Ai GROUP SUBMISSION

The Law Reform Commission

Review of the *Anti-Discrimination Act (1977) NSW*

29 September 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a response to the Law Reform Commission's review of the *Anti-Discrimination Act (1977) NSW* (**AD Act**), commissioned by the NSW Attorney-General.

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Along with the broader community, businesses play an important role in protecting and maintaining human rights. Employers must observe anti-discrimination legislation and other statutes based on human rights principles. For this reason, a human rights framework that is simple to understand, not overly complex and recognises that employers can comply in different ways is needed to ensure that human rights legislation is practical, fair and complied with.

In summary, the review of the AD Act should result in the AD Act:

- Working harmoniously with reforms made to anti-discrimination and workplace laws made by the Commonwealth Government;
- Providing a contemporary and nationally consistent regulatory approach to 'special measures' to support and encourage employers to both build diverse workplaces and address historical disadvantage faced by certain groups;
- Ensuring that any amendments relating to sexual harassment do not further complicate the complex regulatory interaction between the *Sex Discrimination Act 1984 (Cth*), the *Fair Work Act 2009 (Cth)* and the *Work, Health and Safety Act 2011 (NSW)*, including regulations and codes of practice around psychosocial hazards and the regulatory focus of the Safe Work NSW *Respect@Work* Taskforce;
- Maintaining well-understood concepts of direct and indirect discrimination;
- Maintaining current approaches to discrimination, harassment and vilification (rather than adopting positive duties on employers), in light of recent WHS regulatory developments requiring employers (and persons conducting a business or undertaking (**PCBU**s) to eliminate or control risks relating to psychosocial hazards such as discrimination, harassment and vilification.

- Recognising that the Australian Human Rights Commission (AHRC) is the primary national body and regulator in conducting inquiries into systematic discrimination for persons and organisations in NSW;

Interaction with Commonwealth anti-discrimination law

Employers are already subject to multiple and duplicate pieces of legislation directed at discrimination, adverse action and harassment.

Anti-discrimination legislation is regulated through a complex web of federal, state and territory laws.

Anti-discrimination law is found at the federal, state and territory levels. In total, 14 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment that would apply to many larger businesses operating in NSW.

These include:

1. *Fair Work Act 2009* (Cth) (**FW Act**)
2. *Age Discrimination Act 2004* (Cth)
3. *Disability Discrimination Act 1992* (Cth)
4. *Racial Discrimination Act 1975* (Cth)
5. *Sex Discrimination Act 1984* (Cth)
6. *Australian Human Rights Commission Act 1986* (Cth)
7. *Anti-Discrimination Act 1977* (NSW)
8. *Equal Opportunity Act 2010* (VIC)
9. *Anti-Discrimination Act 1991* (QLD)
10. *Equal Opportunity Act 1984* (WA)
11. *Equal Opportunity Act 1984* (SA)
12. *Anti-Discrimination Act 1998* (TAS)
13. *Discrimination Act 1991* (ACT)
14. *Anti-Discrimination Act* (NT)

Ai Group does not support additional regulation in the NSW AD Act that would see the regulatory burden on employers further increase, particularly where such obligations do not presently exist under Commonwealth anti-discrimination law. The AD Act should operate harmoniously with Commonwealth anti-discrimination laws.

We also caution against an assessment of the AD Act in isolation without regard to protections afforded by other laws applying to persons in NSW.

For instance, the growing jurisdiction of the FW Act's General Protections both prohibits certain employer conduct in relation to various protected attributes and provides a pathway to dispute resolution in the Fair Work Commission as well as access to various remedies and Court orders. The

FW Act covers national system employers, being employers who are generally constitutional corporations in addition to other categories as defined in the sections 14 and 30M of the FW Act. These employers are also subject to federal anti-discrimination law and state anti-discrimination legislation, including the AD Act.

Significant and recent developments have also occurred with model WHS psychosocial hazard regulations that have been adopted by various state and territory governments, including the NSW Government. These regulations require strong interventions from persons conducting a business or undertaking (**PCBUs**) to eliminate psychosocial hazards including exposure to discrimination, harassment and bullying. Further reform to the AD Act in certain areas may place the AD Act on a regulatory collision with WHS laws, particularly as these regulatory frameworks address discrimination and harassment in different ways.

The AD Act should be amended to support special measures consistent with Commonwealth laws

Increasingly, businesses are focused on building diverse workplaces and it is important that unnecessary regulatory barriers are removed to ensure vulnerable and/or socially marginalized people in the community have access to employment opportunities.

The AD Act, unlike other anti-discriminations laws around Australia, does not recognise or support efforts by organisations to achieve substantive equality for disadvantaged groups that can be achieved through the adoption of 'special measures' in relation to a particular benefit.

Organisations who wish to adopt special measures, must make a formal application under section 126 of the AD Act to obtain formal exemption from the Anti-Discrimination Board to be exempt from certain provisions of the AD Act that would otherwise prohibit the special measure.

