



Submission by the
Housing Industry Association

**Supplementary Submission
Senate Inquiry Into Small
Business and Employment**

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1 Introduction

HIA, in its primary submission to the committee, focused on two issues. Planning and the implications of the Alienation of Personal Services Income Legislation for small business. The purpose of this supplementary submission is to bring to the Committee's attention HIA's concerns regarding a number of other issues that are within the committee's terms of reference. Those issues are Workplace Relations, Superannuation, and Occupational Health and Safety. HIA would also like to offer a solution to the problems and frustrations that our small business members encounter with the NSW Planning System.

2 Workplace Relations

HIA's submission on workplace relations will be in two parts. One dealing with general workplace relations issues and the other dealing specifically with unfair dismissal issues.

2.1 Workplace Relations General

The nature of the building and construction industry means that workplace relations is an important and complex issue for all businesses in the industry but particularly for small businesses who do not have the capacity to employ or engage advisers with expertise in these areas. The Royal Commission into the Building and Construction Industry has highlighted a number of those problems. In its primary submission to the Royal Commission HIA put forward a number of recommendations for the Commission's consideration. They are reproduced below

Curtailment of Pattern Bargaining and other Anti-Competitive Behaviour

- 1. The **Workplace Relations ACT 1996 (WRA)** be amended to make it clear that pattern bargaining is contrary to the objects of the WRA. Pattern Bargaining is where unions and certain industry parties determine wage outcomes at the industry level and force these onto individual employers. The current objects of the WRA make it clear that the legislation should provide the means for wages and conditions of employment to be determined at the workplace or enterprise level. Pattern Bargaining is contrary to these objects and this should be specified in the WRA.*
- 2. The WRA be amended so that if the Employment Advocate is of the opinion that pattern bargaining is occurring in an industry, he or she should be empowered to make a declaration to that effect. Prior to making such a declaration the Employment Advocate would require industry parties to "show cause" as to why such a declaration shouldn't be made;*
- 3. The WRA be amended to the effect that where such a declaration is in force, the Australian Industrial Relations Commission (and likewise State IR Commissions) be*

prevented from certifying a Certified Agreement (or State EBA) in that industry, unless the Australian Consumer & Competition Commission on the application of the proposed parties to an EBA in that industry, has after due investigation issued a 'ruling' that a particular EBA is not anti-competitive or otherwise against the public interest;

4. *The **Trade Practices Act 1974 (TPA)** be amended to allow the ACCC to take this scrutinising role, and to impose a duty (ie. removing any discretion) on the ACCC to take action to restrain secondary boycott conduct, unless the ACCC issues a 'ruling' that it not would be in the public interest so to do. This duty would also include investigations of possible breaches of Section 45 E of the **Trade Practises Act 1974** by principal contractors in their dealings with subcontractors*

5. *The TPA and judicature legislation be amended to enable either type of TPA 'ruling' (as outlined in 3 or 4 above) to be the subject of an appeal to the Federal Court (or a state Supreme Court) by an affected party, the Employment Advocate and the relevant Crown.*

6. *That the WRA be amended to make industrial action taken against those who have genuinely entered into properly certified workplace agreements not involving unions illegal*

Curtailment of Illegal Acts and Unlawful Conduct

7. *The Office of the Employment Advocate be given the duty, power (and appropriate resources) to uphold Freedom of Association laws throughout Australia;*
8. *The Office of the Employment Advocate be given the power (and appropriate resources) to bring prosecutions for other breaches of the WRA;*
9. *Existing Freedom of Association provisions of the **Workplace Relations Act 1996** should be extended to conduct involving constitutional corporations, whether or not employment under a Federal Award is involved;*
10. *States be encouraged to fully implement mirror Freedom of Association laws, with dedicated and appropriately resourced State enforcement bodies set up to work co-operatively with the Office of the Employment Advocate;*
11. *That the penalties for breach of the Workplace Relations Act, including non-compliance with tribunal orders and freedom of association, be substantially increased particularly with respect to individuals.*

