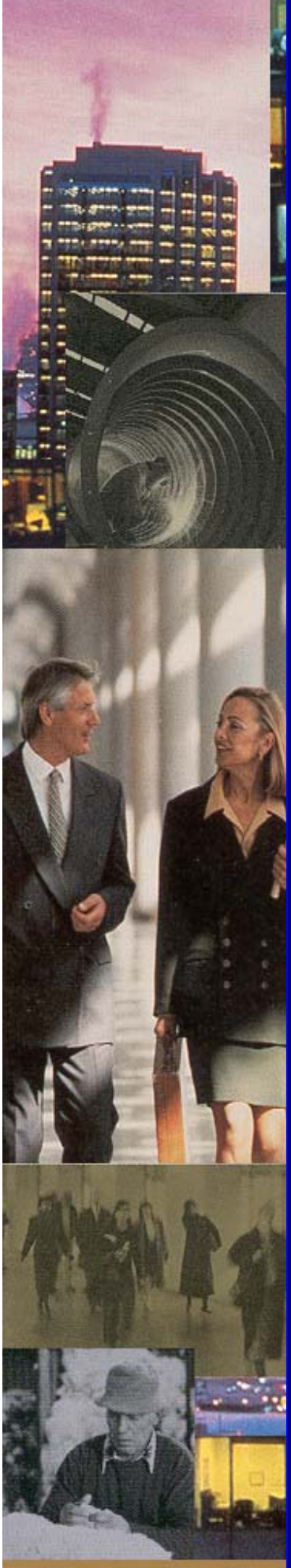

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE DISABILITY DISCRIMINATION AND OTHER HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2008

ACCI SUBMISSION

6 FEBRUARY 2009

LEADING AUSTRALIAN BUSINESS

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.
- Business representation on a range of statutory and business boards, committees and other fora.

- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.

- Research and policy development on issues concerning Australian business.

- The publication of leading business surveys and other information products.

- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.

- Issue papers commenting on business' views of contemporary policy issues.

- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.

- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.

- The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.

- Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.

- Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.

- Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.

- Education and training reports and discussion papers.

- The ACCI Annual Report providing a summary of major activities and achievements for the previous year.

- The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.

- The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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1. INTRODUCTION

ACCI EQUITY POLICIES

1. ACCI supports appropriate and balanced anti-discrimination laws, and supports the general principles underlying anti-discrimination legislation.

2. ACCI's formally adopted policies on equity maintain that employers expect anti-discrimination laws to "represent a balance of interests and necessarily be qualified and targeted to specified conduct rather than imposing far reaching or general unspecified duties."[1]

3. Employers are subject to both federal and state anti-discrimination laws. Employers do not seek to conduct business operations or employment practices on a discriminatory basis. However, the regulation of employment practices by discrimination law raises multiple issues of public policy that can, if the law fails to properly take into account the interests of industry, unduly and inappropriately impede legitimate business decisions and employment practices. This also does no service to those sought to be protected by such laws.

4. Multiple regulatory jurisdictions create multiple regulatory obligations. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the *Workplace Relations Act 1996* (eg the form of awards, unlawful dismissal etc). This proliferation of obligations can be confusing and challenging to employers. Again, this does nothing to aid in discouraging discrimination.

5. The Government has also introduced yet another layer of anti-discrimination legislation through the *Fair Work Bill 2008*, which is currently before a Senate Committee inquiry process.[2] This will undoubtedly (if passed) create an additional overlapping avenue of litigation for aggrieved individuals in the industrial tribunals and Courts.

6. ACCI supports a review of overlapping anti-discrimination laws across Federal, State/Territories and within non-discrimination legislation. Employers must ensure that they comply with each different jurisdiction, with various rules, procedure and jurisprudence – this is clearly regulatory confusion and deserves close examination in the future.

[1] ACCI Modern Workplace: Modern Future - A Blueprint for the Australian Workplace Relations System 2002-2010, p.127.
[2] See Chapter 3, Parts 3-1 of the Fair Work Bill 2008.

7. The fact that an aggrieved person must elect to have the matter brought in only one jurisdiction does not assist employers, who will be required to comply with all laws, not just the one which was used by the applicant. Therefore, the possibility and problems of forum shopping is always present.

