CHAPTER 8

IMPACT ON THE ECONOMY

8.1 The committee received evidence suggesting that, while the Act imposes some economic costs, eliminating sex discrimination and sexual harassment has economic benefits both for individual businesses and the Australian economy as a whole. However, some submissions and witnesses expressed concern about the complexity of the existing system of anti-discrimination legislation. There was particular concern about the complexity produced through each jurisdiction having its own anti-discrimination legislation. To address this, some organisations expressed in principal support for harmonising anti-discrimination laws. In addition, business groups argued that there is inconsistency between the obligations of employers under anti-discrimination laws and their obligations under unfair dismissal laws.

Impact on individual businesses

8.2 ACCI submitted that implementing anti-discrimination and anti-harassment measures "has not been done without imposing significant costs and challenges for employers."[1] ACCI stated that:

> [S]ome of the costs imposed by anti-discrimination laws on business are in training and educating staff, responding to and investigating complaints and engaging legal and specialist assistance where necessary, in addition to the costs that arise from any litigation.[2]

8.3 Nevertheless, ACCI noted that "[t]here is a strong business case for diverse and inclusive workplace cultures which possess clear norms against discrimination."[3] In particular, ACCI acknowledged that there are:

> ...benefits to employers in achieving recognition as an employer with a discrimination-free culture. Those benefits can accrue in staff well being, high quality job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution, and higher rates of retention.[4]

8.4 Several other submissions also pointed to the economic benefits of removing discrimination in workplaces. For example, Australian Women Lawyers noted the benefits of introducing flexible work measures include improved staff retention, increased productivity and reduced absenteeism.[5]

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1 *Submission 25*, p. 3.

2 *Submission 25*, p. 3.

3 *Submission 25*, p. 2.

4 *Submission 25*, p. 3.

5 *Submission 29,* p. 16. See also Carers Australia *Submission 33*, pp 7-8 and 12; Diversity Council Australia Inc *Submission 47,* pp 7-11.

8.5 The Diversity Council of Australia provided several specific examples of companies obtaining significant commercial benefits through the introduction of initiatives such as paid parental leave, more flexible work practices and work-based childcare.[6] More generally, the council noted research by the Catalyst organisation that:

> ...indicates that Fortune 500 companies with the highest representation of women board directors attained significantly higher financial performance, on average, than those with the lowest representations of women board directors. This related to return on equity (companies with the highest percentages of women board directors outperformed those with the least by 53%), return on sales (by 42%), and return on invested capital (by 66%).[7]

8.6 The Diversity Council of Australia also noted the corollary that the failure to eliminate discrimination imposes significant costs on businesses. The council pointed to direct costs such as legal fees and damages awards but noted that:

> Less easy to quantify are the "hidden" costs, including, for example unplanned absenteeism, reduction in work team cohesion and productivity, reduction in staff morale, lost management/employee time (investigations, hearings etc.), resignations and labour replacement costs, workplace accidents, stress and illness claims, damage to the company's reputation, and/or political and industrial relations impacts.[8]

8.7 Ms Penny Thew of the Law Council of Australia told the committee that legal firms are aware of the costs involved in failing to address sex discrimination:

> From my experience for at least the last 10 or 15 years I think the firms have been getting that input themselves, that the cost to them of losing female employees at the five, or seven or nine-year mark and continually replacing them, as many of the firms around edge of the cities do, is very high. There is the cost of losing the relationships that those solicitors had with the clients.[9]

8.8 In relation to the cost of sexual harassment to businesses, HREOC submitted that:

> [T]here is a strong business imperative to eliminate sexual harassment. Sexual harassment presents a significant cost to employers through lost productivity, absenteeism, workers compensation, staff turnover, drop in staff morale and reputational damage.[10]

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6 *Submission 47*, pp 10-11. See also Carers Australia, *Submission 33*, pp 7-8; Collaborative submission, *Submission 60*, p. 32.

7 *Submission 47*, p. 10.

