

21 January 2004

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

Dear Ms Owens

As discussed at the hearing held on 4 February 2004, the attached document is ACCI's supplementary submission to the Productivity Commission Inquiry.

Yours sincerely

Steve Balzary
Director
Employment and Training

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

9 February 2004

Senator Payne
Chair
Senate Legal and Constitutional Committee
Room S1.61, Parliament House
Canberra ACT 2600 AUSTRALIA

Dear Senator Payne,

Inquiry into the provisions of the *Disability Discrimination Amendment Bill 2003*
- ACCI Submission

Please find attached ACCI's submission to the above inquiry.

ACCI will be available to further address these submissions via oral evidence should any inquiry hearings be convened.

I am the ACCI contact in regard to these submissions, and any appearance before the Committee. My contact phone number and e-mail details appear below.

Yours sincerely,

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LEADING AUSTRALIAN BUSINESS

*ACCI SUBMISSION
TO THE
SENATE LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE*

*INQUIRY INTO THE PROVISIONS OF THE
DISABILITY DISCRIMINATION AMENDMENT BILL 2003*

FEBRUARY 2004

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ACCI

The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

ACCI is Australia's largest and most representative business organisation.

- Through our membership, ACCI represents over 350,000 businesses nationwide, including:
 - Australia's top 100 companies.
 - Over 55,000 medium sized enterprises employing 20 to 100 people.
 - Over 280,000 smaller enterprises employing less than 20 people.

Businesses within the ACCI member network employ over 4 million working Australians.

ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

ACCI members actively participate in developing national policy on a collective and individual basis.

As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

Employer Commitment to Employment Opportunities for Persons with Disabilities

- ACCI and its members have a long and demonstrated commitment to enhanced employment opportunities for persons with disabilities.
- This includes:
 - Many ACCI members employing persons with disabilities, in both open and sheltered employment, and under both mainstream and supported wage arrangements.
 - ACCI membership covering a wide range of disability services, employment services for persons with disabilities, employers, and other disability industry organisations.
 - ACCI and ACTU cooperation on minimum wages arrangements for persons with disabilities, including principally the ongoing consent maintenance of supported wage arrangements under federal awards made under the *Workplace Relations Act 1996*.
 - ACCI's foundation membership of the Australian Industrial Relations Commission's *Disability Sector National Industry Consultative Council*.
- ACCI has a detailed policy on Disability Employment which has at its core non-discrimination and expanded opportunities for employment ([Attachment A](#)).
- Ongoing implementation of this policy in partnership with a wide range of government, industry, employer and other disability interests is a priority for ACCI during 2004 and beyond.
- ACCI and its members have also been directly engaged in the current general re-examination of the *Disability Discrimination Act 1992*, appearing before the Productivity Commission and making detailed written submissions during recent months.

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TABLE OF CONTENTS

Introduction	1
Intersection of Employment and Drug Use / Drug Addiction	1
Impacts of Drug Use on Australian Business...	2
What Employers Must Be Able To Do	8
The Importance of Excluding Drug Addiction from Statutorily	
Prohibited Discrimination	10
Confidence for Employer Users	11
What is Addiction / When is Someone Addicted?	11
The 'Lawful Use' Exclusion	12
The 'Treatment' Exclusion	13
Which Drugs?	20
Do the Terms of the Act Already Provide Sufficient Protection?	20
Other Addictions?	23
Amendments To The <i>Workplace Relations Act 1996</i>	24
Harsh, Unjust or Unreasonable Dismissal would Still Be Prohibited	24
An Additional Clarification	25
Conclusion: How the Senate Should Proceed	26
Attachment A: ACCI Disability Employment Policy	27
Attachment B: ILO Typology of the impacts of drug abuse	33

INTRODUCTION

Intersection of Employment and Drug Use / Drug Addiction

1. Australians bring a range of personal and social experiences, orientations, characteristics and indeed addictions and afflictions into their workplaces.
2. In contemporary Australia, the employment relationship intersects with both the positive and negative aspects of social and societal change, including relevantly for this inquiry, the use of / addiction to prohibited drugs.
3. Almost 10 million persons are employed in Australia, representing the diversity of all parts of our society. An unavoidable fact is that this includes persons who use and are addicted to illegal drugs.
4. In some cases there may be no visible manifestation of drug use/ addiction and this will not be an issue for the workplace or for employment. However in others, the interaction of work and drug use will manifest itself in negative outcomes and negative impacts on work and workplaces.
5. The manifestations of drug use/addiction are a live workplace issue in such cases, and represent yet another operational, human resource and legal challenge which must be navigated by Australian employers.
6. Available data suggests that the annual impact of illegal drug use on workplace production in Australia exceeds \$990 million.¹ This is clearly a major issue for Australian business, for policy makers and for the Australian community.
7. The ongoing challenge for policymakers is to ensure that Australian businesses have effective and appropriate capacities to manage and address the intersection of drug use/ addiction and work.
8. Crucially, in any workplace the employer must manage the interests of the whole and not just the interests of the individual. The interests of the whole - that is: other employees, the public, clients and business goodwill - must be able to be factored into managing the interaction of drug use/ addiction and work in Australia.

¹ Collins, D. and Lapsley, H. (2002) *"Counting the cost.. estimates of the social costs of drug abuse in Australia in 1998-9"*, Drug Offensive Monograph Series, No.49

9. Equally crucial is the recognition that a workplace is a commercial undertaking, and that an employer's responsibilities and duties extend to commercial and industrial matters, and not to manage, second guess or shape social policy.
10. Employers do not accept the role of undertaking social services which are properly the responsibility of individuals and the broader community through governments and voluntary agencies established for these purposes.

Impacts of Drug Use on Australian Business

11. Prior to directly addressing the amendments proposed in the *Disability Discrimination Amendment Bill 2003*, it is appropriate to properly comprehend the impacts of drug use/addiction on Australian workplaces, and the operational challenge drugs can present to Australian business.
12. The intersection of drug use/ drug addiction and work can present a wide range of challenges to employers. As set out in the introduction, these challenges are not manifest in each and every intersection between work and drug use, but do present in a proportion of cases, particularly where longer term addiction is involved.
13. These should not be viewed as mere temporary obstacles that can be navigated or balanced against other competing policy considerations. They can fundamentally threaten an employer's business, custom and the co-workers and the general public.

Safety

14. Public safety: Impairment due to drug use can clearly threaten public safety, particularly where an employee operates machinery, transport or a vehicle. The foreseeable negative consequences of an employee driving a company vehicle, (for example a bus) under the influence of drugs, or operating machinery around the public while impaired, are clear.
15. The extent of drug based impairment in the community and its potential impact on individuals is underscored by very recent research into driving and impairment, through the phenomena of ""drug driving""².
16. Product safety: A second dimension of public safety is any impact of employee impairment on product safety and product quality. Employers must be able to avoid any situation in which an employee with responsibility to produce to a certain standard or to check quality / safety fails in these fundamental tasks (and endangers the public / end users) due to drug use / addiction.

