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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INTRODUCTION

1. It is now over 20 years since the *Sex Discrimination Act 1984* (SDA) commenced operation.

2. In that time, Australian society and Australian workplaces have undergone significant change.

3. In particular, human resource practices and workplace attitudes have changed, reflecting both the changing legal environment that employers operate in, and broader social changes. Most employers have now put in place practices and systems which are designed to proactively address and minimise the risk of discrimination or harassment occurring in the workplace. Most managers and proprietors make their best efforts to manage in a non-discriminatory way that reflects contemporary attitudes on equality of treatment.

4. The underlying objectives and assumptions of anti-discrimination law – that people deserve equal treatment in employment – particularly when it comes to gender or family responsibilities – enjoy broad community support. Associated with this, Australia now has a broad framework of laws, at the Federal and State/Territory level that support these objectives.

5. There are also agencies and institutional structures whose role is to support these objectives through advice, research and education. One example of this is the Equal Opportunity for Women in the Workplace Agency, which through its EOWA Employer of Choice for Women list, recognises best practice in diversity management (with a focus on gender).

PERSPECTIVES ON THE *SEX DISCRIMINATION ACT*

6. On the 20th anniversary of the SDA, ACCI published an employer perspective on how the Act was functioning and how it may be improved.

7. Those perspectives remain highly apposite today and are included in this submission at Attachment A. In that paper ACCI identified broad areas of concern with the operation of anti-discrimination laws for employers, and recommendations for improving that legal framework.

8. Key perspectives in that paper include:

   a. The legislative purpose of the SDA and its core objectives enjoy strong support within the employer community.

   b. There is a strong business case for diverse and inclusive workplace cultures which possess clear norms against discrimination.

   c. Anti-discrimination law enjoys its widest support within the employer community when laws are balanced, clear and grounded in common sense understandings of discrimination and harassment.

   d. An overall approach which encourages cultural change and prevention, rather than remedies enforced by regulation after the fact, is preferable and most effective.

9. The ACCI *Modern Workplace: Modern Future* workplace blueprint also provides some broad parameters for the reform of anti-discrimination laws which are germane to this inquiry:

   a. Employers should be able to readily identify their obligations.

   b. Employers should be protected from double jeopardy.

   c. The concept of indirect discrimination can create uncertainty in some employment contexts.

   d. Anti-discrimination law should not be utilised to impede legitimate business decisions.

   e. There should be a greater emphasis on education, promotion and problem solving in discrimination policy.

   f. The exemption for 'genuine occupational qualification' in the SDA is a fundamental one to render the Act workable.

10. Additionally, ACCI below addresses specific contemporary matters that are relevant to the terms of reference of the inquiry.

11. ACCI does not seek to address the Committee on all matters contained in the inquiry terms of reference, having regard to the comprehensive and wide-ranging nature of the inquiry.

12. Instead ACCI has identified specific issues of contemporary significance for employers, and wishes to highlight these matters to the inquiry.

KEY PROPOSITIONS

13. In considering what, if any, changes may be warranted to the SDA, and thereby the overall structure of federal anti-discrimination law, the Committee should have regard to the following views expressed by industry:

    a. ACCI welcomes this opportunity to have a contemporary assessment of the framework of the SDA and its contribution to anti-discrimination outcomes. The operation of the SDA is an issue of importance for industry, as evidenced by the perspectives on the SDA that ACCI circulated in 2004, and which are included at Attachment A.

    b. While most employers have successfully implemented anti-discrimination and anti-harassment measures into their overall human resource management, this has not been done without imposing significant costs and challenges for employers.

    c. It must be acknowledged, however, that there are also cost 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.

    d. On the cost side, some 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.

    e. Employers are subject to multiple and potentially overlapping anti-discrimination laws at the State and Federal level. They must manage an often complex web of obligations in respect of these laws, as well as their other legal and ethical obligations (including industrial relations laws).

    f. Harmonisation or simplification of the overall legal framework may therefore produce regulatory and equity benefits; however the

content of these laws and the extent of the obligations they impose on employers will be significant.

g. In seeking to balance and minimise their legal risk from these multiple legal regimes, employers are potentially frustrated in achieving the best possible outcome in relation to the objectives of anti-discrimination laws. .

h. Consistent with what has been said above, additional resources into advice, education and reform of the legal framework to assist employers in managing their legal obligations, will assist in producing better outcomes in respect of harassment and discrimination.

HARMONISATION

SCAG REVIEW

14. ACCI notes that the Standing Committee of Attorneys-General (SCAG) has placed on its agenda the issue of harmonisation of anti-discrimination laws. It is also understood that various State Governments have initiated their own reviews of their main anti-discrimination legislation.

15. It is unclear to ACCI what the level of coordination is among the various initiatives to review federal and State/Territory anti-discrimination legislation, but harmonisation is one issue that governments appear to already be giving active consideration to.

16. In its most recent communiqué (25 July 2008), and under the heading *"Anti-Discrimination Laws Harmonisation"* SCAG agreed on the following course of action:

> (a) noted that the Anti-Discrimination Law Harmonisation Working Group will identify options for harmonisation in the short, medium and longer term, taking into account related Commonwealth, State and Territory policy initiatives.
>
> (b) approved as the terms of reference for the Working Group, to develop options in consultation with all jurisdictions' human rights or equal opportunity commissions for harmonising Commonwealth, State and Territory anti-discrimination laws and complaint handling systems for the consideration of Ministers, including.
>
> (i) as a priority—identify and progress non-legislative options to enhance access by individuals and businesses to complaint handling procedures in all jurisdictions (Stage 1).
>
> (ii) identify options for reform in the medium term—undertake a needs analysis to identify potential areas for minor legislative and procedural reforms that could lead to significantly improved harmonisation, including any barriers and resources required to implement options (Stage 2).
>
> (iii) identify longer-term options for reform that examine opportunities for (and obstacles to) substantive reforms to anti-discrimination laws, procedures, and institutional and/or co-operative arrangements (Stage 3).

17. In light of this announcement, ACCI believes the most appropriate course would be for this inquiry to defer making any conclusive findings or recommendations in relation to harmonisation, or proposing any particular model of harmonised anti-discrimination laws.

18. ACCI urges that any review in this area by SCAG not disenfranchise stakeholders outside of Government, such as business, who must ultimately comply with the law. Industry will seek an opportunity to be consulted on, and to have input into, any proposals that emanate from SCAG.