8 *Submission 47*, p. 8. See also Collaborative submission, *Submission 60*, p. 31.

9 *Committee Hansard*, 10 September 2008, p. 59.

10 *Submission 69*, pp 131-132.

8.9 HREOC conducted a review of sexual harassment in employment complaints in 2002 and found that only 7 per cent of complainants were still working for the organisation where the alleged harassment occurred.[11] Referring to this review, Mr Mathew Tinkler of PILCH noted:

> A 2002 survey by HREOC suggested that ...only seven per cent of people who had made a complaint had returned to the employer to which the complaint related to. In terms of business, 93 per cent of people ...are leaving the business. So there is a real commercial and business imperative to improve the way we handle this. It is not in business's interest to lose its well-trained employees.[12]

Overall economic impact

8.10 The Diversity Council of Australia argued that beyond the costs and benefits to individual businesses there are wider economic implications of failing to eliminate discrimination:

> Not only does discrimination adversely impact upon individuals, groups, and organisations, it also incurs costs to the broader community. The United Nations estimates that discrimination against women has cost Asia-Pacific billions of dollars every year. The Economic and Social Survey for Asia and the Pacific 2007 identified that barriers to employment for women cost the region $42 billion to $47 billion annually. Other research has demonstrated a direct relationship between higher sex discrimination in particular nations and lower output per capita.[13]

8.11 More specifically, HREOC submitted that the Act has had a positive impact on the Australian economy:

> The SDA has made a substantial contribution to Australia's increasing productivity and economic prosperity in the last 24 years. In particular, legal protection from discrimination in the workplace, implemented through access to complaints mechanisms, and through HREOC's education and awareness-raising activities, has assisted in removing barriers to workforce participation for women.[14]

8.12 HREOC pointed out that increasing participation by women in the workforce is closely linked to economic growth:

> Enabling skilled women workers to participate in and retain labour force attachment – particularly following childbirth – is essential in order to get a maximum return on Australia's significant public and private investment in women's education and training.

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11 *Submission 69*, p. 132.

12 *Committee Hansard*, 10 September 2008, p. 30.

13 *Submission 47*, p. 9.

14 *Submission 69*, p. 251.

> The OECD has noted that workforce participation of women is a key economic issue for Australia. As well as boosting Australia's overall labour market participation rate, women's increased workforce participation has boosted family living standards and, by driving up the demand for goods and services and expanding the size of the domestic market, enabled the Australian economy to continue to grow.
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> ...At a time of skills shortages across a number of industries, women workers are invaluable to the current labour market.[15]

8.13 Similarly, the Association of Professional Engineers, Scientists and Managers Australia argued that there is an economic imperative to retain skilled and experienced women in the technical professions but that this is unlikely to be achieved unless all forms of discrimination including systemic discrimination are eliminated.[16]

Lack of consistency between federal, state and territory anti-discrimination laws

Impact of inconsistency

8.14 Submissions from business groups suggested that the lack of consistency between federal, state and territory anti-discrimination legislation as well as inconsistency with obligations imposed by other legislation causes considerable difficulty for businesses. VACC noted that:

> [C]urrent differences between the Federal and State sex discrimination legislation impose a myriad of regulatory obligations that can be challenging and confusing for small and medium size businesses. The existence of multiple regulatory jurisdictions and the inconsistencies in State and Federal legislation encourage forum shopping and create uncertainties.[17]

8.15 Mr Daniel Mammone of ACCI also submitted that the complex array of anti-discrimination obligations under federal, state and territory laws poses a problem for employers:

> The main problems that employers face is that they may have a set of circumstances that will give rise to a possible multiple legal action, one part of which could be a possible breach of the SDA. Others could be breaches of contract agreements. ...The same set of circumstances can give a claimant the possible opportunity to take action, say, in Victoria at the Victorian Equal Opportunity Commission under the Victorian act or under the SDA perhaps. If they have been dismissed they may also take proceedings, in some cases, to the [Australian Industrial Relations Commission] for unfair dismissal proceedings or commence proceedings at

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15 *Submission 69*, p. 252. See also ACTU, *Submission 55*, p. 3. On the related issue of workforce participation of carers see Carers Australia, *Submission 33*, pp 7-8 and 14-15.

