HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Standing Committee on Education and Employment

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

11 November 2022

HOUSING INDUSTRY ASSOCIATION

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.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

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 the manufacturing, supply and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

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."*

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 18 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. EXECUTIVE SUMMARY

On 27 October the Senate referred the provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Bill) to the Standing Committee on Education and Employment for inquiry and report.

HIA provides this submission in response to the Bill.

The measures outlined in the Bill are broad-ranging with many describing the Bill as representing the most significant reforms to the workplace relations framework since the introduction of the *Fair Work Act 2009* (FWA). As such, the Bill demands detailed consideration and interrogation, yet the time frame allocated for the consideration of this complex and lengthy Bill is simply inadequate.

Stakeholders have had a mere 2 weeks to consider the Bill prior to the lodging of these submissions and this Committee has been afforded less than one week to consider submissions on a Bill. With the Government appearing committed to pushing the legislation through Parliament over the remaining sitting weeks before Christmas, HIA strongly suggests that the Committee recommend that the Bill, in its current form, not be passed or that aspects of the Bill be deferred to ensure more detailed consultation.

The Bill implements policies foreshadowed by the Government in its pre-election Secure Australian Jobs Plan policy as well as other priorities from the September Jobs and Skills Summit. Many of these measures could move ahead.

On the other hand, significant changes to the enterprise bargaining framework that would introduce compulsory multi-employer bargaining and arbitration were unexpected and without further scrutiny and change should not progress.

The expansion of compulsory multi-employer bargaining is an unacceptable measure that could jeopardise the effective operation of the residential building industry noting that, under the Bill:

- Businesses in the same industry, same area or subject to the same regulation could be compelled to bargain and become subject to a 'one size fits all deal'.

  Productivity gains and competitive outcomes are achieved through tailored workplace arrangements based on the needs of individual businesses and their employees, not the appropriation of terms and conditions to other workplaces.

- The proposed changes 'sidestep' the current prohibition on pattern bargaining, which remains prevalent in the building and construction industry.

  Pattern bargaining has been outlawed since 2006 and this limitation was retained by the Rudd Government when the FWA was being developed. Conduct, or conduct of a similar nature must remain prohibited.

- Businesses, including those in the residential building industry that operate largely outside the current enterprise bargaining arrangement could easily be roped into multi-employer agreements on the satisfaction of broad and nebulous criteria.

- There is a real risk of multi-sector or industry wide industrial action. There is a reason why industry wide industrial action has been prohibited and this prohibition must be maintained. The adverse impact of such activity on productivity and the economy more broadly is well understood and has been widely reported on.

In addition to the proposed changes to the enterprise bargaining framework, HIA's submissions focuses on the following aspects of the Bill:

- The abolition of the Australian Building and Construction Commission (ABCC)

HIA strongly opposes the abolition of the ABCC. Over many years the case for a stand-alone specialist statutory agency for the building industry has been made. A litany of royal commissions, inquiries and Federal Court decisions have continually highlighted a persistent and pervasive culture of industrial lawlessness in the commercial construction industry, particularly in relation to the conduct of the construction union.

The ABCC has been a proactive regulator, for example during 2020-21 the agency secured the issuance of 2 Code Ministerial exclusion sanction and the two highest personal payment orders to date[1].

Their work should not be cut short.

- Changes to the objects and the modern awards objectives in the FWA

The inclusion of 'job security' and 'secure work' in the Acts objectives and the modern awards objectives is of concern. These terms are ill-defined and raise a series of questions regarding how they may operate and apply. HIA is concerned that their inclusion may have adverse impacts on genuine independent contracting in the residential building industry and may jeopardise real life scenarios where people genuinely seek alternative forms of work arrangements.

- Prohibiting sexual harassment in connection with work

HIA supports appropriate actions being taken by the business community to address the risks of sexual harassment in the workplace. However, the complexity and societal nature of these issues, as well as the maintenance and expansion of overlapping regulatory frameworks, means a regulatory response that places a heavy responsibility for the management of these matters on business is not always appropriate. In fact, these steps may undermine recognition of the need for, and importance of, cultural change; a necessary component of reform in this area as emphasised in the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work Report).

[1] Australian Building and Construction Commission Annual Report 2020-21

A systemic and community wide change in behaviour is best achieved through education and support tailored to the needs of, and risks prevalent in, particular industries or community cohorts. A 'one-size-fits-all' approach through the industrial relations framework is inappropriate and duplicative.

- Flexible Work

Employers and employees should have the ability to discuss and determine flexible work arrangements that suit the needs of both the individual and the workplace.

The current provisions appear to be working, with most of these matters resolved at the workplace level. On this basis there does not appear to by a solid justification for the proposals in the Bill which would increase the regulatory burden associated with responding to these requests or allowing arbitration of such matters.

- Government amendments to the Bill

On 9 November the Government moved extensive amendments to the Bill. Noting that this Bill is currently 'in flux' these amendments do not dissuade HIA from its positions as set out in this submission. Further, the moving of substantive amendments sends a signal that the Bill, in its original and amended form, is not fit for purpose.

Notwithstanding this, Section 4 of the submission provides comments on two aspects of those amendments including the proposed amendments to single interest employer authorisations and the National Construction Industry Forum.

2. THE RESIDENTIAL BUILDING INDUSTRY

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 contributing over $100 billion per annum to the economy and accounts for 6.9 per cent of Gross Domestic Product.

The residential building industry includes detached home building, low, medium and high-density multi-unit housing developments, home repairs, renovations and additions, along with the manufacturers and suppliers of building products and related building professionals. The industry has important linkages with other sectors, such as manufacturing, finance, real estate, and retailing, meaning its impacts on the economy go well beyond the direct contribution of construction activities.

The industry contributes to the economy in a number of ways providing hundreds of thousands of Australians with jobs, generating billions of dollars of economic output each year and stimulating spending on housing services. Specifically, it is estimated that the residential building industry engages over 1 million people representing tens of thousands of small businesses and over 200,000 subcontractor businesses reliant on the industry for their livelihood.

The reliance on the use of subcontractors in the residential building industry, in particular the detached housing and renovation markets, is unique.

By contrast, in commercial construction, whilst there are a large number of subcontracting firms, the overwhelming majority of those working are actually employed by these subcontracting firms. Further subcontracting occurs only in specialist areas.

The flexibility of the subcontract system and the highly competitive nature of the residential building industry have interacted to secure a high degree of efficiency and productivity for many decades.

There are around 25 different trades involved on-site in the building of a house. These trades are on-site for short periods of time, interacting with other trades in an ad hoc manner with respect to overlaps of time and direct interactions to undertake work tasks.