19. Regard must also be had to the Federal Government's policy announcement for amendments to the workplace relations system (Forward with Fairness). This policy blueprint states that the Federal Government intends to implement new National Employment Standards (NESs) by 1 January 2010. These NESs will include a right to request flexible working arrangements to assist employees in balancing work with family responsibilities. This NES will usher in a major extension of employee rights in this area and the management of these requests may impose significant challenges for business. ACCI recommends that sufficient time is allowed for these new rights to be 'road tested' and understood before other measures are considered.

Other reviews

20. There are a number of other reviews in this area, including:

    a. The Productivity Commission (PC) review into paid parental leave.[1]

    b. The Australian Industrial Relations Commission (AIRC) award modernisation process that will create new industrial instruments with safety net standards to apply from 1 January 2010.

    c. The Government's substantive legislation to amend the *Workplace Relations Act 1996* to be introduced sometime during 2008 and commence in 2010. This may include provisions that address discrimination in certain areas.

[1] http://www.pc.gov.au/projects/inquiry/parentalsupport

21. It would be prudent to allow these reviews and inquiries to finalise before embarking on a wide ranging reform of the SDA or other anti-discrimination legislation, noting that these extant processes foreshadow the creation of new and additional rights in several areas, including in relation to the rights of employees to request employment arrangements that assist them in meeting their family responsibilities. It may be that once the 'dust has settled' and a revised regulatory framework is in place, there is still value in conducting a further review of the SDA and the anti-discrimination framework more broadly, but this stage has not yet been reached.

TIME FOR A SINGLE SYSTEM?

22. Noting our disclaimers above in relation to other reviews, ACCI believes that there 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.

23. It is worth recalling that the development of the framework of anti-discrimination laws in Australia occurred in a piece-meal fashion, with South Australia creating the *Prohibition of Discrimination Act 1966*, and the Commonwealth first legislating in this area by passing the *Racial Discrimination Act 1975*, which relied on the external affairs power of the Constitution.

24. The piece-meal and ad-hoc approach has resulted in disparate anti-discrimination law content and substantial overlap between State/Territory and Commonwealth law. This is largely the result of the constitutional limitations on the Federal Government to pass legislation in this area, with the States having greater scope to legislate by not relying specifically on international conventions to do so.

25. Therefore, it is difficult to argue that there is any apparent deficiency or gap of coverage – in fact, there is now the problem of multiple and overlapping coverage, causing uncertainty in legal compliance. This is particularly the case in relation to sex discrimination. While it is true that some employees in certain circumstances, e.g. men, are unable to access some of the remedies available under the *Sex Discrimination Act* 1984 (Cth), they have no such restriction on access to State/Territory remedies (e.g. under the Victorian *Equal Opportunity Act* 1995).

26. At the federal level, employers must comply with the following main pieces of legislation:

    a. *Racial Discrimination Act 1975* (RDA)

    b. *Sex Discrimination Act 1984* (SDA)

    c. *Equal Opportunity for Women in the Workplace Act 1999 (EOWWA)*

    d. *Human Rights and Equal Opportunity Commission Act 1986*[2] *(HREOC Act).*

    e. *Disability Discrimination Act 1992 (DDA).*

27. In addition, every State and Territory now has omnibus legislation prohibiting discrimination on a variety of attributes.[3]

28. Furthermore, employers also have anti-discrimination obligations under the *Workplace Relations Act 1996* with respect to unlawful terminations, industrial awards and agreement content.

29. It is ACCI's view that when considered as a totality, this framework of laws provides a comprehensive system of anti-discrimination law, albeit with inconsistencies and overlap which are capable of being improved.

INCONSISTENCY

30. Federal anti-discrimination legislation generally does not override State or Territory laws dealing with the same subject matter, where it can operate "concurrently". This is expressly provided for in ss.10 and 11 of the SDA and is necessary because of s.109 of the Constitution, which provides for Commonwealth legislation to override State legislation where there is an inconsistency.[4]

31. This poses a problem for employers when they are trying to identify which laws they need to comply with and how they will implement

[2] Under the HREOC Act, HREOC can deal with complaints in the employment context concerning sexual preference.
[3] *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).
[4] See also s.6A(1) RDA, s.13(3) DDA.

systems to prevent discrimination occurring, depending on the specific legislative framework.

32. For example, s 21 of the Victorian *Equal Opportunity Act 1995* provides an exception for small business (defined as a business with 5 full-time employees or less), in determining who should be offered employment.

33. In the above example, it is not clear how a Victorian employer can utilise this lawful exemption, when the SDA does not offer a similar exception/exemption. The result is that an employer may believe they have lawfully complied with the State legislation, and it is only when an employee commences proceedings under the federal act, (knowing that this employer doesn't have a defence) that the employer is exposed to potential legal liability.

34. As observed by the Productivity Commission (PC) in its review of the DDA in 2004 a number of salient problems are inherent in running two parallel anti-discrimination systems:

> *… lack of uniformity can add to the compliance costs for organisations. In any one State or Territory, organisations must comply with two potentially conflicting statutes and deal with different complaint processes.*
>
> *… the administrative costs of nine separate agencies administering nine parallel Acts are likely to be more substantial than those of a nationally uniform approach.*
>
> *… Finally, lack of uniformity means that case law in one jurisdiction is not necessarily applicable in other jurisdictions. Given the relatively small number of disability discrimination cases taken to court (see chapter 13), uniform legislation in each jurisdiction would help to establish useful precedents more quickly.*[5]

35. It is clear that these issues are relevant to the SDA inquiry and as stated earlier, ACCI recommends that SCAG investigate these issues in order to consider making a consistent, coherent and uniform framework to anti-discrimination legislation.

[5] Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) Volume 1, pp 172-173.

PROBLEM AREAS WITH SDA

36. In the preceding section employer concerns in relation to overlap between State/Territory and Federal laws were outlined. Additionally, there are a number of discrete problems concerning the current operation of the SDA and other anti-discrimination legislation.

SPURIOUS CLAIMS

37. A person aggrieved can lodge an application and initiate proceedings, in either federal or State/Territory jurisdictions, not knowing:

    a. The strength of their case, or

    b. Whether they have a sound legal basis for making the complaint in the first place.

38. This leads to claims being filed, which may be legally tenuous or without any basis, but which require an employer to then seek costly legal advice, attend conciliation proceedings, and decide whether they will defend the matter from mediation/conciliation to tribunal/Court proceedings.