16 *Submission 48*, p. 8. See also HREOC *Submission 69*, p. 252.

17 *Submission 32*, p. 5. See also ACCI, *Submission 25*, pp 3 and 7.

> the Federal Magistrates Court or the Federal Court for unlawful termination ...depending on the factual matrix. ...[I]t is concerning that an employer has to navigate through that legal minefield.[18]

8.16 In addition, ACCI pointed to the difficulties employers face reconciling their obligations under anti-discrimination legislation with the laws prohibiting unfair dismissal or unlawful termination.[19] ACCI provided five examples of cases in which employers were ordered to reinstate employees who had been sacked as a result of the employer seeking to enforce its policies in relation to sexual harassment. These were two decisions of the Australian Industrial Relations Commission and three decisions made by the New South Wales Industrial Relations Commission.[20] ACCI stated that:

> There is considerable authority now from the decisions of tribunals (e.g. the Australian Industrial Relations Commission) to suggest that even when an allegation of sexual harassment is sustained on the basis of a thorough investigation, and the conduct is serious, this will not mean that termination of the employment of the harasser will be considered fair or reasonable by a tribunal. This is a highly invidious position for an employer to be in.[21]

8.17 ACCI argued that this is a form of 'double jeopardy' for employers. Mr Mammone told the committee:

> This is a real concern because employers are trying to comply with their anti-discrimination legal obligations but at the same time they do not know whether they will be made subject to further litigation down the track.[22]

8.18 Mr Barklamb of ACCI suggested that there should be a presumption of fairness where a dismissal is the result of an employer seeking to meet its obligations with respect to sexual harassment:

> It would be useful to us if action were taken in direct response to formal complaints for harassment or actions that are being taken by us in furtherance of compliance with other areas of law had some presumption towards fairness in dismissal or were matters that any determining body was directed to take into account.[23]

8.19 In response to questions from the committee on this issue, the Attorney-General's Department advised that two of the cases referred to by ACCI, which were determined by the Australian Industrial Relations Commission, had been overturned on appeal. While in two of the cases determined by the New South Wales Industrial

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18 *Committee Hansard*, 10 September 2008, p. 11. See also *Submission 25*, pp 12-13.

19 *Committee Hansard*, 10 September 2008, p. 12.

20 *Submission 25*, pp 13-14 and 27-28.

21 *Submission 25,* p. 26.

22 *Committee Hansard*, 10 September 2008, p. 14.

23 *Committee Hansard*, 10 September 2008, p. 15. See also p. 16.

Relations Commission, the commission had expressed reluctance to make the finding that the employees had been unfairly dismissed.[24] The Department submitted that:

> Generally, in all the cases outlined in ACCI's submission, the applicable Commission considered a range of factors, including longevity of service, behavioural record of the employee and the gravity of the misconduct. The law attempts to balance the rights of employees to be protected against discrimination and harassment in the workplace with the right of employees to be protected from being dismissed unfairly.[25]

Options for harmonisation

8.20 There was qualified support for harmonisation of anti-discrimination legislation in the evidence received by the committee. HREOC outlined the benefits to be gained from the harmonisation of equality and discrimination laws for both applicants and respondents:

> Under the existing state of affairs, whilst the various laws are largely similar, some significant differences exist. Accordingly, individuals face a difficult decision as to where to commence their action without prejudicing their prospects of success, which is complicated further by restrictions against swapping between jurisdictions mid-stream. Likewise, respondent organisations and bodies, particular[ly] those that operate in more than one State or Territory, face the complex task of ensuring that their actions, policies and operations comply with overlapping obligations under multiple pieces of legislation that all seek to address the same social wrong.[26]