² Darke, S. (2003) "Drug Use and Driving Among Injecting Drug Users -A Monograph for Policy Makers"

17. An example would be an aircraft maintenance engineer. He or she must at all times be capable of performing his or her quality checking and maintenance tasks with the highest levels of rigour, diligence, clarity, attention to detail, the exercise of observational and problem solving skills etc. He/she would also need to be able to exercise appropriate fine motor skills (e.g. appropriate tensioning and adjustment), and to work safely at a height.
18. Clearly, drug based impairment would be fundamentally inimical to such work and a direct threat to the safety of the public / clientele. The employer in such an example must be able to be lawfully and meaningfully treat drug based impairment and its manifestations as completely unacceptable, and to take appropriate action to ensure it does not occur.
19. OHS (Self and co-worker safety): It has been estimated that drug and alcohol abuse is implicated in 20 - 25% of all workplace injuries and accidents, and 3 - 15% of fatalities.³
20. Employers have very significant and well established duties of care under state and territory law to provide safe workplaces. This includes duties to avoid / eliminate foreseeable capacity for accident, illness or injury, and to take active steps in meeting what is increasingly an absolute duty of care. The duty of care relevant to this inquiry would be to not allow any employee's impairment or drug use to endanger either the drug using addicted employee, his/her co-workers, bystanders, or the public.
21. An employer with knowledge of an employee's drug use and with a general level of societal knowledge of the capacity of drugs to impair motor, concentration and cognitive skills, would have a clear statutory duty to eliminate such a risk.
22. Such an employer would also clearly bear ultimate legal responsibility should such a conflagration of risk factors translate into accident / injury. Indeed, under OHS law, the mere possibility of accident/injury and a failure to act on that possibility is a breach of the duty of care.

³ Reilly, D. (1999) "Over the Limit", Australian OHS, CCH Australia, March 1999, pp.24-27. This also appears to be drawn from ILO data, - see "Where to Next - Inquiry into substance abuse in Australian Communities" *House of Representatives Standing Committee on Family and Community Affairs*, September 2001, Section 7, p.95

23. Employees also have a reciprocal duty under most state and territory OHS law to not put themselves or co-workers / the public at risk. Impairment due to drug use could clearly constitute recklessness or negligence that would breach this duty. Again, employers need effective capacities to manage employees in regard to safety and to clearly and unambiguously prohibit drug use / drug based impairment.
24. Unsafe work / not presenting in a condition to work: There is also the related issue of employees presenting for work in an unfit condition. An employer forming an opinion that an employee is unfit for work due to drug impairment (or indeed with a valid suspicion of such impairment) would have a clear duty not to allow that employee to commence work.
25. Recent developments: Relevantly, the Victorian government recently announced that it was introducing random drug testing for Victorian drivers⁴. Transport Minister Bachelor in announcing the new testing regime stated that:
- These substances⁵ seriously impair driving ability. In fact, research into driver fatalities in Victoria shows drug driving is as much of a factor in road deaths as drink driving.
26. Just as the Victorian government has determined that drug use while driving is unacceptable and should be prohibited, Australian employers need the same capacities to clearly eliminate drug use and drug based impairment in their workplaces.

Absence

27. Absenteeism: Some persons with drug addictions may also miss days of work due to factors such as:
- a. The physical manifestations of the addiction.
 - b. Physical manifestations of particular episodic drug use.
 - c. Time spent seeking access to drugs.
28. Absenteeism generally is a very significant concern for Australian employers. It has been estimated that drug-related absenteeism costs business \$294.8m per annum.⁶ Even more pertinently, the absence of single staff members can considerably compromise the work of a wide variety of workplaces, reducing productivity, efficiency and the capacity of Australian business to deliver.

⁴ Media Release - Victorian Minister For Police & Emergency Services, Thursday, October 30, 2003 - "*Victoria Leads The Way On Drug Driving*".

⁵ Methamphetamine (speed) and THC (the active component of cannabis).

⁶ Collins, D. and Lapsley, H. (2002) "*Counting the cost: estimates of the social costs of drug abuse in Australia in 1998-9*", Drug Offensive Monograph Series, No.49, p.53

29. Not presenting in a condition to work: There is also a form of soft or hidden absenteeism in which an employee presents for work, but not in a condition for work. He or she may be present at the workplace, but may not deliver the level of work performance which would ordinarily be expected / delivered. As is the case with the impact of alcohol use, drug addiction clearly may present such a prospect and employers need proper capacities to manage such situations, particularly where such impairment is ongoing or repeated.

Productivity & Marketing

30. Customer Service /Marketing: Customer service and face-to-face interactions with customers are vital factors in determining the success of most businesses.
31. The visible manifestations of drug based impairment are instantly recognisable to many in contemporary Australia. Poor service, poor concentration, disengagement, and disinterest are more than obvious even where someone has had no interaction with drug use. Regardless of whether a customer knows the person serving them is drug affected or not, the Australian customer is well able to detect poor service and to meet this with a resolute refusal of future custom.
32. It is fundamental to the contemporary contract of employment that Australian businesses have the right to guarantee the standards of service customers expect. Businesses must be able to properly ensure that expected standards of service can be delivered and must have the managerial tools to guarantee this.
33. Maintaining a professional appearance: A key part of presenting the professional face for a business is the appearance of customer service and other staff. During the past 20 years for example an increasing range of companies have standardised uniforms and work clothes, and have set standards of appearance to deliver levels of service / professionalism expected by customers.
34. Some drug users / persons with drug addictions may (either consistently or episodically) manifest an appearance which does not reflect the image and appearance their employer is attempting to present - this is an issue which employers need to be able to address.
35. Reduced productivity: Drug use/addiction may also manifest itself through unacceptably low productivity / throughput, or through an unacceptable level of breaks / absence from one's work station. This is fundamentally at odds with the contract of employment and does not represent a valid exchange of effort for remuneration / employment.

36. Of course, the cost of any productive failure by an employee is not restricted to the labour costs of that employee alone - employers cannot deliver appropriate levels of service, other employees cannot work without appropriate input from the affected employee etc. It is well recognised that such factors multiply the costs of absenteeism, to employers and to the community.

Harmonious Workplaces

37. Another very significant challenge for employers is ensuring that the complex interaction of personalities in any workplace operates harmoniously and that this in turn delivers expected commercial / productive outcomes (e.g. customer service, responsiveness, high quality, problem solving etc).
38. In many cases, it is likely that co-workers will be aware of a person's drug use at the same time as, or prior to the employer. A range of responses are possible, but in some cases, co-workers may resent someone's drug use and will seek to no longer work with that person. Just as some co-workers may manifest highly sympathetic and empathic responses, others may have strong personal objections to drug use and may manifest this in response to a co-worker with an addiction).
39. Both responses have previously been recognised, including in the 2001 report of the House of Representatives Standing Committee on Family and Community Affairs, which found that:
- An individual may be less productive in the workplace through effects caused by the abuse of alcohol and other drugs before commencing or during work. As well as the loss of productivity by the substance user, the behaviour of a user might have a significant impact on the productivity of those around them who are concerned with that person's use.⁷
40. This is a very complex and challenging issue for any employer. However, no employer can validly allow an individual's personal drug use to endanger the wider viability of their business or the wider productive and operational harmony of the workplace. Again, employers must have appropriate tools and capacities to manage this complex issue.