The familiar ones are of course concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. Others include the contractor who pegs out the site, backhoe operators, drainers, termite system installers, plasterboard fixers, plasterers, floor tilers, glaziers, kitchen installers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer.

Central to the notion of subcontracting arrangements and the use of independent contractors is that the contractor is running their own business, which is generally a small or micro business. This means that the way those contractors operate can be diverse.

To support this diverse and unique industry the workplace relations framework should be based broadly based on five key principles:

- The workplace relations system should be simple, flexible and establish a fair minimum standard.
- Businesses must have the confidence to hire.
- Business must be protected from unlawfulness and business should be free to operate without fear of union interference.
- Employers and employees should have the ability to individually bargain to attain genuine flexibility.
- Independent contractors should be regulated by commercial law not workplace relations law.

There are many instances where the Bills provisions stand at odds with these principles and in fact move the industrial relation system to further diverge from this approach. This is of concern and may adversely affect the residential building industry.

3. RESPONSE TO THE BILL

3.1 ENTERPRISE BARGAINING

The Bill proposes several changes to the enterprise bargaining framework.

Some were foreshadowed by way of actions arising from the Jobs and Skills Summit. Specifically, immediate actions included:

- Ensuring workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements.
- Allowing businesses and workers who already successfully negotiated enterprise level agreements to continue to do so.
- Giving the Fair Work Commission (FWC) the capacity to proactively help workers and businesses reach agreements that benefit them, particularly new entrants, and small and medium businesses.

Others were not.

Critically, the measures proposed by Part 21 of the Bill, being the expansion of the single interest employer authorisation stream were not a part of these immediate actions, nor any longer-term proposals.

HIA strongly opposes this Part of the Bill.

Of note, an October Productivity Commission (PC) 5-year Productivity Inquiry interim report foreshadowed the need for a cautious approach with respect to these matters stating that:

> *'…any changes to the FW Act to increase the use of multi-employer and industry/sector wide bargaining are likely to have uncertain implications for productivity (depending largely on the approach taken) and should be undertaken with caution and be subjected to detailed, rigorous and transparent analysis'*
>
> *In the extreme, multi-employer agreements could morph into industry-wide agreements, undermining competition across industries, weakening the growth prospects of the most productive enterprises in any industry, and creating wage pressures that cascade into other industries.*
>
> *Given that industrial action is the most important source of leverage for employee bargaining, the overall level of industrial disruption could also be expected to increase.*[2]

HIA urges the Committee to take note of the PC's warnings.

[2] 5-year Productivity Inquiry: A more productive labour market, Interim Report No. 6, PC, October 2022, pages 62-63

HIA also has significant concerns with amendments that would give the FWC additional discretion and power.

Multi-employer bargaining – Single Interest Employer Authorisation

The Explanatory Memorandum accurately describes how the current single interest employer authorisations operate, specifically that they are available to franchisees and employees who have obtained a Ministerial declaration based on meeting specified criteria regarding their common interest and may include, for example, schools in a common education system.

What is proposed represents a significant departure from these arrangements, specifically:

- The FWC may authorise the proposed single interest employer agreement, as opposed to them requiring Ministerial approval.
- The current 'common interest' test will be replaced. Under the new test, factors that 'may' be relevant to a common interest include 'geographic location', 'regulatory regime' or 'the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises'. No other factors are defined.
- The FWC must be satisfied that a 'majority' of employees wish to be covered by the agreement. It would appear that this is an overall majority of employees across all of the businesses subject to the authorisation. Under the proposal, the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.
- The FWC must also be satisfied that it is not against the public interest to make the authorisation.
- Protected industrial action can be taken during bargaining under this stream.
- Once entered into, these agreements can be varied to add employers or employees on the basis of satisfying the same criteria as set out for securing an agreement (i.e. common interest and majority support).

In essence these proposed changes:

- Compel employers to bargain.
- Facilitate pattern bargaining, side stepping the current prohibition.
- Have the potential to lead to industry wide industrial action.

The proposed changes could also see the low-rise detached/cottage/domestic sector of the residential building industry being 'roped in' to multi-employer bargaining. This would have serious economic consequences not only for industry participants but homeowners simply looking to get their dream home built or renovation project completed.

HIA strongly opposes any moves that could lead to these outcomes.

- Compelled to bargain

Much of the current multi-employer bargaining framework operates on a voluntary basis. This is a critical component of a number of elements that underpins bargaining including that such

bargaining occurs in good faith and results in better outcomes for employers and employees. The only circumstance under which orders compelling an employer to bargain can be made are when the conditions of a low-paid authorisation are met.

The changes proposed significantly diverge from this approach.

The amended common interest test, along with the lack of clarity regarding the test to determine if there is a majority of employees in support of bargaining, means that employers could be compelled to bargain. Further, the imposition of a reverse onus regarding the consideration of the public interest provides no limit on the reach of this proposal.

Common interest test

Under the Bill the expansion of the 'common interest test' will mean that employers, particularly employers in the building and construction industry, will be easily captured.

Further, the test stands in stark contrast to the current test required for Ministerial authorisation under which the Minister must take into account the following when deciding whether or not to make a declaration:

- the history of bargaining of each of the relevant employers,
- the interests that the relevant employers have in common and the extent to which those interests are relevant to whether they should be permitted to bargain together,
- whether the relevant employers are governed by a common regulatory regime,
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees,
- the extent to which the relevant employers operate collaboratively rather than competitively,
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth or a state or territory, and
- any other matter the Minister considers relevant.

The Explanatory Memorandum to *Fair Work Bill 2008* specifically identified categories of employers that may be considered for a Ministerial declaration, including:

- public hospitals that are technically distinct employers, but have a high degree of coordination and common employment arrangements,
- schools which share common employment arrangements and a common funding source and arrangements, and
- school councils or parents and friends associations that are technically separate employers but who may employ additional staff to work within a single public school system[3].

What is proposed will extend well beyond those groups originally intended to be captured and raises a number of questions in respect of the test proposed by the Bill. For example:

[3] Paragraph 1041

- What is meant by a common 'geographical location'? Could that be that the business is located in the same state? The same suburb? In respect of the building and construction industry specifically is the requirement a reference to the geographical location of the building site, or the businesses head office?

  Could residential and commercial building companies operating in the same state be compelled to bargain together, notwithstanding that their way of operating is very different? Specifically, and as outlined above, the use of independent contracting arrangements in the residential building industry as opposed to predominant use of employment arrangements in the commercial sector means the impact of such an approach would have unintended consequences.

  What about a roof truss manufacturer and a residential builder operating in the same region? Could they be compelled to bargain together? They both service the building and construction industry?

  Could residential builders operating across the same suburb be compelled to bargain, notwithstanding they have nothing else in common?