8.21 However, given existing differences in state, territory and Commonwealth anti-discrimination legislation as to grounds and coverage, some organisations cautioned against harmonisation that produces 'a lowest common denominator' approach.[27] For example, Ms Kate Eastman of the Law Council noted that some provisions in state and territory legislation provide greater protection than Commonwealth anti-discrimination legislation. She told the committee:

> I think that the states would probably be concerned about losing those provisions that work effectively and appropriately in their jurisdictions. I have particularly in mind the Northern Territory act, which of course has special provisions to deal with its Indigenous community. Much consideration has been given to ensuring that the Northern Territory act is responsive to those particular issues in the territory. I think this process of

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24 Attorney-General's Department, *Answers to questions on notice,* 22 October 2008, p. 4.

25 Attorney-General's Department, *Answers to questions on notice,* 22 October 2008, p. 4.

26 *Submission 69*, pp 256-257. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 11 September 2008, p. 10.

27 National Foundation for Australian Women, *Submission 15*, p. 8; Shop, Distributive and Allied Employees' Association, *Submission 42,* p. 4; ACTU, *Submission 55*, p. 16; HREOC, *Submission 69*, p. 258.

> harmonisation needs to look at the best features of all of the legislation, not just a lowest common denominator approach to harmonisation.[28]

8.22 Consistent with this view, the Anti-Discrimination Commissioner of Tasmania noted that Tasmanian legislation provides broader protection against discrimination than Commonwealth legislation and supported harmonisation provided comprehensive protection is maintained.[29]

8.23 Similarly, the New South Wales Government considered that efforts to harmonise anti-discrimination laws should not limit existing protection provided against discrimination.[30] The government's submission outlined the broader protection available under the *Anti-Discrimination Act 1977 (NSW)* in relation to carer responsibilities and transgender people and stated:

> The New South Wales Government considers it essential that any reforms to anti-discrimination law to promote consistency across jurisdictions do not operate to limit existing protections from discrimination, including those provided to transgender persons and carers under NSW legislation.[31]

8.24 ACCI considered that harmonisation or simplification of anti-discrimination laws may produce regulatory and equity benefits.[32] While cautioning that related reviews and inquiries should be allowed to finalise before any wide ranging reform of anti-discrimination laws, ACCI acknowledged that:

> [T]here is merit in considering a review of the existing structure of Federal and State/Territory discrimination laws to identify opportunities to rationalise, harmonise or streamline where appropriate.[33]

8.25 As noted in chapter 2, SCAG has established a working group which will advise Ministers on the harmonisation of state, territory and Commonwealth anti-discrimination laws. The working group has representatives from all jurisdictions apart from South Australia.[34] An officer of the Attorney-General's Department advised the committee that the working group is considering options for harmonisation of anti-discrimination laws in three stages:

> Stage 1 is options that could be identified and progressed in a ...non-legislative manner fairly quickly. We are looking at bringing those options to ministers later this year. Stage 2 is more medium-term, slightly less-significant legislative and procedural reforms and they are ...into the next

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28 *Committee Hansard*, 10 September 2008, p. 53

29 *Submission 13*, pp 2-3. See also Queensland Council of Unions *Submission 46*, p. 1; Office of the Equal Opportunity Commissioner and the Office of Women (SA), *Submission 45*, p. 4.

30 *Submission 23*, p. 2.

31 *Submission 23*, p. 2.

32 *Submission 25,* pp 3-4.

33 *Submission 25,* p. 7.

34 Attorney-General's Department, *Answers to questions on notice,* 22 October 2008, p. 2.

> year. Stage 3 is to identify longer-term more structural, more substantive options to reform the discrimination laws.[35]

8.26 In light of the SCAG review of options for harmonisation, ACCI submitted that the committee should defer making any conclusive findings or recommendations in relation to harmonisation or proposing a particular model for harmonised anti-discrimination laws.[36]

35 *Committee Hansard*, 11 September 2008, p. 3.

36 *Submission 25,* pp 5-6.