39. It is well known that many employers simply settle claims (in cases where either party is unsure whether they have legal grounds to initiate or defend proceedings) to make them "go away" (similar to what occurs in unfair dismissal jurisdictions). In most cases, legal advisors will recommend this as the most prudent approach to avoid the costs of litigation.

40. While HREOC is widely regarded as doing an effective job in conciliation, feedback from the ACCI member network suggests that there remains some tendency to resolve cases in this manner, with employers settling the matter, regardless of the legal strength of an applicant's case.

41. This does not assist the employee in having their alleged wrong redressed, nor does it provide the employer with certainty of their legal obligations into the future. Neither does it further the legislative objects of anti-discrimination laws in preventing discrimination. It may have

the overall effect of undermining managerial courage to take action to address issues of discrimination or harassment when they occur (because of the risk and cost of litigation).

FORUM SHOPPING

42. One of the biggest problems facing employers is what conduct, practice, or procedure (either by the employer themselves or via an agent by which the employer is vicariously liable) will lead to an aggrieved person taking legal action. This is not to be treated lightly, because employers must undertake a legal and operational risk analysis daily, as its conduct and the conduct of its employees, has the potential to create legal risk – which can only be determined in future.

43. For example, it is possible that one set of circumstances may provide an employee with the following choices concerning legal action:

    a. Commence proceedings under federal anti-discrimination legislation; OR

    b. Commence proceedings under State/Territory anti-discrimination legislation;

    c. If there is a termination of employment (noting in constructive dismissal cases, the employer will usually not know they have technically terminated the employment relationship until the Tribunal/Court declares that they have, *ex post facto*), whether the employee will bring an:

        i) Unfair dismissal proceeding in the federal jurisdiction or State jurisdiction (depending on whether they are covered by the *Workplace Relations Act 1996*);

        ii) Whether they will bring an unlawful termination proceeding under the *Workplace Relations Act 1996*.

        iii) Or an action for discrimination under a Federal or State/Territory anti-discrimination law.

44. If the circumstances permit, whether the employee will also launch civil court action for breach of:

a. Contract (implied or express terms), or registered workplace agreement (the latter also attracts civil pecuniary penalties).

b. The tort of negligence (where the payouts are only limited by the jurisdiction of the Court for which it is brought and therefore significant in some cases).

45. Whilst there are legal prohibitions on aggrieved persons bringing claims for discrimination in both federal and state jurisdictions, this does not remove scope for the employee to 'forum shop', with an employer in legal limbo as to what laws they should have retrospectively complied with (due to the fact that the laws are broadly similar but not identical).

46. It appears that a decision by an aggrieved person may rest on the advice they receive from their legal representatives, based on where they believe the applicant has the best chance to secure an outcome, whilst also noting the possibility of large costs (both legal costs and costs against them if they lose the case).

47. Policy makers should be aware that employers are under subject to diverse legal obligations and, as such, compliance will only be strengthened when laws are certain, stable and easy to apply in workplace. Both aggrieved individuals and businesses will, at the end of the day, make decisions on a commercial basis in many instances.

EMPLOYER DOUBLE JEOPARDY

48. A related problem in this area is the ongoing legal uncertainty and risk an employer faces in seeking to comply with anti-discrimination legislation: they will also possibly be exposed to breaching other laws, such as unfair dismissal / unlawful termination in their efforts to manage such issues. This is also touched on in the section addressing harassment.

49. The following cases illustrate this point:

a. The employee was summarily dismissed on the grounds that he placed his hand on a female colleague's hip, made comments such as "I want to have sex with you", and tried to discuss his penis size after he had asked her out. The Full Bench found that

the whilst these acts were found to have occurred, the dismissal was harsh and he was ordered to be re-employed (*Attorney-General's Department v Miller* [2007] NSWIRComm 33).

b. An employee had breached a company policy by receiving and storing on his computer 125 pornographic emails over a 5 year period, and had accessed the saved material on 91 occasions. The Commission held that his dismissal was harsh, unjust and unreasonable and ordered that he be reinstated (*Budlong v NCR Australia Pty Limited* [2006] NSWIRComm 228).

c. The employee harassed another female employee by touching her and attempting to kiss her, which breached the employer's relevant policies. Although the Commission found that the female employee had been sexually harassed, the Commission ordered reinstatement as the conduct did not justify termination (*Lupcho Dafkovski v Attorney-General's Department* [2006] NSWIRComm 378).

50. Employers should be able in these circumstances to adopt a zero-tolerance approach to such conduct, and apply the law and company policy in a consistent manner. However, employers are unfortunately placed in a position where they have to undertake a cost-benefit analysis of a situation and choose which course of action may minimise their legal exposure. This is a persistent and significant concern for employers.

51. The significance of this is that it undermines the scope of the employer to protect employees from harassment or discrimination. An employer seeking to comply with anti-discrimination legislation and in particular, an employer seeking to take leadership in achieving a workplace free from harassment or discrimination, may soon find themselves in a position of considerable legal risk (and cost) due to the operation of other laws.

INCONSISTENT DECISIONS

52. Employers can also find that aggrieved can take actions based on similar grounds or attributes, in similar circumstances, but with very different outcomes. This further adds to the legal uncertainty employers face.

53. Often, differences in outcomes or decisions can be the result of precedent which is particular to that jurisdiction on the issue, or the determination of the particular comparator used to undertake an analysis of whether discrimination has taken place. It is not uncommon for appeal decisions to determine that the judicial officer at first instance applied the "wrong" comparator when determining whether discrimination occurred.

54. The nuances of such judgements make it difficult for employers in the field, making decisions every minute of a working day, or employees engaging in conduct (to whom they are responsible) which may result in legal action. There are significant opportunities for greater clarity and consistency in this area.

55. It also needs to be remembered that specialist anti-discrimination tribunals and courts are not the only bodies that are required to apply and interpret anti-discrimination provisions. Industrial tribunals also regularly interpret and apply their own understandings of anti-discrimination principles in forming judgements about whether employees have been fairly terminated. This adds an additional layer of regulatory complication for employers.

STATUTORY TIME LIMITS

56. The federal HREOC Act states that the President has discretion to terminate a complaint if it is lodged more than 12 months after the alleged unlawful discrimination took place.[6] However, it does not prevent a complainant from making an application directly to the Federal Court or Federal Magistrates Court.