  The breadth of this test is potentially limitless.

- What is meant by a common 'regulatory regime'? Could this capture work, health and safety laws, or is this limb intended to operate on the basis of a specific regulatory regime that may apply just to certain businesses?

The proposed test is a much-truncated version of the current requirements.

A notable omission is the current requirement to consider the competitiveness of the relevant employers. Could this mean that businesses, in the highly competitive residential building industry that operate in the same state could be compelled to bargain and their employees become subject to the same terms of and conditions of employment?

The existing skills shortages within the industry give the upper hand to skilled trades who can demand market rates for their labour. Capturing those arrangements will adversely affect productivity and overall competitiveness.

Public interest

The Explanatory Memorandum states that the requirement to consider the public interest would:

> *'provide the FWC with scope to consider all the relevant circumstances and the broader public interest of making the authorisation. For example, the FWC could consider the broader economic ramifications of making the authorisation. The public interest would be likely to favour the making of an authorisation that inhibit a 'race to the bottom' on wages and*

conditions while discouraging the making of an authorisation that could adversely affect competition on the basis of quality and innovation' [4]

Despite this comment it is largely unclear how a party would demonstrate that an authorisation is not contrary to the public interest.

Determination of a 'majority'

In order to issue an authorisation, the FWC must be satisfied that a majority of employees who are employed by the employer and who will be covered by the agreement want to bargain with the employers that will be covered by the agreement. Further, the Bill provides that the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

The lack of clarity regarding how this majority is calculated is problematic.

Is this a majority of employees of each employer proposed to be subject to the authorisation or a majority of employees across all of the employers proposed to be subject to the authorisation?

As the Bill currently reads, only a majority of employees across all businesses subject to the authorisation is required. In practice this could mean that there are employees at businesses who do not support the authorisation, but their voice is drowned out by this approach. This is not only unfair and inappropriate but surely at odds with the fundamental notion of bargaining.

Equally, it would seem inappropriate that the FWC could determine that a different method to determine a majority is appropriate in respect of different authorisation applications.

- Facilitating pattern bargaining

The proposals in the Bill will invariably lead to pattern bargaining, a method of bargaining that is currently prohibited and represents a longstanding blight on the building and construction industry, and is a direct drain on productivity.

Pattern bargaining describes the actions of unions whereby they seek common wages or conditions in two or more agreements with two or more employers under an enterprise agreement. Where superior entitlements have been secured at one workplace, unions use that example to demand the same entitlements from another employer.

HIA strongly opposes pattern bargaining.

These one-size fits all agreements are routinely forced on employers and employees by unions with no real opportunity to negotiate. Such agreements can result in increased costs with little or no productivity growth.

[4] Paragraph 1023 pg. 180

The notion of 'pattern bargaining', which is often presented to an employer on a "take it or else" basis, impose terms and conditions that have specifically been negotiated based on the needs and bargaining position of the head contractor's workplace who sits at the top of the contractual chain. This undermines the principal purpose of an enterprise agreement, that is, an agreement which is negotiated based on the specific circumstances of an employer and their employees. Instead, this approach imposes the default bargaining position of the union on all parties down the contracting chain on to those who are largely ill-equipped to manage it.

The notion of pattern bargaining also neglects to consider the competitive environment in which small businesses operate, particularly considering that the effects of employment regulation and wage increases are strongly felt by these small businesses. They have a much more limited capacity to absorb wages increases and the subsequent effects on employment on-costs such as workers compensation, superannuation and payroll tax.

As highlighted by the FWBC head Nigel Hadgkiss:

> *'…there are plenty of ways in which these agreements (pattern agreements) restrict efficiency and flexibility – for example, industry-wide RDOs, shutdown weekends and restrictions on using subcontractors and labour hire…These clauses reduce productivity and stifle competition and need to be consigned to the past where they belong.'*[5]

Under the FWA, a course of conduct is pattern bargaining if:

- the person is a bargaining representative for two or more proposed enterprise agreements; and
- the course of conduct involves seeking common terms to be included in two or more of the agreements; and
- the course of conduct relates to two or more employers[6].

However, the FWA does not prevent bargaining representatives from making common claims and engaging in pattern bargaining (according to the ordinary understanding of that term) provided they are 'prepared to genuinely reach agreement with each individual employer.'[7] Despite this attempted limitation, pattern bargaining remains a prominent feature of bargaining in the building and construction industry.

HIA sees that these same circumstances will arise if the proposed single interest employer authorisations as set out in the Bill were to proceed. For example, the ability to vary a single interest employer agreement to include additional employers on the basis of satisfying the same tests, as was the basis for the initial authorisation, will allow for the same agreement to apply across a broad range of businesses.

[5] Nigel Hadgkiss, Director, Fair Work Building and Construction, Address to the MBAV (March 20, 2014).
[6] s.412(1) of the FWA.
[7] s.412(2) of the FWA, and Cooper, R and Ellem, B, (2009) *Fair Work and the Re-regulation of Collective Bargaining*', 22 Australian Journal of Labour Law 284 [48].

- Industrial Action

The ability of employees to take industrial action through the single interest employer authorisation stream has been retained.

By broadening the types of employers that can be covered by this stream the Bill significantly increases the risk of multi-sector and industry wide industrial action.
Changes that could result in outcomes of this nature cannot and should not be permitted. History shows the widespread economic damage caused by industry wide stoppages, notwithstanding that industry-wide industrial action has never been lawful in Australia. Since 1993, there has been a right to take industrial action pursuit of an enterprise agreement, but there has never been a right to take industry-wide industrial action.

For the building and construction industry, the costs of industrial action cannot be underestimated.

Historically, the low-rise detached/cottage/domestic sector of the residential building industry has not been a source of illegal industrial disputation to the extent suffered by the civil and commercial construction sectors. This is in part due to the engagement of specialist contractors by builders, the relatively small scale of construction for single, detached dwellings, the relatively short construction phase, and the limited union membership across the industry.

However, for infill/medium and high-density residential developments, construction costs represent the largest component of overall costs by a considerable margin. Costs are much less elastic than on residential projects.

A range of industrial relations matters typically drive up commercial construction costs:

- days lost because of industrial action;
- use of WH&S issues for industrial purposes;
- inflexible inclement weather procedures;
- less working days per annum because of RDO provisions; and
- cost stemming from pattern bargaining (no ticket, no start).

If the Bill is passed in its current form, there is a real risk that the costs and circumstances currently faced by the commercial construction sector due to enterprise bargaining and industrial action will 'leak' into the largely 'untouched' and functional low-rise detached/cottage/domestic sector of the residential building industry.

