Ai GROUP SUBMISSION

Attorney General's Department
Australian Government

Religious Freedom Reforms
Second Exposure Drafts

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About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

Nicola Street, National Manager – Workplace Relations Policy
Telephone: 0414 614 069 or 02 9466 5541
Email: nicola.street@aigroup.com.au

EXECUTIVE SUMMARY

Ai Group welcomes the opportunity to provide a submission in response to the second Exposure Drafts of the Religious Freedom Bills released for consultation by the Commonwealth Attorney-General's Department.

Consistent with our original submission in response to the first Exposure Drafts, Ai Group supports the right to freedom of religion (including the right not to be religious) in the Australian community. Businesses manage a combination of multi-faith and non-religious workforces while striving to ensure that their operations are viable, productive, competitive and harmonious.

Ai Group welcomes the amendments made to the first exposure draft of the *Religious Discrimination Bill 2019* (**RD Bill**) aimed at preserving the existing rights of employers to ensure appropriate standards of conduct by employees during meal breaks, at work functions and at other times when the employees are engaged in employment-related activities, but are not actually working. This was a key issue raised in Ai Group's original submission.

Ai Group remains concerned however, that significant aspects of the RD Bill are problematic for Australian employers and workplaces.

Specifically, the many and significant problems with the RD Bill's statement of belief provisions, coupled with the existing legislative protections already in place to support religious belief, should be reason for the Government to abandon the statement of belief provisions completely.

The Second Exposure Draft of the RD Bill would still impose unreasonable restrictions on businesses and would give employees a very wide ability to argue that they should not have to comply with reasonable company policies. Further amendments are needed if the RF Bill is to proceed.

Ai Group remains concerned that the Bill:

- Continues to 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;
- 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.

For the RD Bill to proceed in a way that will be workable for businesses, the following amendments are needed:

- Removal of the statement of belief provisions in subsection 8(3);

- Ensuring that actions taken by employers in satisfaction of existing workplace laws are appropriately protected and a defence to claims of discrimination under the Bill;

- Removal of the indirect discrimination provisions in section 8, if a broad definition of religious belief is to remain in the Bill; and

- Removal of the reverse onus of proof.

Ai Group's earlier submission details our concerns about the RD Bill. A large number of these concerns remain in respect of the second exposure draft.

THE RD BILL IS A MAJOR DEPARTURE FROM THE APPROACH TAKEN IN EXISTING ANTI-DISCRIMINATION LAWS

Unlike conventional anti-discrimination laws that are based on established notions of direct and indirect discrimination, the RD Bill goes further by restricting the operations of businesses while conferring extensive positive rights on certain persons and organisations to lawfully discriminate. Such an approach is inappropriate and confusing for employers and employees due to its inconsistency.

The RD Bill's expanded provisions at sections 11 and 12 that enable organisations meeting the definition of a religious body, to discriminate in workplaces based on religious preference, or to meet a need arising out of a religious belief, is starkly at odds with the requirement on secular businesses to not discriminate on the basis of religion.

Ai Group is not convinced of the need for a new Freedom of Religion Commissioner. The position raises questions as to the desired qualifications and experiences for the role and whether a Freedom of Religion Commissioner would be expected to be a person holding a particular or mainstream religious belief, or non-religious belief.

STATEMENT OF BELIEF PROVISIONS ARE STILL UNWORKABLE AND NEED TO BE REMOVED

The statement of belief provisions at subsection 8(3) of the RD Bill and the related definitions present significant problems for employers. These problems are best solved by removing subsection 8(3) and the related definitions in section 5 entirely, including the definitions of "*statement of belief"*, "*employer conduct rule"* and "*relevant employer"*. Related provisions such as section 32(6) should also be removed.

While the Government has made some improvements to aspects of the statement of belief provisions in the RD Bill, the revised provisions still unreasonably restrict employers from appropriately managing their workplaces and businesses.