57. ACCI understands that there are similar provisions in State/Territory anti-discrimination legislation.

58. Whilst employers do not object to the principle that there should be discretion to accept late lodgements in exceptional circumstances (as is the case for federal unfair dismissal legislation), employers face a problem when an aggrieved person makes a claim long after the alleged unlawful conduct is said to have occurred. Often key evidence

[6] Section 46PH(1)(b)

may be in the sole domain of certain employees (or ex-employees) or contained in documents, both of which may not be available.

59. This creates a distinct advantage for litigants and puts pressure on employers to settle matters early in conciliation proceedings. This is a particular problem when the alleged wrong doer is a former employee who has left the workplace and the employer is alleged to be vicariously liable. There is little incentive for such persons to cooperate with their employers in an investigation into the complaint.

60. Given this, it is preferable to provide for an absolute statutory limitation period that is enforceable. There is also uncertainty as to whether the 6 year statutory limitation period generally provided under State and Territory legislation applies to federal anti-discrimination legislation, notwithstanding s 79 of the Commonwealth *Judiciary Act 1903* stating that it does apply.[7]

61. It is particularly concerning to ACCI, that an employer could be exposed to liability some 25 years after the alleged unlawful discrimination as occurred in a recent case under brought under the RDA.[8] This precedent allows a litigant to launch proceedings that are significantly outside any statutory limitation period, long after the alleged discrimination occurred. It is unreasonable that an employer should be exposed to such liability in a complaint based system.

62. All federal legislation should therefore include an absolute limitation period, particularly where discrimination is alleged in the workplace context. ACCI considers that this approach is reasonable and should allow sufficient time for complainants to lodge an application if they have a genuine grievance.

[7] Contrasting judgements on this issue in *McBride v Victoria* [2001] FMCA 55, [10] and *Gama v Qantas Airways Ltd* (2006) 195 FLR 475, 477-479 for example.
[8] *Baird v State of Qld* [2005] FCA 495. It appears that any limitation period (ie. 6 years) runs from the time that the President of HREOC terminates a complaint.

ROLE OF SOCIAL CHANGE / EDUCATION

63. Term of reference (g) directs the Committee to consider:

> *preventing discrimination, including by educative means;.*

64. ACCI would support a range of measures which address discrimination on a longer term basis using an educational/preventative approach. Recognising always a proper role for legislation, such an approach, we believe, offers the best chance of having a lasting and ongoing societal impact (noting of course, that what society accepts at one stage is not necessarily acceptable at a later stage).

65. In that regard, we commend to the Committee the HREOC publication '*Sexual Harassment in the Workplace: A Code of Practice for Employers*' as an example of useful guidance material that assists employers in understanding their obligations under the SDA. This code was released in 2004 with input from industry and while it is not possible for any single piece of guidance material to overcome the inherent complexities of the legislation, this guide explains the various obligations that employers have under the SDA to manage sexual harassment claims.

66. Whilst government agencies should continue their role in public education programmes, with some targeting of particular areas, programmes should also be developed at primary and secondary levels, to teach future employees, employers and corporate citizens the values and expectations society places in this area.

67. It could be argued that children are still developing their social norms and behaviours, and this could lead to better outcomes in the long-term, rather than short-term legislative fixes that may include, harsher penalties and complex laws imposed on business, particularly where adult wrongdoers are less likely to change their behaviour and conduct overnight.

68. ACCI would encourage and support various anti-discrimination agencies preparing material in conjunction with education departments to give effect to such proposals. It would be appropriate to involve

industry in the design of such programmes to ensure their effectiveness.

FAMILY RESPONSIBILIITES

69. Term of reference (i) directs the Committee to consider:

> *addressing discrimination on the ground of family responsibilities;*

70. The issue of balancing family responsibilities with work has been the subject of much consideration by governments, industry and the community over the last ten years.

71. As a result of changes in society and the labour market, there has been a significant shift in human resource practice, and a far greater level of diversity in workplace arrangements has evolved. This greater diversity has assisted in the achievement of a substantial improvement in the capacity of employees to negotiate arrangements that suit their particular needs and circumstances.

72. The creation of flexible working arrangements and human resource practices through workplace bargaining will remain the principal way that employees will continue to seek to reconcile their working arrangements with family responsibilities.

73. Anti-discrimination law plays an additional role in ensuring that employees with family responsibilities are not discriminated against in employment. In the SDA, these provisions are contained in s 7A. Additionally, State/Territory anti-discrimination legislation renders discrimination against persons with family responsibilities unlawful by a variety of means (e.g. under the Victorian *Equal Opportunity Act 1995* various attributes could be utilised by parents, the most apposite being 'parental status or status as a carer').

74. These rights are in addition to the extensive range of rights that parents currently enjoy under the *Workplace Relations Act 1996*. These include:

    a. The right to up to one year's parental leave, and to return to the same position following parental leave[9].

    b. The right to up to 10 days paid carer's leave per year (or up to 2 days unpaid leave per occasion for casual employees)[10].

[9] WR Act Part 7 Div 6
[10] WR Act Part 7 Div 5

c. A right to refuse overtime in certain circumstances on the basis of family responsibilities[11].

d. It is unlawful to terminate an employee's employment for reasons that include their family responsibilities[12].

75. It needs to be remembered that these are entitlements enjoyed by all employees through the operation of the *Workplace Relations Act 1996*, and specifically the Australian Fair Pay and Conditions Standard (the Standard) which establishes minimum employment standards for virtually all employees in Australia.[13] We expect these rights to continue when industrial relations laws are revised.

76. Additionally, many employees have, through workplace bargaining, gained access to additional entitlements and flexible working arrangements which assist them in balancing work with their family responsibilities.

REGULATORY GAPS?

77. ACCI wishes to address a perceived notion that due to the constitutional basis of the SDA, men cannot utilise the provisions where they believe they have been discriminated against on the basis of family responsibilities (or indeed other provisions under the SDA).

78. This is erroneous and does not, in our submission, create a 'regulatory gap' that requires fixing:

a. Whilst all women are covered by the SDA because of its reliance on CEDAW, s 9 of the SDA enables provisions to apply to men where there is a Constitutional basis / head of power (ie. a male employee who works for a constitutional corporation can bring an action of discrimination – See *Dudzinski v Griffith University* [2000] 23 February, unreported).

b. The rights that are established by the *Workplace Relations Act 1996* apply equally to men and women.

