HOUSING INDUSTRY ASSOCIATION

Submission to the
Education, Employment and Small Business Committee Parliament House

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents some 60,000 members throughout Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

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 23 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 22 August 2019 the Minister for Education and Minister for Industrial Relations, the Hon Grace Grace MP introduced the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Bill) into the Queensland Parliament. The Bill was referred to the Education, Employment and Small Business Committee for detailed consideration.

The Bill proposes to amend the following Acts:

- Workers' Compensation and Rehabilitation Act 2003 (Workers Compensation Act);
- Further Education and Training Act 2014 (Training Act); and
- TAFE Queensland Act 2013.

In addition the Bill proposes to amend the Workers' Compensation and Rehabilitation Regulation 2014 and repeal the Commonwealth Games Arrangements Act 2011.

HIA takes this opportunity to make a submission is response to the proposed amendments to the Workers Compensation Act and the Training Act.

1.2 WORKERS COMPENSATION ACT

HIA submits that overall the Queensland WorkCover Scheme is working well and, in its current state, serves its purpose well. This was the central finding of the five year review of the Workers Compensation Act carried out by Professor David Peetz.

However, HIA members do have concerns in relation to premium levels, coverage of workers compensation policies and their interaction with public liability policies. HIA's view is that there is little evidence to support the need for significant changes to the scheme outlined in the Bill. Throughout the consultation sessions HIA was of the understanding that the changes were mostly inconsequential and minor in detail.

The additional $18.6 million cost of the proposed legislative changes suggests the changes are not minor and will result in increased premiums.

The costs as outlined in the explanatory note do not account for all potential costs. The estimate provided for the cost associated with the extension of the workers compensation scheme to unpaid interns is undervalued and does not take into account the inevitable red-tape compliance requirements business will incur. There is also no information about the cost of the proposal to require Rehabilitation and Return to Work Coordinators undertake an approved training course. This is a further cost imposed on businesses in Queensland which has not been assessed.

In the context of an already highly regulated environment for Queensland businesses HIA is concerned that the cost imposed will add another burden for business for little tangible benefit for workers. Whilst HIA is not opposed to some measures in the Bill, such as the ability for WorkCover to fund some of its own programs, the overall cost of the changes should be mitigated or set-off with other business savings.

1.3 TRAINING ACT

The VET system underpins the skills capacity of Australia's construction industry, providing the competencies and qualifications to become experienced and licensed to build and renovate the homes of thousands of Australians every year. It is for this reason that HIA has a strong and vested interest in ensuring affordable and easy access to training for all persons wanting to pursue a career in the residential construction industry.

The sector must be structured to support the housing needs of Queenslanders, to meet population growth and underlying demand.

Despite the desire of employers in the residential building industry to take on an apprentice they are confronted with a complex apprenticeships system. The interaction of this system with the workplace relations framework, the mere fact that an apprenticeship/traineeship involves at least three parties and the red tape imposed at a State and Federal government level creates a genuine barrier to greater take-up.

Further, the failure to identify those trades currently experiencing skill shortages as well as those that will experience shortages in the future must be addressed. Without this, putting in place effective ways to address this is significantly compromised.

The benefits of skill development are widely recognised, as stated in a 2006 Access Economics Report:

> *'Our living standards per head are a function of the effectiveness with which we work (productivity) and the proportion of us working (participation). Importantly, improved skills development (such as via VET studies to improve work skills) can do both of these. As economists have increasingly noted, not merely does increased investment in skills show up as more productive workers, those workers also tend to stay in the workforce for longer – thereby boosting participation as well as productivity...'*[1]

It is HIA's submission that given the wide ranging impact the VET sector plays in skills development more must be done to support this integral component of the Qld economy. It must be noted that while the focus of the Bill is the regulatory framework, regulation alone cannot improve the completion of apprenticeship and traineeship qualifications.

It is extremely frustrating that HIA was not approached during the consultation phase given the significance of this issue to the ongoing success of the residential building industry and given HIA's extensive experience as a Group Training Organisation (GTO).

The introduction of labour hire licensing in Queensland, with specific inclusion of GTO's, has increased the cost of employing apprentices in Queensland. The Bill, via the introduction of the employer resource assessment and the conflation of the employment contract and the training arrangement, further increases the complexity and cost of hiring and training apprentices in Queensland.

2. WORKERS' COMPENSATION ACT

2.1 EXPRESSIONS OF REGRET AND APOLOGIES

HIA understands that the Bill proposes to exempt expressions of regret and apologies provided by employers following a workplace injury from being considered in any assessment of liability for damages brought under the Workers' Compensation Act to align with the approach taken in the Civil Liability Act 2003.