Specifically, the revised statement of belief provisions would:

- Remove from 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;
- Inhibit or prevent employers from managing their obligations under existing anti-discrimination and other workplace laws, such as the *Sex Discrimination Act 1984 (Cth)* (**SDA**) and the General Protection and Anti-Bullying provisions in the *Fair Work Act 2009 (Cth)* (**FW Act**);
- 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;
- 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 employers as they would need to review existing operating policies, procedures and employment contracts to comply with the RD Bill's provisions.

- Unnecessarily and unfairly targets larger employers based on a threshold of $50 million in annual revenue. Larger organisations have widely demonstrated a commitment to recognising religious diversity and tolerance through company policies and practices, and should not be treated differently under the RD Bill.

- Adopts an inequitable approach in restricting existing rights and policies of some employers while granting additional rights to employers that meet the definition of a religious body, including where such employers provide comparable services to other employers.

These concerns are dealt with below in more detail below.

The weakened connection between a belief and a religious belief is unworkable

Ai Group acknowledges the amendments to the definition of "*statement of belief"* at section 5 of the RD Bill. Despite what the Government may have intended, some of these amendments create further concerns.

Firstly, replacing the requirement at paragraphs 5(a)(iii) and 5(b)(iii) that the belief "*may be reasonably regarded*" as being in accordance with the doctrines, tenets, beliefs or teachings of the religion, with a requirement that the belief is a belief that "*a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*" significantly reduces the necessary safeguard connecting a belief with a religious belief to qualify for the Bill's protection.

Unlike the original provision which would have enabled the Courts to consider the connection based on the range of available evidence submitted to it, including where such evidence may have included a contrary view, the amendment simply enables a person to find another person (e.g. a family member or a close friend) who is prepared to state that they are of the same religion and that the belief is in accordance with that religion. In other words, the amendment replaces a Court's objective assessment of the connection between a statement of belief and a religion with a subjective view of another person, regardless of the person's motivation or relationship to the first person seeking the protection. Ai Group considers this amendment to be unsound.

Moreover, for employers, it would be extremely difficult, and at times impossible, to identify, know or anticipate who this other person may be who could verify the connection between the religion and the belief allegedly held by the first person. As referred in our earlier submission, employers are not experts in the philosophies of all religious and non-religious views around the globe. It is unfair to require employers to curtail their policies and operational requirements based on religious beliefs they cannot easily or reliably verify as protected statements of belief.

Limiting statements of belief to written or spoken words by an employee

Ai Group acknowledges the amendment to the RD Bill's statement of belief definition by limiting the Bill's protection to statements of belief that are either written or spoken words by the employee. While this reduces concern about the extent of the protection to non-written or non-verbal conduct, the medium through which such statements may be made (particularly those with a far-reaching audience such as on social media), may still have a deliberate or unintended connection to, and impact on an employer's business or workplace. Online communications may be permanent (until deliberately removed) and accessed by other workplace participants and business clients outside the workplace.

While the amendment is an improvement, it insufficiently addresses the concerns that businesses will still be required to manage online communications made outside the workplace but impacting the business. These issues are discussed further below.

Amendments to subsection 8(5) – statements of belief that harm workplaces

Subsection 8(5) of the revised RD Bill provides for some exceptions where a statement of belief would not be protected. These exceptions are where the statement is malicious, or that would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons, or would encourage conduct that would constitute a serious offence. Ai Group notes the amendments made to subsection 8(5)(b) but does not consider them sufficient to alleviate employer concerns that a wide range of statement of beliefs may still cause detriment, harm or damage to the health or reputation of another person or group of persons – including co-workers and customers of the employer's business. Specifically, it appears a statement could still be disparaging in effect or could intimidate another so long as the statement does not "seriously" intimidate. It is problematic that the provision in effect allows conduct that might be intended to intimidate a co-worker, and yet an employer must come to a subjective view about whether the intimidation was 'serious' before taking reasonable action.

Employers typically have policies in place to protect employees from harm caused by inappropriate or offensive conduct or to prevent behaviour that is divisive or not conducive to maintaining workplace harmony. The importance of such policies has been recognised by the Fair Work Commission. The decision below highlights the mental health impact that inappropriate statements made by an employee can have on other employees.