[11] WR Act s 226(4)(b)
[12] WR Act s 659 (2)(f)
[13] Provisions covering unlawful termination and parental leave apply to all employees in Australia. The Standard generally applies to all employees employed by constitutional corporations, and persons employed in the Territories and Victoria. Employees not covered by the Standard are entitled to similar provisions in under equivalent State legislation.

c. Where a man wanted to commence an action for redress from discrimination on the basis of his family responsibilities, he would have access to remedies under State/Territory anti-discrimination legislation.

THE WAY FORWARD

79. ACCI notes that the foreshadowed National Employment Standards that will be introduced in 2010 also include a right for employees to request flexible working arrangements and extensions to parental leave.

80. These NESs, when introduced, will significantly extend employee rights in this area, particularly in relation to balancing work and family matters (Attachment B is an extract of the proposed changes to occur on 1 January 2010).

81. ACCI anticipates that these new rights may constitute a challenge for businesses who are seeking to reconcile the preferences of their employees with their commercial and operational requirements.

82. For the purposes of this inquiry, ACCI does not believe it would be prudent for the Committee to entertain any further extension of employee rights in this area, before employers have had an opportunity to understand and manage the additional employee rights that will flow from the introduction of the NES.

83. It may be that policy imperatives in this area will look quite different in a few years, once the NES has had time to operate and filter through to workplace and human resource practice.

SEXUAL HARASSMENT

84. Term of reference (k) directs the Committee to consider *sexual harassment.*

85. Combating sexual harassment remains one of the more challenging legal obligations that employers bear under anti-discrimination legislation (as well as being a challenging personal and managerial matter where it arises in the workplace). ACCI fully supports measures necessary to provide workplace environments free of sexual harassment, and to enable both employers and employees meet their mutual duties in this regard.

86. Employers largely bear these obligations as a result of provisions which make them vicariously liable for harassment their employees may suffer in the course of their employment. As a result of this liability (and in particular, court decisions which have expanded on the extent of this obligation) employers have extensive obligations which they are required to meet.

87. This section discusses the extent of these obligations, particularly when considered against the backdrop of the complexity of the legislation. It is ACCI's view that better outcomes in sexual harassment management are needed. In the main, these will result from education and support from employers, alongside amendment of other laws (rather than through the imposition of additional obligations on top of the already onerous obligations that exist in this area).

VICTIMISATION

88. Section 94 of the Act renders victimisation of sexual harassment complainants unlawful. This is understood as subjecting an employee to a detriment in their employment because they have brought a complaint of harassment (or discrimination). The making of a complaint must be a 'substantial or operative' factor in the alleged detriment[14].

[14] See *Obieta v NSW Department of Education and Training* [2007] FCA 86

89. Victimisation is another element of the management of sexual harassment complaints within workplaces that can be difficult for employers[15].

90. Once an employee makes a complaint of sexual harassment, it will be necessary, if the employer wishes to meet their legal obligations, to conduct a thorough investigation, to determine facts relevant to the complaint, whether the complaint can be sustained, and what action is appropriate in the circumstances.

91. During this period, the employer conducting an investigation must ensure all parties are treated fairly and that they are subjected to no detriment. Managing these situations can be challenging as employees accused of sexual harassment often respond to such accusations in a highly emotional manner, and other employees in a workplace may seek to 'take sides'.

92. It is ACCI's view that the challenges of managing these situations should be taken into account in any consideration of a review of sexual harassment laws. Employers need additional support and education to assist them in meeting their legal obligations in this area (obligations which are already very onerous) and the extent of the challenges they face should be acknowledged.

VICARIOUS LIABILITY

93. Employers may be vicariously liable for acts of sexual harassment their staff are subjected to.

94. It is a defence to vicarious liability that an employer has taken 'all reasonable steps' to prevent harassment or discrimination. The meaning of all reasonable steps has been the subject of much consideration by courts and tribunals.

95. As a result of various court decisions, the standard to which businesses are held in seeking to discharge their obligations to manage sexual harassment matters is a high one, and it is a standard that imposes considerable costs on a business.

[15] It appears from the case law that employers have vicarious liability for acts of victimization (e.g. see *Lee v Smith* [2007] FMCA 59 and even if they did not, their legal obligations arising from other areas of law (e.g. unfair dismissal laws) would require the prudent employer to assume they were vicariously liable in these circumstances.

96. That standard requires that for most businesses:

a. The employer adopt a proactive and systematic approach to managing sexual harassment in their workplace.

b. That the employer develop a written sexual harassment policy which is actively communicated to all employees.

c. The policy must be actively enforced including through the provision of regular training to all staff.

d. The employer should develop a complaints procedure which employees are aware of and which is suitable given the circumstances of the business.

e. The employer must act in a prompt and thorough manner to investigate allegations of sexual harassment and act in a manner that is procedurally fair.

A WRITTEN POLICY IS NOT ENOUGH

97. Several decisions have established that written policies, while required in most circumstances, are not sufficient to discharge an employer's legal obligations in this area. The policy:

a. As mentioned, must be adequately communicated and explained.

b. Must be drafted sufficiently well so that it covers all relevant circumstances.

c. Needs to be 'reasonable'.

d. Need to be periodically reviewed.

e. Needs to be adhered to by the employer.

98. It is difficult for smaller employers, even with the best of intentions, to succeed in meeting such standards *in all circumstances*. While it is true that courts have not held smaller employers to the same standard as large corporate employers, the standard to which they have been held is nonetheless onerous. In most cases, it will usually require a smaller employer to engage external advice or support to design policies, implement training and otherwise meet obligations.

99. Employers incur considerable costs when they seek to try and meet their obligations of employers in this area. An internet search of training providers in this policy area reveals that a single day's training for line managers or human resource practitioners in sexual harassment/anti-discrimination training can cost $1000 per person. Large employers report that measures such as commissioning online training systems for sexual harassment and anti-discrimination can cost upwards of $50,000.

100. Training in sexual harassment policies and procedures will usually be required when an employee commences employment. It will then need to be updated on a periodic basis and remedial training may be required when there is an incident. As noted above, none of this guarantees that a court will find an employer has undertaken all reasonable steps that are required of them – but such training does clearly impose a significant cost on businesses. It is necessary to recognise that even the 'incident-free' employer who is subjected to no litigation or complaints regarding harassment or discrimination still incurs costs in implementing and maintaining an ongoing human resource system to manage and prevent such claims.

