HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Education and Employment Legislation Committee

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

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contents

Housing Industry Association contacts:

Melissa Adler
Executive Director – Industrial Relations and Legal Services
Housing Industry Association
79 Constitution Avenue,
CAMPBELL ACT 2600

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 19 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 30 March the Senate referred the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (Bill) to the Senate Education and Employment Legislation Committee for inquiry and report. HIA makes these submissions in response to this inquiry.

HIA's comments are confined to the measures that would insert a right to superannuation in the National Employment Standards (NES) under the *Fair Work Act 2009 (Cth)* (FWA) which are set out in Schedule 3 of the Bill.

HIA opposes the inclusion of a right to superannuation in the NES.

Firstly, there is a risk that 'deeming' of independent contractors as 'employees' for superannuation purposes could be conflated with the application of other employment related obligations on legitimate independent contractors.

Secondly, the approach adds another enforcement and penalty regime on top of what is already an extensive and complex regime administered by the Australian Tax Office.

The current administrative arrangements do not assist in ensuring the timely payment of Superannuation Guarantee (SG) contributions nor do they encourage employers to rectify missed contributions. Adding to this already complex regulatory environment by expanding the NES to capture superannuation will not improve this situation.

Finally, the proposed approach is duplicative and has the potential to simply impose further administrative burden in an already complex regulatory environment with no guarantee of any greater improvement with respect to compliance with superannuation obligations.

HIA supports the broad policy intent of a compulsory superannuation scheme to provide an adequate level of retirement income, relieve pressure on the aged pension and increase national savings, however it is important to recognise that the SG Scheme has placed additional regulatory obligations on employers to ensure that the correct amount is paid to their employees at the right time, to the chosen fund and in the right manner.

HIA elaborates on these matters below.

2. SCHEDULE 3 OF THE BILL

2.1 SUPERANNUATION AND INDEPENDENT CONTRACTORS

The residential building industry is principally comprised of small businesses and self-employed independent contractors. Some of these businesses may have obligations as employers to pay superannuation and in other cases these businesses may have entitlements to receive superannuation as a result of complex laws that 'deem' independent contractors to be treated as employees in certain circumstances.

The *Superannuation Guarantee (Administration) Act 1992* (SGA Act) moves beyond well understood common law principles by deeming that "labour only" businesses are employees for the purpose of superannuation.

In this regard, the extended definition of 'employee' in section 12(1) of the SGA Act deems certain individuals to be employees for superannuation guarantee purposes, even though they would otherwise be outside the scope of the SGA Act. In particular, section 12(3) of the SGA Act deems a person that 'works under a contract that is wholly or principally for the labour of the person' to be an employee for superannuation law purposes.

The ATO has issued Superannuation Guarantee Ruling 2005/1 (SGR 2005/1), which sets out the Tax Office's view on when a contractor falls within the expanded definition of an employee. Drawing on the common law the ruling sets out three principal tests when a contractor will be considered an employee. These are if the contractor:

- Is remunerated wholly or principally for their labour and skills.
- Performs the work themselves (with no right of delegation).
- Is not paid to achieve a result.

Whilst this ruling provides some guidance, there remains considerable uncertainty about who is an employee and who is a contractor for superannuation purposes and distinguishing between employees and independent contractors for the purposes of superannuation can be a complex and difficult task. The resolution or determination of the status of a worker for superannuation purposes may sometimes occur on a timeframe outside the required lodgement and payment periods.

Further whether an independent contractor is covered by the SGA Act can be difficult to predict if the matter is pursued through the courts.

Ultimately, who is required to be covered by the superannuation guarantee legislation is a matter of fact coming down to the circumstances of engagement and the court's interpretation of the facts.

Clearly, the SG can (and does) apply more broadly than to a traditional employment relationship. There will be circumstances in which all parties agree that a legitimate independent contractor arrangement is on foot, yet due to the specifics of that engagement i.e., that the person works under a contract that is wholly or principally for the labour of the person, the person is an employee for superannuation purposes.