In an appeal by *Mt Arthur Coal Re: Goodall* [2016] FWCFB 5492, the Majority of a Full Bench of the Fair Work Commission upheld the reinstatement of an employee dismissed for explicit sexist, homophobic and racist remarks made at work. Commissioner Johns strongly dissented, stating: (Emphasis added)

> "**[91]** This is not a case of a difference of degree, impression or empirical judgment. There is extensive literature about the effects of discrimination, including in the workplace. Making jokes or comments that are inherently Islamophobic and homophobic is likely to negatively affect the mental health of people in the workplace ranging from anxiety to depression. The Commissioner should have taken

"judicial notice" of the same.

[92] It is for this very reason that Mt Arthur has a Code of Business Conduct that expressly prohibits behaving in a way that is "offensive, insulting, intimidating, malicious or humiliating", making "jokes or comments about a person's race, gender, ethnicity, religion, sexual preference, age, physical appearance and disability." In implementing the policy, promulgating it and conducting training for its employees (including Mr Goodall) with the aim of eliminating discrimination in the workplace, Mt Arthur was fulfilling its obligations as an employer under Federal and State legislation to ensure that its workplaces are free of discrimination and harassment.

[93] In the face of a substantial and willful breach of that policy, Mt Arthur took the matter seriously, and ultimately concluded that it was a valid reason for termination that was not otherwise harsh, unjust or unreasonable. Requiring Mt Arthur to reinstate Mr Goodall in this context is plainly unjust. Mt Arthur took decisive action to eliminate Islamophobia and homophobia in its workplace. It should have been commended for its action, not punished by being required to take Mr Goodall back."

The RD Bill's statement of belief provisions would reduce tolerance of religious diversity

The statement of belief provisions at subsection 8(3), combined with the broad definition of religious belief, would reduce tolerance for religious diversity in workplaces and the broader community.

In *Ronald Anderson v Thiess* [2015] FWCFB 478, a Full Bench of the Fair Work Commission upheld the dismissal of an employee who sent an email message that included the following content about the religion of Islam and persons of Islamic faith:

> "As you can see they are a non-violent religion as they claim, although 70% of them are being hood winked just as it was in the days of Hitler and other notorious leaders. We need action urgently, and this does not mean to be violent. We must speak out if we want our Country back…You may have noticed that they did not respect their Australian Citizenship, as their allegiance is to Allah and the Muslim banner…"

The Full Bench characterised this email at paragraph [28] of its decision:

> "…objectively speaking, clearly inappropriate and offensive for the reasons earlier discussed. It was apt to offend not only Muslims, but anyone who valued religious tolerance and rejected bigotry. It also, if publicly exposed, had the potential to damage Thiess' reputation as a company with a multicultural workforce and international operations which extended to Indonesia, Muslim-majority nation."

Ai Group considers that statements made in good faith that are critical of other religious beliefs could attract the protection of the Bill in a way that would prevent employers from managing the adverse impact on their business and workplaces.

The statement of belief definition should be removed, along with subsection 8(3).

The amendments to the statement of belief provisions at subsection 8(3) are an improvement to

the original Exposure Draft but do not sufficiently address the unworkability of these provisions.

The expression "*other than in the course of the employee's employment*" is not wide enough to protect employers

The insertion of the phrase "*other than in the course of the employee's employment"* at paragraph 8(3)(b), to replace the original phrase "*other than when the employee is not performing work on behalf of the employer"*, restores in some circumstances the ability of employers to take remedial action against employees who do not comply with reasonable company policies. However, the amendment continues to expose employers to harm in cases where there is a clear impact between the statement of belief and the employers' business and workplaces.

