HOUSING INDUSTRY ASSOCIATION

Submission to the
Education, Employment and Small Business Committee

Inquiry into Wage Theft in Queensland

31 July 2018

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contents

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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.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

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 building 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 home building 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 committees before progressing to the 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, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On Thursday 17 May the Queensland Legislative Assembly referred an inquiry into the problem of wage theft in Queensland to the Education Employment and Small Business Committee.

The Terms of Reference for the inquiry are broad ranging and ask that the Committee consider:

a) *the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia;*
b) *the impact of wage theft on workers, families, law-abiding businesses, the economy and community;*
c) *the various forms that wage theft can take, including through unpaid super, the misuse of ABNs and sham contracting arrangements;*
d) *the reasons why wage theft is occurring, including whether it has become part of the business model for some organisations;*
e) *whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers;*
f) *the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers; and*
g) *options for ensuring wage theft is eradicated, including consideration of regulatory and other measures either implemented or proposed in other jurisdictions interstate, nationally or internationally and the role of industrial organisations, including unions and employer registered bodies in addressing and preventing wage theft.*

HIA is unaware of a *'problem of wage theft'* in the residential building industry.

HIA does not support the deliberate underpayment of wages and other entitlements to employees. In HIA's experience employers in the residential building industry aim to do the right thing by their employees.

Where such conduct does occur it is an industrial matter and there are appropriate existing mechanisms in place to ensure employees are paid what they are owed.

In responding to this inquiry there are four key matters HIA would bring to the Committee's attention.

1. Criminalising the underpayment of wages is inappropriate

Criminalising matters of an industrial nature is inappropriate.

Circumstances in which an employer fails to provide their employees with the full wage or salary to which they are entitled is an underpayment. The use of the term 'theft' seeks to inappropriately attach criminal intent to an employment related matter. HIA opposes such an approach.

2. The jurisdiction of the Queensland legislature is limited

All employers and employees in Queensland (except state and local government workers) are captured by the *Fair Work Act 2009* (Act).

As outlined by the *Response to Committee Request* provided by the Queensland Office of Industrial Relations (OIR), the Queensland Government has no power to create laws in relation to workplace relations matters.

3. ***There is a framework of existing powers to respond appropriately to the underpayment of wages***

The current provisions of the Act including the role of the Fair Work Ombudsman (FWO) are appropriate to respond to instances of underpayment.

4. ***The current workplace relations framework is complex***

The current complexity of the workplace relations framework, including the complexity in determining rates of pay is directly relevant to the incidence of the underpayment of wages.

HIA elaborates on these matters below.

2. WHAT IS WAGE THEFT?

'Wage theft' is a term of art, the adoption of which seeks to inappropriately criminalise the underpayment of wages.

The term appears to be primarily American-based but has come to be used more commonly in Australia after cases like that of 7-Eleven where systemic and deliberate underpayments of vulnerable workers was found. Of note, in that case, existing mechanisms were used to uncover and remedy this conduct.

HIA rejects its use within an industrial context.

As noted in the submission from the OIR *"there has been a long-standing principle that criminal law has no place in an industrial context"* and such a major departure from traditional civil remedy provisions relating to underpayment issues would require significant justification, which HIA submits is currently not available.

The offence of theft (whether that occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for theft and other criminal offences should only be instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.

Public policy, including workplace relations legislation should be focused on the actions of employers and employees in the workplace, including the fundamental duty to pay an employee what they are owed for the labour provided.

3. THE CAUSES OF UNDERPAYMENT

3.1 MISTAKE OR ERROR

In HIA's experience underpayments are generally a result of mistake or error. The Terms of Reference fail to acknowledge this.

For example, recent media articles about instances of the incorrect calculation of overtime[1] and underpayments due to payroll errors[2] by employers were not the result of a deliberate attempt to underpay staff and were remedied once the issues surfaced.

In HIA's experience where underpayments are identified and an employer is made aware and agrees that an underpayment has occurred an employer moves to remedy the situation.

