PRODUCTIVITY COMMISSION
Inquiry into the Effectiveness of Disability Discrimination Act 1992 (DDA)

Respondent:
The Disability Discrimination Unit ('the DDU') at Sussex Street Community Law Service (WA) provides advice and assistance to people who are considering making a complaint under either State or Federal disability discrimination legislation.

Term of reference 2(a)

The social impacts in terms of costs and benefits that the legislation has had upon the community as a whole and persons with disabilities in particular.

The initial scope of the DDA included-

"a vision [of a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights…where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference."[1]

Initial criticisms of the DDA were couched in the following terms:

The DDA was a dangerous or a wasteful measure[2], it would provide an intolerable burden upon business[3], and that its funding would be at the expense of service delivery[4].

There were further criticisms that the DDA in its original planning stages did not go far enough[5]. (It is interesting to note that the terms of reference are phrased in the negative, that is, what parts of the legislation *inhibit* competition principles.)

The DDU argues that a more realistic view might be that the Act 'did not go far enough' in that it neglected to encourage better business practice by way of incentive. For example, the Australian Council for the Rehabilitation of the

[1] See the second reading speech of Mr How, Minister for Health, Housing and Community Services, Commonwealth, *Parliamentary Debates,* 26 May 1992, 2755
[2] Tyler, M-C "*Law and Change The Disability Discrimination Act 1992: Genesis, Drafting and Prospects"*, Melbourne University Law Review, Vol. 19, no.1, 1993, pp.211-228 at 223
[3] Motion of Mr. Broadbent: Commonwealth, *Parliamentary Debates,* House of Representatives, 19 August 1992, at 203
[4] *Ibid.* 207 (Mr. Campbell)
[5] Supra n2 at 224

Disabled lobbied for the inclusion of tax incentives for businesses to change discriminatory practices.[6]

Term of Reference 2 (d):
need to promote consistency between regulatory regimes and efficient regulatory administration

The terms of reference reflects the concern that the Human Rights and Equal Opportunity Commission may be hindered in effectively implementing the requirements of the ***Disability Discrimination Act (Cth) 1992.***

This further reveals a widely identified and referenced common concern of reconciling social justice policies with fiscal caps[7]. The DDU submits that the Act purports to be focussed on implementing or protecting human rights, rather than concentrating on 'efficient service delivery', and that the focus of the legislation is to achieve abstract social benefits. Thus the legislation should reflect more effectively "the rights and interests of people with a disability as influenced by international law and Australian domestic law and social justice policy"[8]

Terms of Reference 2 (b) and 3

Competition Principles

The terms of reference make the point that analysis should proceed on the basis that : Any part of the legislation which conflicts or inhibits competition principles should be evaluated if it's social benefits outweighs the costs to competition (See 2(b) and 3(c) of terms of reference).

The ***Productivity Commission Act (Cth) 1988*** does not explicitly define 'competition principles'. However, under s.60 Regulations may be prescribed as to the definition of competition principles.

However the national competition Policy Scheme refers to the legislative package comprising of the ***Trade Practices Act (Cth) 1974*** as amended by the ***Competition Policy Reform Act (Cth) 1995*** and the ***Conduct Code Agreement*** and the ***Competition Principles Agreement.***[9]

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[6] Evidence before the Hearing of the Senate Standing Committee on Community Affairs, Parliament of the Commonwealth of Australia, held in Canberra, 8 October 1992 presented by Mr Kim Duggan of the Attorney-General's Department
[7] Commonwealth Law Bulletin 22 (3 and 4) July / October 1996, 918-938 at 923
[8] *Ibid*
[9] For a more detailed see ***Halsburys Laws of Australia,*** ¶ 420 TRADE AND COMMERCE, at ¶ 320 National Competition Policy Scheme.

In particular it is interesting to note that the mission statement of the National Competition Council is:

"To improve the well being of all Australians through growth, innovation and rising productivity, by promoting competition that is in the public interest".

Underlying these three tenets of growth, innovation and rising productivity is the assumed principle that competition is in the public interest, irrespective of competing social values.

The statement noted above has application in the current context. It assumes that the well being of all Australians can be secured through growth, innovation and rising productivity. The submissions to follow are made according to competing rationales:

Growth in the context of the Act refers to growth in awareness of the need to address competing objectives. Innovation in the context of the Act stems from the fact that the Act may not go far enough to provide incentives to employers, respondents or businesses to cultivate an awareness of discrimination issues. Rising productivity is not necessarily a paramount issue if it comes at the cost of achieving equality before the law.