The phrase "*in the course of employment"* can be found in workers' compensation legislation, such as the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) and the Victorian *Workplace Injury Rehabilitation & Compensation Act 2013* (Vic). Section 6 of the SRC Act identifies a list of circumstances in which workers may be compensated for injuries that involve an injury occurring outside the ordinary workplace, for instance during a recess from work. Specifically, section 6 states that "*in the course of employment*" is an alternative to "*having arisen out of…employment*": (Emphasis added)

> "Without limiting the circumstances in which an injury to an employee may be treated as <u>having arisen out of, or in the course of, his or her employment,</u> an injury shall, for the purposes of this Act…"

The SRC Act's reference to "*in the course of the employee's employment*" carries a history of judicial decisions that have applied the phrase with limitation. In *Comcare v PVYW* [2013] HCA 41*,* the High Court considered that "*in the course of the employee's employment"* applied where an employee was injured during an interval in an overall period of work, the circumstances of the employee's injury must be connected to an inducement or encouragement by the employer. That is, the connection of the circumstances of an injury sustained during a period of non-working time to an employer's inducement or encourage was a limitation on the Comcare compensatory scheme to compensate for workers' injuries.

Referring to the High Court's decision in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473*,* the High Court in *Comcare* held (at paragraph [60]) that an "*inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place*" and at paragraph [61] "*…the effect of the principle stated in Hatzimanolis was to create an interval between periods of actual work, to better explain the connection that an injury suffered by an employee in certain circumstances has to employment. <u>It did so by reference to the fact that the employer induced or encouraged the employee to do something or be somewhere in particular</u> and the fact that the employee did so and was injured."* (Emphasis added)

Whether or not an employer had induced or encouraged the relevant circumstances giving rise to liability was a limitation attributed to the phrase "*in the course of the employee's employment."* The limitation has also been evident in more recent decisions in workers' compensation jurisdictions

concerning "*in the course of the employee's employment."*

In *Hill v Comcare* [2018] AATA 670, the Administrative Appeals Tribunal of Australia found that an employee's knee injury sustained playing netball at an employer-facilitated weekend game was not compensable. It held that an email from the employee's team leader encouraging his attendance at the Geelong Games was not a request or direction to attend and such attendance was not associated with his employment.

In *Mozsny v Comcare* [2018] AATA 1966*,* the Administrative Appeals Tribunal of Australia held that an employee who injured her knee at a weekend Christmas party, organized by her work colleague using her employer's resources and time (including email system), was not an injury arising out of or in the course of her employment for the purposes of compensation. The Tribunal applied the principles in *Hatzimanolis* and held that the use of the employer's resources and time (including its email system) "*does not equal encouragement or direction*" by the employer.

These later decisions demonstrate that even where an employer may exercise some encouragement for an employee to engage in an activity, it may not be sufficient for an event (in these cases, an injury) to be considered in the course of the employee's employment.

It is unclear whether the limitation of an employer's inducement or encouragement attributed to "*in the course of the employee's employment*" would equally apply to subsection 8(3) of the RD Bill in respect to statements of belief made "*other than in the course of the employee's employment*." To apply the reasoning in both *Hill* and *Mozsny* to the protections in the Bill would, in effect, mean that employees at an employer-facilitated weekend event could be free to engage in conduct that harasses, victimizes and seriously intimidates on religious grounds, without their employer being able to take remedial action. This would include statements made about those who hold religious beliefs that are contrary to an employer's discrimination and bullying policies.

Given the similarly of the phrase used in subsection 8(3) and the Government's reference in the Explanatory Memorandum at paragraph [138] to the amended subsection 8(3) enabling an employer to meet its obligations under work health and safety or workers' compensation law, it is reasonable to conclude that the principles in *Comcare v PDYW* and in *Hatzminonalis* (and other relevant workers' compensation decisions) would be relevant to the interpretation of the phrase "*in the course of the employee's employment*" in subsection 8(3) of the Bill. Accordingly, in the case of a protected statement of belief made *"other than in the course of the employee's employment"* the issue of whether an employer induced or encouraged the making of a statement of belief is likely to be considered relevant. This is problematic and does not align with employer obligations under existing workplace laws.

