

21 January 2004

Ms Helen Owens
Commissioner
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003

Dear Ms Owens

**ACCI SUBMISSION ON THE DRAFT REPORT OF THE INQUIRY INTO
*THE DISABILITY DISCRIMINATION ACT 1992***

Please find attached the ACCI submission on the draft report from the Commission's inquiry into the Disability Discrimination Act 1992, as discussed at our meeting late last year in Canberra.

As you are aware, ACCI has taken a keen interest in improving employment opportunities for people with disabilities and has, in 2003, developed a national employment policy for persons with disabilities in consultation with its broad membership that incorporates clear anti-discrimination principles.

The ACCI submission in relation to the draft report from the inquiry reflects the national view of employers on disability discrimination. Employers do not believe that, in the absence of persuasive evidence of frequent, systematic discrimination against people with disability, and in the absence of clear evidence that existing approaches are not working, anti-discrimination regulation should be escalated in Australian work places.

Based on the analysis provided in the draft report ACCI is not persuaded that employer discrimination is to blame for low participation rates, higher unemployment rates and lower average wage rates experienced by people with disabilities. As explained at our recent meeting, non-participation supported by income support arrangements, low VET participation and attainment and ineffective return to work arrangements for injured workers are the most obvious causes of these phenomena. These factors would be in no way addressed by additional anti-discrimination regulation.

The incidence and trends within complaints data do not support further anti-discrimination regulation, including measures to reduce the onus of proof from complainants or to impose "positive duties" on employers in respect of the employment of people with disabilities. There is simply not the empirical evidence, nor epistemological merit to warrant the draft conclusions / recommendations identified to date.

Although vigorously opposed to an increased regulatory and compliance burden, never-the-less ACCI is prepared to continue its support of improved awareness and education in regard to anti-discrimination in respect of disability and will consider measures that contribute to a better understanding of the issues among employers and their representative organisations.

I have alerted ACCI members to the hearing dates and venues for 2004 and will encourage their attendance. I look forward to discussing the issues raised in response to the draft report at the Canberra hearings and would be grateful if you would advise me in due course of the arrangements for our attendance.

Yours sincerely

Steve Balzary
Director
Employment and Training

***ACCI SUBMISSION ON THE DRAFT REPORT OF
THE PRODUCTIVITY COMMISSION REVIEW OF
THE DISABILITY DISCRIMINATION ACT***

JANUARY 2004

Background

The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak national body of employer associations. Members of ACCI represent employers of all sizes, in all regions and across all industry sectors. ACCI and its members have particular, but not exclusive, interest in workplace and industrial issues.

Membership of ACCI is made up of State and Territory Chambers of Commerce, together with employer and industry associations. ACCI, through its member organisations, is the largest and most representative business organisation in Australia with a strong and active network including:

- wide coverage and representation of Australian business (over 350,000 enterprises nationally);
- coverage of all key State and Territory based Chambers of Commerce and employer associations;
- geographical coverage, including all capital cities and major regional centres nationally;
- all sectors of Australian commerce and industry; and
- large, small and medium sized enterprises, including:
 - the top 100 companies
 - over 55,000 enterprises employing between 20 and 100 employees; and
 - over 280,000 enterprises employing less than 20 employees.

The ACCI employer network employs over 4 million people.

ACCI RESPONSE TO THE DRAFT REPORT IN SUMMARY

The draft report of the Review of the Disability Discrimination Act is disappointing in that it reflects more of a rights-based response to employment for people with disabilities rather than an approach that focuses on the productivity and competition issues at stake.

Low participation rates and high levels of welfare dependency experienced by people with disabilities is a major national issue that needs to be addressed through policies which generate greater labour market participation rather than by singling out Australian employer behaviour as the key contributing factor.

Insufficient attention has been given to ways in which people with disabilities might become more competitive in labour markets and how our social security system may be encouraging over-dependence on income support at the expense of active participation.

