, to apply to the Fair Work Commission for an order to stop the bullying.

5.12 The Commission may make *'any'* order it considers appropriate. The Explanatory Memorandum makes it clear that a bullying order will not necessarily be limited or apply only to the employer of the worker which is bullied but could also apply to others such as co-workers and visitors to the workplace.

5.13 Further the orders could be based on behavior such as threats made outside the workplace if the threats relate to work.

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[10] Ibid., p. 31

[11] See p. 29

[12] Workplace Bullying – We just want it to stop., p. 15

[13] Ibid., p.16

5.14 HIA submits that this significantly expands the range of matters the Commission is responsible for and encroaches on existing state based WHS laws.

***Action under Work, Health and Safety Laws***

5.15 The Bill encourages forum shopping as it enables 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[14].

5.16 The potential outcome of the proposed law is that an employer may have to defend the same allegation in multiple jurisdictions.

# 6 CONCLUSION

6.1 HIA opposes the Bill.

6.2 It is piecemeal legislation that does not fairly balance the interests of employers and employees. If passed, it risks further eroding employer confidence in the Fair Work Act, the modern award system and importantly on looking for and taking on new/ additional staff.

[14] s115 *Work, Health and Safety Act 2011 (Cth)*