There are many instances where employees engage in outside of hours conduct without inducement or encouragement by the employer, but which nonetheless have a clear impact on the workplace and business. Therefore statements of belief amounting to bullying, discrimination or harassment that have not been induced or encouraged by the employer, or statements inflicting damage (intentional or otherwise) against an employer's business that have similarly not been

induced or encouraged, would expose employers to a variety of harms that cannot be easily managed under the Bill's protections. This could include cases where employers are liable under anti-discrimination legislation or other relevant laws. Indeed, there are a range of decisions made under the Fair Work Act and State and Federal anti-discrimination legislation that extend the connection between conduct and the workplace further than the Comcare cases outlined above. Some examples are set out in the sections below.

Unreasonable restrictions on policies needed to comply with anti-discrimination and FW Act obligations

As discussed in Ai Group's initial submission, there are many cases and established principles of employment law that provide for different tests of whether an employer is liable or responsible for the conduct of its employees outside working hours.

While the Explanatory Memorandum identifies that the amendment to subsection 8(3) would not affect employer rules about employee conduct during recesses at work and where employers might require standards of behaviour for the purposes of meeting work health and safety obligations or workers' compensation laws, the amendment does not align with other existing employment obligations on employers.

For instance, in *Vergara v Ewin* (2014) FCAFC 100 the Full Federal Court upheld a claim of sexual harassment under the SDA involving the sexual assault of an employee by a co-worker contractor at a hotel establishment outside working hours. In doing so, the Court upheld a broad meaning of the SDA's definition of "*workplace participant"* to include a labour hire contractor, and upheld a broader meaning of the term "*workplace"* to include the hotel establishment because the visit to the hotel was "to deal with what had occurred at the workplace".

Many instances of unlawful discrimination or sexual harassment occur outside the workplace without "inducement or encouragement" by the employer.

It would be extremely concerning for the RD Bill to limit or prevent the application of employer policies that seek to prevent discrimination and harassment that occur in circumstances other than in the course of the employee's employment because the employer has not induced or encouraged such conduct.

The following example is relevant:

> An employer's HR Manager receives a complaint from a female employee stating that a co-worker sent a text message to her expressing the view that it was God's desire she be at home with her children rather than working. The co-worker sent the message on a company provided mobile phone while he was eating breakfast at home and it was received by the employee on her way to work. The sending of the text message was not induced or encouraged by the employer. While the employer has a policy on appropriate workplace conduct, it is doubtful whether the grievance and the conduct complained of would be able to be dealt by the employer's policy. The employer is now required to manage the relationship between the two employees and would be impeded in effectively addressing the

employee's complaint if the RD Bill is enacted as currently drafted.

While section 42 of the Bill declares that a statement of belief, in and of itself, does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the FW Act), we consider that it falls short of ensuring that employers are not vicariously liable for conduct of an employee such as unlawful discrimination.

It is also unclear whether section 42 means that a protected statement of belief can still amount to harassment or victimization under workplace laws for which employers may still be liable. Harassment and victimization generally have their own definitions separate to discrimination. Similarly it is also doubtful whether section 42 would protect employers from claims of adverse action or bullying claims by employees.

Section 42 clearly contemplates that some statements of belief may unlawfully discriminate against others. This, in itself, is a problem for employers and workplaces in that it condones conduct that is elsewhere recognised as harmful in anti-discrimination law, and that employers generally try to eradicate or resolve in their workplaces.

Ai Group does not support anti-discrimination protections that are inconsistent with other protections at law. Such an approach is unfair and confusing for employers and employees. It would create unnecessary divisions in workplaces.

The problems with section 42 are best solved by removing subsection 8(3) and section 42 from the Bill.

Employer rights to remediate cases of harm unreasonably eroded

Many decisions under existing employment legislation, such as the FW Act, have recognised the ability of employers to take remedial or disciplinary action against employees who engage in out of hours conduct that damages the business or workplace in some way. The amended subsection 8(3) removes that existing ability for employers to take such action in some circumstances.

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 read 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." (Emphasis added)

If an online post was made in similar circumstances as a protected statement of belief, then the

question of impact and connection to the employee's workplace, as duly recognised by the Fair Work Commission, may have no relevance under the proposed test of "*other than in the course of the employee's employment",* particularly where it can be demonstrated that the employer did not induce or encourage the making of the online statement of belief by the employee.

