Productivity Commission Submission –
Review of the Disability Discrimination Act

I have read the Productivity Commission draft report and consider it to be an insightful and thorough treatment of an important issue. The Commission is to be commended for its work thus far.

There are however several matters I wish to raise with you, in the form of a contribution to the process in which you are engaged. My comments relate solely to the issue of discrimination in employment.

1. The DDA and Employment

I believe it is important that the DDA be evaluated in terms of its stated objective, which is to eliminate, as far as possible, discrimination in various activities, including employment. It is **not** the purpose of the DDA to increase the employment of people with a disability. At times the draft report seeks to point out benefits that would flow to the economy and society if the employment of people with a disability was increased (pages 178-186). In relation to the DDA, this argument requires a link to be established between a reduction in discrimination and an increase in the employment of people with a disability. But as your report points out (page 89), it is not clear that the DDA has succeeded in reducing discrimination.

The DDA would be regarded as having achieved its objectives if it reduced discrimination, even if it had a neutral or even negative impact on the employment of people with a disability. Indeed, studies seem to suggest (as you note on page 86) that anti-discrimination legislation such as the DDA can actually **reduce** the employment of people with a disability.

There are other reasons why we should not expect the DDA to have a positive impact on employment. I am not aware of any cases under the DDA that involve a person **seeking** employment. All the

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cases I have seen involve a person who is already employed seeking redress or compensation for discrimination against them at their place of work. If people are using the DDA to protect their rights at work, rather than to get work, then there is no **direct** pathway for the DDA to increase employment.

Even if the DDA led to people with a disability gaining jobs, there is no economic reason that this will increase the productive capacity of the economy (although the "better matching" argument [page 187] has some merit). In the absence of any increase in the **demand** for labour, there is no reason why an increase in the number of people with a disability entering the labour market will lead to their becoming employed. An increase in the supply of labour does not produce in itself an increase in the demand for labour (this is mentioned briefly on page 187 of the Draft Report but should, in my view, be expanded). Even if they did find employment, it would presumably be at the expense of other job aspirants. Positions on the job queue would alter, but not the length of the queue nor the number of people employed. The benefits then posited (about increased productive capacity in the economy, greater employment of carers and reduced transfer payments) unravel.

I say this, not to criticise the DDA as such, but to point out that it should not realistically be regarded as a tool for increasing the employment of people with a disability. The Government will need to look to other policy initiatives in order to achieve that outcome.

2. Workplace Adjustments

Your report rightly points out that costly workplace adjustments by employers could deter the employment of people with a disability (170, 199). Although some of these costs may be met by the Government's Workplace Modifications Scheme, such reimbursements typically omit some of the real costs faced by employers – these include some of items mentioned on page 173 of your report – "time spent searching for a technical solution, the purchase of equipment or software, the restructure of work processes and/or applying for government funding".

I would make three points in relation to this. Firstly, these additional costs are probably more troublesome for employers than the actual cost of any special equipment required. Your list should be expanded considerably. Take for example your mention of "voice-activated software" – an area in which I have acquired considerable expertise in research and practice. Not only must the employer identify the need for such software and procure it, but

they must also customise it to the needs of the individual, identify and obtain possible alternative microphones and pointing devices, integrate the system to existing phone systems and computer networks (many of which are hostile to the introduction of extraneous input devices and drivers) provide training on the job, arrange upgrades and seek technical support. Ambient noise also needs to be considered. This example illustrates the range of costs an employer may have to face in order to employ a person with a disability.

To give another example, even though an employer may be able to pay a worker with a disability according to their productivity, it is still going to cost more to employ 10 people with a disability (at 50% productivity) than 5 without – for all kinds of reasons.

My second point in relation to costs to employers is that the burden of these is likely to be greater for **smaller firms**. This applies, not only in the obvious case of ramps and accessible toilet facilities, but even more so in the case of the hidden, managerial costs referred to earlier.

Thirdly, I am broadly in favour of your proposal for a portable employee access grant. However not all adjustments are "portable" in this sense. But for those that are, this idea has some merit.

We could go one step further. Many people with a disability would benefit from having the required technology to make them productive **prior** to their entering the workforce. Yet current arrangements locate this adjustment at the point of entry to a job. Without the technology the person's productivity is diminished, yet their wages (under the Supported Wages System) are determined on their productivity without the required adjustments. Surely it would be better if the person was equipped with the technology and necessary skills (in, for example, voice recognition software) prior to entering the workforce. The technology could then be portable among various employers. The productivity of the person would be calculated at their maximum.