8. 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.

9. Anti-discrimination law should have a clearly delineated scope of operation, and provide specifically identifiable obligations and avenues for redress. General anti-discrimination goals/ objects should only be included in legislation where supported by detailed operational provisions that properly support compliance. Moreover, they should not be repetitious or overlapping.

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

11. Redress based approaches must be complemented by appropriate resources to encourage and promote best practice, including through the production of guidelines and the active promotion of best practice.

12. It is within the prism of the above core policy principles that ACCI has approached the Government's proposed amendment Bill.

13. The following is a summary of ACCI recommendations:

Recommendation 1:

The dominant purpose test should be retained in the ADA.

Recommendation 2:

The proposed amendments to the DDA as outlined in this submission not be agreed to.

Recommendation 3:

An employer can only be found to have discriminated against a person, if they had actual knowledge at the time of the person's "disability".

Recommendation 4:

The Senate should recommend that further consideration be given to expanded defences to employers in order that they comply with OHS laws and laws arising under other pieces of federal, State or Territory legislation.

Recommendation 5:

Section 46PO(2) of the HREOC Act be retained and the current time limit of 28 days not be amended to 60 days.

Recommendation 6:

That illicit drug addictions/dependence or gambling addictions be explicitly excluded from the definition of "disability".

Recommendation 7:

That a regulation making power be inserted into the DDA to exclude new forms of "addictions", such as "internet addiction".

2. AGE DISCRIMINATION ACT

PROPOSAL

14. The Bill seeks to overturn important principles in the *Age Discrimination Act 2004* (ADA) that were deliberately intended by Parliament by removing the sole or dominant purpose test. This test was specifically and intentionally included in the ADA to balance appropriate policy objectives.

POLICY CONCERN

15. To be clear, ACCI supports programs and efforts to increase the employment and workforce participation rate in the Australian economy. ACCI and its members unashamedly support the employment of employees of any age where they have the requisite skills and abilities to perform the work. The recent skills crisis has made employees all to aware of the need for skilled and experienced employees.

16. Criticisms of the Bill do not go to the question of whether employers support workers of a certain age or age cohort or not. Rather we seek to constructively engage with deliberate changes in the law which impose legal obligations on employers.

17. The former Coalition Government renewed its commitment to age discrimination legislation during the 2001 election, as both the Explanatory Memorandum and Second Reading Speech to the ADA highlight. The ADA was the result of a consultation process on a paper released by the Attorney-General's Department in December 2002 that had been prepared in consultation with the 'Core Consultative Group'.

18. ACCI participated in extensive working parties and discussions with the Government before the implementation of the ADA. ACCI also participated in the Senate inquiry into the *Age Discrimination Bill 2003* by contributing a submission and appearing to amplify a number of important issues during the Committee process.

19. As identified by ACCI in those early consultations, age discrimination itself is a fluid concept which operates across age groups. The ADA does not preclude discrimination against a specified age cohort – it prohibits age discrimination per se. The important distinction is that everyone has an age and all employees have an age. What may be a policy benefit to one

age group by definition is of detriment to those outside the age group if they are precluded (directly or indirectly). ADA does not apply to mature aged persons – it applies to all persons and can be used by a person of any age. This is why the current tests in the ADA are important to industry and should not be disturbed without cogent evidence.

20. It must also be recalled that this is a still a relatively new piece of legislation and given the extensive consultation process industry and others were engaged in, it is premature to now suggest substantial amendments where there is no systemic problem identified. ACCI is not aware of any major systemic problem with the current framework. Moreover, as we enter into a possible recessionary period, there is no clear policy rationale to introduce such changes that may have unintended consequences. For example, as businesses either offer voluntary redundancies or make workers redundant, there is the chance that employees will use ADA to argue discrimination on the basis of age. This cuts both ways:

    a. Older workers who feel that they are being "let go" because of their age;

    b. Younger graduates who have been offered graduate positions only to be told that they can no longer be kept on.[3]

21. Therefore, ACCI does not support amendments proposed in the Bill that would remove the 'dominant reason' test in s.16. This is not a minor change, but represents a significant departure from the existing law and will have many unintended consequences. There are sound policy reasons for treating the ADA differently to other types of anti-discrimination legislation.