INTERACTION WITH OTHER LEGAL REGIMES/DOUBLE JEOPARDY

101. Another considerable constraint on the employer's ability to manage sexual harassment claims is that the management of such claims is constrained by the employer's legal exposure that arises from other areas of law, including unfair dismissal laws.

102. 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.

103. This is not the only source of legal exposure for the employer. In certain circumstances, policies or procedures of the employer may be expressly or implicitly incorporated into contracts of employment. When this occurs, an employer may also be exposed to a common law action for breach of contract and recent cases have suggested courts

may be prepared to award substantial damages where an employer has failed to adhere to policies or standards they may have set[16].

104. The overall effect of this legal risk is to require:

a. Employers to act defensively, including in respect of expectations of their ability to manage and deliver on the objectives of creating harassment-free workplaces. The safest course for an employer is to adopt a minimalist approach in policies and to not seek to incorporate substantive policies into contracts or other employment agreements (notwithstanding the human resource benefits of doing this).

b. For those employers who have acted to meet their sexual harassment obligations, and then been subject to litigation for unfair dismissal or some other legal remedy, frustration at their inability to take reasonable steps to meet their obligations under anti-discrimination law and take effective action against harassment in their workplaces.

c. It needs to be remembered that under the *Workplace Relations Act 1996*, the primary remedy is reinstatement. In a sexual harassment matter, reinstatement can often be more problematic than merely the awarding of damages. As a practical matter, it can often be impossible to repair relationships and trust within workplaces following a sustained allegation of sexual harassment; the human resource outcome of courts and tribunals forcing an employer to continue to employ or to re-employ a sexual harasser can be significantly disruptive.

UNFAIR DISMISSAL CASES – SEXUAL HARASSMENT

105. There are now several cases where industrial tribunals have taken a highly technical approach to whether sexual harassment has occurred and as such forms a basis for legitimate termination of employment, or where an industrial tribunal has conceded that serious harassment may have taken place, but has determined that dismissal is nonetheless unfair.

[16] *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 and *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120.

106. Cases where this approach is on display have been cited earlier in the submission. Additional examples include:

a. *Markham v Graincorp Ltd* PR918603 [2002] AIRC 642 (12 June 2002): in this case serious allegations of sexual harassment against the employee were sustained (including the repeated yelling of obscenities against the employee while in their hotel room) but the employer was required to reinstate the employee with back-pay.

b. In *Streeter v Telstra* [2007] AIRC 679 (10 August 2007) the AIRC took a relatively technical view of what constitutes sexual harassment to hold that it was unfair to terminate the employment of an employee after she had brought two people back to a hotel room she shared with two work colleagues and engaged in various sexual acts with them.

107. It is worth considering what the practical effects of these tribunal decisions may be on an employer's ability to manage or provide leadership in combating harassment:

a. In these decisions, employers have developed sexual harassment policies and procedures, which have been activated by complaints.

b. The employer has conducted an investigation and allegations of sexual harassment have been sustained.

c. The employer has then acted to enforce their policy and to protect employees from harassment.

d. That decision has however been successfully challenged by an employee through recourse to a tribunal.

e. Presumably other employees are aware of the success of this challenge.

f. The credibility and leadership capabilities of an employer in creating a harassment-free workplace have been significantly undermined.

108. What these decisions cannot tell you, but what would be interesting to investigate is the longer term human resource effect of these decisions. Are policies taken less seriously? Are employees who were complainants or witnesses demotivated by the decision? Do other employees leave, i.e. does turnover result? What happens to managerial courage to investigate complaints?

109. ACCI notes that the exemption for smaller employers from federal unfair dismissal laws which was introduced with the *Workplace Relations Amendment (Workchoices) Act 2005* will be removed by 2010 at the latest (according to the Federal Government's *Forward with Fairness* workplace relations policy document). The removal of this exemption will increase the exposure to unfair dismissal claims smaller employers face and their legal risk when managing sexual harassment claims.

LEGAL FRAMEWORK

110. The Act renders sexual harassment unlawful. Furthermore, State/Territory anti-discrimination law also contains prohibitions against sexual harassment.

111. Employers bear responsibility within the workplace for addressing and resolving complaints of sexual harassment and under certain circumstances (discussed further) are vicariously liable for acts of sexual harassment.

112. Sexual harassment applies to conduct of a sexual nature. The definition of conduct of a sexual nature is extremely broad; while there is a good level of understanding that, for example, persistent unwelcome sexual advances constitute sexual harassment, many other forms of conduct can potentially also form sexual harassment. For example, comments on dress or appearance, even with no intention of a sexual proposition could constitute sexual harassment in certain circumstances.

113. One challenge employers face in managing sexual harassment in the workplace is being aware of the broad range of situations that could give rise to a potential case of sexual harassment, and educating and advising employees of the potential scope of conduct which may in certain circumstances form sexual harassment. Many court decisions

establish the potential breadth of the conduct that may be sexual harassment[17].

UNWELCOME CONDUCT

114. A second major challenge in the practical management of sexual harassment is that behaviour can be harassment to the extent that it is unwelcome. There are several management issues associated with this feature of sexual harassment laws:

a. It is not uncommon for people to develop and enter romantic relationships with other people in their workplaces, which can later be dissolved.

b. For conduct to be considered unwelcome there must be some indications that the conduct is unwelcome, which are capable of being identified by the employer. This is not often clear and much sexual harassment training addresses techniques that can assist employees in ways that they can signal conduct is unwelcome.

c. Furthermore, the general tolerance or acceptance of behaviours also differs from workplace to workplace on the basis of the particular culture that is present at that workplace. Behaviour that might be shocking or uncomfortable in some work cultures may be accepted in others; and such matters can change over time.

115. In many cases it is clear to the employer that conduct has been unwelcome. However, the significance of this feature of the legal understanding of sexual harassment is that it requires employers to make what are, in a minority of cases, relatively complex judgments to determine whether conduct is unwelcome or not. Whilst such a 'control element' is clearly necessary so that legislation does not render conduct that is harmless and consensual between parties, it does have the effect of requiring employers to make judgments which can be difficult in the circumstances. It is also difficult, in providing training to employees, to operationalise the concept of 'unwelcome conduct' in non-legalistic terms that people can grasp and apply.

