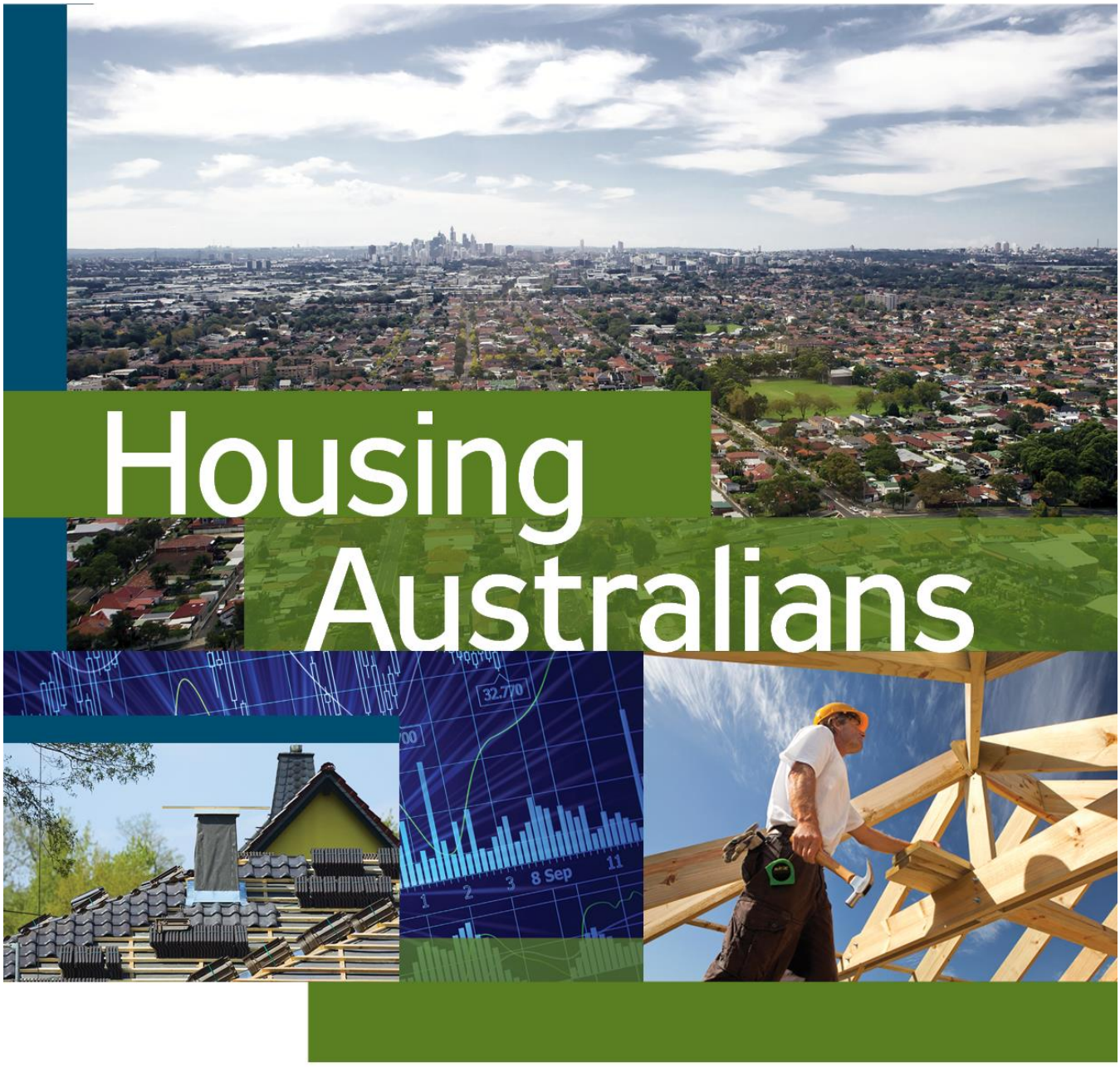
HOUSING INDUSTRY ASSOCIATION

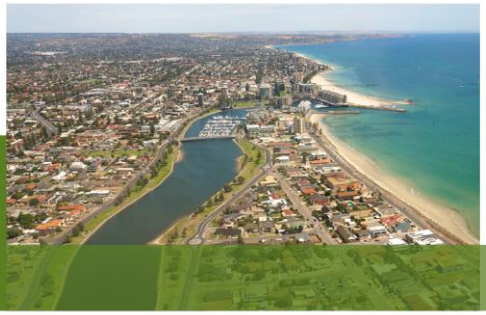


Submission to the
Department of Mines, Industry Regulation and Safety

Ministerial Review of the State Industrial Relations System
Response to Interim Report

30 April 2018

HOUSING INDUSTRY ASSOCIATION



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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new residential construction and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support.