This Minister speech noted that this proposed amendment

> *"…aligns with the approach taken in the Civil Liability Act 2003. Some workers often only want an apology from their employer for what has occurred to them and their family."*

HIA would reiterate the issue that was noted during the consultation discussions regarding the treatment of apologies. Whilst primarily an apology may not count towards civil liability there may be an issue regarding any criminal prosecutions. Clarification on this aspect in the explanatory notes would be beneficial.

2.2 REHABILITATION AND RETURN TO WORK

HIA understands that the Bill proposes to:

- provide an additional way for employers to ensure that Rehabilitation and Return to Work Coordinators (RRTWC) are appropriately qualified; and
- require employers to provide details of their RRTWC to insurers in order to support compliance and the provision of advisory services to coordinators.

The Minister's speech noted:

> *"The bill will also improve the capability of employers to help rehabilitate injured workers. Employers who are required to appoint a rehabilitation and return-to-work coordinator will, under this bill, also now be required to submit to their insurer details demonstrating how their coordinator is appropriately qualified to*

[1] Access Economics Pty Limited, 16 June 2006 *Future demand for vocational education and training in NSW,* p.1

undertake their role. This could include showing evidence that the co-ordinator has completed a training course or qualification approved by the Workers' Compensation Regulator. This new requirement addresses a concern from stakeholders that the skill level of rehabilitation and return-to-work co-ordinators has reduced since the requirement for accreditation was removed in 2013 by the Campbell Newman government. The amendments are intended to increase the skill level of rehabilitation and return-to-work coordinators and will enable the regulator to undertake targeted compliance and education activities with coordinators, ensuring that resources are focused on the greatest areas of need"

In the residential building industry, employers with approximately 50 or more workers are already required to have a RRTWC under existing legislation.[2] To ensure that persons appointed as RRTWC are appropriately qualified, the Bill proposes to amend the Workers' Compensation Act to allow the Workers' Compensation Regulator to approve a list of training courses or qualifications for RRTWC relevant to the industry of the employer. The onus for demonstrating the person engaged to perform the role of RRTWC is appropriately qualified remains with the employer. This obligation can be met either through an approved training course or another way.

HIA is concerned that the additional cost of complying with the proposed requirement outweighs any perceived benefit to industry or workers. HIA is unaware of any issues in the residential building industry associated with the 2013 change noted by the Minister. On the basis that no evidence has been provided HIA opposes the proposed amendment as an unnecessary and costly burden.

Further, HIA opposes the proposed new section 228 that seeks to introduce a penalty for a failure by an employer to assist or provide rehabilitation. The existing legislative provisions are sufficient.

2.3 UNPAID INTERNS

HIA opposes the extension of workers' compensation coverage to unpaid interns.

The proposed amendment is unnecessary and is likely to act as a direct disincentive for business to take on interns. Specifically the record-keeping associated with this proposal, in order for premiums to be assessed, is not supported. The proposed amendment will have a direct negative impact on numerous university courses that currently rely on the goodwill of a multitude of businesses to provide opportunities for students to gain practical experience prior to graduation.

The FWO website notes that unpaid work experience and unpaid internships generally indicate the following elements (for there to not be an employment relationship):

- the person must not be doing "productive" work; and
- the main benefit of the arrangement should be to the person doing the placement; and
- it must be clear that the person is receiving a meaningful learning experience, training or skill development.

If they are not an intern, as assessed by the above employment criteria, then by default they are an employee covered by the WorkCover scheme.

HIA is unsure what area this extended coverage is responding to. A legitimate intern who is injured whilst undertaking an internship would have recourse through the public liability insurance of the business, private health insurance or accident/illness insurance under superannuation.

HIA would contend the definition provided for an 'intern' is flawed. There appears to be an assumption that all interns have been illegitimately engaged and should be paid employees. This is not the case.

The definition under the Bill provides:

A person (an intern), other than a person mentioned in chapter 1, part 4, division 3, subdivision 1, 2, 3 or 4, is a worker if the person—

(a) is performing work for a business or undertaking without payment of wages to gain practical experience in the type of work performed by the business or undertaking, or to seek to obtain a qualification; and

[2] QLD WorkCover website: https://www.worksafe.qld.gov.au/claims-and-return-to-work/rehabilitation-and-return-to-work/roles-and-responsibilities/the-role-of-a-rehabilitation-and-return-to-work-coordinator

(b) would be a worker if the work performed by the person were for the payment of wages.