The draft report proposes extending the regulatory system to counter a range of issues that the Commission found hampered the capacity of people with disabilities to file complaints under the DDA. Dismissing the need to rationalise a maze of overlapping Commonwealth and State anti-discrimination legislation, the multiple courses of action for complainants and the lack of growth in unresolved complaint, the Commission proposes extending the grounds for complaint, the parties to complaints and shifting the evidentiary burden to respondents. Nothing in its analysis of complaints suggests that this is warranted and the proposals do nothing to address the real challenges identified by ACCI and other organisations.

While the draft report falls short of recommending the introduction of employment standards under the DDA, a course of action already dismissed in the past as unworkable after a long and detailed examination, it proposes a series of measures that amount to the same thing through enforceable guidelines, mandatory codes of conduct and goes even further with proposal to introduce a "limited positive duty on employers towards removing barriers to employment of people with disabilities". These recommendations appear based on a superficial examination of the causes of low participation and employment rates that falsely isolate discrimination, and the activities of employers as the key factors. This is presumptive and without evidence. Employers do not lie at the heart of the deficient outcomes driving the draft report's recommendations.

At the heart of the draft report's approach to the impact of the DDA in the area of employment, are a number of assumptions which are incorrect or faulty. The DDA was introduced to eliminate discrimination, not to increase employment. Underlying education, training and labour market conditions and people with disabilities' experience of these were present at the time of the introduction of the DDA and are not ever capable of being addressed by anti-discrimination measures alone. Other key causative factors such as new social security arrangements were introduced at the same time creating relatively generous alternatives to paid employment, and further underscoring the extent to which employment gains for persons with disabilities cannot be secured based (in whole or part) on a re-examination of the DDA.

ACCI has shown a high level of commitment to improving education, training and employment opportunities and outcomes for people with disabilities, and is committed to continuing to do so. However, ACCI will vigorously oppose misguided moves to redress the inequities through additional workplace regulation or legislative burden on employers.

ACCI ANTI-DISCRIMINATION POLICY

The ACCI labour Relations policy, articulated in a ten-year Blueprint for the Australian workplace relations system, entitled *Modern Workplace: Modern Future*, reflects the general principle of equal opportunity that underpins discrimination law. It says,

Unlawful discrimination is not an acceptable human resource practice, does not constitute an appropriate basis for human resource decision-making and is contrary to the interests of business.

ACCI is actively involved in a number of areas that promote vocational education and training and employment opportunities for people with disabilities and has a direct interest in the impact of anti-discrimination legislation on the employment of people with disabilities.

ACCI has for many years worked cooperatively on appropriate wages arrangements which maximise employment opportunities for persons with disabilities, particularly in open employment. This includes ongoing consent process with the Australian Council of Trade Unions in regard to supported wages.

ACCI recognises the efforts of Australian enterprises in providing employment opportunities for people with disabilities and has for many years participated in and supported the Prime Minister's Employer of the Year Awards which promote the employment of people with disabilities and recognise best practice in this area.

ACCI is currently developing a national employment policy for people with disabilities. This will further underscore the ongoing commitment of Australian employers to providing employment opportunities to persons with disabilities.

DISABILITY DISCRIMINATION

On the basis of available evidence, there does not appear to be a high incidence of disability discrimination complaints to do with employment. From a review of data published by the Human Rights and Equal Opportunity Commission (HREOC), there

appears to be no trend towards higher numbers of complaints over time and no explicit evidence of widespread discrimination by Australian employers toward people with disabilities.

The reported number of complaints under the DDA indicates low levels of complaint relative to both the size of the Australian workforce (9.5 million) and the proportion of the population with disabilities (2.1 million of work force age). HREOC has reported an average annual rate of 550 complaints lodged under the DDA in its first 10 years of operation. Not all these complaints were to do with employment and not all complaints were successful. A review of complaint cases presented by HREOC in its 10-year review of the DDA does not reveal systematic discrimination in respect of particular employment practices. On the basis of these indicators, there appears to be no convincing basis for asserting that people with disabilities are experiencing systematic discrimination in Australian workplaces.