22. Whilst we agree that consistency is an important objective across the discrimination framework, this must be balanced against other legitimate concerns for industry. The fact that s.16 departs from other anti-discrimination standards is not sufficient in itself to make this significant amendment.

23. This was explained in the Explanatory Memorandum to the ADA as follows:

[3] The Australian Financial Review, (6 February 2009), "Law clerks laid off as firms feel pinch", p.45.

> 23. This is different from tests in the other Commonwealth anti-discrimination legislation, which provide that the act is taken to have been done for the relevant reason if that reason is one of a number of reasons.
>
> 24. However, in this case, the primary solution to most aspects of age discrimination is based on education and attitudinal change. In doing so, it is critical that that the legislation not establish barriers to such positive developments, for example, by restricting employment opportunities for older Australians by imposing unnecessary costs and inflexibility on employers acting in good faith.

24. ACCI reiterates the Attorney-General's second reading speech (26 June 2003) to the Bill:

> All antidiscrimination laws must strike the right balance between prohibiting unfair discrimination and allowing legitimate differential treatment.
>
> The bill takes a commonsense approach and exempts legitimate distinctions based on age.
>
> …
>
> Of course, age discrimination also poses problems for business. Stereotypical views about the capacity of older Australians prevents business from getting the best person for the job.
>
> Age is not an indicator of capacity and must not be used as a blunt proxy for capacity.
>
> This legislation protects against age discrimination and the approach taken is also fair for business. Employers and industry were closely involved in the development of this bill.
>
> The bill ensures on a national basis that all Australians have equality of opportunity to participate in the social and economic life of our country.

25. To remove the dominant reason test would require business to re-consider its support of the ADA, as it would not strike the right balance between protecting persons from discrimination and allowing business to legitimately deal with its enterprise in a sustainable and productive manner.

26. A recent case of *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978, is illustrative of the possible effect the proposed amendments will have in certain employment scenarios. The facts of the case can be summarised as follows.

27. The employee, aged 37 years old was employed by the respondent hotel for 6 years. In 2005, the hotel changed her shift arrangements. The

employee claimed that this was because of her age, and that she had heard the owner of the hotel make comments about replacing older staff with *'young glamours'*. The hotel argued, and Buchanan J accepted, that the dominant reason for the change in shifts was due to the fact that the hotel needed to reduce the wages bill and address the breakdown in the working relationship between the employee and management.

28. If the dominant reason test was removed, the employee in the above example would have arguably had a much stronger case against the employer on the basis that a reason for her treatment was due to her age (notwithstanding the legitimate business reasons of the employer).

29. Once again, it is important to recognise that the ADA does not capture "mature age" workers only. It covers all persons (by definition, everyone has an age). What concerns employers that as a characteristic that is amorphous, it is not difficult for employees / aggrieved persons to subsequently characterise their 'unfavourable' treatment on a basis of their age. An unintended consequence is that many more claims being potentially made against employers and industry with "go-away" money offered to settle spurious matters.

30. Proposed new s.16 will create an uncertain situation for employers, in that they are potentially exposed to legal liability for actions that are indirect or incidental. For example, the new section provides that a person is taken to have committed an unlawful act if it was for any one of these reasons:

    a. The age of the person; or

    b. A characteristic which relates generally to persons of that age; or

    c. A characteristic which is generally imputed to persons of that age.

31. If the dominant purpose test is removed, the following actions will arguably be under the spotlight:

Graduate Recruitment

The practice of 'graduate recruitment' whereby firms deliberately hire graduates from university who in the majority of cases will be younger persons.

Redundancy

Will employers be exposed to age based discrimination claims when it makes persons redundant who are older than younger workers or (vice versa)?

This could occur when:

- Recent entrants into the labour market have broad based skills (ie. IT) and can be deployed into other areas in the workplace.

- A mature aged worker offered voluntary redundancy or made redundant, declines to update their skills to be re-deployed, even when given the opportunity.

- Younger employees are made redundant because of "last on, first off" policies (often contained in Workplace Agreements).