Discharge of Public Duties

12. *As a matter of principle, powers under Occupational Health and Safety and Workers Compensation legislation should be exercised only by public officials and not by union representatives.*

Curtailment of Abuses of Power

13. A Permit under s.285A of the **Workplace Relations Act 1996** should be issued only to persons who are 'good character' that have passed a rigorous competency assessment to show that they have a minimum level of knowledge of the Act, relevant Awards and industrial law generally; such assessments should be carried out by the Registrar on the basis of competency standards set by him or her;
14. Permit holders should be required to be reassessed every two years in order to ensure the currency of their knowledge;
15. Permit holders should be required to act responsibly and lawfully, and those who act contrary to law should have their permits revoked for a minimum of two years; and
16. Permit holders should be held personally liable for their acts/omissions while exercising their rights/obligations as union officials
17. State systems should be encouraged to adopt mirror provisions.

Accountability

18. As a matter of principle, industrial organisations should be at a minimum subject to the commercial and regulatory framework of the Corporations law and the scrutiny of ASIC.
19. The WRA be amended to mandate that one of the essential pre-conditions to recognition as an industrial organisation under the WRA is the requirement for incorporation as a public company. This will ensure that the organisation is subject to the tenets of corporate governance, responsibility and accountability as well as the supervision of ASIC.
20. As a matter of principle the AIRC jurisdiction over an industrial organisation be limited to recognition (or withdrawal thereof) as an industrial organisation for the purposes of representation, bargaining and standing to participate in hearings.
21. The regulation of industrial organisations other than by ASIC (and the Australian Electoral Commission for elections of officeholders) be removed from the WRA. The Corporations Law be amended to pick up any additional governance or regulatory requirements imposed on industrial organisations by the WRA that are not currently replicated in the Corporations Law

Preventing the Application of Industrial Co-ercion to Commercial Relationships

22. The Commonwealth government should adopt the Alienation of Personal Services Income test as it currently exists in the **Income Tax Assessment Act 1997** as a single objective, unambiguous test of a natural person's legal status as either an employee or an independent contractor, and State and Territory governments be encouraged to accept the results of this test for the purposes of their own employment, workers compensation, payroll tax and other relevant legislation.
23. That the TPA be amended to ensure that any attempt by a party to coerce a person into changing their status is an offence.

24. *Existing Commonwealth and state law should be changed to allow, in a prosecution for failure to pay Award entitlements, any over-award payments in one area to be offset against underpayment of entitlements in any other area.*

HIA is not requesting that the committee judge these issues as they are already before the Royal Commission. HIA is bringing these issues to the Committee's attention to highlight the complex nature of workplace relations in the building and construction industry and the importance of simplifying these issues for the benefit of small business.

2.2 Unfair Dismissals

HIA is aware of the Governments attempt to reform unfair dismissal laws for the benefit of small business through the *Workplace Relations Fair Dismissal Bill 2002*. This issue, has been the subject of considerable parliamentary and community debate. While HIA notes that there are divergent views on this issue HIA believes that, although it is difficult to quantify, there is very good evidence to suggest that unfair dismissal laws act as a disincentive to employment, particularly for small business. As small business is a principal driver of employment in the economy and is a crucial part of the housing industry this is an issue that needs to be considered by the Committee in making recommendations for reform.

3 Superannuation

HIA's primary area of concern in the area of Superannuation is with the provisions of Section 12(3) of the *Superannuation Guarantee Administration Act 1992*. Those provisions deem contractors to be employees in certain circumstances. They state that

"If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract".

HIA is pursuing a policy position that Governments, both Federal, State and Territory should adopt the Alienation of Personal Services Income test as it currently exists in the ***Income Tax Assessment Act 1997*** as a single objective, unambiguous test of a natural person's legal status as either an employee or an independent contractor, and State and Territory governments be encouraged to accept the results of this test for the purposes of their own employment, workers compensation, payroll tax and other relevant legislation.