Exclusion from multi-employer bargaining

The Bill proposes to introduce a prohibition on participation by 'a person' from being a bargaining representative for multi-employer agreements including the new single interest employer authorisation if they have *'a record of repeatedly not complying with the FW Act'* and that *'makes it inappropriate that they be a bargaining representative'*.

A 'person' can be excluded by the FWC if they have a finding of non-compliance by a court in the previous 18 months and, if so, the 'severity of the contraventions', the lack of action to rectify their behaviour and the 'culture' can be grounds for exclusion.

Noting HIA's overall opposition to the changes to multi-employer bargaining set out in the Bill, should the Bill proceed in its current form HIA is supportive of the inclusion of this provision.

Additional powers of the FWC

- Demonstrating 'genuine agreement'

The existing 'genuine agreement' requirements will be replaced with a 'statement of principles' that will enable to the FWC to exercise discretion as to whether processes to ensure employees have genuinely agreed were reasonable in the circumstances.

The 'statement of principles' will be issued by the FWC and will broadly cover:

- informing employees of the commencement of bargaining,
- informing employees of representation rights,
- providing reasonable opportunity for employees to consider the agreement,
- explaining the terms of the agreement,
- providing employees a reasonable opportunity for employees to vote in a free and informed manner,
- other matters considered relevant.

The FWC must consider the statement of principles when approving agreements.

While it appears that the intention of this change is to adopt an approach that will be less technical or prescriptive than the current approach, it does give the FWC significant discretion which is concerning.

- Better Off Overall Test (BOOT)

The Bill proposes to make significant changes to the BOOT to respond to long term concerns with its practical operation and effect.

In principle, HIA supports the proposals that would:

- remove the requirement to consider 'prospective employees', and
- ensure that, in applying the BOOT, the FWC make a 'global assessment' and only have regard to 'patterns of work or types of employment' that are 'reasonably foreseeable at the test time'.

In contrast, HIA is concerned that the FWC is being empowered to vary an agreement, on its own motion to 'remediate' its terms where employees are subsequently not better off, including if employees subsequently engage in 'other patterns or kinds or work or other types of employment'

which were not considered at the test time. This may cast a shadow of doubt over approved enterprise agreements.

3.2 Australian Building and Construction Commission

HIA acknowledges the long-standing position, and pre-election commitment of the ALP to abolish the Australian Building and Construction Commission (ABCC).

Equally, HIA has a long held position in support of a stand-alone specialist statutory agency for the building industry. HIA holds the strong view that the construction industry requires access to an independent body, which is able to quickly and effectively respond to unlawful activity on site.

Although the jurisdiction of the ABCC applied to the construction of 5 single dwelling houses or more, many HIA members work across both the commercial, public works and residential sectors. These include builders and developers of multi-unit apartments, mixed-use buildings and social housing sites. Additionally, many HIA trade contractors work for both commercial and residential builders.

The ABCC had been doing a sound and effective job of law enforcement, clamping down on unions and others for illegal industrial behaviour and right of entry breaches.

However, its work was far from finished. Aggressive and unlawful industrial action persists as an area of concern for the industry. The findings and serious body of evidence presented before the 2015 Heydon Royal Commission, the 2002 Cole Royal Commission and the number of cases determined by the FWC and the Federal Court demonstrate the need for building industry specific laws.

To quote Commissioner Heydon:

> *'the argument that there is no need for an industry specific regulator cannot be sustained.'*[8]

As identified in its final report, the *'systemic corruption and unlawful conduct'*[9] of the CFMEU is not new; over the last 40 years a number Royal Commissions have reported the same.

There is, according to Commissioner Heydon:

> *'a long standing malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that the CFMEU officials habitually show contempt for the rule of law.'*[10]

The building industry still needs an effective deterrent and enforcer of the rule of law.

It is also disappointing that no moves have been made to replace the ABCC with a dedicated construction industry regulator, as was the approach taken in 2012 at which time the Gillard Labor

[8] Chapter 8 at paragraph 97
[9] Chapter 8 at paragraph 1
[10] Chapter 8 at pparagraph 23

Government replaced the ABCC with the Office of the Fair Work Building Industry Inspectorate under the *Fair Work (Building Industry) Act 2012* (FWBC).

While HIA did not support the reduced remit of the FWBC, there remained some (limited) recognition of the need for a focus on the action of industry participants in the sector.

Charging the Fair Work Ombudsman (FWO) with sole responsibility for enforcing industrial relations laws in the building and construction is a flawed approach. Not only does it demote the status of a specialist statutory agency to that which is inferior to the ABCC in almost every respect including the removal of the examination notice regime and a number of prohibitions on specific conduct (such as picketing and coercion). Further, sole coverage by the FWA means that the maximum penalties for illegal misbehaviour are significantly lower.

These moves reduce the disincentives to engage in such behaviour and are being pursued despite the fact that current penalties are apparently insufficient to deter union misconduct[11].

HIA strongly suggests that the Committee recommend that should the Bill proceed, there remains a need for an industry specific regulator, with powers similar to, or the same as those held by the ABCC.

3.3 Objects of the Fair Work Act

Part 4 of the Bill proposes to introduce job security and gender equity into the objects of the FWA.

HIA notes that this proposal reflects both the Government's pre-election commitment and recommendation 16 of the final report of the Select Committee on Job Security.

HIA's comments are confined to the inclusion of the words:

- '*Promote job security'* into the objects of the FWA; and
- *'The need to improve access to secure work across the economy'* into the modern awards objectives.

In explaining the intention of these new objectives, the Explanatory Memorandum notes that:

> *'the reference to promoting job security recognises the importance of employers and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment'.*

HIA has two main concerns with the proposal:

- That these objects underpin matters for consideration across the workplace relations framework, for example, an amendment to the FWA might require they be considered.

[11] See for example ABCC Media Release 12 September 2022 *CFMMEU and representatives penalised $495,000 over work stoppages at Melbourne University Veterinary School project site*, ABCC Media Release 29 August 2022 Full Federal Court upholds ABCC appeal – imposes higher penalties, ABCC Media Release 5 August 2022 $114,000 in penalties ordered against CFMMEU and two officials after disrupting works on the Pacific Hwy upgrade

- The terms proposed are a 'term of art' as opposed to a common phrase with an 'ordinary meaning'.

Consideration of the objects (both the objects of the FWA and the modern awards objectives)

The objects of the FWA form an important part of the consideration of a range of matters and the weight the objects are given during these considerations is highly discretionary.

For example, during the four yearly review of modern awards, the modern awards objectives have been considered numerous times. The approach to the consideration of these objectives was recently set out in *4 yearly review of modern awards—Plain language—Shutdown provisions*[12].

The FWC has observed that:

> *[36] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account s 134 considerations. "Fairness" in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.*
>
> *[37] The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.*
>
> *[38] It is not necessary to make a finding that the modern award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives. In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in ss 134(1)(a)-(h) of the FW Act and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.*

What is meant by the proposed objects?

The meaning of the terms 'job security' and 'secure work' is uncertain, for example whether a job is 'secure' is inherently subjective. For example, such a view could depend on the circumstances faced by an individual, the income earned or even the flexibility offered by the arrangement. Further, to highlight 'job security' is to imply that there is job 'insecurity' which is also neither a legal term nor a clearly defined concept[13].

Broadly speaking, these terms have been used in connection with those operating in the 'sharing', the 'on-demand' or the 'gig' economy. HIA understands that there is growing concern in relation to

[12] 25 August [2022] FWCFB 161
[13] See Victorian Inquiry into the Labour Hire and Insecure Work, Background Paper, October 2015 pg.11

the treatment of those working in these 'new' economies. HIA sees that the current regulatory arrangements can (and have) appropriately respond to these alternative forms of work and that the need to amend the objects of the FWA and modern awards objectives to address these concerns is unnecessary.

Existing, well established legal and other arrangements apply to those operating across the Australian workforce. Irrespective of commentary otherwise, evolving case law confirms that those operating in the sharing economy (for example) can be satisfactorily classified as either 'employees' or 'independent contractors'.

An example of this was the shutdown of the Foodora business operations in Australia and the outcomes of its administration. Foodora was pursued, albeit after going into voluntary administration, by several regulatory authorities to determine the legal status of their workers, via Revenue NSW, Australian Taxation Office (ATO) and the FWO. Subsequently, Revenue NSW and the ATO determined that Foodora's workers were employees.

Another example of the use of the well-developed legal frameworks being applied to on-demand economy workers, involved Uber, and two unfair dismissal cases.[14] In both cases the FWC applied the well-established common law indicia to determine that the workers were independent contractors.

Alternative forms of employment are not necessarily insecure nor are they required to be 'secure' (however defined). Some individuals prefer a form of work that others may consider insecure, because it better suits their needs or provides benefits not available with traditional forms of employment.

HIA is concerned that this approach may have unintended consequences for the residential building industry that has a long and established use of alternative modes of work engagement rather than directly employed full time workers. The majority of work undertaken on a detached house is performed by independent (sub)contracting tradespersons. This subcontract system contributes to the efficiency, adaptability, and cost competitiveness of the housing industry. Contractors in this part of the residential building industry are small businesses working for themselves.

Neither the Australian economy nor the labour market is static. Demand rises and falls over time, in sometimes very unpredictable ways. Work in the residential building industry is cyclical and project based. The COVID-19 pandemic has certainly demonstrated this.

The reliance on independent contracting by the residential building industry was of significant benefit in responding to the COVID-19 pandemic. This was both in terms of being able to support the economy and the individuals operating in the industry.

A mobile, agile modern economy market with a mix of work arrangements – both permanent and temporary – is required to respond to these rapidly changing circumstances. The residential

[14] Mr Michail Kaseris v Rasier Pacific V.O.F [2017] FWC 6610 (21 December 2017); and Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579 (11 May 2018)

building industry exemplifies an industry where it is neither reasonably practical, nor desirable, to rely solely on full time employees.

Genuine independent contractors choose to work under these arrangements because they want to run their own businesses, make money and be rewarded for their productivity, efficiencies and entrepreneurial efforts. Builders choose to engage them because of their superior construction and scheduling efficiency and the cost-effective benefits that flow on to the consumer. Contractors wish to pick and choose the work they do. They do not want to be treated as employees as it would effectively limit their income.

The benefits from independent contracting include:

- Higher levels of productivity;
- Higher quality of work;
- Payment by results which leads to stable costs at greater rewards for productivity;
- Capacity to organise work to suit themselves; and
- It is the most cost-effective way of doing most building tasks.

The task of governments should be to preserve and enhance genuine independent contracting businesses and encourage innovative solution that support productivity and business and income growth, and not unduly interfere with those efforts.

3.4 PROHIBITING SEXUAL HARASSMENT IN CONNECTION WITH WORK

Part 8 of the Bill proposes to include a new prohibition on sexual harassment into the FWA to implement recommendation 28 of the Respect@Work Report.

The proposal includes the creation of a new dispute resolution function for the FWC that would enable people who experience sexual harassment in connection with work to initiate civil proceedings if the FWC is unable to resolve the dispute. The amendments merge the existing stop sexual harassment order jurisdiction into the new provisions.

HIA refers to and relies on submissions made in response to the Senate Standing Committees on Legal and Constitutional Affairs inquiring into the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Respect at Work Bill) included at Attachment A.

In addition, HIA has two specific concerns with the approach in the Bill set out below.

Firstly, while the FWC already had jurisdiction regarding sexual harassment, the proposed provisions clearly represent a duplication of not only the Respect at Work Bill, but also existing arrangements in other legislative frameworks.

Businesses, in particular small businesses, will potentially be required to comply with a plethora of similar obligations in respect of the same, or similar, conduct, noting that the approach to be taken to mitigate liability for such conduct is not the same under each regime. This presents serious challenges for businesses when determining the appropriate approach to take in respect of these obligations.

On this basis, if retained in the Bill, provisions which prevent a person from pursuing multiple remedies for sexual harassment under both the FWA and an anti-discrimination law or under the Australian Human Rights Commission Act are critical.

Secondly, the prohibition is intended to apply to workers, prospective workers and persons conducting businesses or undertakings (PCBU) calling up terms used under Work, Health and Safety laws. On this basis 'a worker' captures a broad church including an individual who performs work in any capacity, including as an employee, a contractor, a subcontract, an outworker, apprentice, a trainee, a student gaining work experience or a volunteer.

The meaning of 'PCBU' is equally broad.

Proposed section 527E introduces a further term *'principal'* which is not defined however those who are determined to be a 'principal' may be vicariously liable for acts of their employees or agents.

While consistent with the previous jurisdiction of the FWC, the use of this terminology does represent a new approach. It effectively broadens the application of the workplace relations regulatory framework to those not traditionally covered by such arrangements, such as independent contractors, setting an unappealing precedent.

3.5 Flexible Work

HIA recognises the need for employees to have the ability to request flexible working arrangements and to have the confidence to have these discussions with their employers.

However, the proposal to amend the procedure for dealing with requests for flexible work represents a significant regulatory burden, particularly for small businesses.

The Bill seeks to expand the employer's obligations to discuss a request for a flexible work arrangement with the employee, requires that the employer provide reasons for any decision to refuse the request, and if the request is refused inform the employee of any changes in working arrangements the employer is willing to make that would accommodate the employee's circumstances.

HIA also has concerns regarding the proposal to empower the FWC to resolve disputes regarding flexible work arrangements, including by mandatory arbitration where the employer refuses the employee's request or does not respond to the employee's request within 21 days.

This not only represents an unjustified interference with managerial prerogative and business needs, but also represents an unreasonable overreach by empowering the FWC to arbitrate these matters, when by and large these issues are resolved at the workplace level and should remain at that level.

4. CONCLUSION

4.1 SINGLE INTEREST EMPLOYER AUTHORISATIONS

The introduction of 'excluded work' from the application of a single interest employer authorisation would see 'general building and construction work' excluded from this stream of multi-employer bargaining.

This novel approach would appear to reflect the moves foreshadowed by the Minister in his second reading speech where he stated that amendments may be made to the Bill to ensure that *'multi-employer bargaining is not extended to industries in which it is neither appropriate nor necessary—in particular, commercial construction.'*

'General building and construction work' will be defined by section 4.3(a) of the *Building and Construction General Onsite Award 2020* and would capture the onsite residential building industry. The proposed definition also excludes specific industries, employees and/or work including:

- Work in the manufacturing and associated industries and occupations within the meaning of clause 4.8 of the *Manufacturing and Associated Industries and Occupations Award 2020*.
- Work of an employee who is covered by the *Joinery and Building Trades Award 2020*.

Further, the *Timber Industry Award 2020* is not mentioned under proposed section 23B(1)(b). Does this mean those businesses covered by the Timber Award remain captured by the single interest employer authorisation stream? Or is there some significance to being specifically excluded from the exclusion?

Unfortunately, coverage by the Modern Awards is complex. Businesses in the building and construction sector cannot always be 'neatly' captured by one Modern Award or another. This has significant implications within the context of the proposed single interest employer authorisations.

For example, there are similarities between the occupations and classifications contained within the Timber Award, the Building Award, the Joinery Award and the Manufacturing Award, and in some cases a business may need to use their judgement and discretion to determine which Modern Award most appropriately captures the industry they are in and the work they do.

Also, businesses in the building and construction industry may not just operate 'onsite' or 'offsite'.

A business could be captured by the Building Award on the basis that the majority of their work is onsite, but may also have employees who carry out offsite work captured by an occupation under the Joinery Award.

There is a litany of examples of businesses that both manufacture products off site and then install them onsite. The kitchen and bathroom industry is the most obvious example, but many other manufacturers and suppliers now also attend site to install their products. How these types of

businesses are dealt with by the 'excluded work' and the exclusions from the 'excluded work' is muddy at best.

While other amendments that 'tweak' the discretion of the FWC when considering issuing an authorisation are positive, they do not go far enough, may simply add further complexity and do not resolve the fundamental concerns with the proposed approach outlined in this submission.

4.2 Establishment of the National Construction Industry Forum

The establishment of a National Construction Industry Forum is a unique opportunity to canvass industry specific matters such as the skills needs of the industry, including how the workplace relations framework can support the apprenticeships system, and the need for clarity and certainty regarding genuine independent contracting arrangements in the residential building industry to support and enhance productivity in the sector.

Attracting diversity to the construction industry, including increasing female participants, requires clearer options for women, and a forum of the nature proposed could be a vehicle through which a range of pathways that exist beyond the traditional trades are considered.

HIA agrees that directed attention towards safety and encouraging cultural change across the sector is critical. Further, HIA sees that there is a need to:

- focus on apprentice safety, an area that HIA has extensive expertise in, and
- shift the dialogue to one that focuses on safety culture to ensure safety becomes embedded is how businesses do business.

As the only national association solely representing the residential building industry if given the opportunity HIA would be eager to participate in the Forum.

While the move to establish the Forum as a statutory agency may raise its profile it is certainly not a 'replacement' for a stand-alone specialist regulator for the building industry.

HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Standing Committees on Legal and Constitutional Affairs

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

12 October 2022

HOUSING INDUSTRY ASSOCIATION

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.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

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 the manufacturing, supply and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

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."*

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 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 28 September the Senate referred the provisions of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Bill) to the Standing Committee on Legal and Constitutional Affairs for inquiry and report.

HIA provides this submission in response to the Bill.

HIA does not oppose the primary objective of the Bill, that would see seven recommendations of the Respect@Work Report implemented to strengthen the legal and regulatory framework relating to sexual harassment for the purpose of *'ensure[ing] safer, respectful and more equitable workplaces in Australia'*.

HIA supports appropriate actions being taken by the business community to address the risks of sexual harassment and other forms of sex discrimination in the workplace. However, the complexity and societal nature of these issues, as well as the overlapping regulatory frameworks, means a regulatory response that places a heavy responsibility for the management of these matters on business is not always appropriate. In fact, these steps may undermine recognition of the need for, and importance of, cultural change; a necessary component of reform in this area as emphasised in the Respect@Work Report.

A systemic and community wide change in behaviour is best achieved through education and support tailored to the needs of, and risks prevalent in, particular industries or community cohorts. A 'one-size-fits-all' approach is inappropriate. There is a need for the development of industry specific guidance, in a similar way to which industry or task specific work health and safety codes of practice are developed.

The importance of a tailored approach is underscored by the unique nature of the residential building industry. As detailed below, the predominance of independent contracting arrangements, a high proportion of which are small businesses, coupled with the transient nature of the industry sets the residential building industry apart from other parts of the construction industry and other sectors of the economy.

While the Bill empowers the Australian Human Rights Commissions (AHRC) to ensure that employers and PCBUs are supported to meet their obligations and achieve compliance through, for example, the publication and preparation of guidance, HIA is concerned these materials will not be ready prior to the commencement of the Bill, nor will they be appropriately tailored.

When looking to respond to the risks of sexual harassment and other forms of sex discrimination in the workplace it is HIA's view that the regulatory approach should encapsulate the following 4 key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical solutions for achieving that compliance.
- Enforcement of the laws should be fair.

- Liability should be based on "actual" control.

While some elements of the above are evident in the Bill, HIA has several concerns including:

- The impact of the Bill on small businesses should not be underestimated. The Respect@Work Report outlined the unique circumstances that face small business regarding managing the risk of sexual harassment and responding to complaints.
- The impact of the Bill on current or proposed arrangements dealing with these matters in other jurisdictions.
- The overlap with existing work, health and safety obligations in terms of both duties and enforcement.
- How employers and PCBUs will practically comply with the obligation to prohibit conduct that subjects another person to a workplace that is hostile on the grounds of sex and the positive duty to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination.
- A lack of transition. While the enforcement and compliance powers of the AHRC will be delayed by 12 months, the new obligations regarding the positive duty and a hostile workplace should also be delayed to provide further time to educate and develop guidance material.

HIA elaborates on these and other matters regarding the Bill below.

2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry includes detached home building, low, medium and high-density multi-unit housing developments, home repairs, renovations and additions, along with the manufacturers and suppliers of building products and related building professionals. The industry has important linkages with other sectors, such as manufacturing, finance, real estate and retailing, meaning its impacts on the economy go well beyond the direct contribution of construction activities.

For example, it is estimated that the residential building industry engages over 1 million people representing tens of thousands of small businesses and over 200,000 subcontractors reliant on the industry for their livelihood.

The residential building industry contributes over $100 billion per annum to the economy and accounts for 6.9 per cent of Gross Domestic Product.

The impact of the sector on the health of the Australian economy should not be underestimated.

The Respect@Work Report makes a number of observations regarding sexual harassment in the construction industry including:

- The construction industry has characteristics that make it more prone to sexual harassment, for example that it is a male-dominated industry.
- That the culture of the industry, including the acceptance of masculine norms and practices, tolerances for sexism and the exclusionary nature of the industry has adverse impacts on women in the sector and the appeal of the sector to women.

HIA supports moves that seek to respond to, and ultimately reduce the incidence of sexual harassment across the construction industry, including the residential building industry. To that end it is noteworthy that the construction industry is not homogenous. The industry is divided amongst those businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector. While some workers will move between sectors, as a general rule most tend to operate in just one discrete sector. The approach adopted on a single dwelling residential building site is, in every way, different from the approach adopted on, for example, a multi storey commercial development.

The unique nature of the residential building industry, in particular the detached housing and renovation markets, is further highlighted by its reliance on the use of subcontractors.

In commercial construction, whilst there are a large number of subcontracting firms, the overwhelming majority of those working are actually employed by these subcontracting firms. Further subcontracting occurs only in specialist areas. Most commercial construction employees are union members and casual labour is rarely used, for industrial reasons.

By contrast, the housing industry is predominately a subcontracting sector, meaning there are relatively few employees on a low or medium density housing site.

The flexibility of the subcontract system and the highly competitive nature of the residential building industry have interacted to secure a high degree of efficiency and productivity for many decades.

There are around 25 different trades involved on-site in the building of a house. These trades are on-site for short periods of time, interacting with other trades in an adhoc manner with respect to overlaps of time and direct interactions to undertake work tasks.

The familiar ones are of course concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. Others include the contractor who pegs out the site, backhoe operators, drainers, termite system installers, plasterboard fixers, plasterers, floor tilers, glaziers, kitchen installers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer.

Central to the notion of subcontracting arrangements and the use of independent contractors is that the contractor is running their own business, which is generally a small or micro business. This means that the way those contractors operate can be diverse.

Further as with any commercial relationship, there are risks in managing the subcontractor relationship and it is unclear how the proposed obligations will impact these contractual arrangements.

The allocation of risk through a contractual chain is acceptable business practice. How the industry will respond to the Bill through the allocation of the risks it highlights is unclear, principally because the expected approach and response to the new obligations are unclear.

3. THE BILL

3.1 HOSTILE WORK ENVIRONMENT

The Bill seeks to introduce a new provision to prohibit conduct that subjects another person to a workplace that is hostile on the grounds of sex.

The Explanatory Memorandum to the Bill (EM) notes that while conduct that results in a hostile work environment may be captured through existing provisions of the *Sex Discrimination Act 1984* (SD Act) it is not well understood or recognised and that the proposed amendment would *'provide clarity and certainty to the law and set clear boundaries on acceptable conduct in the workplace.'*[1]

HIA is concerned that proposed section 28M of the Bill does not achieve this outcome, in fact in many respects the provision in confusing and complex due to the broad and ongoing nature of the obligation.

The new obligation applies to the 'workplace'.

The meaning of 'workplace' has been drawn from the model *Work Health and Safety Act 2011* (WHS) and means

> *'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.'*

The appropriateness of this definition for the purposes of work, health and safety laws can be justified. In contrast, there is less certainty regarding the appropriateness of this approach within the context of the Bill, particularly given the broad nature of this definition.

The proposed provision, as explained by the EM, appears to set an expectation that an employer or PCBU can and should anticipate all of those who may come into their workplace on an ongoing basis.

This presents real challenges for those working on residential building sites, particularly for those working on renovation, alterations and additions which would also be a 'workplace' for the purposes of the Bill. Owners generally remain on the premises while renovation, alterations and additions work is being carried out. This makes having some foreseeability regarding who will be attending the 'workplace' more difficult.

Inevitably a variety of individuals enter and exit residential building sites continuously. This does not only include trade contractors but local regulators, council officer or even bank valuer and in cases where owners remain on site this list expands.

[1] EM pg.4

It is hard to conceive how an employer or PCBU, working in these circumstances, can ensure they are taking the appropriate steps. While the example set out in the EM[2] provide some guidance the lack of examples that set out circumstances that would not breach the provision is problematic.

The notion that a hostile work environment is not *'directed towards a particular person, but results in a generally hostile environment'* [3] is an incredibly complex notion to respond to in a meaningful way. Further and based on the material in the EM, the possibility that a person could experience a hostile work environment based on, for example, overhearing others presents real challenges for employers and PCBUs.

While a 'reasonable person test' applies in conjunction with the ability to take into consideration a number of factors when assessing a workplace, that proactive nature of the obligations coupled with the intended broad remit of the provision, creates significant complexity for employers and PCBUs.

3.2 POSITIVE DUTY TO ELIMINATE SEXUAL HARASSMENT IN THE WORKPLACE

The Bill seeks to introduce a positive duty on all employers and PCBUs to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination, including sex discrimination, sexual and sex-based harassment, hostile work environments and victimisation, as far as possible. This imposes a proactive duty on employers and PCBUs to prevent discrimination and harassment being engaged in by the duty holder themselves, as well as their employees, workers, agents and third parties.

Existing regulatory arrangements

The EM concedes that WHS laws currently impose a positive duty on PCBUs to prevent sexual harassment. The EM also supports the observations of the Respect@Work Report regarding current overlapping duties under the SD Act and that rather than duplicating obligations, it is proposed that this new positive duty *'would ultimately work in a mutually reinforcing way.'*[4]

HIA is concerned that this overstates the compatibility between the current WHS regulatory arrangements including the current Codes of Practice that deals with sexual harassment[5], not to mention that a similar duty also exists under the Victorian *Equal Opportunity Act 2010* with proposals for similar arrangements under consideration across WA, the NT and the ACT.

What is 'reasonable and proportionate'?

The Bill imposes a significant duty on employers and PCBUs, a duty that, while described to be similar to that imposed under WHS laws, differs in a number of respects.

Firstly, the assessment of the steps to be taken to action the obligations in respect of the duty differ from the approach to managing risks and implementing controls under WHS laws.

The model WHS laws require that a PCBU *'ensure, so far as is reasonably practicable, the health and safety of their workers and any other persons who might be affected by a PCBUs business or undertaking'*. The 'reasonably practicable' test is a point in time test that requires the weighing up of

[2] See paragraph 37 and 45
[3] EM pg. 21
[4] EM pg. 32
[5] The Model Code of Practice: Managing psychosocial hazards at work addresses sexual harassment as a workplace hazard

a range of relevant factors. This approach is supported by a hierarchy of controls that guide PCBUs regarding the steps to take to meet their duty.

Section 47C proposes a different test, one that requires taking reasonable and proportionate measures to eliminate, as far as possible…unlawful sex discrimination etc. This imposes an ongoing obligation, the assessment of which does not appear to be linked to a particular point in time when determining if a breach has occurred, as stated in the EM:

> *'…employers must continuously assess and evaluate whether they are meeting the requirements of the duty.'*[6]

Secondly, and despite assertions in the EM that the approach under the Bill is, for all intents and purposes, the same as that under the model WHS laws, it is arguable that a 'proportionate response' sets a higher bar than what is *reasonably practicable*.

The notion of 'proportionality' holds significant weight, for example, in a criminal law context the concept may be used to convey the idea that the punishment of an offender should fit the crime; in a civil law sense, proportionately liability allows courts to apportion responsibility for damages amongst a number of wrongdoers to the extent of their determined wrongdoing. Finally in terms of its ordinary meaning, 'proportion' can mean *'comparative relation between things as to size, quantity, number…proper relation between things or parts: balance'*.

Critically if an employer or PCBU can prove that they have taken 'reasonable and proportionate' measures to eliminate unlaw sex discrimination they will not be held liable for the unlawful conduct of their employees etc. Therefore, understanding and complying with this test is crucial.

If the intention is that employers and PCBUs approach this duty in the same way as they do their duties under work health and safety laws then, a more common sense approach would be to adopt that approach in this Bill. This would provide greater clarity and certainty for employers and PCBUs.

Control and Influence

Subsection 47C(3) of the Bill provides that a duty holder is responsible for the conduct of specific people in the workplace. The EM states that this responsibility is confined to workplace relationships where an employer or PCBU could *'reasonably exercise control or influence over another person's conduct'*[7].

While supportive of this approach HIA would highlight that this intention is not abundantly clear from the drafting of the Bill. HIA strongly recommends that the duty apply where an employer or PCBU had actual control over those at the workplace. This approach provides both clarity and certainty regarding the nature and extent of the obligation.

[6] EM pg. 31
[7] Item 98

3.3 REPRESENTATION

The Bill seeks to amend the *Australian Human Rights Commission Act 1986* (AHRC Act) to enable representative bodies to make representative applications in the Federal Courts on behalf of people who have experienced unlawful discrimination. HIA opposes this approach.

HIA agrees with the current approach to handling complaints i.e., that representative bodies can lodge a complaint in the AHRC on behalf of a person but where a complaint is terminated, only the affected person has standing to initiate federal court proceedings. This *'constrained'*[8] approach appears appropriate.

Taking a matter to court is a serious step particularly where the complaint has been terminated by the AHRC. Affected persons should be able to go to their representative bodies for guidance and support but to allow those bodies to commence court proceedings, in HIA's view is a step to far.

If there is general acknowledgement of the complexities and costs in the court system the more appropriate response would appear to be to review those processes rather than unduly, and without much justification, expand the role of representative bodies in relation to these matters.

The proposed ability, under the Bill, of the AHRC to conduct inquiries into systemic unlawful discrimination offers a sounder approach, subject to sensible checks and balances to ensure that such investigations are not frivolous or vexatious, to respond to concerns of public interest based organisations as opposed to expanding standing in the Federal Court.

3.4 COMPLIANCE AND ENFORCEMENT

The EM sets out the current compliance and enforcement mechanisms with regards to sexual harassment, noting that the expanded role of the AHRC by way of the Bill requires that the operation of these current arrangements be clarified. On this basis HIA understands that:

- A work health and safety regulator can investigate sexual harassment in a workplace.
- An individual could make a complaint of sexual harassment to the AHRC under the AHRC Act in relation to the same conduct being investigated by the work health and safety regulator.
- A person cannot make a complaint about a relevant matter under both the SD Act and a state or territory law that deals with the same matter, however a person remains entitled to raise a WHS issue at their workplace.
- Applications to the Fair Work Commission (FWC) regarding orders to stop sexual harassment or bullying are intended to operate unaffected.

This represents a regulatory web that will require detailed explanation for employers and employees alike. Concerningly, if enacted, an employer or PCBU can be investigated for the same conduct through at least three different avenues at the same time. Equally, there does not appear to be anything preventing an applicant from commencing proceedings in different jurisdictions sequentially, particularly if the claim is unsuccessful.

[8] EM pg. 79

HIA suggest that this approach be reconsidered. The Committee could consider recommending an approach that would see applicants being required to 'choose' an option to the exclusion of others, for example, if a complaint is made to the AHRC, an application could not be made in the FWC's jurisdiction and vis versa.

3.5 IMPLEMENTATION

HIA supports the proposed approach to delay the commencement of the AHRC functions to monitor and assess compliance with the new positive duty to eliminate unlawful sex discrimination.

HIA is extremely concerned regarding the lack of any transitional arrangements in relation to the positive duty and the new prohibition on subjecting another person to a hostile workplace on the grounds of sex.

As noted by the Respect@Work Report, and echoed throughout the EM, obligations relating to sexual harassment currently exist, albeit in various forms, but employers and PCBUs appear to be broadly unaware of their obligations or how to take appropriate actions to respond to such circumstances. More rules do not of themselves, make people comply. Education and support for compliance are key to effective implementation.

In light of the complexity, uncertainty and inevitable cost burden that will be imposed, entities carrying out residential building work must be provided sufficient time to build capacity to address and respond to these complex issues. Time must also be allowed for contracting parties to understand their roles and responsibilities in responding to this issue and to negotiate and determine what the appropriate expectations are on all of those working on a residential building site.

On this basis HIA proposes a three staged transitional arrangement.

Stage 1 would see the commencement of the proposed new functions of the AHRC under clause 35A on Royal Assent.

12 months later the new obligations in Schedule 1 and Schedule 2, Part 1 of the Bill could commence, and finally, the third stage would see the commencement of the AHRC compliance and enforcement powers.

These proposed transitional arrangements seek to provide a balanced approach to ensure a focus on cultural change in the first instance, followed and supported by what would have become a familiar regulatory framework.