[1] http://www.abc.net.au/news/2017-04-04/george-calombaris-apologises-after-restaurant-staff-underpaid/8412852
[2] https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m

The unsupported observation made by the OIR that *"mistakes identified by the FWO have consistently favoured employers"* would seem to be largely irrelevant, but would accord with the Fair Work Ombudsman's (FWO) educative compliance role (further detail below). The primary objective in the determination of a claim for underpayment is to ensure that the employee is paid correctly, favouring neither party.

The equally facile observation that *"genuinely innocent errors would be expected to include some proportion of overpaid employees. The absence of any evidence that widespread overpayments cast a certain amount of doubt over claims of inadvertent underpayments"* in no way assists this inquiry.

Firstly, why would an employee report an overpayment? If an employer is overpaying their employee it is likely they are either unaware and therefore would not take action to remedy or that these payments are made as a result of a deal struck between them.

Secondly, the ability at law to 'remedy' an overpayment i.e. to reduce an employee's wage is fraught with uncertainty for employers.

One key risk for employers is that generally a reduction in an employee's remuneration may be seen as a breach of contract and while parties can agree to do so, it would be unusual for an employee to genuinely agree to such an arrangement. A reduction in pay could also be seem as a constructive dismissal and lead to the risk of an unfair dismissal claim.

This was the outcome for the employer in the case of *Owens v Allied Express Transport Pty Ltd*[3].

In that case, the employer and employee agreed that the employee would work in a less difficult role as the employee was pregnant. However, when the employer informed the employee that there would be a significant reduction in salary for the new role, the employee refused to agree, and regarded herself as having been dismissed. This was found to constitute a termination of employment at the initiative of the employer opening the employer to an unfair dismissal claim.

Equally problematic is the situation in which an employer is accidentally overpaying an award covered employee. In such situation the FWO advises that *"if the repayment can't be agreed an employer should get legal advice."*[4]

Clearly, a lack of reported overpayments says nothing about the prevalence of errors or mistakes in relation to underpayments.

3.2 Complexity of the Current Workplace Relations Framework

The Terms of Reference fail to consider the impact of the current workplace relations framework on the underpayment of wages.

To say that the current framework is complex is an understatement. Employers in the residential building industry must comply with the safety net as set out by:

- The National Employment Standards under the *Fair Work Act 2009* ;
- The Building and Construction General Onsite Award 2010 (Onsite Award)[5]; and
- Individual Flexibility Agreements or Enterprise Agreements.

While employers must seek to understand how these different instruments interact, the complexities do not end there. Interpreting and applying modern awards also presents a number of challenges, as did

[3] [2011] FWA 1058
[4] https://www.fairwork.gov.au/pay/deducting-pay-and-overpayments
[5] The Onsite Award is one of several Awards that may apply

the determination of the terms and conditions of employment that applied to Queensland apprentices and trainees up until recently.

(a) Modern Awards

Most employers in the residential building industry are covered by the Onsite Award.

The Onsite Awards presents a set of complicated and complex provisions, running at over 100 pages, that are not reflective of flexible and modern work practices and are incredibly difficult for small businesses to understand and apply.

Notably, Fair Work Commission (FWC) president Iain Ross has observed that the Award system, and language used within those awards, can be "tortuous".[6]

The FWC has also engaged in a plain language redrafting exercise of all Modern Awards, specifically research done by Sweeny Research found that small businesses view Modern Awards as:

- *"Convoluted... Too long and unwieldy, suggesting a time intensive and difficult process.*
- *Complex... The language was difficult to understand, with 'legalese' and jargon.*
- *Ambiguous... Information provided was not clear, requiring too much interpretation.*
- *Of questionable relevance... Difficult to identify which award was most relevant when employees' roles varied and did not clearly fit into a single industry.*
- *Not for them... Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability."*[7]

In addition, issues of potential overlap between the coverage of modern awards, difficultly determining rates of pay and redundancy provisions at odds with the commonly accepted notion of 'redundancy' provide fertile ground for inadvertent underpayment wages.

Cross coverage issues - paying under the incorrect award

Confusion as to the appropriate award coverage can cause payment errors.

During award modernisation the Australian Industrial Relations Commission (AIRC) was directed to *'create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate.'*[8]

This was a significant shift in approach and in contrast to pre-reform awards rather than being clearly bound to an award, as a respondent (or within a class of respondents), employers are now required to determine the appropriate award coverage:

> *"Rather than using a concept of parties being 'bound' to awards…adopt two new key concepts which better reflect the new modern workplace relations system. These are:*
> - *That an instrument covers an employer and employee or organisation; (that is they fall within the scope of the instrument); and*
> - *The instrument applies to the employer and employee (that is, the instrument that actually regulates rights and obligations)"*[9]

[6] http://www.abc.net.au/news/2018-06-06/iain-ross-industrial-award-system-language-set-to-become-simpler/9833026
[7] Citizen Co-design with Small Business Owners (13 August 2014) Pg.6
[8] Award Modernisation Request 28 March 2008
[9] [2008] AIRCFB1000 at paragraph 12

This approach has caused uncertainty for employers operating across industries who engage employees across a variety of trades and who may be covered by more than one modern award, for example for those businesses carrying out both on and off-site work, determining the appropriate award to derive employment conditions from can be extremely difficult.

To that end, there are similarities between the occupations and classifications contained within the *Timber Industry Award 2010* (Timber Award), the Onsite Award and the *Joinery and Building Trades Award 2010* (Joinery Award).

There are classifications that provide coverage for the following occupations in the Joinery, Timber and Onsite Award:

- Joiner
- Machinist
- Carver
- Special class trade

In light of this, disagreements can arise in relation to the most appropriate award coverage. Unsurprisingly, each award contains different employment conditions, including different rates of pay resulting in potential underpayments by virtue of a change in award coverage.

Rates of Pay

The calculation of a rate of pay under the Onsite Award is a complex matter.

The minimum rate of pay as prescribed by the award is rarely the actual rate of pay an employee is entitled to, in fact at a minimum there are at least 12 variables that influence the actual amount an employee is paid.

Under the Onsite Award an employee's rate of pay depends on whether the employee is:

- Engaged as a daily hire, weekly hire, or casual employee; and
- Which of the following are applicable (some of which are compulsory):
  - clause 19.1—Minimum wages;
  - clause 21.1—Special allowance;
  - clause 21.2—Industry allowance;
  - clauses 20.1—Tool and employee protection allowance;
  - clause 21.3—Underground allowance;
  - clause 21.11—Air-conditioning industry and refrigeration industry allowances;
  - clause 21.12—Electrician's licence allowance; and
  - clause 21.13—In charge of plant allowance.

An employer must determine if each allowance is applicable in order for it to form a part of the employee's actual minimum rate of pay.

Further, some allowances are payable for 'all purposes' of the award, and will be payable when for example, an employee works overtime, but some are not. Finally, the Onsite Award contains a range of other skill, expense and disability allowances that, depending on the circumstances, an employer will be required to pay, potentially changing an employee's rate of pay on a daily basis.

Redundancy pay in the residential building industry

The Onsite Award provides that a redundancy exists if employment ceases for any reason other than misconduct or refusal of duty, this includes if an employee resigns.

This is at odds with the definition of redundancy under the National Employment Standards which occurs when employment ends because the employer has determined that the employee's job no longer exists, is not needed or if the employer becomes insolvent or bankrupt.

Further, small businesses are exempt from paying redundancy under the NES, however under the Onsite Award they are not.

The NES reflects the ordinary and commonly accepted meaning of 'genuine redundancy' as devised by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Case (the 'TCR Case').