General Recruitment

A potential mature age employee is not offered employment, was offered employment on conditions which it could not meet (hours, location, uniform etc.) and the employee imputes that one of the reasons was the persons age.

There is nothing to prevent an aggrieved person from filing a discrimination complaint, particularly given the low-cost nature of the jurisdiction, whereby the employer must still expend time and money to defend spurious claims. The dominant test makes it clearly as to whether age was a real and dominant factor in the offering of employment.

ACCI RECOMMENDATION

32. ACCI recommends that the Senate adopt the following proposal:

Recommendation:

The dominant purpose test should be retained in the ADA.

3. DISABILITY DISCRIMINATION ACT (DDA)

PROPOSAL

33. The Bill seeks to make numerous substantial amendments to the current DDA. Some of these changes are complicated and have unintended consequences. These may require further amendments if they are causing such problems.

POLICY CONCERN

34. As was stated above in relation to amendments to the ADA, to be clear, ACCI supports programs and efforts to increase the employment and workforce participation rate in the Australian economy. ACCI and its members unashamedly support the employment of employees with a disability.

35. ACCI currently is the peak employer organisation that represents Australian employers on the Australian Fair Pay Commission Disability Roundtable and has supported the Supported Wage System for workers with a disability.

36. Criticisms of the Bill do not go to the question of whether employers support workers with a disability. Rather they seek to constructively engage with deliberate changes in the law which impose legal obligations on employers.

Forest Case

37. The Bill seeks to address the recent Full Federal Court case of the *State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96 (6 June 2008), whereby the Full Court held that for discrimination to be established pursuant to section nine of the DDA, it was insufficient for the less favourable treatment to be on the grounds that Mr Forest (the applicant) was accompanied by an assistance animal. It was also necessary to establish that the less favourable treatment, the exclusion from the Cairns Base Hospital and Smithfield's Community Health Centre, was on the grounds of his psychiatric disability and this could not be established.

38. Paragraph 115 of the joint judgment of Justices Emmett and Spender states:

> While it may be that Queensland Health discriminated against Mr Forest within the meaning of section nine, because it treated him less favourably because of the fact that he was accompanied by his dogs, it did not do so on the ground of his psychiatric disability… It follows that there was no unlawful conduct on the part of Queensland Health.

39. Whilst ACCI prefers to reserve its position as to these amendments, the facts of the case must be recalled. This was a case of a person who had an apparent psychiatric condition and who felt it necessary to have an animal with him at all times. His apparent mental illness was characterised as an anti-social/personality disorder in which he exhibited erratic behaviour, making it difficult for him to communicate and present himself in public. The applicant trained a boxer dog named Knuckles to accompany him in public and was refused access to two health facilities for unrelated treatment.

40. Whilst the Health Centre allowed access for guide and hearing dogs, under a well structured policy and protocol, it refused access to the applicant's dog on the basis that it considered that *"his dogs were ill-behaved and ill-controlled and that there was inadequate evidence of proper assistance dog training."*

41. The case highlights the difficulty employers may have in ascertaining whether someone (a) has a "disability", (b) whether the assistance animal is actually required for the persons disability and (c) whether the person's assistance animal will not compromise health and safety to the public or other employees – all of whom, are owed a duty of care by the employer.

42. ACCI understands that an employer could request evidence of training of an "assistance animal". However, there must also be a provision under proposed s.9 that specifically allows an employer to refuse or place conditions on access to a worksite on the grounds of OHS obligations. It does not appear that the unjustifiable hardship provision would capture this.

43. This would make it clear to employers, that entry or conditions of an assistance animal could be refused on OHS grounds.

Unjustifiable Hardship

44. ACCI supports and welcomes amendments to extend the unjustifiable hardship defence to all areas of the DDA – not just to recruitment and selection.

45. Whilst ACCI supports the defence it should be expanded. For example, it does not take into account the fact that an employer may have taken action in order to comply with Occupational Health and Safety (OHS) laws to protect the person or other persons (who may be employees or the public).

46. Employers are under significant obligations arising from Federal and State/Territory OHS laws that can subject employers to criminal penalties and imprisonment, not to mention civil common law damages.