Section 126 is a high barrier and disincentive for many businesses who wish to engage in special measures to address historical disadvantage of certain groups by, for example, engaging in targeted recruitment or offering particular benefits to certain employed groups.

Section 126 is also inconsistent with the approaches to special measures taken by most other Commonwealth and state and territory anti-discrimination laws.

Ai Group urges the review to consider limiting the application of section 126 such that it doesn't apply to special measures, thus ensuring that there is stronger alignment with Commonwealth anti-discriminations laws. This approach generally recognizes that special measures are exceptions to discrimination without the need to obtain a formal exemption from the Anti-Discrimination Board.

Under Commonwealth anti-discrimination laws (see for example section 7D *Sex Discrimination Act 1984 (Cth)*(**SD Act**), special measures are:

- embedded within those laws to promote substantive equality;

- defined by explicit criteria set out in the relevant law;
- limited to the particular benefit identified;
- without formal application and approval processes; and
- supported with comprehensive guidelines from the AHRC to guard against their mis-used;

Organisations wishing to adopt special measures in accordance with federal and other state and territory anti-discrimination laws are frequently frustrated by the AD Act and its 'anomaly' as being the only jurisdiction that requires applying for and obtaining a formal exemption from the relevant human rights body.

Limiting the application of section 126 to ensure it excluded conduct taken in accordance with a special measure would go a long way in improving consistently between the AD Act and Commonwealth laws and support businesses achieve substantive equality for disadvantaged groups in NSW.

This could be achieved by creating a new section 126A that enabled special measures, (see for example, section 21 of the AD Act relating to race-based discrimination) that would enable the creation of special measures subject to relevant conditions (see eg. section 7D of the SD Act) and where the adoption of a special measure is:

- an explicit exemption to unlawful discrimination as provided by the AD Act;
- is not subject to a formal exemption process in section 126.

Section 126 should also be amended to explicitly state that the provision does not apply to a special measures provided for in section 126A.

Sexual Harassment

Consideration of the AD Act's sexual harassment provisions should be viewed cautiously given the complex interaction between federal and state WHS laws regulating this areas of persons and businesses in NSW.

Any amendments relating to sexual harassment should not further complicate the complex regulatory interaction between the *Sex Discrimination Act 1984 (Cth*), the *Fair Work Act 2009 (Cth)* and the *Work, Health and Safety Act 2011 (NSW)*, including regulations and codes of practice around psychosocial hazards and the regulatory focus of the Safe Work NSW *Respect@Work* Taskforce.

While Ai Group considers there to be scope for the AD Act to be amended to include the types of unlawful conduct relating to sexual harassment as set out in the SD Act (such as sex-based harassment and creating a hostile working environment on the grounds of sex), we do not support

the creation of a further regulator to enforce compliance with the AD Act or to conduct inquiries into systematic unlawful sex discrimination and sexual harassment. Such a function already exists with the AHRC.

Maintaining current approaches in light of increased duties in WHS

It is important that the AD Act maintains current approaches to discrimination, harassment and vilification (rather than adopting positive duties on employers). Employers and PCBUs in NSW now have elevated duties under WHS laws to eliminate or control risks relating to psychosocial hazards such as discrimination, harassment and vilification.

Further reform to the AD Act is not necessary and is likely to place the AD Act on a regulatory collision with WHS laws, particularly as these regulatory frameworks address discrimination and harassment in different ways.

Employers and PCBUs are presently dealing with differing standards or prevention and risk assessment under WHS statutory duties and the new positive duty under the SD Act. For instance, the SD Act's positive duty does not conform to the WHS considerations (many of which are specifically regulated) such as the hierarchy of controls approach in conducting risk assessments, worker consultation and training. This is proving extremely difficult for employers, in practical terms, who are now required to implement two rounds of changes in their workplace to comply with each duty under the SD Act and WHS regulation.

Creating further duties in the AD Act, will only create further complexity for PCBUs when similar duties exist in WHS laws.

Maintaining well-understood concepts of direct and indirect discrimination

The concepts of direct and indirect discrimination are generally well-understood by NSW businesses; they are concepts that also appear in Commonwealth and state and territory anti-discrimination laws.

In our experience in providing anti-discrimination law training to employers, it is important the concepts of direct and indirect discrimination are not conflated, but separately understood by the community as different and distinct forms of unlawful discrimination. Employers generally understand these two limbs of discrimination, and this underpins their organizational anti-discrimination policies.

The definitions of direct and indirect discrimination should not be disturbed.

Conclusion

Ai Group supports an AD Act that works harmoniously with Commonwealth anti-discrimination laws and adopts a nationally consistent approach in regards to the implementation of 'special measures' enabling employers to more easily support equality for disadvantaged and socially marginalised groups. It is important that the AD Act is sensitive to the regulatory burden on business who must also comply with other laws, including the FW Act, WHS laws and Commonwealth anti-discrimination laws.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

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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. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and 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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