In particular the issue as to whether social benefit is or should be paramount is evidenced by the wealth of case law supporting the broad propositions that it should. Secondly the overriding importance of preserving these fundamental rights is reflected by the following idea:

"Discrimination against people with disabilities does not just limit their employment opportunities and financial position: judgments made by others have wider effects on the availability of social contacts and support and, naturally, upon self-esteem"[10]

This reflects the limitation of the case law to justify whether or not a social benefit, however laudable or affordable, has actually been achieved. Certainly it may reflect growing awareness through publication of the decision, but whether it demonstrates the continuing education of the public- a further goal of the DDA- is another issue.

[10] Tyler, Melissa Conley, *'Law and Change. The Disability Discrimination Act 1992: Genesis, Drafting and Prospects'* Melbourne University Law Review, Volume 19, No.1, 1993 : 211-228 which goes on to note that in regards to women and girls with disabilities the negative self-image is created and reinforced by overt or hidden discriminatory attitudes, this response shows that the effects of discrimination will be more than purely economic: Steinberg ,M. (National Women's Advisory Council), *Special Consultations with Disabled Women and Girls* (1983) 22

Application of competition principles should not override the benefits of the legislation.

Further to the previous submission: it is contrary to the principles of the legislation to expect a person with a disability to compete for employment with a person who does not have the same or any other disability.

In fact some of the initial concerns raised regarding the omission of the Act to provide a positive incentive system to reward businesses that address and deal with discrimination issues are pertinent here.[11]

Case Example:
Discrimination in an offer of employment- genetic testing.

The ***Disability Discrimination Act (Cth) 1992*** provides that a prospective employer cannot discriminate against a prospective employee on the grounds of disability.[12]

This represents a possible inhibition of competition principles, which can be most poignantly highlighted by reference to developments in genetic testing. The future-oriented character of the relevant provision thus ensures that fundamental rights cannot be displaced by overriding notions of competition. Ordinarily, in measuring 'efficiency', an employer would be able to factor in future contingencies without reference to anti-discrimination legislation. This provision can probably be used in the sense that under section 15 (1)(a) of the Act the manner in which the services are provided in relation to prospective employment must be taken into account to ensure that action taken does not offend the Act.

The rationale underlying genetic testing of employees is that it allows for prospective employers to test particular applicants for their suitability.[13] It could also be argued that it increases competition between businesses to produce the best employee-to-work outcome, and therefore increases the cost of business per se, thus running counter to competition principles.

Persons finding themselves in such instances (pre-employment testing) warrant the protection of the Act. This is because:

"discrimination by an employer against an employee or applicant for employment on the basis of genetic predisposition to a disability which may exist in the future

[11] See 1.1
[12] ***s.15(1) Disability Discrimination Act (Cth) 1992***
[13] Otlowski, Margaret *"Employers' use of genetic test information: is there a need for regulation?"* Australian Journal of Labour Law 15 (1) May 2002, 1-39

or in respect of a disability which is imputed to a person, possibly incorrectly, because of their genetic status, will prima facie be unlawful" [14]

The implication is that with the future inevitably bringing an exponential change in technology and working environments, the core rights of people not to be subjected to unfair processes on the basis that they might be subjectively determined to be incapable of 'performing' should be held paramount and above any competing principle of efficiency. Any "growth" in a truly "innovative" workplace will recognise that the Act retains a 'non-negotiable' abstract character (stemming from Australia's obligation to implement international law inherent in conventions to which Australia is a signatory), and which must be factored into the cost of business.

DDA actually aids competition principles.

It is ironic that the terms of reference seem to be premised on the assumption that the Act inhibits competition or runs counter to principles of competition, thus necessitating an inquiry.

What the terms of reference overlook, which therefore limits the scope of the inquiry, is the ability of the Act to redress instances of discrimination which have occurred in pursuit of efficiency, the effect of which is to 'factor in' to the cost of business the necessity to conform to abstract principles enshrined in legislation such as the DDA, which represents competing social values.

By way of illustration the case of ***X v Commonwealth*** [15]establishes an expanded view of the 'inherent requirements' defence available under the Act.

It expanded the scope of the defence by incorporating a broader range of employment requirements, thus destroying:

"the Act's power to mandate a change in the organisations of business such that would permit HIV positive persons to work in environments where the risk of transmission is low"[16]

More importantly, the DDU submits that it assumed in passing that the interests of the employer in maximising profit and maintaining workplace efficiency were paramount and should prevail over the employee's right not to experience discriminatory workplace policies.[17]

[14] *Ibid,* at 11
[15] (2000) EOC ¶ 93-054
[16] Hirst, M, *X v Cth Case Note,* University of Queensland Law Journal, 21(1), 2000 @ 107 and 109

[17] *Ibid* at 108 note also the author's treatment of McHugh's J judgment revealing this misconception.

Education measured in terms of competition.

The National Competition Code, Competition Principles preserves the integrity of growth, innovation and rising productivity. These are assumed to be in the interests of the public. However promotion of such interests requires that they be fair and equitable.