Despite this result, it is presumed that should a right to superannuation be inserted into the NES, and on the basis that a legitimate independent contractor arrangement is on foot, no obligation under the FWA would arise. While paragraph 89 of the explanatory materials to the Bill indicates that this would be the case, this does not appear to be reflected in the text of the Bill.

2.2 ENFORCEMENT AND PENALTIES

HIA does not support employers or businesses deliberately avoiding their superannuation obligations or failing to pay their employees superannuation entitlements, however, the consequences for the non-payment of superannuation under the current laws are significant. It is

far from clear that adding another compliance obligation and potential penalty regime will assist the payment of superannuation.

A failure to comply with superannuation obligations can result in the requirement to pay:

- The SG amount;
- A nominal interest component of 10.5%;
- A general interest charge;
- An administrative charge; and
- A penalty of up to 200% of the SG amount.

Employers covered by a Modern Award that fail to pay the SG amount may also be subject to penalties where the award makes provision for such obligations. Including superannuation in the NES would provide a third avenue of recourse.

The Bill also appears to expand who can bring an action to enforce and recover unpaid superannuation including an employee organisation and the Fair Work Ombudsman (FWO).

The explanatory materials to the Bill indicate that notwithstanding this, this obligation would not replace the ATO's powers regarding the recovery of superannuation amounts but would compliment it and, that where the Commissioner of Taxation has instituted proceedings to recover superannuation amounts this would prevent an employee or other person with standing from commencing proceedings for an alleged breach of Division 10A of the Bill.

While HIA supports this approach, it does not go far enough to ensure that an alleged failure to comply with superannuation obligations is not the subject of multiple actions. For example, changes made in 2019 to the *Tax Administration Act 1953* were targeted at enhancing employer compliance with the SG. Two specific measures were introduced.

Firstly, the Commissioner was empowered to issue directions to employers to undertake specific actions where the Commissioner is satisfied that there has been a failure to comply with an obligation or a failure to pay a SG charge. On issuing such a direction, an employer must ensure that the amount of the unpaid liability is paid within the period specified in the direction. A failure to comply with the direction can result in criminal penalties.

Secondly, the Commissioner can issue an education direction to an employer on a reasonable belief that the employer has failed to comply with a superannuation obligation. The employer (or an individual who participates in the decision making of the business) must complete an approved course. Failure to comply with the direction can result in administrative and/or criminal penalties.

It appears that section 116D of the Bill would not capture the measures outlined above, as such, an employer could be the subject of a direction from the Taxation Commissioner and also be the subject of proceedings for a breach of the NES. There is also nothing indicating how the latter would be dealt with should the employer ultimately comply with their superannuation obligation.

Further, there is no indication that the FWO recognise that a failure to comply with superannuation obligations is not simple. For example, the explanatory materials to the *Treasury Laws Amendment (2018 Measures No. 4) Bill 2019* that introduced changes to the powers of the Commissioner of Taxation (outlined above) identified at least 2 categories of employers that may fail to comply with their superannuation obligations:

> *'1.14 An employer's failure to comply with their superannuation guarantee obligations can occur for a variety of reasons. In particular, smaller employers may not be fully aware of their superannuation guarantee obligations under the SGAA. Employers may also misclassify payments which results in an underpayment of superannuation guarantee.*
>
> *1.15 In other cases, there are recalcitrant employers who have intentionally failed to provide their employees with their superannuation guarantee entitlements and repeatedly disregarded their obligations and continuously failed to pay their superannuation liabilities.'*

This is an important distinction and must be encapsulated in any enforcement response of the FWO.

2.3 REGULATORY COMPLEXITY

Should superannuation be included in the NES, businesses in the residential building industry will likely be covered by three regulatory schemes including the:

- NES;
- applicable Modern Award, for example Clause 28 of the *Building and Construction General Onsite Award 2020*; and
- SGA Act supported by various tax rulings and guidelines.

This will undoubtedly lead to complexity and uncertainty.

To date we have seen steps taken to remove overlap between regulatory frameworks to ensure consistency and to reduce the compliance burden on all parties. Should this proposal be adopted, HIA sees that the same exercise should be undertaking regarding superannuation obligations, particularly with respect to the operation (and interaction) between any NES entitlement and current superannuation terms in Modern Awards.