Criminality

41. At the extreme end of the scale, the impact of drug use on a workplace may fall into the area of criminality. It is well understood that drug use and some drug addictions in particular are associated with criminality in many cases.
42. Data from the Australian Institute of Health and Welfare indicates that:

⁷ "Where to Next - inquiry into substance abuse in Australian Communities" *House of Representatives Standing Committee on Family and Community Affairs*, September 2001, p.97

More than half (52%) of illicit drug users surveyed reported that they had been involved in some type of criminal activity during the previous month, while 44% had been arrested at least once during the past year. The most common criminal activity reported was drug dealing (39%), followed by property crime (20%). The most common reason for arrest was property crime (17%) followed by drug use/possession (7%) and violent crime (6%).⁸

43. just as drug use and addiction has an intersection with work and the workplace, any drug related criminality may also be manifest in workplaces and can present a direct challenge to employers.
44. Theft and Fraud: The use of some drugs of addiction can be very expensive. As addiction increases frequency of use, personal finances may prove insufficient to fund an addiction for some people. Just as drug addiction lies at the heart of a proportion of home burglaries and personal theft, drug addiction may also lead to theft in the workplace context.
45. Firstly there is the prospect of theft from the employer. For someone in work seeking to finance an addiction, theft from the employer may provide a ready and tempting source of finance. This may be theft of finished or unfinished goods, of stock (e.g. in retail) or of monies (fraud). Fraud is a very serious issue for employers and has for example been estimated to cost the Australian community 5.8 billion per year.⁹
46. There is also the prospect of theft from co-workers in some cases, e.g. pilfering personal belongings, stealing monies etc. Again, employers need to be able to effectively manage such circumstances when they do manifest themselves.
47. Employers must have viable, accessible and practical capacities to preclude theft and fraud in all cases where they occur, including in those cases where drug addiction is a contributing or causal factor. This must include appropriate capacities for discipline, control, monitoring, investigation and termination of employment.
48. Drug use on premises: Employee drug addiction may also see employees using drugs on the employer's premises, in an employer's vehicle, or on client premises. This is absolutely unacceptable, and must be capable of being treated as such. Employers must have a meaningful capacity to ensure drug use on premises etc constitutes unambiguously unacceptable behaviour, and to properly respond to / preclude any such drug use.

⁸ Australian Institute of Health and Welfare (2003) Statistics on Drug Use in Australia 2002, p.74

⁹ "\$32bn, the high cost of crime", The Age, 9 April 2003 - data from Dr Adam Greycar, Australian Institute of Criminology.

49. This may also create public safety and OHS considerations for employers (e.g. syringe disposal¹⁰). This is fundamentally inappropriate for any workplace and employers should not have to manage this on any ongoing basis for employees (and should not have to bear any additional costs).
50. Use of employer premises / infrastructure to undertake criminality: There is also some prospect of employees seeking use the employer's premises and infrastructure to finance their addiction. In some cases, employees may be dealing drugs in / through the workplace, or dealing stolen goods. Again, this would be fundamentally inappropriate and unacceptable and employers must be able to address it on this basis.
51. Aggression and Assault: In some cases employee drug use may manifest itself as violence in the workplace. An employee may for example become violent due to a particular drug effect, seek to extort money from a co-worker through violence, or simply manifest an unduly violent reaction to the exigencies of work. Again, this cannot be acceptable and the law must support employer efforts to ensure this does not occur.

International Perspectives

52. Attachment B is an International Labour Organisation (ILO) typology¹¹ of the effects of substance abuse in workplaces throughout the world.
53. It directly validates the preceding ACCI analysis. It shows that the challenges for Australian employers reflect the challenges presented by drug use/ drug addiction in workplaces throughout the world.

What Employers Must Be Able To Do

54. Australian business needs to be able to effectively and practically manage challenges associated with employee drug use/ drug addiction where they occur.
55. Employers need to be able to set standards of acceptable behaviour in their workplaces, and to meet their legal, commercial and societal duties without legal threat under anti-discrimination or other law.
56. Employers need to be able to meet both their legal and commercial duties without falling into any conflict of laws which clouds or confuses their obligations and capacities to manage.

¹⁰ "Where to Next - inquiry into substance abuse in Australian Communities" *House of Representatives Standing Committee on Family and Community Affairs*, September 2001, see Section 7, p.96

¹¹ Alcohol and illicit drugs.

57. In short, under the complex web of federal and state employment regulation (including anti-discrimination legislation), Australian employers must be able to:
- a. Deliver a safe workplace for all their employees, and for the public.
 - b. Maintain a professional workplace.
 - c. Maintain the good reputation of their companies / brands.
 - d. Maintain productive, harmonious and efficient workplaces.
 - e. Deliver high quality products and services, on time and to specification.
 - f. Deliver excellent, efficient and responsive customer service.
58. These are inherently complex and challenging issues for employers.
- a. Nothing any lawmaker can do will render simple the personal, social and operational challenge posed by employee drug use / drug addiction. This is never going to be an easy issue to manage.
 - b. However, Parliament does have the scope to ensure that the legal capacities of employers to manage these challenges and comply with existing legal obligations are not unwittingly and inappropriately compromised.
 - c. On this basis, ACCI strongly supports the passage of the *Disability Discrimination Amendment Bill 2003*.

THE IMPORTANCE OF EXCLUDING DRUG ADDICTION FROM STATUTORILY PROHIBITED DISCRIMINATION

59. The amendments to the *Disability Discrimination Act 1992* advanced in the Bill have been 'prompted'¹² by the decision of the Federal Court in *Marsden v. HREOC & Coffs Harbour & Districts Ex-Servicemen and Women's Memorial Club Ltd* [2002] FCA 169 (15 November 2000).
60. ACCI strongly supports the amendment of the *Disability Discrimination Act 1992* to overcome the apparent effect of the *Marsden* decision. The decision in *Marsden* represents an unsound and unbalanced policy outcome, which is contrary to the legitimate expectations of Australian society.
61. This is precisely the type of judicial outcome which, whilst an interpretation of the statute, legitimately demands an overriding/ corrective response by the legislature as a matter of sound public policy and meeting community expectations.
62. It is not a material consideration to look at the number of specific actions initiated in the wake of the *Marsden* decision. For such time as this remains part of Australian anti-discrimination law, employers and others seeking to comply with the *Disability Discrimination Act 1992*:
- a. Have been placed in an untenably ambiguous position.
 - b. Are subject to an unacceptable level of legal risk.
 - c. Are governed by law directly contrary to community expectations and understandings.
63. In introducing the Bill, the Attorney-General stated that: "*The bill provides that it is not unlawful to discriminate against a person who is addicted to or dependent on illicit drugs.*"¹³
64. ACCI supports measures which will guarantee the capacity of Australian employers to take whatever actions are necessary to appropriately respond to, and manage the interaction of drug use / drug addiction and the workplace.

¹² *Disability Discrimination Amendment Bill 2003*, Second Reading, 3 December 2003, (Ruddock, Philip, MP - Attorney-General), H of R Hansard, p.23541

¹³ *Disability Discrimination Amendment Bill 2003*, Second Reading, 3 December 2003, (Ruddock, Philip, MP - Attorney-General), H of R Hansard, p.23541

65. Regardless of any technical status under anti-discrimination law, necessary employer responses to drug use / drug addiction should be inherently lawful, legitimate, and not open to challenge on the basis of purported discriminatory effect/cause.
66. On this basis, ACCI supports the *Disability Discrimination Amendment Bill* 2003 and calls on the Senate to pass the proposed amendments with expedition.

CONFIDENCE FOR EMPLOYER USERS

67. A key priority for employers in the operation of all employment regulation is confidence in applying the regulation in their day to day managerial and operational activities. Employers must clearly know which actions are and are not lawful and in which circumstances.
68. As ACCI has repeatedly made clear, such clarity contributes to both the appropriate balance of employer and societal concerns, and to the effectiveness of any employment regulation in achieving its fundamental aims.
69. The proposed amendments to the *Disability Discrimination Act* 1992 directly assist in providing employers with this clarity and confidence. They are closely targeted, very clear, and provide a suitably unambiguous correction to the decision in *Marsden*.
70. There are however three (4) factors which potentially warrant further consideration:

What is Addiction / When is Someone Addicted?

71. Proposed s.54A(a) of the *Disability Discrimination Act* 1992 operates on the basis of an individual's "addiction" to a prohibited drug. Addiction is not proposed to be further defined.
72. There are various references in the Explanatory Memorandum to persons being "addicted". It appears that the amendments will rely for their operation on a person either being in a state of "addiction" or not being in that state to determine rights, liabilities and access to redress.
73. The difficulty for employers of course is determining when someone is and is not "addicted", and in distinguishing "addiction" from episodic use or impairment.

74. To the extent that addiction is accorded a medical or scientific meaning, this may be very problematic for employers. Medical testing for example may be very cost ineffective for businesses, particularly smaller businesses.
75. Employers need to be able to act with confidence to address the manifestations of drug use and any impact on their business. They need to be able to identify addiction as an ordinary person in the street would, and to have confidence that this is a legitimate approach under the *Disability Discrimination Act 1992*.
76. In particular, employers need to be able to act to address unacceptable manifestations of drug use / impairment without subsequent disputation as to whether an individual was or was not technically "addicted" to the drug they were using at that time.

The 'Lawful Use' Exclusion

77. Two exemptions / exclusions are provided for in the proposed amendments (s.54A(2)). The effect of such exemptions appears to be that in particular circumstances litigation may still be made pursued on the grounds of disability discrimination due to drug addiction.
78. The first is the proposed exemption based on specifically lawful medically authorised use of a prohibited drug (proposed s.54A(2)(a) of the *Disability Discrimination Act 1992*).
79. ACCI accepts that use of medically prescribed drugs ceases to have the character of an addiction which has given rise to these amendments. The example of a palliative treatment for cancer via morphine is a very different circumstance from drug addiction more generally, and one which employers accept may legitimately constitute a genuine disability in policy terms.
80. However, even in these circumstances, an employer cannot avoid the commercial, operational, safety etc imperatives outlined in the introduction to this submission.
81. Whilst accepting the general validity of the proposed s.54A(2)(a) of the *Disability Discrimination Act 1992*, employers still need to be able to ensure their workplaces are safe, productive, professional, present an appropriate image/ appearance etc.
82. Employers would be concerned lest their efforts to balance the imperatives of retaining staff undergoing medically supervised drug treatment with their operational imperatives were found to constitute a disadvantage to

an employee which was actionable under the *Disability Discrimination Act* 1992 (e.g. under s.15 of the Act).

83. Again, taking the example of someone undergoing palliative treatment via morphine, an employer must have the confidence to properly manage the safety and operational consequences of this without threat of an action under the *Disability Discrimination Act* 1992. This may legitimately include:
- a. Changing an employee's responsibilities on a temporary or ongoing basis.
 - b. Restructuring a work team or tasks.
 - c. Offering a changed role / engagement where this is the only option to retain the employee.
 - d. Ultimately determining that employment cannot continue where an employee's absence from work/unfitness for work/impairment ceases to be of a temporary nature.¹⁴
84. It is important that there be scope for a proper assessment/ balancing of the reasonableness of an employer's actions in all the circumstances.
85. If in relation to direct discriminatory effect, s.54A(2)(a) would impose an offence of strict liability against an employer, with no scope for an assessment of the reasonableness of the employer's actions in the circumstances, then further work on this issue will be required.

The 'Treatment' Exclusion

The second proposed exclusion / exemption is potentially of greater concern to employers. Proposed s.54A(2)(b) appears to ensure that disability discrimination can apply in cases where there is:

- a. An addiction to a prohibited drug.
 - b. The person is undergoing a program or receiving services to treat the addiction to the drug.
87. Employers have an apprehension that the proposed exclusion may create a level of ambiguity which is inconsistent with:
- a. Fundamental employer expectations regarding clarity of obligations and scope to take corrective action.

¹⁴ See *Workplace Relations Act* 1996, s. 170CK(2)(a).

- b. Scope for sanctions against employers under the *Disability Discrimination Act 1992*.

Which Treatment Constitutes A Valid Exclusion?

88. Proposed s.54A(2)(b) is in the following form:

- (2) Subsection (1) does not apply to discrimination by a person against another person on the ground of the other person's disability if:
- (b) the other person is undergoing a program, or receiving services, to treat the addiction to the drug.

89. The explanatory memorandum to the amending Bill acknowledges that this exemption / exclusion operates in fairly broad terms, and that legitimate treatment of drug addiction may encompass a wide range of programs and services.¹⁵

90. The explanatory memorandum further states that:

It does not specify what type of program or services would qualify, so as to not limit the type of treatments or services that can be accessed, and to ensure that people who are attempting to put their lives back on track are not inadvertently left out.

91. ACCI does not dispute the policy basis on which the Bill seeks to encompass a wide range of drug addiction treatments - what does and does not constitute effective approaches to drug treatment is a matter for experts in different fields (e.g. the medical and treatment sciences).

92. However, employers (and others seeking to comply with an amended *Disability Discrimination Act 1992*) require more certainty than the proposed exclusion appears to provide. Again, the policy imperatives for those with drug addictions set out in the explanatory memorandum need to be properly balanced with the interests of those seeking to comply with anti-discrimination law.

93. Under the amendments as proposed, an employee's treatment status will potentially govern the legal liability of an employer in an action alleging illegal discrimination. Consistent with the aims of the amendments generally, employers are entitled to some exactitude in the obligations they must meet.

94. ACCI is concerned at the scope for informal and alternative treatments to govern the extent to which employers have obligations under the *Disability Discrimination Act 1992*.