47. The also needs to be further exemptions for actions taken in order to comply with other laws arising under federal or State/Territory laws.

Reasonable Adjustments

48. The Productivity Commission recommended that there should be a new duty on employers and others to make reasonable adjustments to accommodate the needs of people with disabilities. There would be no need, however, if the adjustments would cause unjustifiable hardship.

49. ACCI supports the response of the former Coalition Government when it accepted the Commission recommendation in part. However, it opted for HREOC to publish guidelines which list examples of how the duty to make adjustments should apply to each of the areas covered by the DDA.

50. ACCI does not agree with proposals in the Bill to specifically require positive obligations on employers that they make reasonable adjustments. This would be creating a new obligation where none currently exists. ACCI also does not agree with the suggestion that such an obligation was Parliament's original intention.

51. According to the majority of the High Court in *Purvis*, there is no duty of 'reasonable accommodation' to be implied from the DDA. McHugh and Kirby JJ found that, while the effect of the DDA is that, 'as a practical matter', a service provider may have to take positive steps to accommodate those with disabilities to avoid a finding of discrimination, the Act falls short of creating a duty to accommodate (*Purvis* [2003] HCA 62; (2003) 202 ALR 133, 158.) Gummow, Hayne and Heydon JJ rejected the argument that the failure to provide reasonable accommodation would amount to less favourable treatment and, thus, discrimination (Purvis [2003] HCA 62; (2003) 202 ALR 184)

52. This is also consistent with previous decisions on whether an implied duty exists.

53. There does not appear to be any regulatory gap in this area, as an aggrieved person could arguably run a case based on indirect discrimination, if an employer failed, in the totality of circumstances, to reasonably accommodate their needs.

54. The Bill proposes to cast a positive duty on an employer, who will be obliged to undertake an analysis of whether an employer could make reasonable adjustments. This extends obligations on employers much further than is suggested in the explanatory materials.

55. However, if a positive duty was created, ACCI proposes that this should be qualified and supplemented by the expanded defence as outlined above.

Genetic Predisposition / Requests for Information

56. ACCI does not accept that there should be an explicit amendment in this area without appropriate protections for employers. ACCI made numerous submissions to the Australian Law Reform Commission and the National Health and Medical Research Council's extensive inquiry into genetic information.

57. Employers continue to be concerned that they be able to manage their continuing legal obligations in a manner that allows them to determine and assess risk to all employees (and the public). This includes employers assessing employees against the inherent requirements of jobs and assessing OHS risk.

58. The difficulty with assessing or knowing an employee's disability (and genetic predisposition), is that there is no positive obligations on an employee to disclose to the employer such conditions. The Victorian Equal Opportunity and Human Rights Commission fact sheet provides:

> Disclosure is a personal decision to reveal a disability to a prospective or current employer. There is no legal obligation to disclose a disability unless it is likely to affect your job performance or ability to work safely.
>
> For people with an obvious disability, the decision is not whether to disclose but when to do it. But there are many people whose disabilities are not visible, as in the case of someone with a mental illness or epilepsy.4

[4] http://www.humanrightscommission.vic.gov.au/publications/disability%20disclosure%20guidelines/

59. Only the employee knows whether they have such conditions. In other words, there is no requirement for knowledge on the part of the employer for discrimination to be proven, which is particularly a problem in the case of indirect discrimination.

60. ACCI would only agree to a legislative amendment that explicitly refers to genetic predispositions, if there were also provisions that required the discriminator to have knowledge of the disability and for defences from discrimination to incorporate OHS concerns. ACCI does not believe that s.47(2) of the DDA provides the necessary protection and certainty.

61. ACCI considers s.80 the Victorian *Equal Opportunity Act 1995* to be an appropriate provision to be inserted into the DDA:

> **80. Protection of health, safety and property**
>
> (1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary-
>
> (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally;
>
> (b) to protect the property of any person (including the person discriminated against) or any public property.
>
> (2) A person may discriminate against another person on the basis of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against).

ACCI RECOMMENDATION

62. ACCI therefore recommends the following:

Recommendation 1:

The proposed amendments to the DDA as outlined in this submission not be agreed to.