One of the most valuable (although intangible) of all social resources or assets is the growth of education. The point was made above and is re-iterated that a person with a disability cannot effectively compete with those who do not have that or any other disability.

In relation to deaf persons, for example, it has often been regarded that it "is useful to determine the extent of the opportunities, benefits and rights for deaf people associated with disability rights legislation"[18] and particularly so in the context of education.

The concept of 'reasonableness' in the context of the defence of unjustifiable hardship reveals that even at the microcosm the interplay of competition between parties in education is not paramount to the rights of individuals. For example deaf students may use the legislation to argue that if they are denied alternative accommodation requirements there can be grounds for a complaint for unlawful discrimination[19].

However, by reference to the terms of reference, an issue that may detract attention from the right of the individual to learn on a level playing field is, again, the extent to which the Act inhibits competition. This is because attention inevitably becomes directed towards student/pupil ratios, or equations of time spent per pupil, the modelling for which does not easily accommodate issues of time spent per *disabled* pupil, or the number of teachers required to provide educational services for disabled persons, and is therefore an ineffective means of measuring resource distribution. The competition principle might require the question: How much of a teacher's time should a disabled student utilise, to the detriment of other students, and how will available resources be depleted.[20]

However, the purpose of the Act- to eliminate discrimination- must be held paramount from the point at which a person commences the long journey through the education process. This purpose should outweigh competing principles relating to the distribution of educational resources.

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[18] Komesaroff, Dr *"Linguistic Rights of the deaf: struggling against disabling pedagogy in education"* Australian Journal of Human Rights, vol 6, no.1 , Feb 2000 , 59-78 at 65

[19] ***s.22 Disability Discrimination Act (Cth) 1992***

[20] Hannon, Michelle, *"The Disability Discrimination Act: protection against discrimination in the provision of education"* Law in Context, Vol 17 (2) 28-53 at 46

The defence of unjustifiable hardship does not inhibit competition principles for employers.

The defence of unjustifiable hardship, available to employers under the Act, does not necessarily inhibit competition principles.

Various unjustifiable hardship defences can be instituted.[21] The principal objection raised by respondent parties to complaints, and the essence of the defence, is that there would entail a significant economic detriment to accommodate a person with a disability, and that it would be unjustifiably hard.

Such accommodations may, in the minds of some respondent parties, be unfair to them on the grounds that competitors do not have to deal with such problems. What then of the social benefits and the awareness raised as a result of the complaints procedure?

By way of illustration this issue was raised directly in ***Cooper v Human Rights and Equal Opportunities Commission***[22]**,** which concerned adjustments to accommodate a person with a wheelchair. There was a concern that the costs amounted to approximately $400,000.00.

Commentary suggests that under this decision "surveyors, councils and responsible authorities when considering applications for developments or buildings need to be acutely aware of the requirements of the DDA…the fact that a council issues approvals or permits which are in accordance with state legislation and other codes will not provide a defence to a claim under the DDA" [23]

Conclusion

As is the case when analysing any initiative, whether on an actuarial basis or otherwise, the colloquial principle of 'short term pain- long term gain' applies. Arguably, the short term cost to a party affected by the ambit of the Act in implementing or observing the requirements of the Act, may be more cost effective (and therefore competitive in the 'efficiency' understanding of the term) than dealing with discrimination complaints on an ad hoc basis, or in the hope or expectation that grounds for a complaint would never arise.

The party that endeavours to maintain an environment free of discriminatory practices is also one that has a 'competitive edge', in that:

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[21] see for example ***s.24 (2) Disability Discrimination Act (Cth) 1992*** which provides for the defence of unjustifiable hardship in the provision of goods, services and facilities.
[22] (1996) EOC 93-012
[23] Gerber P, *"Enabling people with disabilities"* Australian Construction Law Bulletin, Vol. 11 (4) June 1999: 25-28 at 28

a) it is more likely to attract disabled persons, thus increasing the talent pool from which it may wish to draw its human resources;
b) it will achieve a flow-on ‘goodwill’ factor as a ‘disabled-friendly’ entity; and
c) it is likely to avoid inflationary and/or budgetary pressure in relation to dealing with ad hoc complaints of discrimination if effective mechanisms to avoid discriminatory practices are set up at the earliest possible stage.

As a final submission the hypothetical question is posed:
Assuming that the thrust of the inquiry is to ascertain whether the costs of compliance with the DDA affects the competitiveness of a business, or impedes the principles of competition as outlined in the instruments mentioned above- are not all entities who might otherwise be competing with each other not equally affected by the Act? Surely the obligation to meet the provisions of the Act (or to avoid the negative consequences of not doing so) is spread across the board.

DATE: