Submission No 109

ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

Organisation: Australian Industry Group (Ai Group)

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Ai GROUP SUBMISSION

Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

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Summary

Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission to the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (**the ADA Bill**).

Ai Group supports the right to freedom of religion (including the right not to be religious) in the Australian community. Both religious and non-religious beliefs are very diverse and can be deeply personal. They are very important to many individuals, families and community groups in society. Businesses manage a combination of multi-faith and non-religious workforces while striving to ensure that their operations are viable, productive, competitive and harmonious.

Despite Ai Group's broad support for the right to freedom of religion, the ADA Bill contains some significant inconsistencies with established rights and obligations under employment and work, health and safety laws. The ADA Bill also unnecessarily overlaps with similar draft religious freedom bills released by the Australian Government and revised in January 2020. It is the view of Ai Group that the ADA Bill should not proceed.

Ai Group's concerns with the Federal Government's Religious Discrimination Bills

On 2 October 2019 and 31 January 2020 respectively Ai Group lodged detailed written submissions in response to the Federal Government's proposed Religious Freedom Bills and its subsequent amended Second Exposure Drafts released for public consultation. The Federal Government's Religious Freedom Bills comprised three exposure drafts: a *Religious Discrimination Bill 2019*, a *Religious Discrimination (Consequential Amendments) Bill 2019,* and a *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.*

Ai Group's submissions are here:

- Ai Group submission – Religious Freedom Reform, Attorney-General's Department, Australian Government, 2 October 2019
- Ai Group submission – Religious Freedom Reform – Second Exposure Drafts, Attorney-General's Department, Australian Government, 31 January 2020

Importantly, Ai Group expressed significant concern that the Federal Government's *Religious Discrimination Bill 2019* (**RD Bill**):

- Unfairly restricts the legitimate and necessary operating policies and procedures of businesses, including in circumstances where such policies are needed to manage obligations under current employment laws;
- Is likely to reduce tolerance for religious diversity in workplaces by protecting a broad range of statements of belief about religion and/or other religions, including statements that cause offence;

- Is likely to lead to increased workplace grievances that are unable to be resolved by employers, but which nonetheless impact an employer's business;

- Would impose further complexity upon employers in navigating Australia's web of anti-discrimination laws, by elevating legal protections for some employees over others;

- Contains complex provisions relating to indirect discrimination that, when combined with the broad definition of religious belief, are too far-reaching and difficult for employers to comply with; and

- Would increase compliance costs and the regulatory burden upon employers as they would need to review existing operating policies, procedures and employment contracts to comply with the RD Bill's provisions.

Given that the Federal Government is yet to respond to the latest round of public consultations in regards to its three RF Bills, Ai Group considers that it would be premature for the NSW Government to pass its own legislation introducing protections for religious freedoms. Ai Group would be particularly concerned if businesses were required to simultaneously comply with different and inconsistent religious freedom obligations under both Commonwealth and NSW legislation. This outcome must be avoided.

Key elements of the ADA Bill are inconsistent with other workplace laws

It is apparent that the NSW ADA Bill contains concepts and provisions that are very similar to the Federal Government's RD Bill and to the extent of that similarity, Ai Group's concerns about the broad purpose and workability of the RD Bill identified above are also applicable to the NSW ADA Bill.

Additionally, Ai Group notes some important differences between terms of the NSW ADA Bill and the RD Bill, particularly in relation to section 22N and its broader application to most NSW employers, including the NSW Government and many smaller to medium businesses.

The ADA Bill also introduces the concept of ***protected activity*** at section 22N(4) that is not dissimilar to the statement of belief provisions at section 8 of the Federal RD Bill. Whilst worded differently to the RD Bill, these provisions are equally problematic and do not resolve the inevitable conflict employers would face in managing obligations under work health and safety legislation, the *Fair Work Act 2009 (Cth)* and anti-discrimination legislation.

However, unlike the RD Bill, the provisions in the ADA Bill relating to a protected activity:

- Are more broadly defined and capture a raft of activities including those presumed to have occurred or not to have occurred in the past, present and future. In contrast the RD Bill's statement of belief provisions are limited to written or spoken statements of belief for the purpose of the Bill's protection.

- Apply to all NSW employers, other than private households or employers with fewer than 5 employees, with the application of such obligations extending to the NSW Government, State Government Agencies and small to medium businesses in the private sector. In contrast, the Federal RD Bill's statement of belief provisions apply only to businesses with $50 million or more in revenue in a financial year and do not extend to the Commonwealth, a State or a Territory, or a body established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

Importantly, section 22N creates an unworkable separation between conduct occurring at work and conduct occurring outside of work for the purposes of defining religious activity as a protected activity.

Section 22N(4) provides:

> In subsection (3), protected activity means—
>
> (a) a religious activity performed by the employee that:
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> (i) occurs at a time other than when the employee is performing work and at a place other than the employer's place of work, and
>
> (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.
>
> (b) a religious activity performed by an associate of the employee that does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.

The use of the phrase "*other than when the employee is performing work*" is extremely problematic in seeking to isolate from work, conduct by an employee for the purposes of a protected activity. When and where an employee is performing work or is "at work" carries different meanings in various aspects of employment law as to when employment rights and obligations may be triggered or enforced, such as in unfair dismissal, work health and safety legislation and rights under existing anti-discrimination legislation. These differing obligations were set out in in Ai Group's 2 October 2019 submission in addressing the First Exposure Draft RD Bill's use of the similar phrase "*other than performing work for the employer*" to mark the separation between employee conduct in and outside of work.

A relevant extract from our 2 October 2019 submission is set out below (emphasis added):

> Specifically, the Bill imposes unreasonable and unworkable restrictions on implementing conduct rules that may restrict or prevent statements of belief in circumstances when employees are not "performing work for the employer". The provisions are at odds with other workplace laws and established principles over the type of out of work conduct employers may both be liable for and/or able to act on to protect the interests of other workers and the business.
>
> The Bill is inconsistent with workplace laws in respect of when an employer may take remedial or

disciplinary action in response to an incident occurring outside the workplace or outside normal working hours. An employee's employment contract with their employer generally does not stop on each occasion the employee stops the performance of work.

Courts and tribunals have developed principles about when employers can reasonably regulate, respond to and address certain employee conduct outside of work. The concept of when an employee is working or at work, for the purposes of employers regulating or responding to employee conduct, has been the subject of many decisions of courts and tribunals under workplace relations laws, WHS laws, antidiscrimination laws and workers' compensation laws.

The RD Bill would disturb these principles in a major way. For instance, in the context of the anti-bullying provisions in section 789FD of the FW Act, a Full Bench of the Fair Work Commission held that the reference to bullying "at work" in section 789D was broader than when an employee is performing work in the workplace. The Full Bench held: 3

> [49] While a worker performing work will be 'at work' that is not an exhaustive exposition of the circumstances in which a worker may be held to be at work within the meaning of s.789FD(1)(a). For example, it was common ground at the hearing of this matter that a worker will be 'at work' while on an authorised meal break at the workplace and we agree with that proposition. But while a worker is on such a meal break he or she is not performing work. Indeed by definition they are on a break from the performance of work. It is unnecessary for us to determine whether the provisions apply in circumstances where a meal break is taken outside the workplace.
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> [50] In our view an approach which equates the meaning of 'at work' to the performance of work is inapt to encompass the range of circumstances in which a worker may be said to be 'at work'.
>
> [51] It seems to us that the concept of being 'at work' encompasses both the performance of work (at 3 Bowker and Others v DP World Melbourne Limited T/A DP World and Others [2014] FWCFB 9227. 11 any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).

In other words, where an employee makes a statement of belief during his/her meal break and that statement causes offence to, or conflict with, other co-workers, the employee could be fully or partially protected from any action by their employer. This outcome is unjustified and unbalanced with the need for employers to protect the welfare of other employees and to provide safe, harmonious and productive workplaces. It also shows the arbitrary nature of limiting a conduct rule to an employee "performing work", when clearly there will be many circumstances where an employee makes a statement of belief "at work".

In the context of unfair dismissal, a Full Bench of the Fair Work Commission in *Pinawin v Domingo [2012] FWAFB 1359* made the following comments about whether out of hours misconduct has the relevant work connection to being it within the purview of the work relationship: [36] Generally employers have no right to control or regulate an employee's 'out of hours conduct'. But if an employee's conduct outside the workplace has a significant and adverse effect on the workplace,

then the consequences become a legitimate concern to the employer. A range of 'out of hours conduct' has been held to constitute grounds for termination because the potential or actual consequences of the conduct are inconsistent with the employee's duty of fidelity and good faith. This concept is closely allied to the implied term of 'trust and confidence' in employment contracts which relates to modes of behaviour which allow work to proceed in a commercially and legally correct manner.

Also, in *Rose v Telstra Corporation [1998] AIRC 1592*, the Australian Industrial Relations Commission held that the circumstances in which 'out of hours' conduct might constitute a valid reason for dismissal were cases where the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee, damage the employer's interests, or is incompatible with the employee's duties as an employee.

These cases recognise that certain types of employee conduct outside of work can still cause substantial detriment to the employer and other employees, and constitute a fundamental breach of the employment contract, even though they may not cause "unjustifiable financial hardship" to the business. The limitations on conduct rules that the Bill would implement would prevent an employer from disciplining or dismissing an employee in numerous circumstances where there is a valid reason for dismissal or disciplinary action under current well-established legal principles. The limitations in the Bill on actions that an employer can take when an employee is not "performing work for the employer" do not take into account the various circumstances where employers are, or can be, liable for the conduct of employees outside of work. For instance, under workers' compensation laws there are many circumstances where employers have been held to be liable for injuries that occurred other than where the employee was "performing work for the employer".

In response to those concerns, the Federal Government subsequently revised subsection 8(5) of the RD Bill to use the broader threshold of "*in the course of employment*" used in workers compensation and work health and safety legislation, with the purpose of enabling employers to discharge their statutory obligations to provide safe workplaces, including in matters where statements of belief, otherwise protected by the RD Bill, endangered the health and safety of co-workers and others.

For reasons outlined in our 31 January 2020 submission, however, this amendment does not resolve the conflict between existing employment law and work, health and safety obligations with the proposed statement of belief provisions.

Ai Group considers that section 22N(4) is significantly inconsistent with established rights and obligations under existing workplace relations and safety laws in a manner similar to the RD Bill. The additional factor that the employee be at a "*place other than the employer's place of work"* does not sufficiently minimize that conflict. In fact, now more than ever, circumstances of the "*employer's place of work*" have been significantly expanded as many employees work remotely or at home, away from the usual workplace, to manage the safety and health risks of the pandemic. Work, health and safety and workers' compensation legislation has long recognised that employer liability and obligations to provide safe workplaces extend beyond the employer's nominated physical workplace. Today's current working environment would see the application of this protected activity threshold based on when and where work is performed as unworkable.

In *O'Keefe v Williams Muir's Pty Limited Troy Williams The Good Guys* [2011] FWC 531*,* the Fair Work Commission upheld the employer's dismissal of an employee for social media online posts made outside of working hours, that had breached the employer's Sexual Harassment Policy and Workplace Bullying Policy and had amounted to serious misconduct. In finding so, the Deputy President recognised the impact of the employee's conduct on his work colleagues and manager and held at paragraph [43]: (Emphasis added)

> "the fact that the comments were made on the applicant's home computer, out of work hours, does not make any difference. The comments were ready by work colleagues and it was not long before Ms Taylor was advised of what had occurred. The respondent had rightfully submitted, in my view, that the separation between home and work is now less pronounced than it once used to be.

For instance, like the RD Bill (including its Second Exposure Draft) Ai Group considers that problematic scenarios for employers, like the following examples, may result under the ADA Bill:

- A manager of a publicly listed company shares anti-religious views online and publicly targets religious figures for criticism on Twitter about both their religion and their religious beliefs. The company and individuals who work for it suffer a barrage of online abuse from members of the public in response to the manager's online activity.

- An employee at home posts a video in a What'sApp group of co-workers with his own accompanying comments instructing his co-workers to repent for acts which he regards as sins on religious grounds. A co-worker who was part of the group complains to HR the next day and requests that he not be required to work alongside the employee given the views expressed which the employee finds offensive. The employer wonders how it will manage the employee's request, given that the employer is likely prevented by the Bill from restricting the first employee's protected religious activity.