The explanatory notes explain the definition as follows:

> *An intern is defined as a person who is performing work for a business or undertaking without payment of wages to gain practical experience in the type of work performed by the business or undertaking, or to seek to obtain a qualification; and would be a worker if the work performed by the person were for the payment of wages.*

Further HIA would contend that subsection B of the definition is problematic. It implies that the only difference between an intern and a worker is the payment of wages. As per the criteria for considering whether an employment relationship occurs, this is not the case. If an intern is working and should be paid wages (due to an employment relationship existing) then they are not an intern and are a worker.

3. TRAINING ACT

3.1 EMPLOYER RESOURCE ASSESSMENT

The Bill proposes the insertion of a new definition of 'employer resource assessment'. The new definition requires that a registered training organisation provide a *'report about the capacity of the apprentices or trainees employer to provide or arrange to provide the range of work, facilities and supervision required under the training plan.*

The need to provide a 'report' is above and beyond the current requirements, yet the explanatory notes provide little supporting evidence demonstrating the need for the proposed change.

HIA opposes new section 66A which makes a failure to provide an employer resource assessment a penalty provision.

3.2 SUSPENSION BY ONE PARTY

In principle, HIA supports the ability of one party to apply for the suspension of the training contract.

HIA does have some concerns regarding the time periods under the proposed provision. The suspension of the training contract is, ideally, for short durations. Likewise a decision by the Chief Executive should be made as soon as possible after an application is provided. The process to gather information, issue a show cause notice, receive responses and then issue a determination have lengthy timeframes allocated and there is ultimately no timeframe for when a decision by the Chief Executive must be made.

HIA submits that the information gathering process and show cause process should be shortened with discretion built-in for the Chief Executive to allow a greater period of time in exceptional circumstances.

HIA recommends that the Chief Executive should make a decision as soon as possible after receiving all the necessary information but no later than 7 days after receiving such information.

3.3 SUSPENSION, TERMINATION AND CANCELLATION OF THE TRAINING CONTRACT

The Bill proposes a number of amendments to the suspension and termination of the training contract. For example, the Bill proposes to only allow the cancellation of a training contract after 21 days since employment has ceased, to not allow the cancellation of the training contract where there is a *'contested event'* and allows for the automatic re-registration of a training contract in response to a *'re-instatement decision'*.

HIA opposes these aspects of the Bill.

Both a *'contested event'* and a *'re-instatement decision'* relate to matters pertaining to the employment relationship, not the training arrangement. Similarly, preventing the cancellation of a training contract until after the 21 days' time period allowed to lodge an unfair dismissal claim introduces uncertainty to the training arrangement; what are the expectations during the ending of the employment relationship and the end of the training contract 21 days later?

In contrast, while in principle, HIA supports the ability to temporarily suspend the training contract the ability to 'stand down' an employee is regulated by the *Fair Work Act 2009* (FWA).

HIA notes that the explanatory memoranda states that

> *"If the training contract is temporarily suspended, the employer may stand down the apprentice or trainee unless the employer and the apprentice or trainee otherwise agree. The employer may stand down the apprentice or trainee without pay under this section only in accordance with the information notice from the chief executive."*

The explanatory notes however do not make it clear if this provision is intended to override, duplicate or sit in-conjunction with the FWA provisions regarding stand down.

The interaction between the Workplace Relations framework and training arrangements is already problematic when it comes to an employer ascertaining their rights and obligations in relation to the cancellation, suspension, and termination of a training contract.

In the course of terminating an ordinary employee's employment, employers are required to consider the relevant award conditions, and as well the FWA, so as to comply with their obligations.

However, when considering the termination of an apprentice an employer must consider a further 'layer' of legislative requirement as the training contract must also be 'cancelled'. The term 'cancellation' is not recognised in the industrial relations sphere however the effect of taking these actions may have ramification in the workplace relations space.

While the training contract and employment contract must operate 'hand in hand' throughout the apprenticeship, in practice there is a clear disconnect between the cancellation of the training contract and the termination of an employment contract; the relevant legislative instruments do not interact in a cohesive manner.

As such HIA opposes a further 'mudding of the waters' between the employment contract and the training arrangement.

4. CONCLUSION

The rate of growth in the regulatory environment that governs businesses in Queensland has been unprecedented.

The amendments proposed to an already well-functioning WorkCover scheme are, as outlined by the significant additional costs, not of a minor nature, have not been justified by supporting evidence and are completely unwarranted in Queensland's current business environment. Additionally the proposed amendments are likely to have a significant negative impact on the willingness of business to take on interns which will create havoc for numerous tertiary institutions that already face significant challenges placing students in real life workplaces so they can gain much needed experience.

It is HIA's view that a number of the amendments proposed to the Training Act increase the complexity of hiring apprentices by inappropriately linking the employment relationship with the training contract. HIA recommends that such an approach be re-considered.