In the TCR case it was made clear that the right to redundancy referred to situations caused at the initiative of the employer, whether directly as a result of technological change or company restructuring or indirectly because of insolvency or liquidation. This was again confirmed in the 2004 Redundancy Case in which it was stated that the intended operation of severance pay was primarily directed at ameliorating the 'inconvenience and hardship' of sudden job loss and compensation for non-transferable credits.

However, the construction industry through the Onsite Award has its own (and much broader) definition.

This means that an employer is obliged to pay severance whether the employee is terminated by the employer, resigns, retires, loses a required qualification, becomes totally incapacitated for work, dies or is retrenched (just to name a few scenarios).

This is a significant complexity faced specifically by the residential building industry within the current workplace relations framework that could result in an unintentional underpayment.

(b) Queensland Apprentices

Up until recently employers in Queensland were faced with a complicated arrangement to determine the wages and conditions of apprentices and trainees engaged in Queensland.

On advice from the FWO it was understood that despite award modernisation and the transition to Modern Awards, the terms and conditions of employment for some Queensland apprentices and trainees within the building industry (and other industries) continued to be derived from state based awards.

In practical terms this arrangement meant that employers were required to carry out a complicated assessment of their business and employment history in order to determine whether the Modern Award applied or whether the *Building Construction Industry Award - State 2003 (AN140043)*, the *Order - Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* and the Order made by the Queensland Industrial Relations Commission on 19 June 1998 regarding the Supply of Tools for Queensland Apprentices applied.

The following is an overview of a set of questions that were used to determine which instrument applied:

1. Is the apprentice based in QLD?
2. Is the business a constitutional corporation?
3. Did the business employee employ any employees under a state award immediately before 1 January 2010?
4. Did the business employ any of the following immediately before 1 January 2011: an apprentice under the state award; or a trainee on any traineeship with competency based wage progression under the state award?

5. What was the employee's applicable pre-modern award:
    a. Building Construction Industry Award - State 2003 (AN140043);
    b. Civil Construction, Operations and Maintenance General Award - State 2003 (AN140061);
    c. None of the above

Employers required a great deal of assistance to calculate the rates of pay for Queensland apprentices and trainees.

It is unreasonable to refer to employers who, due to the complicated system demonstrated above, inadvertently underpay their staff as having engaged in 'wage theft'. Attaching criminal intent to such matters will not result in increased compliance or less underpayments. In HIA's view resources are better spent on simplifying the workplace relations framework, improving resources and increasing education.

3.3 Sham Contracting

Sham contracting is identified in the Terms of Reference as a form of 'wage theft'. HIA disagrees with this characterisation. Sham contracting is a stand-alone offence and should not be conflated with notions of 'wage theft'.

The concept of sham contracting is found in the "sham arrangement" provisions of the Act (ss.357-359), which is where an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

These provisions prohibit an employer from:

- Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (s.357(1)).
- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (s.358).
- Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (s.359).

Under subsection 357(2) a defence is available to an employer if at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship i.e. whether contract was a contract of employment.

Failure to comply with the sham arrangement provisions attracts potential penalties of up to $51,000 per breach for corporate entities and up to $10,200 per breach for involved individuals.

Sham contracting should not be confused with legitimate contracting arrangements or circumstances where an employee has been misclassified as a contractor, i.e. there is no intent to enter into a sham.

HIA considers that the current provisions provide sound and effective protections measures against sham contracting. Where convicted of sham contracting significant penalties apply.

In recent years, significant penalties have been levied against a number of companies found to be in breach of the law.[10]

4 EXISTING RESPONSE TO UNDERPAYMENT

In HIA's view the current regulatory framework for responding to the underpayment of wages is appropriate.

4.1 CURRENT LEGAL FRAMEWORK

The Fair Work Act

As outlined within the submission of the OIR under the Act the underpayment of wages is a civil offence and penalties can be imposed for being found to have carried out such actions. Recent amendments to the Act have significantly increased penalties for the underpayment of wages where the actions are deliberate and systemic.[11]

Process for Wage Recovery

In contrast to the submission of the OIR there are a range of options for employees to recover unpaid wages.

Firstly, the FWO offers free services to employers and employees to assist with compliance with workplace laws. The FWO also assist to mediate disputes. In 2016–17, the FWO resolved 25 332 workplace disputes through their dispute resolution services, most within an average of seven days.[12]

Further the FWO assisted over 700 people to pursue their small claims (less than $20,000) directly before the courts in 2016–17. The courts awarded more than $975 500 to 171 applicants.[13]

Secondly, where questions about entitlements arise, the Fair Work Commission has power to hear disputes about the NES, Awards and enterprise agreements.[14]

The FWC annual report for 2016-2017 indicates that there were a total of 1940 applications for the FWC to deal with disputes.[15]

Finally, matters that remain unresolved can be heard by the Federal Court. The court also maintains a specific small claims list.

Labour Hire Licencing Law

The recently commenced *Labour Hire Licencing Act 2017* (LHLA) will provide the OIR with the ability to investigate the underpayment of wage. HIA understands that through the appointment of current OIR inspectors as inspectors under the LHLA they will assist the recently formed Labour Hire Licensing Compliance Unit in enforcement and audit activities. Section 47-84 of the LHLA provide broad powers to enter any premises, request any document and require occupier to provide 'reasonable help'.

Further, in determining to issue a licence any information deemed relevant to the application can be requested and the applicant must pass the fit and proper person requirements which requires

[10] See for instance http://www.fairwork.gov.au/about-us/news-and-media-releases/2013-media-releases/july-2013/20130729-happy-cabby-penalty and http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/march-2015/20150302-global-penalty.

[11] *Fair Work Amendment (Protection of Vulnerable Workers) Act 2017*

[12] https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/assisted-dispute-resolution-services

[13] ibid

[14] Part 6-2 of the *Fair Work Act 2009*

[15] Fair Work Commission, 'Access to Justice' Annual Report 2016-2017, page 68

compliance with 'relevant laws' which includes the Fair Work Act. The granting of a licence requires ongoing compliance with all relevant laws.

The LHLA will provide the OIR with extensive scope to investigate labour hire companies, impact their ability to operate and refer any behaviours they believe, or suspect to be in breach of any relevant laws.

The ability to investigate underpayments within labour hire companies in Queensland already exists to the extent provided by the LHLA.

4.2 Role of The Fair Work Ombudsman

Under the Act, the FWO is empowered to promote:

> *"…harmonious, productive and cooperative workplace relations"* and *"compliance with this Act and fair work instruments" including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;*
>
> - *to monitor compliance with this Act and fair work instruments;*
> - *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*
> - *to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;*
> - *to refer matters to relevant authorities;*
> - *to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument."*

Recently the FWO has taken a more transparent and proactive approach. A range of high profile cases that have highlighted systemic breaches of workplace relations laws have, in HIA's view established the FWO as the 'cop on the beat'.

However, the FWO can always improve their performance in relation to their key deliverables of advice, and assistance and would consider that an examination of the role of the FWO in order to provide further dispute resolution processes or mediation outside court processes a worthwhile exercise.

It is of some concern that their resources have changed over time. It is of note however that despite the decrease in the FWO's compliance budget from the year 2015-16 to 2016-17, the wages recovered and penalties imposed significantly increased.[16]

For the residential building industry the introduction of measures tailored for small business, including a dedicated small business InfoLine and the release of a range of guides and resources specifically for small business are certainly steps in the right direction. These resources will assist employers comply with the workplace relations obligations. According to their latest annual report the Small Business Helpline took 100,677 calls.[17]

Wages queries are the most common matter dealt with by the FWO. During 2016-17 the FWO Pay and Conditions Tool generated over 10 million pay rate calculations, providing an average of 90,000 calculations per month. Building and construction was amongst those commonly accessed information.[18]

[16] OIR Response to Committee Request at pg.8
[17] Annual Report at pg.15
[18] FWO and ROC Annual Report 2016-17 at pg. 15

HIA notes that during 2016 – 2017 the construction industry accounted for 15% of the FWO Infoline calls.[19]

In the past HIA has suggested that there would be significant value in the FWO Infoline having industry/occupational divisions for the handling of queries, given the specific complexities in the residential building industry.

This approach would enable callers to access FWO practitioners who are well versed in their respective industry and occupational award issues and complexities and would assist in the provision of quick, consistent and reliable advice and aid in preventing the underpayment of wages.

4.3 Role of Industrial Organisations

Both employer organisations and trade unions currently play a role in assisting their members comply with the law and seek recourse where those laws may have been breached.

For example, HIA members can access advice and assistance across a range of workplace relations matters including in relation to rates of pay.

However, HIA opposes any suggestion that trade unions be given any further powers to respond to breaches of workplace laws.

The submission of the OIR that suggests that *"One potential way then to support workers and improve oversight of employers is to improve the ability of workers to access the support of their union in their workplace"* is misconceived.

Firstly, in HIA's view businesses are currently subject to expansive rights of entry for unions. The current union right of entry provisions are not only adequate but they go well beyond what is considered appropriate.

Secondly HIA opposes any suggestion that it is appropriate that a trade union fulfil the role of a regulator.

A statutory authority should be the only entity capable of enforcing the law. In contrast to a trade union such bodies can be held accountable for their actions and are required to be transparent in relation to their conduct.

Part 3.4 of the Act gives union officials conditional rights to enter workplaces during working hours.

Permit holders can exercise their entry rights to:

- Investigate alleged contraventions of the Act or a fair work instrument (for example, a modern award or enterprise agreement) (s. 481).
- Hold discussions with employees during mealtimes and other breaks (s. 484 and s. 490).
- Perform inspections under state and territory workplace health and safety laws (s. 494).

When entering a workplace, a permit holder must give written notice of at least 24 hours but no more than 14 days before the intended visit, unless the FWC agrees otherwise. Where there is a suspected breach of the Act or a fair work instrument, a permit holder can:

- inspect any work, process or object that relates to the breach;
- interview any person related to the suspected breach, if the person is:
    - entitled to be represented by the union; and

[19] Annual Report pg.16

    - willing to be interviewed;
- meet with employees if the employees are:
    - entitled to be represented by the union; and
    - willing to meet the union;
- access records relating to the breach.

Unions are able to enter work sites without union members or coverage of an enterprise agreement and without an invitation from workers or management because there is at least one person on site who is 'eligible' to be a member under the union's rules. These provisions may result in unnecessary disruption on sites where there are no union members and inappropriately supports membership recruitment drives.

2013 amendments to the Act further expanded unions right of entry[20] so 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.

All employees, irrespective of whether they wish to be interviewed or participate in discussions with the union can be exposed to such discussions during their meal break.

In light of the current regulatory arrangements the requirement that a trade union provide 24 hours notice before entering a workplace is entirely appropriate.
The presence of a union on a construction site can be incredibly disruptive, as observed in the Final Report of the Productivity Commissions review of the Act:

> *"Employee representatives can impose significant burdens and costs on employers by exercising rights of entry very frequently, due to:*
> - *the need to prepare and document the visit;*
> - *the need to escort the permit holder around the worksite, particularly where workplaces have high health and safety risks; and*
> - *disruptions to the performance of work by employees."*[21]

Statutory authority's such as the FWO, an independent non-partisan bodies, are the appropriate entities to take action regarding underpayments. HIA sees little positive correlation between improvements in the underpayment of wages or the 'eradication' of wage theft, through greater union involvement.

5 CONCLUSION

HIA considers that:

- The concept of "wages theft" has been greatly exaggerated by implying that all underpayment of wages is "theft";
- The complexity of the current workplace relations framework and in particular the Modern Awards applicable to the residential building industry are a major contributor to underpayment that in no way should be construed as theft; and
- The existing regulatory remedies for underpayment are very adequate.

[20] *Fair Work Amendment Bill 2013*
[21] At pg. 906