It is unacceptable to impute that Australian employers' attitudes and practices are the main cause of lower participation rates and higher unemployment rates than are experienced by those without disabilities. There is no evidence for such a conclusion and it does nothing to assist either persons with disabilities or their potential employers.

The DDA provides wide scope for employees to pursue complaints. For example, its definition of disability is relatively open-ended and has not been unduly restricted in the application of the law. Access to the mechanisms provided by the DDA in addition to those provided through other Commonwealth and State legislation gives employees multiple options to make complaint if they consider they have been subject to disability discrimination.

The wide availability of these complaint and redress options directly challenges arguments suggesting underlying levels of unreported discrimination.

ACCI has no information before it that would support the view that consistently low levels of complaint mask a more widespread or systemic problem. This issue may only be resolved if relevant, quantitative and qualitative data is available for consideration and until this occurs presumptive conclusions are unjustifiable.

HREOC data presented in the draft report shows 100 of the disability discrimination complaints made in 2002-2003 were abandoned because they were "trivial, vexatious, misconceived (or) lacking in substance" a finding that runs counter to claims that

complainants are either unwilling to come forward or face barriers in proceeding with complaints.

ACCI considers that enhanced emphasis on employment, employability and labour market re-entry will offer a far superior avenue for policy consideration than an unmerited and unsustainable focus on complaints of disability discrimination.

ANTI-DISCRIMINATION REGULATION

Effective education, promotion, problem solving and voluntary compliance can provide the best foundation for the effective administration of anti-discrimination law. This is the lesson which must be drawn from the operation of the various anti-discrimination systems created during the past two decades.

Further regulation, in the form of codes of conduct, guidelines or "limited positive duty" on employers as canvassed in the draft report would not create increased employment opportunities for people with disabilities. In contrast to a greater focus on employment opportunity and employability, there is not a single job in any new guidelines and duties.

The introduction of additional levels of regulation in the workplace through amendments to (the expansion of) the DDA are not supported.

Business already accommodates high levels of regulation through the combination of Commonwealth and State anti-discrimination and workplace relations law, with a comprehensive prohibition of disability discrimination.

ACCI holds the view that any proposed reform in this area should avoid uncertainty for employers arising from a variety of laws and regulations from multiple jurisdictions. Simplification and consolidation of anti-discrimination legislation would provide significant efficiency in the public administration of antidiscrimination law, as well as certainty and clarity in regard to the obligations and rights of employers and employees alike.

Simplification and consolidation of course are not an endorsement of extension or expansion of existing regulatory obligations.

Any regulation that imposes an undue burden on enterprises has implications for their viability and competitiveness, and ultimately on their capacity to provide employment. In regard to the employment of people with disabilities, improvement in the rates of recruitment and retention of workers with disabilities seems to have

more to do with their participation and competitiveness in labour markets and the effectiveness of available supports and incentives.

The draft report floats the notion of a “limited positive duty on employers to identify and work towards removing barriers to employment of people with disabilities”. It proposes industry-developed codes of conduct with deadlines, after which a disability standard is imposed and that the FAQs on the HREOC web site be turned into enforceable guidelines.

In effect, the report is proposing a compulsory and costly series of measures to address problems it has not substantiated and for which no evidence exists. Unless people with disabilities are motivated (and assisted through accessible infrastructures) to participate in employment in greater numbers than at present and possess the qualifications and skills they need to be competitive in the labour market, no real gains will be made for this sector of our community. Misapplied and baseless overregulation actually carries the prospect of being inimical to the interests of persons with disabilities.

EMPLOYMENT OF PEOPLE WITH DISABILITIES

While eliminating discrimination has a role in improving the participation rates of people with disabilities, it does not appear to be the key factor in achieving progress in the Australian setting.

Australia has relatively low levels of workforce participation for people with disabilities compared with other OECD countries, yet it has (and has had for some years) stronger anti-discrimination laws and more comprehensive employment support programmes than many of these.