Recommendation 2:

An employer can only be found to have discriminated against a person, if they had actual knowledge at the time of the person's "disability".

Recommendation 3:

The Senate should recommend that further consideration be given to expanded defences to employers in order that they comply with OHS laws and laws arising under other pieces of federal, State or Territory legislation.

3. OTHER MATTERS - BILL

BILL PROPOSAL

63. Time Limit Increase: ACCI does not agree with item 154, which would remove the current time limit of 28 days for a claim to be made to the Federal Courts after the President of the Commission has terminated the complaint.

64. The current time limits are consistent with other jurisdictions and provide all parties with certainty and allow sufficient time for applicant to obtain legal advice.

65. The time limit is also consistent with current provisions in the *Workplace Relations Act 1996*, for applications to be made to the Court following the end of conciliation processes by the Australian Industrial Relations Commission.

ACCI RECOMMENDATION

66. ACCI therefore recommends the following:

Recommendation

Section 46PO(2) of the HREOC Act be retained and the current time limit of 28 days not be amended to 60 days.

3. OTHER MATTERS - DDA

INTRODUCTION

67. ACCI wishes to take this opportunity to bring to the Senate Committee's attention two matters that are currently unresolved and that leave employers in a precarious situation.

68. ACCI supports well balanced anti-discrimination laws, however, there have been recent developments in the law concerning disability discrimination which have not been redressed. They include persons with an illicit drug addition/dependency and workers with a gambling addiction.

DEFINITION OF "DISABILITY"

69. According to s.4 of the DDA:

> "disability" , in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
> (b) total or partial loss of a part of the body; or
> (c) the presence in the body of organisms causing disease or illness; or
> (d) the presence in the body of organisms capable of causing disease or illness; or
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
>
> (h) presently exists; or
>
> (i) previously existed but no longer exists; or
> (j) may exist in the future; or
> (k) is imputed to a person.

70. The definition of disability is extremely wide, and can conceivably cover nearly every known (and yet to be discovered) medical disease/illness. This can also include psychiatric conditions. The problem for employers is that some conditions are:

a. Objectively not readily observable (genetic conditions, conditions that are not obvious by external manifestations);

b. Manifest in behaviour which is anti-social or dangerous to other persons which could be attributed to someone without underlying conditions;

c. Manifest in behaviour that is not known to result from or be predominantly caused by an underlying condition (ie. illicit or legal drug use).

Psychiatric Disorders

71. The recent case in Victoria illustrates how wide a Court/Tribunal can interpret the meaning of "disability".

72. In 2006, the Victorian Civil and Administrative Tribunal ruled in *McDougall v Kimberley-Clark Aust. Pty. Ltd*,[5] that a "gambling addiction" is an impairment that can give rise to a claim of discrimination under Victorian anti-discrimination laws.

73. At paragraphs [15] and [16] of that decision, VCAT stated (emphasis added):

> 15 At any hearing of this matter, the Tribunal would have to be satisfied that the complainant suffered from a gambling addiction, that it was a malfunction of a part of the body being a mental or psychological disease or disorder and that the gambling addiction existed at 4 April 2003. As the company puts its case, gambling per se is not a malfunction of a part of the body, nor is it a mental or psychological disorder – it is an activity.
>
> 16 The complainant has filed a report from her treating psychiatrist Dr Tannenbaum; the report is particularly notable for the number of factual errors it contains but presumably they arise from the history given to him by the complainant and possibly by others. Doctor Tannenbaum notes that Ms McDougall presented to him with multiple features of pathological gambling with associated major depression and anxiety disorder and he expressed the view that she fulfilled the diagnostic criteria for pathological gambling as set out in DSM IV. That of course does not give rise to an inescapable conclusion that she has an "impairment" as defined and as I indicated earlier, there is nothing to indicate when this condition manifested itself and when and if it ceased. Notwithstanding the lack of certainty about the conclusions that might be drawn by the Tribunal and notwithstanding the present lack of temporal evidence, it is my view that there is a real possibility that the applicant could, with amplification of the evidence from suitably qualified medical practitioners, bring herself within the impairment definition. That is a matter for future evidence, the existing evidence being insufficient for the purpose.