Ai Group's initial submission highlighted other decisions that recognise an employer's right to take remedial action in response to employee conduct outside work based on the nature of connection to the employer's workplace and business (See *Rose v Telstra Corporation* (1998) AIRC 1592*; Pinanwin v Domingo* [2012] FWAFB 1359; and *Streeter v Telstra Corporation* [2008] 270 IR 1).

Online communications and the impact on workplaces

The role of technology in employee communications with each other is challenging for many employers, particularly as it regularly extends to communications outside of working hours but where the communication clearly has an impact or a connection with others at work or with the employer's business.

As referred above in *Mozsny v Comcare (Compensation)* [2018] AATA 1966*,* an employee's use of an employer's communication system was insufficient to amount to an employer's inducement and encouragement for the organizing of a weekend Christmas party at which an injury occurred. This raises the strong likelihood that the concept of "*other than in the course of the employee's employment*" leaves open the possibility that employers are prevented from responding to unreasonable employee conduct in the form of a statement of belief made on the employer's IT/communications system outside of working hours.

It would be inappropriate for a statement of belief to be protected if it was made through the employer's communication system and where the employer's association with the statement is visible to either the recipients of the message or to the public at large (including an online audience).

It is well established that employers are able to regulate the use of their IT and communication systems to protect the employer from financial harm, reputational damage or legal liability.

In *Ronald Anderson v Thiess* [2015] FWCFB 478 a Full Bench of the Fair Work Commission upheld the dismissal of an employee who sent an email message about his views on people of Islamic faith on the employer's email system. The Full Bench a held at paragraph [27]:

> "…it is well established that it is lawful and reasonable for an employer to require an employee to comply with policies and directions which control the nature of communications over the employer's electronic communication systems."

Ai Group's concern about the making of statement of beliefs is not confined to where an employee uses the employer's IT system; an employee may use an alternative communication system but which has a clear impact at work. This includes scenarios where the employer has neither encouraged nor induced the circumstances for making the statement of belief.

The following examples highlight scenarios that would unreasonably restrict employers from taking

remedial action upon receiving a complaint from an employee:

- 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 statement of belief.

- An employee at home creates a post on Facebook publicly identifying her employer and a customer of the employer and declaring that the customer's conduct is not line with her religious views and that the customer is of poor moral character. The customer sees the post and complains to the business.

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

- 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.

These scenarios are not consistent with modern work practices and existing employment laws that are framed to promote workplace harmony and support remedial action by employers.

The statement of belief provisions in subsection 8(3) need to be removed.

The presumption against large employers is flawed

The presumption that employer conduct rules of large employers (referred to as "*relevant employers"*) are not reasonable in respect of conduct that is not in the course of the employee's employment, as provided for in subsection 8(3), is flawed and unnecessary. Larger organisations have demonstrated a clear preparedness to recognise religious diversity and tolerance based on existing religious freedom protections in company policies, including policies relating to broader diversity and workplace conduct. Many of these policies also recognise the legal rights of other employees and balance these with the rights and needs of the business. No additional regulation of the kind in subsection 8(3) is necessary.

The definition of "*relevant employer"* at section 5 captures employers who at a particular time in a financial year have or had revenue for the current or previous financial year of at least $50 million; and who are not the Commonwealth or another Government organisation as defined.

The Bill's definition of "*relevant employer"* contains no clarity as to whether that revenue is earned overseas or is confined to revenue of specific related entities. It is at odds with existing Commonwealth legislation that provides for a different threshold in targeting larger businesses (e.g. the *Modern Slavery Act 2018* (Cth)).

The presumption against employer conduct rules of relevant employers is a further reason why subsection 8(3) should be abandoned.

Employer harm extends beyond unjustifiable financial hardship

It is concerning that the overly narrow "unjustifiable financial hardship" exception has been maintained in the latest exposure draft. This 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. It is of concern to employers that the Bill both recognises that the conduct of employees can give rise to financial hardship (that is harm), but an employer cannot take remedial action unless the hardship is 'unjustifiable.' This also creates confusion about what unjustifiable means, especially for larger employers. Employee conduct may cause damage in the many millions of dollars, however if the conduct is connected to a statement of belief, no action can be taken if the business remains viable.

