SUBMISSION BY THE

Housing Industry Association

to the

Senate Education, Employment and Workplace Relations Committees

on the

Fair Work Act Amendment Bill

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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 Senate Education, Employment and Workplace Relations Committees on the *Fair Work Amendment Bill 2012* (Bill).

Background to the Bill

1.2 HIA notes that this Bill is the first tranche of the Government's response to the review of the *Fair Work Act 2009* (the Act).

1.3 The Bill seeks to implement some of the recommendations of the Fair Work Act Review Panel set out in the June 2012 report entitled - *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* (the Report).

1.4 Whilst HIA supports some of the technical recommendations of the Panel, unfortunately because the Panel took the perspective that the current legislation is working well, the Report failed to deal with many of substantive issues impacting on small businesses, such as restrictions on the engagement of contractors.

1.5 As HIA submitted to the Fair Work Review Panel in February, 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 in the sector.

1.6 HIA does however acknowledge that certain recommendations of the Panel contain merit. HIA encourages the Government to further explore the following recommendations of the Panel in later amendments:

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

1.6.2 *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.

1.6.3 *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.

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

This Bill

1.7 HIA notes that the Minister has announced that this Bill mainly includes 'technical and clarifying amendments'. Whilst HIA supports much of the Bill including the principle of separating the technical amendments from those more substantive areas requiring reform, there are certain matters in the Bill of concern to the residential building sector.

1.8 HIA supports the following amendments:

- That one union cannot act as a bargaining representative where that union does not have coverage.
- The provision of new cost measures for unfair dismissal applications (subject to our recommendation that cost measures extend to union officials. See additional submissions below.)
- Changing the name of Fair Work Australia to the Fair Work Commission (FWC).

1.9 HIA's areas of concern include:

- amendments to introduce new requirements in relation to modern award terms about default superannuation;
- amendments in relation to applications to vary modern awards;
- amendments to prohibit enterprise agreement clauses which permit employees to opt out of the agreement;
- amendments to prohibit enterprise agreement being made with only one employee; and
- amendments to increase the filing period for an unfair dismissal claim.

2 DEFAULT SUPERANNUATION

2.1 Schedule 1 to the Bill amends the Act to introduce a process under which the tribunal will review default fund terms in modern awards every 4 years.

2.2 The Bill also provides for the establishment of the Expert Panel, which will subsume the functions of the Minimum Wage Panel to assess default superannuation funds.

2.3 HIA's concern is that these new provisions introduce another layer of governmental intervention allowing the "conflicted" parties of FWC to continue to select default superannuation funds. Whilst HIA does not have a preference over industry or retail funds, HIA is concerned that the proposed provisions favour industry funds and would enable the removal of a default fund as part of the 4 yearly review. Such a function is anti-competitive and will reduce flexibility.

3 AMENDMENTS TO MODERN AWARDS

3.1 Schedule 3 of the Bill purports to make technical amendments to Part 2-3 in relation to applications to the FWC to vary modern awards.

3.2 Amendments include:

Amending section 160 in relation to the parties able to apply to amend modern awards

3.3 HIA supports this amendment.

3.4 This issue was raised by the CEPU before the Full Bench in an appeal of *Master Builders Australia Limited and Housing Industry Association Ltd v CFMEU; CEPU AWU and AMWU [2012] FWAFB 3210*, where it was submitted that the Master Builder's original application under section 160 was defective as MBA are not an employer in the industry nor a respondent to the award.

3.5 Whilst the Full Bench declined to rule on this point, if the CEPU's submissions were accepted it will impact on the ability of both unions and many employer association to apply to vary modern awards to correct errors and ambiguities.

Changes in relation to the striking out of applications to vary modern awards in certain circumstances

3.6 HIA opposes this amendment.

3.7 Sections 157 and 161 of the Act circumscribe the circumstances under which a modern award can be varied. Wages aside, modern awards are not intended to be varied more often than when reviewed (each 4 years) unless doing so at another time is necessary to achieve the modern awards objective. There are exceptions. Modern awards may be varied by application by the Human Rights Commission or to remove ambiguity or uncertainty.

3.8 Since the modern awards came into effect on 1 January 2010, a number of award variation applications have been lodged by unions, employers and their representatives who have submitted that a variation is necessary to achieve the modern awards objective. As a consequence, case law has been generated which serves as authority as to the application of section 157 and its interaction with the modern awards objective. What is clear from these decisions is that the application of section 157(1) has been limited.