ACCI holds the view that marginalizing people with disabilities in labour markets is counter-productive and wasteful, particularly with an aging workforce and potential future labour shortages.

Australia has an unacceptably low rate of employment for people with disabilities. Although the current work capacity test for the Disability Support Pension is set at a generous 30 hours per week, only 9% of these pensioners have earnings.

ACCI supports participation policies and support systems for people with disabilities that:

- ensure people with disabilities are able to participate to the full extent of their abilities, in employment and in the community;

- recognise that disability does not automatically equate with an inability to work and require people with disabilities to take up employment where it is reasonable for them to do so;
- discourage reliance on income support by those who have a significant capacity to work;
- introduce appropriate mutual obligation requirements relative to those met by people without disabilities;
- provide most support to those most in need of assistance including supported employment options;
- ensure that people with disabilities who are able to work enjoy the rewards of employment and are always better off in work than when reliant on income support; and
- redirect public funding away from passive income support to rehabilitation and employment assistance.

It should also be recognised that people with disabilities are not a discrete group within the community, many of whom also belong to other population categories that may face participation and employment barriers because of other factors such as age, or parenting responsibilities. Again, adequate anti discrimination measures exist and no further avenues of redress are warranted.

The growth in mature-age entrants to the Disability Support Pension who have an acquired disability also suggests problems with rehabilitation and return to work practices that are embedded in contemporary approaches to workers' compensation. With an aging workforce, this issue may continue to contribute significantly to private and public costs unless better rates of workforce re-integration are encouraged.

EDUCATION AND TRAINING

Australian National Training Authority (ANTA) data shows disappointing rates of participation for people with disabilities in vocational education and training - less than 2.5% compared with 11% of all workforce-age Australians.

Training retention rates and eventual employment outcomes for vocational students are also not good, with people with disabilities less likely to complete their training and less likely to get a job if they do finish.

Implementation of the ANTA national strategy for people with disabilities in vocational education and training, *Bridging Pathways* 2000 -2005, is overseen by the Australian Disability Training Advisory Council (ADTAC), in which ACCI participates.

Unless real progress is made in improving the education and training outcomes for people with disabilities (including those returning to work after acquiring a disability) no real progress will be made in addressing the poor employment record for this group.

AUSTRALIAN WORKPLACES

Australian workplaces are governed by a very extensive range of binding obligations and regulations, often drawn from multiple sources and multiple jurisdictions. In the area of disability, a range of Commonwealth and State anti-discrimination and industrial relations systems establish employer and employee rights and obligations and create avenues for enforcement / redress.

Many enterprises have their own internal policies for equal opportunity in employment and, while these may not be cast in the precise terms of an action plan as specified by the DDA, they serve to promote equity in those workplaces and operate to maximise equality outcomes.

Employers will be most likely to provide greater employment opportunities for people with disabilities if there is as simple and straightforward a process as possible for such employment.

The draft report makes no recommendation to address the impact of a range of duplicated and overlapping law and regulation in the area of disability discrimination despite the potential for adverse effects on productivity.

ACCI actively pursues workplace relations policies that:

- provide for the employment of people whose productivity is limited by their disability under the Supported Wages Scheme;
- seek reform of inflexible workplace regulations that restrict employers' ability to accommodate people with disabilities;
- ensure that people with disabilities have the same right to access flexible working arrangements under the workplace relations system as all other employees including individual

agreement making, and agreement making with or without the involvement of trade unions.

In finalising consideration of this issue, and reporting to government, the Commission is requested to properly consider the impact of overlapping and confusing regulation. Consolidation and rationalisation may considerably assist the efforts of employers and others in this area.

Adding to the regulatory burden on employers will not create new jobs, but rather reduce employers' ability to offer employment when faced with additional costs. At odds with this key consideration for employers, the draft report proposes that:

- the range of grounds on which complaints can be made extend into such nebulous areas as "proposed indirect discrimination";
- the range of complainants be extended to include representative organisations such as disability advocates; and
- that the evidentiary onus be shifted from the complainant to the respondent.