Even a HECS type scheme, where a person deferred payment of the cost of the required equipment until they earned a certain salary, could be contemplated, if sufficient funding is not available.

3. Accommodation in the DDA

In my view, the assertion that the DDA already incorporates the concept of 'reasonable adjustment' under the terminology of 'different accommodations' is in error.

'Accommodation' is defined in s.4(1) as including "residential or business accommodation". That is, I believe, how s5(2) should be interpreted. In other words, I believe that the concept of

"reasonable adjustment" is not present in the DDA – and that this is one of the reasons it has never had the public impact of the ADA.

Your report used the plural, "accommodations", to attempt to make the term resemble the concept of "reasonable adjustment". However the plural is nowhere present in the DDA. On pages 224-225 and on three occasions on page 257 your report uses the plural form (sometimes when purportedly quoting from the DDA) – this is an error that should be corrected. But such an error confirms my view that we deal here with eisegesis (reading meaning into) rather than exegesis.

While the Human Rights and Equal Opportunity Commission (HREOC) web site discusses the concept of reasonable adjustment at length, it is forced to acknowledge: "The term 'reasonable adjustment' is not contained expressly in the D.D.A." [1] HREOC argues that the DDA definitely requires employers to make reasonable adjustment, but does not seek to do so through the *accommodation* pathway: "The general requirement under the DDA to make reasonable adjustment results from DDA section 6, on indirect discrimination. This section requires the removal of unreasonable requirements which disadvantage people with a disability". [2]

There is also uncertainty in the literature on this. Eastman notes:

> The common understanding of the *Disability Discrimination Act* has been that it does not impose a positive obligation on employers to provide special facilities or equipment that are not provided to employees without a disability. The only obligation on an employer is not to treat the disabled employee less favourably than employees without a disability.[3]

However she believes a recent case[4] has challenged that:

> The Commission noted that the obligation to accommodate a disabled employee is integrally linked to an employer's common law duty to provide a safe system of work for all employees. Where a disabled employee requires special facilities to make the workplace safe, the employer is required to make the additional facilities available to guarantee a safe system of work.

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[1] HREOC, http://www.hreoc.gov.au/disability_rights/faq/Employment/employment_faq_1.html#adjustment (downloaded 1992)
[2] ibid.
[3] Eastman K., "Off the ground: Employers' obligations towards disabled employees" Law Society Journal 1999 37/8 Sep, 38.
[4] Garity v Commonwealth Bank of Austalia (1999) EOC 92-966.

The reasoning of the Commission involved, according to Eastman, borrowing the concept of reasonable accommodation from the ADA. In her view, "Importing the notion of reasonable accommodation into the Disability Discrimination Act will generate much controversy." This is because the "undue hardship" defence for employers only applies in the recruitment and termination of employment, not in the conditions of employment. The result now is that employers seemingly have an open-ended obligation to provide reasonable accommodation for their disabled employees, but without any concept of undue hardship to moderate or limit such responsibility. This decision, she argues, "creates uncertainty".

In my view these points warrant a closer look at the issues of definitions in the DDA. The term "accommodation" as used in your report is not defined in the DDA; indeed, there exists only the housing sense of accommodation.

4. Positive Duty on Employers

I am strongly supportive of your proposal in this area. In my view the DDA did not have a prominent impact on employers when it was introduced, partly because it failed to impose a positive duty on employers. There was no handle for employers to grasp. This was noted by Tucker:

> Immediately after the ADA was passed employers, owners and operators of places of public accommodations and transportation systems, educational institutions, and the like began making necessary modifications in their enterprises to comply with the law. That has yet to happen in Australia, even though it is more than a year since the DDA became effective.[5]

Further, in its first year, a total of 220 complaints were made under the DDA; in the first 18 months of the ADA there were over 16,000 complaints in the area of employment alone.

Ground could be recovered, and the DDA given new life, if a limited positive duty on employers, as proposed, was introduced. It would make employers examine the issue of workers with a disability without waiting for a case to be brought against them.

[5] Tucker B., "Overview of the Disability Discrimination Act and comparison with the Americans with Disabilities Act", Australian Disability Review 1994, 3, 25.

Please feel free to contact me if you require any further information on the points raised. I look forward to your final report.

Yours faithfully

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