¹⁵ *Disability Discrimination Amendment Bill 2003*, Explanatory Memorandum, p.4

95. Employers need exactitude on precisely when they will and will not be liable to action under anti-discrimination legislation. The drafting of s.54A(2)(b) needs to be clearer.
96. Our concerns over this drafting are not assuaged by the terms of the explanatory memorandum. For example, the explanatory memorandum contains the following:
- The phrase "receiving services" is broad enough to cover regular visits to a counsellor, priest or doctor to support their efforts to address the addiction.
- a. What's ""regular" in regard to visits to a counsellor, priest etc?
- b. Is this just a registered counsellor, or can anyone qualify as a counsellor under the terms of the drafting.
- c. Is it just a counsellor, priest or doctor, or is it someone else, and who might this be? (Is this list exhaustive or indicative?).
97. Again, to again return to our core point, how is an employer to implement his/her obligations in this context? How are they to meet their regulatory obligations with any confidence given the apparent inexactitude of this exclusion?

Privacy

98. The proposed exclusion also raises consideration of privacy laws and what information employers can and should be able to access. The construction of proposed s.54A of the *Disability Discrimination Act 1992* appears to operate merely on the basis of the characteristics of the employee (i.e. their addiction (s.54A(1)) and any treatment (s.54A(2))).
99. There appears to be insufficient consideration of what an employer can and cannot legitimately know in practice regarding the drug treatment status their employees and the extent to which it does or does not render the employer subject to an action under the *Disability Discrimination Act 1992*.
100. For example, how could an employer taking action based on the visible impact of drug use upon work (e.g. impairment leading to absenteeism, failure the present in a fit state for work etc) have any knowledge of whether an employee were receiving any treatment that would bring proposed s.54A(2) into play?

101. It appears based on s.54A as proposed, that an employer could take action in apparent compliance with s.54A(1) with absolutely no knowledge of whether the employee has the capacity to subsequently argue an exemption under s.54A(2).
102. An employer seeking to (for example) dismiss an employee based on one or more unacceptable and detrimental workplace manifestations of drug use may well have no basis to know whether the employee is receiving any form of treatment outside working time which could render the employer's action unlawful under the *Disability Discrimination Act 1992*.
103. Privacy laws may in fact positively preclude an employer from having such knowledge necessary to appropriately comply with both s.54A(1) and (2).
104. This appears to be a clearly foreseeable difficulty with the amendments as introduced.
105. Proposed s.54A(2)(b) appears to be something of a panacea / immunity from sanction which is clearly directly relevant to the actions an employer can take. Employers need greater certainty as to when this can and should apply, and an approach which more properly balances employer and employee interests.
106. Consideration is invited of the following alternative approaches:
 - a. Imposing a reciprocal duty on a person with a drug addiction to properly disclose to the employer (or other potential discriminator under the *Disability Discrimination Act 1992*) both their drug use and any treatment they may be receiving.
 - i) For example, an employee manifests high absenteeism, visible impairment and the visible signs of drug use.
 - ii) An employer proposes to dismiss the employee on this basis.
 - iii) At this point, the employee must disclose their treatment status to maintain any subsequent right to take action under the *Disability Discrimination Act 1992* to contest their dismissal.
 - iv) This would not be a general duty of disclosure, but would operate only where an employer was proposing to take an action which would potentially be actionable under the *Disability Discrimination Act 1992*.
 - v) This is also relevant in those circumstances where an employer is acting on the manifestations of drug use (absenteeism, poor

concentration, poor productivity etc) without any knowledge of any underlying drug addiction or drug use.

- vi) A duty on an employee to disclose their drug use and any treatment at the point of dismissal or sanction would provide an appropriate basis for employers to take informed actions and more clearly comply with the *Disability Discrimination Act 1992* on an ongoing basis.
- vii) There is a clear conceptual link here to s.170CG(3) of the *Workplace Relations Act 1996* which identifies as specific factors in assessing the fairness of a particular dismissal:
 - (1) Whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and
 - (2) Whether the employee was notified of that reason; and
 - (3) Whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee.¹⁶
- b. Alternatively/ additionally, the amendments might sensibly incorporate the notion of what knowledge an employer (or other potential discriminator) should reasonably have had in the circumstances. This could for example see s.51A(2) reformulated in the following terms:
 - (2) Subsection (1) does not apply to discrimination by a person against another person on the ground of the other person's disability if:
 - (a) the other person's use of the drug is authorised by a law of the Commonwealth, a State or a Territory; or
 - (b) the other person is undergoing a program, or receiving services, to treat the addiction to the drug.
 - and
 - (c) the person knew of, or should reasonably have known of, (2)(a) or (2)(b).
- c. This may offer a better balanced approach to meeting the aims of the amendments, whilst also more appropriately balancing employer and employee interests.

Recidivism

107. Anyone with a passing knowledge of drug addiction and drug use in our community knows that simply entering treatment or commencing

¹⁶ Emphasis added.

treatment does not cure drug addiction. Recidivism, be it an episodic return to primary drug use or extended recommencement of drug use is a common experience, particularly for those with opiate addictions.

108. This appears to pose a particular problem. Someone may nominally be undergoing a program or receiving treatment for the purposes of s.54A(2)(b), but may still clearly manifest unacceptable behaviours and conditions in the workplace which demand employer action.
 - a. For example:
 - i) An employee may be on a methadone programme, but may regress into heroin use leading to absenteeism, presenting for work in an unfit condition, endangerment to other employees, etc.
 - ii) An employee may be on a methadone programme, but the use (or abuse) of methadone may lead to absenteeism, presenting for work in an unfit condition, endangerment to other employees, etc.
 - b. An employer must have the right to make the appropriate responses to any negative manifestations of drug use in the workplace, without finding themselves in inherent jeopardy under the *Disability Discrimination Act 1992* due to the employee's entry into the methadone programme.
109. Again, the bottom line for employers is a meaningful and effective capacity to properly manage any negative manifestations of drug use in workplaces. Employers must have viable and unassailable capacities to deliver safe, professional, commercial and productive workplaces free of drug use and free of the negative consequences of drug use.
110. Mere nominal entry into treatment, or participation in a program of treatment should not preclude the capacity of employers to properly manage negative circumstances where drug use does occur.
111. Employers would be very concerned lest proposed s.54A(2) become an effective employee immunity from essential employer actions to manage drug use affecting work and workplaces.
112. The mere fact that an employee is receiving some form of treatment must not constitute either:
 - a. A barrier to / immunity from legitimate employer sanctions in the case of unacceptable behaviour, or

- b. An ultimate panacea for a dismissed employee that operates regardless of what an employer may have known, or should reasonably have known.

An alternative approach

- 113. There appears to be a valid alternative approach to the exemptions set out in proposed ss.54A(2) of the *Disability Discrimination Act 1992*.
- 114. The two exemptions proposed may simply not be required to meet the policy aims set out in the explanatory memorandum, at least in regard to employment discrimination.
- 115. ACCI understands that no change is proposed to the capacities of any employee to claim unfair dismissal under the *Workplace Relations Act 1996*.
- 116. It appears to ACCI that the circumstances in proposed s.54A(2)(a) and (b) could be relevant in determining an unfair dismissal claim where on the balance of considerations, and having applied "a fair go all round", this were warranted.
- 117. An employee could take action under the *Workplace Relations Act 1996* rather than the *Disability Discrimination Act 1992* to address any unfairness that did occur. particularly where the employee was receiving a treatment for a drug addiction.
- 118. This may offer a cost effective and operationally effective alternative, free of the ambiguity and confusion apparently inherent in the approach proposed to date.