- An employee at home creates a post of Facebook publicly identifying the Chief Executive of his employer and claiming he is a sinner, due to certain specified conduct that conflicts with the employee's religious beliefs.

Accordingly, Ai Group's concerns raised with the RD Bill are very relevant to the ADA Bill's section 22N(4). We consider that the effect of section 22N(4) would:

- Remove from NSW employers their current ability to take remedial action in response to unreasonable employee conduct in many circumstances where there is a connection between the conduct and the employer's business;

- Prevent NSW employers from complying with statutory work health and safety obligations by limiting pre-emptive or remedial action in response to work health and safety concerns arising from protected activities engaged in by employees.

- Inhibit or prevent NSW employers from managing their obligations under existing anti-discrimination and other workplace laws, such as the *Sex Discrimination Act 1984* (Cth) and

the General Protection and Anti-Bullying provisions in the *Fair Work Act 2009* (Cth);

- Elevate legal protections for some employees over the rights of other employees, resulting in a confusing and complex anti-discrimination and employment legal framework for employers;

- Unfairly restrict the legitimate and necessary operating policies and procedures of businesses, including in circumstances where such policies are needed to manage obligations under current employment laws;

- Most likely reduce tolerance for religious diversity in workplaces by protecting a broad range of statements of belief about religion and/or other religions, including statements that cause offence to other individuals;

- Most likely lead to increased workplace grievances that are unable to be resolved by employers, but which nonetheless impact an employer's business;

- Increase compliance costs and the regulatory burden upon NSW employers as they would need to review existing operating policies, procedures and employment contracts to comply with the ADA Bill's provisions.

Ai Group is further concerned about the narrow exemptions provided to NSW employers by section 22(4)(ii) in respect of when a religious activity does not attract the Bill's protection because it includes any direct criticism of, or attack on, or causes any direct and material financial detriment to, the employer.

We note that section 22(4)(ii) does not extend to criticism or attacks on other co-workers, employees, contractors, or customers but only employers. This emphasizes our point above in respect of employers being constrained in complying with work health and safety obligations, specifically in respect of being precluded from taking action to eliminate health and safety risks to employees that may arise from a protected activity by a co-worker.

Furthermore, the limitation of financial detriment in this exemption to "direct and material" is further limited by section 22(5), which states that such financial detriment does not constitute boycotts, secondary boycotts, withdrawal of sponsorship or other financial or corporate support. This could still result in significant financial harm inflicted on businesses that would not attract the exemption. For instance, it is unfair that a business which loses its current customer base, being individuals or organisations that boycott the employer's services leading to a close down of the employer's business, would not be a case of direct and material financial detriment.

The effect of this unfairly narrow exemption could see many employers face severe financial and reputational damage but with no ability to rely on this damage to address the protected activity. As our 31 January 2020 submission noted in respect of exceptions granted on the grounds of financial hardship or damage:

The exception ignores the full ambit of harm that may be caused to a business, such as relationships with customers, increased workplace conflict and grievances, and brand and reputational damage. In *Ronald Anderson v Thiess* [2015] FWCFB 478, the Fair Work Commission recognised the potential harm an employer can be exposed to as a result of an employee expressing his religious and political views; namely, in this case, reputational damage as a company with a multicultural workforce and international operations in Indonesia, a Muslim-majority nation.

Preventing the application of reasonable business policies and contracts of employment to employee statements of belief unless compliance by the employee is necessary to avoid "unjustifiable financial hardship", is unfairly narrow.

Conclusion

It is premature for the NSW Parliament to pass legislation to protect religious freedoms when the Federal Government has released draft bills to the same. This will add to the complexity and confusion for employers in having to navigate multiple and different forms of regulation relating to discrimination on the grounds of religious beliefs. Furthermore, the ADA Bill contains some significant problems with how it will operate in a consistent manner with existing employment and work health and safety laws. Many of these problems were the subject of Ai Group's submissions to the Federal RD Bill consultation process but are also evident in the terms of the ADA Bill, particularly section 22N. For these reasons, Ai Group does not support the ADA Bill. The Bill should not proceed.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for more than 140 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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