The regulatory confusion and complexity that these proposals would engender is not at all framed in terms of workability, fairness or cost. The proposals are not grounded in fact, nor justified by experience to date. They are speculative and at large prescriptions to non-existent symptoms. ACCI strongly opposes extension of anti-disability discrimination law as proposed to date.

The administration of anti-discrimination law should not be solely or even substantially based on regulation and prosecution. Effective education, problem solving and voluntary compliance can and must play an important role in the administration of this law.

Prosecution, prohibition and enforcement based approaches cannot change attitudes and expectations of employers. They also cannot change the aspirations, orientations and expectations of potential employees with disabilities.

HREOC has not provided in-depth analysis of complaints that might shed light on areas where further effort is needed to inform and educate employers.

There is no analysis in the draft report that supports the notion that systematic disability discrimination is present in the Australian

workplace. In contrast, ACCI is aware of widespread understanding of anti-discrimination law among employers and is aware of many enterprises that actively encourage the recruitment of people with disabilities.

PRODUCTIVITY BASED WAGES

The introduction of productivity-based wages under the Supported Wages System (SWS) was achieved through the cooperation of ACCI, the Australian Council of Trades Unions, the Commonwealth government and in consultation with disability organisations.

The aim of the SWS was to provide for improved employment options for people who are able to work, but at less than full levels of productivity by adjusting wage levels after an independent productivity assessment for each individual involved.

Similarly, people who work in supported employment services, with low productivity levels and who require higher levels of support may also not be paid at a full award rates of pay, or are paid under Commission certified wage arrangements which yield wage outcomes below general award pay scales.

In 2003 the Australian Industrial Relations Commission convened an Industry Consultative Council to address various remuneration and workplace relations issues in supported employment. The ICC membership comprises ACCI, the Department of Family and Community Services, disability organisations and trades unions. The Commonwealth, through the Department of Family and Community Services, (the funding agency) has put forward a new wage assessment mechanism for supported employment services that is currently subject to consultation with services, employees and their families.

ACCI takes the position that productivity-based wages are not unlawful discrimination for the sole reason of accommodating (and encouraging the employment of) people with significant disabilities in the work force and that the availability of quality, supported employment services as an option for people with high support needs has broad community support.

Moves to diminish these options through misguided amendments to the DDA would decrease rather than improve employment options for those people with the highest support needs, and the greatest labour market challenges.

COSTS OF DISABILITY AND IMPACT ON COMPETITION

Employers are subject to costs associated with disability in a number of ways, including:

- prevention of injury and disability in the workplace;
- compliance with Occupational Health and Safety and Workers' Compensation legislation and regulation;
- insurance against possible workplace injury and disease (Australian business paid \$6 billion in compulsory workers' compensation premiums in 2001-02);
- unsubsidised workplace modifications;
- loss of skilled labour and productivity when disability removes employees from the workplace; and
- increased costs of Workers' Compensation insurance when an employee with an injury-related disability returns to work, or enters a new work place.

While employers support increased employment opportunities for people with disabilities, this will only happen when significant numbers of people with a disability move from inactive income support into the labour market.

This requires significant adjustment in terms of rehabilitation, training/re-training of people not job-ready, specialised job placement and support arrangements and work place modifications.

There may also be cost issues associated with lower productivity for some people with disabilities who may not be able to operate at full productivity levels.

Employers are not able to underwrite substantial shifts in cost from community support to employee support, borne by business and industry alone.

ACCI advocates welfare reform measures that transform passive income replacement (currently funded by the community at large) to in-work support where required by people with disabilities, to enter and remain in employment.

This represents a far superior area for policy re-examination and debate in 2004 than any unmerited and unjustified consideration of

additional anti-discrimination measures above and beyond those already operating at the federal and State level.

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