Some of the cases referred to above, such as *Ronald Anderson v Thiess* [2015] FWCFB 478, recognise 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. We note the reference in the Explanatory Memorandum at paragraph [141] that the unjustifiable financial hardship defence is drawn from the "unjustifiable hardship" defence in the *Disability Discrimination Act 1992* (Cth) (**DDA**) *"to the extent that those tests require consideration of the financial implications of particular conduct."* The "unjustifiable hardship" defence in the DDA is clearly broader than the concept of unjustifiable "financial hardship" in RD Bill.

Cases under the DDA frequently involve claims of disability discrimination where an employer fails to modify a particular aspect of its workplace. The focus on financial hardship is a more obvious factor in assessing the cost to the employer of implementing the modification so that the affected person may participate in, or continue, in employment. That is, the nature of any hardship to the employer is a narrower one and based on the consequences of having to make a modification on the grounds of disability.

In contrast, non-compliance with an employer conduct rule by an employee if the rule prevents or restricts an employee's statement of belief can lead to multiple forms of hardship in different areas of an employer's business. This can range from conflict between co-workers, reputational damage

to the employer, damage to clients and loss of business. DDA cases do not frequently focus on these issues but instead focus on the impact of the relevant modification – which for the employer, is frequently a financial one.

The narrowing of the DDA defence for the purposes of an employer's conduct rule in the RD Bill is not a reliable basis on which to appropriately recognise harm and hardship to employers.

There is no basis for this severe limitation on a Court's assessment of employer disadvantage or reasonableness of a conduct rule. Indeed, absent subsection 8(3), a wider and more appropriate assessment of the reasonableness of a conduct rule would otherwise be available under subsection 8(2).

Subsection 8(3) needs to be removed from the Bill.

Similarly, Ai Group is concerned about the limitation on the application of health practitioner conduct rules in relation to many employers in the health sector. Specifically, the concept of whether or not a conduct rule is reasonable, is significantly narrowed at subsection 8(7) to where compliance is necessary to avoid an "*unjustifiable adverse impact"* on the ability of the employer to provide the health service. This threshold is unreasonably high for employers and patients in the health sector and unbalanced in managing religious freedoms with an employer's delivery of health services.

The inherent requirements of the position defence is essential – subsection 8(3)

The exclusion of the inherent requirement defence (otherwise available under section 32 of the RD Bill) where there is no unjustifiable financial hardship is also inappropriate and unfair. The provision does not recognise the many circumstances where compliance with an employer conduct rule may be directly relevant and/or necessary to the performance of a position notwithstanding that the damage to the employer may not amount to unjustifiable financial hardship.

The following is just one example which highlights why the inherent requirement defence should be available:

> A well-known community liaison executive of a publicly listed company shares anti-religious views online and their Twitter account publicly targets religious figures for criticism about both their religion and their religious beliefs. The executive's role requires the employee to foster positive relationships with different groups in the community in which the business operates.

The inherent requirements of an employee's employment establish whether compliance with the requirement is essential to the employee's employment. It is an objective assessment and one recognised elsewhere as a statutory defence in existing anti-discrimination law. Our comments above demonstrate the subjective and uncertain meaning of unjustifiable financial hardship. Limiting the inherent requirement defence to unjustifiable financial hardship imposes a less certain and subjective assessment between the requirement and the necessity for it in an employee's employment. It is inappropriate and confusing that the inherent requirement defence has been

narrowed by subsection 8(3).

This is another reason why subsection 8(3) and its associated definitions should be removed from the Bill.

INDIRECT DISCRIMINATION

In our initial submission we explained the problems associated with the RD Bill's indirect discrimination provisions at section 8. These provisions remain a concern for employers given the wide ability for employees not to comply with employer policies on broad and nebulous grounds of religious belief. The indirect discrimination provisions should be removed.