[5] *McDougall v Kimberley-Clark Australia Pty Ltd (Anti Discrimination)* [2006] VCAT 1563 (3 August 2006).

74. In refusing to dismiss the case, the tribunal stated: *"whether the existence of numerous gaming machines liberally sprinkled around the state of Victoria is, as a matter of medical science, a sufficient inhibitor of recovery to make her tenure in Victoria dangerous to her health"* (para 24) and further, *"it seems possible that the complainant with appropriate medical evidence can support her claim that she has an impairment"* (para 26).

75. Whilst VCAT did not find in the applicant's favour due to lack of medical evidence presented to VCAT and no actual discrimination proven, the decision stands for the proposition that an "addiction" in the form of a compulsive gambling behaviour can be a disability under anti-discrimination legislation.[6]

76. This decision highlights the unacceptable manner in which courts can extend discrimination law beyond its legislative intent, and beyond where the community would consider a reasonable balance between individual and third party responsibility.

77. Employers support balanced and fair anti-discrimination laws. However, well intentioned laws should not be used to transfer individual responsibilities onto employers where they are beyond the control of a business.

"Addictions"

78. It is also worrying that new forms of addictions can be classified as medical mental impairments. The most recent appears to be "internet addictions" which may give rise to employer obligations in future.

Net addicts mentally ill, top psychiatrist says[7]

INTERNET addiction is a "common" mental disorder that should be recognised by health officials, an editorial in one of the world's leading psychiatry journals says.

The *American Journal of Psychiatry* published an editorial claiming that internet addiction met the criterion for a mental disorder and called on the American Psychiatric Association to officially list it as such.

The editorial's author, Jerald Block, said internet addiction consists of three particular subtypes: excessive gambling, sexual preoccupations and email or text messaging.

"Internet addiction appears to be a common disorder that merits inclusion in the Diagnostic and Statistical Manual of Mental Disorders," Dr Block said in the journal.

[6] *McDougall v Kimberly-Clark Australia Pty Ltd (Anti Discrimination)* [2006] VCAT 2211 (10 November 2006).
[7] http://www.news.com.au/technology/story/0,25642,23402395-5014108,00.html

79. It is reasonable for policy makers to put appropriate limitations in legislation, where it is proven that it is being used (or there is a threat) that it is being used beyond its intended purpose.

Illicit Drug Addictions

80. In addition to ACCI's position on the Government's current amendment proposals, ACCI further requests the Senate to consider recommending amendments to the DDA so that a person's illicit drug addiction is not able to be classed as a disability or impairment giving rise to employer obligations.

81. The decision of the Federal Court in 2000 in the case of *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* which ruled that a heroin addiction was a "disorder, illness or disease" that would give rise to liabilities under the Act caused concern in the employer and wider community. Following that decision the Australian government moved legislative amendments to overcome its effect. The New South Wales Government did likewise. The NSW legislation was enacted; however Commonwealth legislation was opposed at the time.

82. ACCI reaffirms its support for the former Government's previous Bill on heroin addiction (the *Disability Discrimination Act Amendment Bill 2003*), and calls for it to be reintroduced into the Parliament to clarify the situation for employers.

83. The ACCI submission to the previous Senate inquiry on the *Disability Discrimination Act Amendment Bill 2003* is commended to this Committee for consideration.[8]

ACCI RECOMMENDATION

84. Given that the Bill also makes clear that "disability includes behaviour that is a symptom or manifestation of the disability" the imperative to make clear gambling / illicit drug addictions are not a "disability" is more pressing.

85. The Senate Committee should recommend that the forms of mental disorders, characterised as illicit drug addiction/dependence or gambling be specifically excluded from the definition of "disability" under the DDA.

[8] http://www.acci.asn.au/text_files/submissions/(2004-02)%20-%20ACCI%20Subn(Final)%20-%20DDA%20and%20Drug%20Addiction.pdf

86. Therefore ACCI recommends the following:

Recommendation 1:

That illicit drug addictions/dependence or gambling addictions be explicitly excluded from the definition of "disability".

Recommendation 2:

That a regulation making power be inserted into the DDA to exclude new forms of "addictions", such as internet addiction.

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