1. INTRODUCTION

HIA welcomes the opportunity to comment on the Ministerial Review of the Western Australian Industrial Relations System (the Review) Interim Report.

As a national association, HIA has members covered by a range of industrial relations laws and instruments both in Western Australia (WA) and in other states. Whilst many of HIA's WA members are covered by the Commonwealth Fair Work Act 2009 (FW Act), some 30% of HIA's WA membership operates solely within the state industrial relations jurisdiction.

HIA notes that the Interim Reports preliminary position is to develop an *Industrial Relations Act 2018* (2018 IR Act), combining terms and conditions of the:

- Industrial Relations Act 1979 (WA) (IR Act);
- Minimum Conditions of Employment Act 1993 (WA) (MCE Act);
- General Order of the WAIRC;
- Termination, Change and Redundancy General Order (TCR General Order); and
- Long Service Leave Act 1958 (WA) (LSL Act).

For reasons outlined in this submission, HIA is broadly supportive of moves that would see the consolidation and simplification of the WA industrial relations framework. The current system is confusing, particularly for small business and this Review provides an opportunity to modernise, simplify and update the current state industrial relations framework that continues to cover small unincorporated businesses in Western Australia.

HIA does have a number of reservations in relation to:

- the treatment of proposed provisions the would affect the operation of the LSL Act;
- proposals that would see the introduction of an anti-bullying jurisdiction, the introduction of domestic violence leave and an increase in the casual loading; and
- proposals that would seek to increase penalties for breaches of industrial relations law.

In addition to the above, HIA's submission will address the following Terms of Reference and additional request for submissions:

- Jurisdiction and powers of the Western Australian Industrial Relations Commission (WAIRC);
- Definition of employee;
- Minimum terms and conditions of employment;
- Process for updating state awards; and
- Statutory compliance and enforcement mechanisms.

Please find further detail in relation to these matters outlined below.

2. TERMS OF REFERENCE

2.1 TERM OF REFERENCE 2

Review the jurisdiction and powers of the WAIRC with the objective of examining the access for public sector employees to the WAIRC on a range of matters for which they are currently excluded.

A matter of relevance to HIA members is the consideration of the introduction of a new power to permit the WAIRC to issue stop bullying orders based on the model anti-bullying provisions contained within the FW Act.

While HIA recognises the dangers associated with bullying and the existence of bullying at the workplace HIA opposes the regulation of bullying through the industrial relations framework. Such regulation is more suitably contained within workplace health and safety legislation a position supported by the Workplace Bullying Report[1], which considered workplace bullying as *'primarily a work health and safety issue because it poses risks to the health and safety of those workers targeted.'*[2]

The Workplace Bullying Report also identified several existing avenues of recourse an alleged victim of workplace bullying could take, the effect of which may result in multiple actions in multiple jurisdictions against an employer. Of note the Explanatory Memorandum to the *Fair Work Amendment Bill 2013* (Bill) which included the provisions that saw the introduction of the anti-bullying regime unfortunately did not seek to address this situation:

> *'...WHS regulators should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation. The amendments in Schedule 3 are not intended to preclude investigation and prosecutions under WHS and criminal law.'*

In 2013, HIA made submissions in response to the Bill. HIA's concerns with those provisions are summarised below for consideration by this Review:

- The use of the term "worker" was considered significantly problematic as it extended the remit of the anti-bullying jurisdiction beyond the regulation of the employment relationship to any person who carries out work in any capacity for a person conducting a business or undertaking,' including independent contractors and subcontractors as well as employees.

- The Bill provided that a reasonable management action carried out in a reasonable manner would not result in a person being 'bullied at work', however other exemptions suggested in the Workplace Bullying Report were not considered such as 'reasonable performance management by an employer' or 'reasonable disciplinary action by an employer'.[3]

[1] *Workplace Bullying- We just want it to stop.*
[2] *Workplace Bullying- We just want it to stop* at pg.32
[3] *Workplace Bullying- We just want it to stop* at pg.16

- Under the FW Act the Commission may make 'any' order it considers appropriate; 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. The orders could be based on behaviour such as threats made outside the workplace if the threats relate to work. This significantly expanded the range of matters the Commission is responsible for and in HIA's view encroached on existing state based WHS laws

Also of note is that it is unclear whether the new federal anti-bullying jurisdiction is having the desired effect with not even 1% of applications resulting in the issuance of stop bullying orders during the period 2016-17.[4]

The introduction of a new anti-bullying jurisdiction in WA would be a significant step as such HIA would caution against any such moves without further, more detailed consultation and consideration.

2.2 TERM OF REFERENCE 4

Review the definition of "employee" in the Industrial Relations Act 1979 and the Minimum Conditions of Employment Act 1993 with the objective of ensuring comprehensive coverage for all employees.

Of relevance to HIA members are the matters raised within the Interim Report relating to the rights of permit holders to access residential premises and the 'gig' economy.

Access to residential premises

Currently, the IR Act allows industrial inspectors unfettered access to premises whereby work in relation to the Act is performed, including private residences.

HIA is of the view that s98 of the IR Act, which deals with industrial inspectors obtaining access to residential premises, be amended to replicate s708 of the FW Act and include the following safeguards:

- that an inspector must not access part of a residential premises unless there is work in which the 2018 IR Act applies being performed on that part premises; and
- as a precondition to access, an inspector must always, not just on request as per s99B of the IR Act, provide their identity card in order for access to be permissible.

HIA is otherwise of the view that provisions in relation to authorised representatives accessing residential premises should remain unchanged.

Gig Economy Taskforce

The emergence of the digital or 'gig' economy is currently under consideration in a number of forums and is slowly become a part of public discourse.

It would therefore not only be premature for WA to respond but also unnecessary for a taskforce to be formed to further consider and monitor the 'gig economy' given that the state government '*may have very limited, if any legal authority*'[5] in relation to the sector.

[4] Annual Report 2016-17 at pg. 97
[5] Interim Report at pg. 334

2.3 TERM OF REFERENCE 5

Review the minimum conditions of employment in the Minimum Conditions of Employment Act 1993, the Long Service Leave Act 1958 and the Termination Change and Redundancy General Order of the Western Australian Industrial Relations Commission to consider whether:

(a) the minimum conditions should be updated, and

(b) there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission, without the need for legislative change.

The Interim Report recommends that a new State Employment Standard (SES) for minimum conditions of employment be created incorporating provisions of existing legislation including some aspects that relate to long service leave and addressing matters raised within the National Employment Standards (NES) under the FW Act. It is recommended that the WAIRC be required to review the SES every two years

The Interim Report also recommends that the SES include provisions relating to Family Domestic Violence (FDV) and seeks views on whether the current casual loading of 20% be increased to 25%.

HIA has a number of comments and concerns in relation to these proposals.

State Employment Standard

HIA supports the simplification of the industrial relations framework through the development of one set of State Employment Standards.

HIA is however concerned with the proposed approach that would see the retention of any existing superior state based conditions of employment.

It is HIA's view that a cautious approach be taken when assessing which employment conditions are more 'beneficial' under the State system versus those under the FW Act. The current provisions have real and perceived benefits for both employers and employees and any adopted changes should consider the balance of fairness from both the employer and employee perspective.

HIA understands that the proposed SES would incorporate:

- The minimum wage.
- The NES from the FW Act and include provisions relating to:
    - Maximum weekly hours.
    - Requests for flexible working arrangements.
    - Parental leave and related entitlements.
    - Annual leave.
    - Personal carers leave and compassionate leave.
    - Community Service Leave.
    - Public Holidays.
    - Long Service Leave.
    - Notice of Termination and Redundancy Pay.
    - Fair Work Information Statement (presumably under a different name).
- FW Act provisions relating to employer obligations in relation to employee records and pay slips, and the payment of wages.
- Conditions of employment as per the MCE Act which are more beneficial than those under the FW Act.

- Conditions under the TCR General Order, incorporating provisions under the FW Act which are more favourable than those under the TCR General Order.
- Aspects that relate to Long Service Leave.
- Family Domestic Violence Leave.

Given this context HIA submits that the following learnings and inefficiencies of the FW Act, and the NES, be considered.

- *Minimum wages*

  The minimum wages objective[6] that the Fair Work Commission must consider in making national minimum wage orders have produced unsustainably high minimum wage increases well above the level of inflation. In the wage setting process macro-economic considerations are relied upon in a 'broad brush' way, without necessarily taking account of difficulties and challenges specific to industry sectors. It is HIA's view that the criteria against which the minimum wages are determined should explicitly consider productivity, industry specific circumstances and how particular industries may be affected by a minimum wage increase.

- *Maximum weekly hours*

  The inflexibilities in managing hours of work under the NES are not only a constant irritant for small business in the residential building industry, they directly reduce their capacity to respond to market conditions.

  Specifically the NES does not allow for the averaging of working hours, other than where modern awards or enterprise agreements includes such a term, or for award/agreement free employee for only a 26 week maximum. The inability to set hours of work that suits the needs of businesses may expose them to significant on-costs in the form of overtime penalty rates.

  Accordingly HIA recommends the Review considers the SES include provisions for averaging of work hours as part of the minimum state safety net, which is therefore extended into all state system awards.

- *Requests for flexible work arrangements*

  The right to request a change in working arrangements to a wide range of caring and other circumstances ignores the practical and economic realities faced by many employers, in particular small businesses. Flexible work arrangements by their very nature are subjective and usually require human resources departments dedicated to monitoring working arrangements and the employee. The NES does not contemplate the likelihood that many businesses do not have the resources or capacity to understand, apply or monitor such arrangements.

  The provision in the FW Act is very prescriptive, and directed at an individual level as opposed to the broader workplace, flexible work arrangements by their ordinary meaning are something to be determined at a workplace level.

[6] s284 FW Act

HIA recommends that the SES terms in relation to flexible work arrangements, be directed at a workplace level, in order to support mutually beneficial work practices between employers and employees.

- *Annual Leave*

  The current regulation of annual leave under the NES is overly prescriptive inhibiting any ability to manage leave accruals and consequent contingent liabilities.

  Specifically, the cashing out of annual leave for award/agreement employees is only permissible whereby the award terms provide for the cashing out of annual leave. Such inability to incorporate annual leave payments into an employee's wages points to the inherent inflexibility of the framework.

  Further the ability to take concurrent types of leave is also problematic, with the re-crediting of annual leave where an employee is ill or required to care during a period of annual leave, having the potential to encourage absenteeism resulting in increased costs, and hampered productivity.

- *Notice of termination and redundancy pay*

  Employers terminating an employee are required to comply with a range of obligations, for example:
  - The requirement that notice be provided in writing is an unnecessary red tape burden for employers, with a disproportionate penalty in the event of contravention.
  - HIA are of the strong view that any proposed SES not include a carve out for industry specific schemes. For example s141 of the FW Act allows for the continued operation of the industry specific redundancy schemes in the *Building and Construction General Onsite Award 2010* which requires a redundancy payment in circumstances in which employment ends at the initiative of the employee. The ability to impose an industry specific scheme that overrides the safety net entitlement imposed by the NES undermines the very notion of a safety net.

- *Fair Work Information Statement*

  The requirement for employers to provide new employees an information statement does little other than provide an additional red tape burden for business. The Fair Work Ombudsman educational materials are well established, and readily accessible, assisting employers and employees understanding their rights and obligations under the FW Act.

Long Service Leave

HIA notes that the review seeks to address a number of matters relating to long service leave through the proposed SES.

HIA submit that the terms of reference permit the review of the LSL Act, as such any proposed changes to that scheme should be done via the existing legislation and not through the proposed SES.

The proposed approach:

- Is at odds with the retention of long service leave entitlements as distinct from the safety net. This is reflected through the carve out of long service leave from the NES.

- Is at odds with the attempts to simplifying the WA industrial relations framework by consolidating all employment related conditions into the 2018 IR Act. Incorporating provisions relating to long service leave would dilute this objective.
- Would require those in the residential building industry to consider three pieces of legislation when examining their long service leave obligations.