3.9 This is evidenced by the following statement of Watson VP in *Integrated Trolley Management Pty Limited* [2010] FWA 3317:

> *[10] The ability to vary modern awards is limited by the terms of the Act. A variation to terms other than wages can only be made if Fair Work Australia (FWA) is satisfied that the variation outside the 4-yearly reviews of modern awards "is necessary to achieve the modern awards objective." In my view this is a significant hurdle that any applicant in a matter under s 158 is required to meet. The clear import of this provision is that award variations outside the 4-yearly reviews will be the exception. Other provisions of the Act deal with variations to resolve ambiguities or errors. Applications to vary awards on other grounds must be shown to be necessary to meet the modern awards objective rather than desirable or justified in a general sense. In my view this means that an applicant must establish that the modern awards objective cannot be achieved unless the variation is made.*

3.10 The matter of *Simpson Personnel*, in which HIA appeared, also suggests that section 157(1) of the Act is to be narrowly applied. In particular, SDP Watson afforded regard to the 26 June 2009 comment of the Full Bench of the AIRC that:

> *Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration.*

3.11 Watson SDP went on to state at paragraph 49 that:

> *…The comments of the 26 June 2009 Full Bench in relation to applications to vary modern awards, soon after their making, militate against the making of a determination varying the 2010 Modern Award outside the system of 4 yearly reviews of modern awards.*

3.12 Such decisions have stood to mitigate against the making of variations to the awards outside the formal review process. It has also meant that affected parties have had limited capacity to secure changes to the awards where they are not operating as intended by the Act.

3.13 HIA submits that the amendment is both unnecessary and is discriminatory against parties required to bring a variation application to have the intended operation of an award provision clarified.

4 ENTERPRISE AGREEMENTS

4.1 Schedule 4 to the Bill amends Part 2-4 in relation to the coverage of enterprise agreements, requirements for employee bargaining representatives, notices of employee representation rights, and notification requirements for scope order applications.

4.2 HIA has concerns with the following amendments:

Enterprise agreements covering a single employee

4.3 Proposed section 172(6) will provide that enterprise agreements cannot be made with only one employee.

4.4 HIA opposes this amendment.

4.5 Since enterprise bargaining was introduced into the Industrial Relations Act 1988 in 1994, enterprise agreements have been able to be made between an employer and an individual employee.

Clarifying that opt-out terms cannot be included in enterprise agreements

4.6 HIA opposes this amendment. The removal of opt-out clauses significantly restricts the flexibility offered for parties to an enterprise agreement.

4.7 Whilst HIA recognises that “opt out” provisions potentially undermine bargaining certainty, and have provoked some disputation before Fair Work Australia, employees should have the freedom to opt out of an EBA if they so choose.

4.8 Rather than removing the opt out flexibility, HIA recommends that opting out be subject to a "better off overall" precondition.

5 ADVERSE ACTION AND UNFAIR DISMISSAL

5.1 Schedules 5 and 6 to the Bill deal with amendments to the general protections and unfair dismissal provisions.

Aligning the timeframes for all dismissal related claims

5.2 Under Schedule 5 to the Bill, the current 60 day time limit for applying to the Fair Work tribunal to mediate or conciliate a dispute about a dismissal allegedly on "adverse action' grounds will be shortened to within 21 days of the dismissal taking effect.

5.3 These amendments align the timeframes for lodging dismissal-related general protections claims with the increased 21 day time limit for lodging unfair dismissal applications.

5.4 HIA supports an alignment of the time periods for dismissal claims –whether via an adverse action and/or unfair dismissal action.

5.5 HIA does not however agree that an alignment of time periods necessitates an extension of the current unfair dismissal time period of 14 days for a further 7 days.

5.6 As HIA submitted in its February submissions, all applications involving dismissal should be brought within 14 days.

5.7 It remains that the vast majority of claims are for unfair dismissal, and for small business employers in particular, such claims are complex, stressful and costly even if the claim is defeated.

5.8 In 2007, Labor's Forward with Fairness implementation plan promised a simpler, faster, fairer, unfair dismissal resolution process. The primary remedy was to be reinstatement (unless this is not in the interests of the employee or the employer's business).

5.9 Yet despite the claim that "Under Labor's policy there will be no 'go away money'', this has not been the experience of business to date. The reality is

most claims result in monetary compensation – whether or not the claim is meritorious.

5.10 Extending the period within which an employee has to bring an unfair dismissal claim further reduces the likelihood of reinstatement and expands on existing rights.

Power to dismiss applications

5.11 New section 399A will enable the Tribunal to allow unfair dismissal applications to be struck out if the parties have reached a settlement, or if an applicant fails to attend a proceeding or fails to comply with directions/orders

5.12 HIA supports these amendments.

Costs orders

5.13 Under the Bill the Tribunal will be given broader powers to award costs in unfair dismissal claims.

5.14 Firstly, costs can be awarded for unreasonable behaviour – which could potentially include an unreasonable rejection of a settlement offer (new section 400A).

5.15 Further the Tribunal will have the power to grant costs orders against lawyers and paid agents even if they are not granted permission to appear (new sections 401(1) and 401(1A)).

5.16 HIA supports both proposed amendments but believes that an important loophole remains – namely the fact these provisions will not apply to union representatives.

5.17 Many employers, large and small, feel forced to use lawyers or paid agents in circumstances when the claimant is a union member and is able to be represented and assisted, free of charge, by the union in proceedings.

5.18 The consequences of encouraging an unreasonable or vexatious claim or litigation should extend to unions representatives as well.