The following workplace scenarios could amount to indirect discrimination on the basis of religious belief:

- A requirement for employees to wear uniforms for the purpose of enabling customers to identify a representative of the employer, preventing an employee from wearing a T-Shirt declaring "Satan is Supreme" as part of his religious belief;

- A requirement that an employee start work at 9am that prevents the employee from engaging in her morning meditation associated with her religious and spiritual belief.

No doubt given the wide range of beliefs and practices that could satisfy the RD Bill's broad definition of religious belief, there would be countless circumstances where employer operating requirements could be challenged on the basis of indirect discrimination.

A significant difficulty for employers will be the compliance costs and administrative burden imposed by the need to conduct a review of all conditions, practices and requirements on the basis of potential indirect discrimination based on religious beliefs, many of which may not be known to employers. (We note section 26 of the Bill which prohibits the requesting of information from an employee or prospective employee for an unlawful purpose). Such a review may also be necessitated by the burden of proof on the employer in subsection 8(8).

The indirect discrimination provisions in section 8 of the RD Bill are unfair and unworkable for employers and need to be removed.

DEFENCES FOR EMPLOYERS ARE TOO NARROW

Our initial submission addresses the inappropriately narrow defences in the RD Bill, particularly in light of the various problems and ambiguities in the Bill.

To ensure employers have clarity in regard to exercising rights or managing obligations under

existing laws of the Commonwealth, State or Territories, including industrial instruments, the following amendments should be made to sections 30 and 31:

30(1) Nothing in Division 2 and 3 makes it unlawful for a person to discriminate against another person, on the ground of other person's religious belief or activity, if:

(a) the conduct constituting the discrimination is in ~~direct~~ compliance with a provision of a law of the Commonwealth or of an instrument made under such a law; …

(3) (a) the conduct constituting the discrimination is in ~~direct~~ compliance with a provision of a law of a State or a Territory (other than a local by-law); …

31 Nothing in Division 2 and 3 makes it unlawful for a person to discriminate against another person, on the ground of other person's religious belief or activity, if the conduct constituting the discrimination is in ~~direct~~ compliance with any of the following:…

This amendment is necessary to ensure that employer rights exercised under provisions of the FW Act, such as the right to request an employee to work a public holiday if the request is reasonable (s.114) is not disturbed by exposure to potential claims of religious discrimination under the Bill.

REVERSE BURDEN OF PROOF

The reverse onus of proof needs to be removed from the Bill for the reasons explained in our initial submission.

Subsection 8(7) requires the person who has imposed or proposes to impose the condition, requirement or practice to have the burden of proving that it is reasonable. The reverse onus of proof also applies to claims of indirect discrimination under subsection 8(3).

Given the broad and subjective nature of a religious belief that may not be known or articulated to an employer and the wide ability for employees to resist complying with employer conditions, requirements or practices, the reverse onus is inappropriate and unfair. Also, the assumption that a relevant employer's code of conduct is unreasonable, as referred in subsection 8(3), unless the relevant employer can prove that compliance with it is necessary to avoid "unjustifiable financial hardship" is unfairly skewed against employers, making the reverse onus of prof even more unfair.

CONCLUSION

Ai Group acknowledges the amendments made in the Second Exposure Draft of the RD Bill. However these do not go far enough in ensuring that RD Bill is workable and fair for Australian businesses and workplaces.

Further important amendments are needed as detailed in this and our earlier submission.

AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES

SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059
CANBERRA Ground Floor, 42 Macquarie St, Barton ACT 2600, PO Box 4986, Kingston ACT 2604
MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004
BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004
ADELAIDE Level 1, 45 Greenhill Road, Wayville SA 5034
PERTH Suite 1, Level 4, South Shore Centre, 85 South Perth Esplanade, South Perth WA 6151

REGIONAL OFFICES

ALBURY/WODONGA 560 David Street Albury NSW 2640
BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350
BENDIGO 87 Wills Street, Bendigo VIC 3550
NEWCASTLE Suite 1 “Nautilos”, 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300
WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520

www.aigroup.com.au