There does not appear to be a demonstrated case as to why the LSL Act alone cannot be reviewed and amended if necessary.

Family Domestic Violence Leave (FDV)

FDV is a prevalent and concerning societal issue, however HIA questions whether the workplace and therefore this Review is the most appropriate forum for FDV to be dealt with.

The recent decision of the FWC Full Bench granted the inclusion in all Modern Awards of five days unpaid family domestic violence leave[7]. The matter considered substantive materials and evidence submitted by both employer and employee groups and its determination was considered by two Full Benches of the Commission, including a minority decision which rejected the ACTU's claim.

This community issue is clearly one of import, requiring detailed and extensive consideration. HIA does not consider that to date, this Review has undertaken such a process. As such HIA strongly recommends a cautious approach be taken when seeking to introduce provisions to respond to this issue through the industrial relations safety net.

To that end the comments of Watson VP in his minority decision are relevant:

> *'Domestic violence is a serious and pervasive social problem. It affects various aspects of contemporary Australian society including community safety, policing, law enforcement, relationships, families and workplaces. Its incidence and effects have been comprehensively studied. It is broadly accepted that the problem requires a whole of community response and there can be no single solution to the problems it creates.*
>
> *In my view any responsible employer should be aware of the potential for its employees to experience domestic violence and be open to assisting them deal with the problems. The best examples of an approach to the problem appear to be when employees feel they can be open with their manager, and in a cooperative and collaborative manner, develop solutions to assist the employee deal with the issues while remaining in productive employment. Such an approach is in the best interests of affected employees and employers.*
> *….*
> *Australia has a relatively high safety net of terms and conditions. Family and domestic violence leave is not a feature of the safety net in other western economies…*[8]

HIA also notes that the Fair Work Commission has committed to:

> *'…revisit this issue in June 2021, after the model term has been in operation for three years.*[9]

[7] [2018] FWCFB 1691
[8] [2017] FWCFB 1133 at paragraph 9-12
[9] [2018] FWCFB 1691 at paragraph 309

HIA strongly recommends that WA await the outcome of this scheduled review prior to making any legislative changes.

Casual Loading

The causal loading of 20% is currently a statutory minimum condition of employment, as well as a condition in state awards. The Interim Report also notes that in some awards, the casual loading is currently 25%. HIA considers that this situation is appropriate and there is no need to alter the statutory minimum particularly when it is clear that state awards may provide a different rate (although one that is no lower than 20%).

As such HIA considers that any increase be deferred for consideration by the WAIRC.

Process for review of State Employment Standard

The Interim Report recommends that the WAIRC:

- review the SES every two years,
- may, in exceptional circumstances, on its own motion review the SES at any time.

HIA opposes the proposed recommendations on the following basis:

- The SES are legislated minimum terms and conditions of employment, as such, Parliament should be ultimately responsible for their review. Of note, the Fair Work Commission is given jurisdiction to review the Modern Awards, not the NES.
- Two years is a very short time period to carry out any such review. Employers must have certainty as to the industrial relations framework under which they are required to operate.
- There is little justification in the Interim Report for providing the WAIRC with a broad unfettered discretion to review SES.

2.4 TERM OF REFERENCE 6

Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:

(a) ensuring the scope of awards provide comprehensive coverage to employees;

(b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

(c) ensuring awards are written in plain English and are user friendly for both employers and employees; and

(d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

The Review's preliminary position is that a new process for updating and reviewing State Awards for private sector employers and employees will be established. HIA understands from the Interim Report that the Review is seeking further submissions on the method for updating or varying state awards post the implementation of the new state awards.

Review of State Awards

The Interim Report recommends that the *'the WAIRC be required to, within 12 months and with requested input from unions and employer groups and Government, prioritise the making of new State awards, on an industry and occupational basis.'*

HIA supports a genuine review of state based awards in order to ensure they are reflective of modern industry practices, meet the needs of small businesses, and are simplified to form a basic set of industry/occupational specific minimum employment conditions. Further, it is imperative that stakeholder and award parties are engaged in the award making process to ensure the implementation process is managed appropriately.

Method for updating or varying State Awards

Under the FW Act both a statutory review mechanism, and a 'by application' process are available.