HIA is of the view that this approach could be adopted for the purposes of Superannuation legislation and with that in mind we would submit that the committee recommend that the act be amended to include the following in 12(3) of the Act.

*A person who meets the tests set out in the Commonwealth Alienation of Personal Services Income Legislation (Div. 87 of the **Income Tax Assessment Act 1997**) and is running a “personal services business” is not an employee for the purposes of this Act.*

4 Occupational Health and Safety and Workers Compensation

HIA’s principal area of concern is that the OH&S compliance burden for small business has become more complicated. This can be seen in a number of areas including the following.

- (i) Complex definitions of who is an employee and who is an independent contractor for the purposes of Workers Compensation Legislation.
- (ii) Debate in a number of jurisdictions over the introduction of Industrial Manslaughter Legislation
- (iii) Introduction of compulsory injury management and rehabilitation policies for injured workers
- (iv) Introduction of compulsory safety induction.
- (v) Increasing penalties for non-compliance

HIA, in making this submission, is not attempting to diminish the importance of Occupational Health and Safety Legislation nor is it arguing for standards to be diminished. HIA would submit that if the compliance process were simplified then levels of compliance would increase. To that end HIA would submit that the committee should consider the following measures:

- (i) Recommending that standard policies and procedures be adopted for small business. This already occurs in a number of jurisdictions
- (ii) Encourage training and information rather than merely increasing penalties as the best method of achieving increased levels of compliance
- (iii) Recommend that the definition of employer in workers compensation legislation be amended to include the APSI test, along the lines set out in three (3) above.

5 Planning Solutions

The process of securing development consent for a new house, a task that should generally be straightforward, has become fraught with difficulties for many potential homebuilders and homeowners. They encounter a range of different development standards depending on which council area in which they wish to build.

In response to this issue HIA has produced a draft Model Development Control Plan (MDCP) to lead discussion on the merits of securing a consistent approach by local councils to the application of planning controls for detached and small lot housing.

HIA wishes to promote the adoption of controls that respond positively to the challenge of producing high quality, affordable and environmentally responsibly designed houses that contribute towards the creation of attractive streetscapes. HIA has prepared a draft MDCP to address the need for new houses to provide liveable accommodation and to relate appropriately to adjoining properties and the streetscape. The proposed MDCP offers the potential to improve the affordability of new houses, to provide greater clarity and certainty for those involved in the development process, and to ensure that new houses make a positive contribution to the character of their neighbourhoods. The controls suggested in the MDCP are relevant to all forms of detached housing, but particularly to new housing estates.

Amongst the features of the draft MDCP are controls addressing:

- the treatment of front facades of houses;
- the problem of garage dominance of streetscapes;
- the design of houses on corner lots;
- the distance of houses from the street and other boundaries;
- the creation of active street frontages; and
- energy and water efficient designs.

The controls seek to allow for the more efficient utilisation of lots whilst permitting a flexible approach to the design of new housing.

HIA has prepared the MDCP as a discussion paper and is presently seeking input from all stakeholders. HIA seeks government support in seeing the uptake of the MDCP approach across and beyond the Sydney metropolitan area. The MDCP provides an ideal opportunity to reduce red tape, apply consistent controls and to improve the look and performance of new detached and small lot housing, without substantial changes to the planning system. The MDCP therefore site well with the types of reforms that the Committee might deem appropriate for small business ventures in our industry. A copy of the MDCP Discussion Paper can be made available to the Committee upon request.

6 Conclusion

The issues raised in this supplementary submission are important for consideration in any debate surrounding the impact of Government Regulation on small business. When examined together with the issues raised in HIA's primary submission they highlight how the compliance burden for small business has increased

HIA supports measures that would reduce the compliance burden and thus increase compliance. HIA looks forward to on-going participation in the debate surrounding these issues