[17] E.g. *Shiel v James* [2000] FMCA 2

116. In particular the issue of propositions or invitations to lunch, dinner and so forth (being asked out on a date) is often vexed, with practitioners usually addressing this by saying that if an employee persistently asks another employee out on a date after it is clear the other employee has no interest in going on a date, this may 'tip over' into harassment. However this is obviously requires a judgement to be made of all the relevant circumstances surrounding the conduct.

117. The increasing use of information technology, including personal (and even out of hours) use of interactive forums such as facebook and myspace add significant complications for employers in both regulating and controlling behaviour that could constitute sexual harassment between employees

INTERNATIONAL CONVENTIONS

118. Term of reference (b) directs the Committee to consider:

> *the extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organization or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;*

119. ACCI notes that the federal *Sex Discrimination Act 1984* is intended to give effect to the various provisions of CEDAW. This is one reason for some of the limitations and the approach taken to particular provisions in the Act.

120. The principal ILO convention that addresses discrimination in employment is C111 (*Discrimination (Employment and Occupation) Convention 1958*). Australia has adopted this convention, which requires, under Article 2, that each Member:

> *"… for which the Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."*

121. Australia has a highly developed framework of anti-discrimination protections, which involves legislation at both the Federal and State/Territory level and non-legislative mechanisms, such as the funding and establishment of agencies with responsibility for promoting equal treatment in employment and other policy aims associated with these international instruments.

122. Article 11 of CEDAW addresses employment. It requires signatories to *"take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality, the same rights..".* The subparagraphs of this article then address specific issues which are discussed below.

The right to the same employment opportunities

123. Article 11(a) refers to the "*the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.*"

124. Both Federal and State/Territory discrimination laws render unlawful discrimination on the basis of gender in relation to recruitment, promotional opportunities and other matters in employment.

The right to free choice of profession and employment

125. The same set of anti-discrimination provisions that apply in respect of Article 1(a) apply to Article 1(b) which refers to the right of promotion, job security, benefits and conditions of service and training.

The right to equal remuneration and to equal treatment in respect of work of equal value

126. In addition to the application of the anti-discrimination provisions of various State and Federal laws mentioned above, there are provisions in Division 3 of Part 12 of the *Workplace Relations Act 1996* (Cth), giving effect to international conventions requiring equal remuneration for work of equal value. This additionally assists Australia in meeting its obligations under Article 1(d).

The right to social security

127. Unlike some other countries, Australia primarily meets its obligations in relation to social security, illness and unemployment principally through the provision of government provided social security benefits. In other countries, a mix of measures is used, including funds established by the social partners. This has not been the approach taken by Australia. Social security benefits in Australia are subject to a range of conditions, but are available to persons of both genders equally.

128. Superannuation benefits are provided through the provision of compulsory employer payments to complying superannuation funds; however they are heavily regulated by legislation which provides, inter alia, that employers must make payments to all qualifying employees, regardless of gender.

CONCLUSION

129. ACCI has attempted above to do no more than provide a brief overview of the obligations of CEDAW in relation to discrimination in employment. It is ACCI's view that, taken as a whole, the relevant body of Federal and State/Territory legislation provides a robust set of protections against discrimination in employment on the basis of gender.

130. This is not to say that outcomes in terms of eliminating discrimination may not be improved; but it does not appear that, in practical terms, there is a significant 'regulatory' gap that requires addressing. Additional resources and initiatives in the area of advice and education will assist all stakeholders in the achievements of better outcomes, having regard to the objectives of the relevant international conventions.

EXEMPTIONS

131. Term of reference (n) directs the Committee to consider the:

> *scope of existing exemptions;*

132. The SDA currently provides under s 40(1) an exemption for a person who does something in direct compliance under statutory authority, such as an order of a court or award of a court or tribunal having the power to fix minimum wages.

133. As a general principle, employers who, in good faith, comply with employment laws set out under federal legislation (such as the *Workplace Relations Act 1996* or its successor) should be immune from possible action under anti-discrimination legislation.

134. For example, the Government's proposed national employment standard (NES) will create two additional conditions for employees in 2010, that being:

a. The right to request an additional period of 12 months unpaid maternity leave for one parent, where the other parent has already taken 12 months; and

b. The right to request flexibility in employment arrangements in to look after a child until school-age.

135. An employer can only refuse either request on *"reasonable business grounds"*.

136. If the SDA or other anti-discrimination legislation is not amended there is a possibility that an aggrieved employee may still commence discrimination proceedings against the employer even if they lawfully refuse to accede to the request.[18] It is not certain what a court would decide in such an instance, because there is nothing in the current legislation to bar such proceedings explicitly. The possibility of such actions is however at odds with the intent of the proposed new federal workplace relations laws.

[18] With respect to discrimination proceedings commenced under State/Territory legislation, a defendant employer could theoretically argue that s.109 overrides the State proceedings because the two laws are inconsistent. However, it does not bar applications being made nonetheless which an employer must exhaust time and legal costs to defend.

137. ACCI would welcome amendments made for the avoidance of doubt and certainty for employers, that compliance with workplace laws does not then put an employer in possible breach of anti-discrimination legislation.

ATTACHMENT A -
THE *SDA* – AN EMPLOYER PERSPECTIVE: 20 YEARS ON

Anderson, Peter. The Sex Discrimination Act: An Employer Perspective - Twenty Years On. University of New South Wales Law Journal, The; Volume 27, Issue 3;

On 1 August 2004, it was exactly 20 years since the *Sex Discrimination Act 1984* (Cth) ('*SDA*') came into operation in Australia. The majority of current Australian employers were not in business at that time, and most current employees were still in education. Hence, a very large slice of Australian employers, managers and employees have not known a workplace environment that predates sex discrimination legislation.

This explains the first and most basic response of Australian employers to the *SDA* – they accept its policy underpinnings, and have learnt to live with its regulatory obligations. That acceptance is largely drawn from five propositions:

1. The legislative purpose of the *SDA* is (at least conceptually) sound;

2. The past generation has witnessed Australia develop a more diverse labour force, especially with higher rates of female participation;

3. Social and economic forces have combined to create a strong business case for workplace cultures that do not discriminate on gender grounds;

4. A strong public awareness campaign has been conducted by governments, statutory regulators, community bodies, unions and business organisations on the nature and function of the *SDA*; and

5. The reality is that businesses overwhelmingly seek to comply with the law of the day, howsoever it be enacted, and to avoid exposure to the costs, consequences and publicity of complaints and compliance activity.