The need for certainty and clarity

- 119. One of the stated intentions of the amending Bill is:

(The amendments) will *give certainty to all individuals and organisations covered by the DDA*.
- 120. Employers strongly support the proposed amendments on precisely this basis; they will better meet the fundamental needs of employers seeking to comply with the *Disability Discrimination Act 1992* for clear guidance than the existing situation in the wake of the *Marsden* decision.
- 121. However, it is not clear that the proposed exemption in regard to treatment meets employers' fundamental requirement for clarity and certainty in regulatory obligations.
- 122. The Senate and the government are requested to consider the issues raised in relation to this exemption and consider the extent to which:

- a. Adjustments to the Bill as initially introduced would better clarify the operation of this exemption.
- b. The alternatives outlined above may provide superior approaches.
- c. Essential further clarification could be provided through Parliamentary debate / revised explanatory memorandum in the passage of the amendments.

Which Drugs?

- 123. The proposed amendments seek to change the application of the *Disability Discrimination Act 1992* in regard to what is termed a 'prohibited drug'. This is in turn defined as a drug within the meaning of regulation 5 of the *Customs (Prohibited Imports) Regulations 1956*.
- 124. These are clearly not regulations which employers work with on a regular basis.
- 125. Employers require the confidence to act on the basis of the general community understanding of what constitutes a prohibited / illegal drug, and to be able to apply the *Disability Discrimination Act 1992* on this basis on an ongoing basis.
- 126. A particular issue may be the ongoing emergence of new and designer drugs. However, this is an issue for those with the ongoing responsibility for the maintenance of these criminal law based regulations and ACCI has no basis to conclude that the particular regulations cited are not regularly reviewed and updated.
- 127. Another potential grey area is substances which are drug-like but which may not be illegal as such. Kava may be an example of such a substance, although ACCI understands that this substance does have an established status under the *Customs (Prohibited Imports) Regulations 1956*.¹⁷
- 128. The bottom line for employers is again that where "drug use" as is generally understood in the community is affecting employment, appropriate employer responses must be sustainable without challenge on the basis of discrimination.

DO THE TERMS OF THE ACT ALREADY PROVIDE SUFFICIENT PROTECTION?

- 129. ACCI understands that some interested parties consider the construction of the *Disability Discrimination Act 1992* already adequately protects

¹⁷ Source: <http://www.health.gov.au/tga/docs/html/kavafs.htm>

employer and other respondent interests, and in particular that the existing operation of the *Disability Discrimination Act 1992* actively precludes the need for any corrective amendment in the wake of the *Marsden* decision.

130. This is not the view of the Australian Chamber of Commerce and Industry. ACCI does not understand the terms of the existing *Disability Discrimination Act 1992* to provide sufficient protection to employers facing instances of drug addiction, or to preclude litigation alleging that a drug addiction constitutes an actionable disability.
131. There are three specific issues which ACCI wishes to address at this juncture:

Inherent Requirements of the Job

132. Subsection 15(4) of the *Disability Discrimination Act 1992* provides an exemption to unlawful discrimination in employment, in the following very limited terms:
- (4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
 - (a) would be unable to carry out the inherent requirements of the particular employment; or
 - (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.
133. In general debate regarding the operation of the *Disability Discrimination Act 1992*, significant reliance is placed upon the existence of this provision. Some appear to claim it is a panacea for all employer/ respondent concerns in all cases, that it guarantees fairness and balance in all cases, and that it obviates the need for any further amendment of the Act.

134. This is not the case:

- a. Extended debates on what are and are not the inherent requirements of a job do little to assist employers in managing particular circumstances, nor in promptly and properly responding to employee drug use / addiction.
- b. "Unjustifiable hardship" is a very hard test to satisfy in practice. The considerations set out in s.11 of the Act make this a very steep test to meet.
- c. In essence, this provision exacerbates and extends the transactional costs of addressing disabilities. It does not offer employers options for reasonable responses to drug addiction/use in the same manner as the proposed amendments under consideration by the Committee.
- d. Section 15(4) of the *Disability Discrimination Act 1992* does nothing to avoid litigation or minimise litigation at odds with societal understandings of legitimately prohibited discrimination.
- e. The onus is on the employer to make out this defence.

A General Test of Reasonableness

- 135. ACCI also understands some parties claim there is a general test of "reasonableness" and of a fair go all round under the *Disability Discrimination Act 1992*.
- 136. There is no basis to conclude this from the terms of s.5 of the Act. Direct disability discrimination does not appear subject to any test of reasonableness in particular circumstances.
- 137. There is in particular no basis to conclude from the terms of s.15(2)(c) and (d) of the Act that there is any overriding test of reasonableness.
- 138. There is a very limited test of reasonableness, which forms part of the provision prohibiting indirect disability discrimination (s.6 of the *Disability Discrimination Act 1992*).
- 139. This is at best a partial element of one subset of the operation of the *Disability Discrimination Act 1992* - it in no way obviates the need for corrective amendments to properly exclude drug addiction from disability discrimination litigation generally.

A General Exclusion of Impairment Based Actions

140. ACCI also understands that some parties claim there is a general exclusion of impairment (be it alcohol or drug based) as a basis for action under the *Disability Discrimination Act 1992*.
141. That is, where a person's unacceptable actions or capacities are a function of drug or alcohol impairment, any legal claim under the *Disability Discrimination Act 1992* would be precluded.
142. ACCI would welcome such an outcome, if were it to be the case. However, we can see nothing so express in the provisions of the *Disability Discrimination Act 1992*, and are not aware of any specific decision to this effect.
143. Any party claiming that the *Disability Discrimination Act 1992* operates in this way should be challenged to show precisely how this occurs. They should be challenged to identify the confidence to other parties subject to the *Disability Discrimination Act 1992* they claim is present in the system.
144. Even if this understanding is correct, and is based on a specific interpretation of the *Disability Discrimination Act 1992* or some provision we may have overlooked, this would need to be made far clearer to users of the Act and in particular for employers.
145. If there is some basis for such claims, then rather than being considered a substitute for the proposed amendments, a superior approach would be to incorporate any generalised exclusion into the amendments to the *Disability Discrimination Act 1992*.
146. Thus, if there is an authority/ determination which states that the consequences of drug based impairment are not capable of being actionable under the *Disability Discrimination Act 1992*, then it might sensibly be added to the amendments, perhaps as a statutory note.¹⁸
147. Even in such an eventuality, considerable examination would be necessary of any such decision or provision to ensure it has the exclusionary effect claimed.

OTHER ADDICTIONS?

148. The Committee has before it a very specific proposition, and a reference to consider the specific terms of the *Disability Discrimination Amendment Bill 2003*.

¹⁸ Section 170CA of the Workplace Relations Act 1996 provides an example of such a statutory note.

149. However, employers seeking to manage Australian workplaces also face the challenges addressed in these amendments in relation to other addictions.
150. In particular, Australian employers are daily managing the interaction between work and alcohol, and between work and prescription medicines.
151. The question of when a substance addiction may validly constitute a disability may also arise in future relation to these other addictions.

