



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Australian Human Rights Commission

**Willing to Work: National Inquiry into Employment Discrimination against
Older Australians and Australians with Disability**

4 December 2015



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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 industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, 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 housing stock.

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.”

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.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

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 member committees before progressing to the Association's 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 and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



1. INTRODUCTION

HIA welcomes the opportunity to respond to the Australian Human Rights Commission Willing to Work Inquiry (**Inquiry**).

HIA notes that in December 2014 the Attorney General announced that he would ask the Australian Human Rights Commission (**AHRC**) to conduct an inquiry into employment discrimination against older Australians and Australians with a disability.

The Terms of Reference, released on 5 March asked the AHRC to look at practices, attitudes and laws and make recommendations having regard to:

- the obstacles faced by older persons and persons with disabilities in actively participating in the workforce;
- discrimination against older persons and persons with disabilities as a systemic problem and a considerable barrier to their enjoyment of human rights;
- the economic and social costs, and the costs to productivity, that result from discrimination against older persons and persons with disabilities in employment; and
- the Australian Government's commitment to the promotion and protection of human rights of older Australians and Australians with a disability.

Also released were two issues papers:

- Employment discrimination against older Australians; and
- Employment discrimination against Australians with a disability.

HIA's submissions to the Inquiry, relate to the residential construction industry which, despite general increases in building activity across the country, is experiencing skill shortages and is facing an aging workforce, factors which could severely inhibit the industry's ability to meet underlying housing demand and the housing needs of a growing population.

The realities of physically demanding construction based jobs within the context of injured and disabled workers also pose challenges for the construction industry.

However, further regulation will not address these issues or the concerns outlined within the Issues Papers. HIA submits that Government must support business to be better able to manage and accommodate the groups identified as part of this Inquiry.

HIA's submission to the Inquiry addresses the following matters:

- Employment discrimination against older Australians:
 - What is the role of Government, peak business and employee groups, and individual employers?
 - Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing older workers?

- How adequately do existing laws protect older Australians from employment discrimination?
- How effective are the legal remedies for older workers who have experienced discrimination?
- How could existing laws be amended or supplemented?
- What difficulties are there for employers in understanding and complying with legal obligations?
- Employment discrimination against Australians with a disability:
 - What is the role of Government, peak business and employee groups, and individual employers?
 - Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing Australians with disability?
 - How adequately do existing laws protect Australians with disability from employment discrimination?
 - How effective are the legal remedies for Australians with disability who have experienced employment discrimination?
 - How could existing laws be amended or supplemented?
 - What difficulties are there for employers in understanding and complying with legal obligations?

2. EMPLOYMENT DISCRIMINATION AGAINST OLDER AUSTRALIANS

HIA address the following questions as outlined within the Issues Paper:

What is the role of government, peak business and employee groups, and individual employers?

Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing older workers?

HIA submits that the Government must implement funded programs to support the continued employment of an older workforce. As noted in the Issues Paper, the labour force participation rate for older Australians is low with only one in three Australians over 55 participating in the labour force.¹

This is particularly relevant in the residential construction industry which is facing two significant challenges to growing the labour force; the large cohort of workers approaching retirement, and the high rate of attrition amongst new apprentices. In tandem with supporting traditional apprenticeships, government policies must enable more flexible and affordable pathways into the housing industry to facilitate opportunities for career progression and business growth, particularly for those older employees in the industry.

¹ Pg. 6 of the Issues Paper



Over the last decade there has been a persistent imbalance between growth in demand for housing and the slow rate at which the nation has added to the housing stock.

Australia has experienced strong population growth in recent years driven primarily by a large contribution from net overseas migration. Combined with demographic changes, this situation has added considerably to the demand for new housing, putting pressure on housing prices, new residential construction costs, and on the supply of labour inputs.

Building such a large number of new homes places greater demand on the resources of the residential building industry and the industry's suppliers. Inadequate expansion of the housing industry's output capacity under stronger demand conditions may contribute further to price pressures.

State and Federal Vocational Education and Training can be leveraged to support the continued participation of older Australians in the workforce. This can be achieved through:

- Prioritising funding to small business owners to undertake training that will allow them to grow or change their businesses to meet the future housing demand and meet the ever changing regulatory environment.
- Providing incentives to employers to train and develop employees to meet the growth demands of their businesses and the broader industry.
- The development of pathways to redeploy the ageing workforce to complement industry activities and provide funding for businesses who support this initiative.

In a highly regulated industry such as housing construction the support by all levels of government for adequate training funding is paramount to ensure all Australians have affordable housing and are able to contribute more effectively to the broader economy.