While HIA sees merit in having a dual approach, the experience of the statutory 4 yearly review of the Modern Awards casts a shadow on the effectiveness of such statutory review mechanisms noting that legislation was introduced into the Federal Parliament to abolish it.[10]

In HIA's view the 4 yearly review has established a number of procedural and evidentiary precedents which, have caused delay and inefficiencies, for example:

- The Commission has engaged in a process of identifying 'common matters' across all modern awards. This process moves away from the express consideration of industry specific circumstances and provides scope for an across the board expansion of the safety net;
- The discretion to make a determination varying Modern Awards is expressed in general terms;
- There is no one set of provisions within a modern award which are deemed to provide a fair and relevant minimum safety net of terms and conditions. Rather each modern award can be varied numerous times, each which may be said to achieve the modern awards objective; and
- Each party seeking to vary a modern award in the context of the review must advance a merit argument in support of each variation. Some proposed changes may be self-evident, and can be determined with little formality. However where a significant change is proposed it must be supported by a submission which addressed the relevant legislative provisions, and must be accompanied by probative evidence properly directed to demonstrate the facts supporting the proposed variation.

The interaction between the current statutory process under the FW Act and the 'by application' process is also worth noting.

Interested parties may apply to make, vary or revoke modern awards under s157 and s160 of the FW Act.

It has become clear that applications under s157 are limited as it is considered that the Commissions scope to vary an award outside the 4 yearly review process is only permissible whereby an applicant can establish that the modern awards objective cannot be achieved unless the variation is made.[11] HIA submit that any process contemplated by this Review avoid an outcome of this nature.

[10] *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*
[11] Integrated Trolley Management Pty Limited [2010] FWA 3317; Simpson Personnel Pty Ltd [2010] FWA 2894

2.5 TERM OF REFERENCE 7

Review statutory compliance and enforcement mechanisms with the objectives:

(a) Ensuring that employees are paid their correct entitlements;

(b) Providing effective deterrents to non-compliance with all State industrial laws and instruments; and

(c) Updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

Of relevance to HIA members are those matters in the Interim Report relating to wages theft, penalties, industrial inspectors enforcement powers, and right of entry.

Wages theft

Wages theft has been suggested to form a part of the scope of the Review. HIA agrees with the Reviews position that this is a matter of Criminal law and is therefore best dealt with through the involvement of the Attorney General and a separate consultation process.

Penalties

The Review proposes the adoption of the penalty provisions of the FW Act within the 2018 IR Act.

HIA does not support increasing the current penalties.

Firstly, the unincorporated entities operating in the state industrial relations system would, by and large be small business. The penalties recently introduced through the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, were targeted at addressing systemic and deliberate non-compliance of workplace laws by some high profile franchise operators, such entities are certainly not small unincorporated business.

Secondly, whilst HIA recognises the difficulties that different penalty regimes can create, there is no demonstrated case that the increasing of penalties results in a more favourable outcome.

Industrial Inspector enforcement powers

The Review proposes to empower Industrial Inspectors under the 2018 IR Act to have further enforcement mechanisms, specifically the ability to issue infringement notices, compliance notices, and enforceable undertakings, mirroring the provisions of the FW Act. It is also noted that '*the FWO has not undertaken a formal evaluation of these enforcement tools in terms of their cost or effectiveness'.* [12]

With the lack of substantive evidence to support the introduction of further enforcement mechanisms, HIA would recommend that the status quo be maintained.

Right of entry

HIA understands that the Review is proposing to introduce a fit and proper test in relation to granting an Authorised Person a right of entry permit. In the absence of such a test under the proposed 2018 IR Act, HIA is supportive of the inclusion of a fit and proper test similar to s512 and s513 of the FW Act.

[12] Interim Report at pg. 454, pparagraph 1297

HIA however does not support the proposed amendments to section 49I of the IR Act to extend the method in which records can be copied, and inspect or view any work, material, machinery, to include by way of photograph, video or electronic means. The videography of works and records is a significant departure from the current method of copying work related records.

HIA is of the view that there is no substantive evidence to support the expansion of the method of copying of documents, nor has it been established that the current methods of copying are ineffective. Accordingly HIA does not support the proposed amendment.