AMENDMENTS TO THE WORKPLACE RELATIONS ACT 1996

152. Proposed amendments to s.170CK(4) of the *Workplace Relations Act 1996*¹⁹ would prohibit someone claiming that their termination of employment on the basis of drug addiction constituted an unlawful discrimination.
153. A new subsection 170CK(4A) would ensure that any person's addiction to a prohibited drug would not be an inherently unlawful ground for the termination of employment. This is directly comparable amendment to that proposed for the *Disability Discrimination Act 1992*.
154. ACCI strongly supports this proposed amendment to the *Workplace Relations Act 1996*.

Harsh, Unjust or Unreasonable Dismissal would Still Be Prohibited

155. It is absolutely vital that in considering this proposed amendment to the *Workplace Relations Act 1996* that the interaction with existing employment protection law is properly understood.
156. The proposed amendment to s.170CK(4) of the *Workplace Relations Act 1996*²⁰ would merely exclude someone claiming that their termination of employment on the basis of drug addiction was in fact on the basis of an unlawful discrimination.
157. Drug based termination of employment would effectively be removed from the list of explicitly odious/unlawful grounds for termination (e.g. race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, etc).

¹⁹ *Disability Discrimination Amendment Bill 2003*, Schedule 1, Item 3

²⁰ *Disability Discrimination Amendment Bill 2003*, Schedule 1, Item 3

158. Comparable with the principal change to the *Disability Discrimination Act 1992*, an employee would effectively be declined an action based on discrimination due to drug use.
159. However, absolutely no change is proposed to the operation of the separate / parallel statutory avenue for redress based on an unfair termination of employment.²¹
160. Where an employee's termination of employment is '*harsh, unjust or unreasonable*' it would remain actionable under the *Workplace Relations Act 1996*, and the full range of redress would be available.
161. In short, even though an employee's termination of employment would not be inherently unlawful in the wake of the proposed amendment, it could still be deemed to be unfair and the full range of remedies could be applied (including reinstatement).
162. It is also relevant to recall that the unfair dismissal provisions of the *Workplace Relations Act 1996* are underpinned by a fundamental statutory embodiment of a 'fair go all round' for both employers and employees.²²
163. This would appear to offer the capacity to provide a properly balanced consideration of employer and employee considerations in regard to any termination of employment on the basis of the manifestations of drug use / drug addiction.

An additional clarification

164. An additional clarification may also be considered consistent with the policy aims of the amendments.
165. One of the grounds upon which dismissal is inherently unlawful in addition to that specifically addressed by the proposed amendments²³, is the following:

Temporary absence from work due because of illness or injury within the meaning of the regulations.²⁴

166. It would be consistent with the aims of the amending Bill if either the regulations or the *Workplace Relations Act 1996* (as appropriate²⁵) were amended to ensure that temporary illness due to the consequences of drug

²¹ *Workplace Relations Act 1996*, Part VIA, Subdivisions A and B.

²² *Workplace Relations Act 1996*, s. 170CA(2).

²³ *Workplace Relations Act 1996*, s. 17OCK(2)(f)

²⁴ *Workplace Relations Act 1996*, s. 17OCK(2)(a)

²⁵ The passage of the *Workplace Relations Amendment (Fair Termination) Act 2003* has recently altered the relationship between the principal dismissal provisions of the Act and those matters set out in associated regulations.

use / drug addiction did not constitute grounds for an unlawful dismissal. Again, access to unfair dismissal redress would not be affected.

167. Such an additional clarification would be entirely consistent with the aims of the amending legislation as introduced to date.

CONCLUSION: HOW THE SENATE SHOULD PROCEED

168. ACCI calls on the Senate to:
- a. Pass the *Disability Discrimination Amendment Bill 2003*.
 - b. Overcome the undesirable and inappropriate policy consequences of the *Marsden* decision.
 - c. Provide employers and others regulated by the *Disability Discrimination Act 1992* with a clear legal framework to properly respond to the interaction between drug use/ drug addiction and the contemporary workplace.
 - d. Consider in conjunction with government, ACCI's comments on particular issues relating to exemptions and the practical operation of the *Disability Discrimination Act 1992* in the wake of amendments proposed in the Bill.

ATTACHMENT A

ACCI DISABILITY EMPLOYMENT POLICY: EMPLOYMENT FOR PEOPLE WITH DISABILITIES

PRINCIPLES OF DISABILITY EMPLOYMENT POLICY

ACCI advocates, through its general employment policy, for an employment system that enables all Australians to be competitive in the employment market. While the extent of disability for each person with a disability is unique in its nature, ACCI advocates for a diverse work force in which people with disabilities are encouraged to participate where they are able to do so. Those who are genuinely not able to work because of their disability deserve the support of the community and the opportunity to lead constructive lives as valued community members.

Over 670,000 Australians of working age now receive the Disability Support Pension - more than the number receiving unemployment benefits. The growth in numbers has been in excess of 60% over the last 10 years. This trend indicates that an ageing Australian workforce, together with growing numbers of people with disabilities has potential to seriously erode labour supply and add significantly to public outlays. In an era of improved health and longevity and declining lost time injuries in the workplace, growth in the incidence of disability should be seriously questioned and policies that encourage greater reliance on income support must be discarded in favour of better rehabilitation and employment policies.

A new focus on disability employment is required urgently due to the failure of past approaches that, while leading to an array of fragmented public policies and programs, have failed to achieve adequate employment and participation outcomes for people with disabilities who have significant work capacity. ACCI, through its education and training policy, promotes equality of education opportunities and options for groups with special needs, including people with disabilities.

This means providing access to and appropriate support for people with disabilities in education and training to ensure they have opportunities to develop marketable skills that meet the needs of business.

Through its economic policy, ACCI articulates long-term aims of full employment and an acceptable distribution of income and wealth across the community. A growing trend that sees more people with disabilities of work force age entirely reliant on income support for long periods of their lives undermines these objectives and without remedy, will contribute to unsupportable growth in public expenditure.

Workplace relations regulation must have the ultimate effect of encouraging rather than discouraging the employment of people with disabilities. ACCI workplace relations policy principles of simplicity, minimising regulation and determination by employer and employee at the workplace level are particularly relevant to the employment of people with disabilities. An overly protective, rights-based approach to employment regulation for people with disabilities will detract from rather than assist an increase in employment levels.

ACCI policy in regard to occupational health and safety and workers' compensation advocates improved health and safety performance and better rehabilitation and return to work outcomes. Population ageing has demonstrated potential to increase the incidence of disability in the community, particularly within the cohort of mature age employees. This trend will require higher priority to be given to the prevention of workplace injury and disease and to the reform of workers' compensation schemes to create greater incentives and supports for injured

employees to return to work and to protect employers willing to recruit and retain employees with disabilities from unreasonable risk and cost.

THE POLICY FRAMEWORK

Sustained and sustainable economic growth underpins improvement in the standard of living of all Australians. Through participation in work, people with disabilities are able to make a valuable contribution and share in the benefits of employment.

At the same time, ACCI recognises that increasing the capacity of people with disabilities to participate in employment and in many other areas of community life will bring greater opportunities for improved markets in assistive and adaptive technologies that remove barriers.