HIA notes that the Issues Paper recognises the lack of *'vocational programs targeted to older workers, as well as opportunities for older workers to retain and equip themselves for new jobs and careers'*². HIA agrees that *'these issues need to be addressed in order to maximise the potential of those who are willing and able to work.'*³

**How adequately do existing laws protect older Australians from employment discrimination?
How effective are the legal remedies for older workers who have experienced discrimination?
How could existing laws be amended or supplemented?**

As outlined within the Issues Paper, the domestic legal framework is comprehensive and expansive and provides those who feel they have been the subject of age discrimination a variety of avenues through which to seek a remedy. On this basis, HIA does not consider that further laws or protections are necessary.

² Pg.13 of the Issues Paper

³ Pg.13 of the Issues Paper



Also of note are recent amendments to the *Fair Work Act 2009* that provide a right to employees over 55 years of age to request flexible work arrangements.⁴ Whilst not mentioned in the Issues Paper, these changes are further remedies available to older workers to facilitate their longevity in the workforce.

Proactive measures to encourage the employment of older workers and to encourage those individuals to stay in the workforce should be the focus. To add further regulation to an already saturated area simply adds further complexity and only serves to act as a disincentive to employers to engage older Australians.

What difficulties are there for employers in understanding and complying with legal obligations?

The complex and overlapping regulatory framework makes it difficult for employers to understand and comply with their legal obligations.

One particular area of difficulty is the operation of the exemption from age discrimination under the *Anti-Discrimination Act 2004 (Cth)* if a person is unable to carry out the inherent requirements of the job. Whilst guidance material is available this is an invariably difficult area for business, particularly small business, to manage which is exacerbated by (potentially irreconcilable) obligations under work, health and safety laws.

HIA submits that more work needs to be done in assessing and evaluating how those 'other laws' (mentioned at page 10 of the Issues Paper) interact with anti-discrimination laws and how the current uncertainties can be resolved in order to facilitate the continued participation of older Australians in the workforce.

3. EMPLOYMENT DISCRIMINATION AGAINST AUSTRALIANS WITH A DISABILITY

HIA address the following questions as outlined within the Issues Paper:

What is the role of government, peak business and employee groups, and individual employers?

Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing Australians with disability?

Employing people with disabilities in the residential construction industry is a unique challenge particularly in light of the physical nature of the work and the work, health and safety obligations on a construction site.

One issue often raised is how to manage employees with epilepsy. Clearly this type of condition if untreated and left unmanaged, could have safety implications for the individual, other's on a construction site and the community more broadly. HIA would recommend better co-ordination

⁴ s65(1A)(d)



between the AHRC and safety regulators across the country to develop guidance materials specific for the construction industry. The current limited and ad hoc materials as to how to manage this specific issue are sparse and provide employers little comfort that they are doing the 'right' thing by the individual whilst not placing others at risk.

Other areas that pose specific challenges for businesses in the residential construction industry include:

- Matters that can lawfully be raised during the interview and selection phase of recruitment in relation to illness, injury or a disability.
- How to manage a disability that may manifest during employment or as a result of a workplace injury.

HIA submits that there must be a focus on educating employers to ensure they better understand their rights and obligations in relation to the recruitment and ongoing employment of employees with a disability.

How adequately do existing laws protect Australians with disability from employment discrimination?

How effective are the legal remedies for Australians with disability who have experienced employment discrimination?

How could existing laws be amended or supplemented?

It is HIA's view that the current laws which make it unlawful to discriminate on the grounds of a person's disability with certain exemptions including an inability to perform the inherent requirements of the job, even with reasonable adjustment, strikes the right balance.

The current regulatory framework recognises the rights of a person with a disability to work whilst also recognising the needs of business, particularly small business and the limitation on employers in trying to accommodate an employee with a disability.

What difficulties are there for employers in understanding and complying with legal obligations?

As noted above the lack of clear guidance material on the operation of these laws combined with a lack of co-ordination with work, health and safety laws makes it difficult for employers to comply with their legal obligations.

Of note whilst the *Disability Discrimination Act 1992* provides an exemption to unlawful discrimination if an employee's disability precludes them from performing the inherent requirements of the job (after any reasonable adjustments) or it would be unjustifiably hard for their employer to accommodate their disability, in practice, it is incredibly difficult for an employer to '*know what compliance looks like*' under these circumstances.

Further while the criteria for determining 'unjustifiable hardship' was expanded to include the availability of financial and other assistance to the disabled person and the benefit or detriment to the community at large, it is now clear that the employer claiming unjustifiable hardship bears the onus of proving it. Under these circumstances and in light of the lack of practical guidance in this area there are significant barrier to employers complying with their legal obligations.