ACCI plays an active part in the development, monitoring and evaluation of education and training policies and initiatives and labour market policies and programs to ensure they meet the needs of business and industry in a dynamic and competitive global economy. From this perspective, ACCI is ideally placed to perform a lead role in developing new approaches to improve the participation and competitiveness of people with disabilities in labour markets.

POLICY OBJECTIVES

Participation and Support for People with Disabilities

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;
- redirect public funding away from passive income support to rehabilitation and employment assistance; and
- do not create abrupt changes in the composition of the labour force without adequate
- and well-planned support for employers.

Training and Education for People with Disabilities

Australia has disappointing rates of participation for people with disabilities in vocational education and training - less than 2.5% compared with 11 % of all work force age Australians.

Training retention rates and eventual employment outcomes are also well below average, as people with disabilities are less likely to complete their training and graduates with disabilities less likely to find employment.

ACCI promotes training and education policies that:

- develop and recognise marketable skills;
- improve transitions for young people with disabilities from school to further education and training;
- promote participation in vocational education and training through early intervention in schools;
- provide appropriate assistance for people with disabilities to undertake education and training;
- ensure that people with disabilities are acknowledged as potential participants in programs that address areas of skills shortages wherever reasonably practicable;
- provide for people with disabilities to upgrade their skills while in work and reskilling where disability is a barrier to returning to a former occupation; and
- are effectively linked to employment and pre-employment programs so that people with disabilities have continuity in the assistance they require to move from training and education to work.

Employment for People with Disabilities

ACCI supports employment policies that:

- promote the employment of people with disabilities to employers and within the wider community;
- provide for a range of employment options that acknowledge fairly and realistically the circumstances and capacity of each individual and the level of support required;
- guarantee professional assistance in the recruitment and integration of employees with disabilities in the workplace that is well-coordinated and informed by employers' needs and that forms part of the community's obligation to people with disabilities;
- do not provide disincentives or unreasonable burdens for employers seeking to include people with disabilities in their work force;
- acknowledge that not all industries are able to accommodate people with disabilities to an equal degree due to the inherent nature of their key occupation types;
- reduce complexity and red tape across the range of employment and VET programs designed for people with disabilities;
- establish effective linkages between rehabilitation, training and return to work programs; and

- acknowledge and reward employers who make substantial effort to increase the numbers of people with disabilities in their work force.

Workplace Relations

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.

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.

Occupational Health and Safety and Workers' Compensation

ACCI is committed to the achievement of an OHS outcome for Australian workplaces where every person in the workplace has a safe place of work and a safe method of working as far as is reasonably practicable, including;

- improved workplace OHS performance that continues to reduce work-related injury and disease;
- increasing the capacity of employers to achieve improved OHS performance;
- ensuring that OHS and workers' compensation systems encourage early intervention;
- promoting responsible participation by employees and encouraging their disclosure of conditions that may affect employers' ability to maintain adequate levels of safety in the workplace;
- ensuring that an awareness of OHS issues is incorporated into appropriate workplace induction and vocational education and training programs;
- the establishment of an OHS policy that clearly defines roles and responsibilities of everyone in the workplace;
- a joint approach that involves all employees in the workplace;
- the provision of appropriate information and training to meet the needs of the workplace and employee participation;
- risk minimisation, including the identification, assessment and control of hazards, ongoing monitoring, evaluation and review; and
- reform of workers compensation schemes that contain disincentives to early rehabilitation and return to work.

Recent trends in the regulation of OHS and workers' compensation schemes are placing a higher duty of care on employers that may result in disincentives for the employment of people who present additional OHS risks. This does not assist in increasing employment opportunities for people with disabilities in many industrial settings where there are significant, additional costs associated with advanced risk management processes. Employers who welcome people with disabilities into their workplaces should not be penalised for doing so.

While employers wish to promote the employment of people with disabilities in a non-discriminatory workplace, shifting public costs of support for people with disabilities to private cost or risk will not add to employers' capacity to offer employment.

Anti-Discrimination

ACCI accepts the general principle of equal opportunity that underpins anti-discrimination law. ACCI promotes the understanding that 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's policies on unlawful discrimination against people with disabilities are incorporated in its Blueprint for the Australian Workplace Relations system, Modern Workplace: Modern Future.

Employers already bear a considerable regulatory burden from a range of Federal and State anti-discrimination laws. Additional regulation that introduces far-reaching and unspecified obligations on employers or mandatory requirements such as employment quotas cannot be supported.

FUTURE DIRECTIONS

To make real progress in this area, a concerted and well-coordinated effort must be made on the part of governments and the community sector, working in partnership with employers to achieve the following key goals:

1. eliminating aspects of social and industrial policies that create disincentives for people with disabilities to take up employment;
2. examining the reasons for the growth in welfare reliance among people with disabilities and the factors that need to be addressed to stem unacceptable exit rates from the labour force;
3. provide for enhanced employment opportunities for people with disabilities through the provision of training, recognition of skill, support in the workplace and community education;
4. providing consistency and ease of transition between programs that aim to assist people with disabilities in education, training, pre-employment, employment and return to work;
5. improving community awareness of the benefits of increased employment for people with disabilities and recognising employers who make a commitment to doing so;
6. providing adequate and well-communicated support and incentives for employers, together with a reduction in risks and red tape; and
7. ensuring that employers are not liable for the costs of adjustment where welfare reform measures lead to significant change in the composition of labour markets.

ILO²⁶ TYPOLOGY OF THE IMPACTS OF DRUG / SUBSTANCE ABUSE

Accidents

- Up to 40 percent of accidents at work involve or are related to alcohol use
- Drug using workers are more likely to be involved in an accident at work than workers who do not use drugs

Absenteeism

Drug using or heavy drinking workers are more likely than other workers to be absent without permission

Drug using or heavy drinking workers are absent from work more often than other workers

Drug using or heavy drinking workers are more likely than other workers to have absences of eight days or more

Tardiness

Drug using or heavy drinking workers are more likely to arrive at work and leave early than other workers

Strains on co-workers

Increased workload to compensate for drug using or heavy drinking workers

Higher safety risks due to intoxication, negligence and impaired judgement of drug-using or heavy drinking workers

Disputes and grievances

Lost time due to decreased productivity

Intimidation and trafficking in illicit drugs at the worksite Violence

Theft

Replacement Costs

- Drug using or heavy drinking workers are more likely than other workers to have worked for three or more employers in the past year
- Drug using or heavy drinking workers are more likely than other workers to have voluntarily left an employer in the past year
- Drug using or heavy drinking workers are more likely than other workers to have been fired by an employer in the past two years

26 International Labour Organisation (2003) *Alcohol and Drug Problems At Work* Geneva, pp.17-19

Workers' Compensation Costs

Drug using or heavy drinking workers are more likely to file a workers' compensation claim than other workers

Output

- Both intoxication and post use impairment ("hangover effect") impact the following functions, which are relevant to work performance.
 - Reaction time (reactions are slower)
 - Motor performance (clumsy movements and poor coordination)
 - Sight (blurred vision)
 - Mood (aggression or depression)
 - Learning and memory (loss of concentration)
 - Intellectual performance (impairment of logical thinking)