This acceptance does not, however, mean that aspects of the *SDA* are viewed uncritically by industry. Nor does it mean that deficiencies in the law do not exist, nor that there are counterproductive impacts and unjustified transactional costs for employers. The method of its implementation by regulators, the use of the *SDA* to pursue extraneous industrial objectives and the expansion by tribunals and courts of circumstances giving rise to statutory liability have all been the subject of critical comment by employers.

EMPLOYERS AND DISCRIMINATION LAW – KEY PRINCIPLES

There is a substantial body of discrimination law in Australia, at both a Commonwealth and State level. Most discrimination law bears directly on the rights and responsibilities of employers and employees in the workplace. Regulating the contract of employment has been one of the major areas of attention for policy makers and parliaments when framing Australian discrimination law over the past 20 years. In this sense, employers have

developed an acute awareness of discrimination law. Many have dealt first-hand with its operation in their workplace. Others have actively participated in employer policy development and reaction to policy proposals.

In a broad sense employers accept the general principle of equal opportunity which underpins discrimination law. Discrimination law must, however, necessarily be qualified. It should represent a balance of interests, and operates most efficiently when it is targeted to specific conduct rather than imposing far-reaching or unspecified duties. The particular circumstances of smaller and medium-sized businesses need to be taken into account in framing and implementing the law.

In particular, employers lose confidence in discrimination law if it goes beyond boundaries of common sense or is unbalanced in content or enforcement. Employers accept their role as part of the community and acknowledge that their workplaces need to reflect general norms operating in the community at large. Conversely, employers resist their workplaces being used to engineer social attitudes or to experiment with policy that is ahead of community attitudes.

Nor should employer acknowledgement of equal opportunity be a basis for the headlong pursuit of regulation. Indeed, intervention by governments in the absence of a clearly demonstrated need can hinder rather than foster effective and fair employment policy and practice.

All regulation should be regularly reviewed. Ideally, the ultimate policy objective should be for regulation such as the *SDA* to become unnecessary, or at least to be modified, once community and workplace practice is overwhelmingly in compliance with the mischief that the regulation was intended to cure. Moreover, if it is demonstrated that the regulation is failing to cure the mischief, if the costs outweigh the public benefits, or if there emerge better alternatives to maintaining a regulatory approach, then legislation should be substituted with different approaches.

THE *SEX DISCRIMINATION ACT* AND INTERNATIONAL STANDARDS

The *SDA* was not the first enactment of its kind that employers in Australia were forced to grapple with. Throughout the 1970s various States enacted anti-discrimination laws, based, in part, on international standards.

In 1973, the Australian government ratified the International Labour Organisation ('ILO') *Convention Concerning Discrimination in Respect of Employment and Occupation*[19] and a year later ratified the ILO *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.[20] The United Nations' *Convention on the Elimination of All Forms of Discrimination against Women*[21] was ratified in 1983 and the ILO *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*[22] was ratified in 1990. In addition, the ILO *Declaration on Fundamental Principles and Rights at Work* was adopted in 1998.[23]

19 Opened for signature 25 June 1958, [1974] ATS 12 (entered into force 15 June 1960).
20 Opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953).
21 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
22 Opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983).
23 Conference of the ILO, 86th Session, Geneva, 18 June 1998.

This body of international law and policy partially explains why the *SDA* has general support amongst Australia's representative business organisations. Through the representation of ACCI and the International Organisation of Employers, business organisations have participated in the process of international standard-setting on discrimination law.

DISCRIMINATION LAW AND REGULATORY REFORM

In 2002, Australia's leading employer bodies combined to produce a joint statement on reforming employment law – including discrimination law – under the auspices of the ACCI *Modern Workplace: Modern Future 2002–2010 Blueprint*[24] ('*Blueprint*').

Inappropriate regulatory intervention, even if well intended, can frustrate the achievement of broader economic, social and industrial objectives, such as the pursuit of full employment. Over-regulation and inappropriate or inexact regulation must be resisted.

The *Blueprint* outlined broad principles that employers generally apply when dealing with discrimination policy and practice, including the *SDA*. On the question of employment regulation, the *Blueprint* argued that:

- The scope and content of employment regulation is the combined accumulation of laws made over many decades by parliaments, governments and industrial tribunals based on the disputes and circumstances of the day;

- 'Ad-hockery' has characterised the regulation-making process and, in qualitative terms, regulation has far too often characterised employers according to the worst possible form of conduct. As a general rule, this is not the correct approach to labour market regulation;

- Policy makers with a predilection for legislative and judicial solutions usually underestimate the capacity and goodwill of Australian managers and workers to sort things out for themselves;

- One should not approach a response to employment law on the basis of the activities of a miniscule minority of people; and

- There is no significant mechanism in place that effectively and systematically revises the regulatory content of the system once regulation is enacted.

These observations are directly relevant to employer attitudes to the *SDA*. Specifically on the issue of discrimination policy the *Blueprint* noted that:

> 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.

[24] ACCI, *Modern Workplace: Modern Future 2002–2010* (2002) <http://www.acci.asn.au/WRBluePrintMain.htm> at 7 October 2004.

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.

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.

Workplaces are not appropriate venues for experimentation in social policy. In framing law, it should be recognised that private sector workplaces are private businesses where work is performed under private contracts of employment.[25]

OBJECTIVES IN REVIEWING THE *SEX DISCRIMINATION ACT*

Should the *SDA* be reviewed by the federal government or Parliament, the *Blueprint* advocates six objectives from an employer perspective:

1. Discrimination law should be clearly expressed so that employers can readily identify their obligations, whether under one or multiple regulatory systems;

2. Employers should be protected from 'double jeopardy'. Discrimination law should not permit multiple claims in different jurisdictions based on the same conduct. Discrimination law should not permit claims in discrimination tribunals which are within the lawful jurisdiction of industrial tribunals;

3. Discrimination law should, in certain cases only, apply the concept of 'indirect discrimination' to employment and workplace policy and practices. The concept of indirect discrimination does not always provide the regulatory certainty required by employers, especially small business;

4. Any proposed extensions of discrimination law to include new grounds, or to extend and vary the application of existing law, should be examined under the principles for regulation review;

5. Discrimination law should not impede legitimate business decisions, such as decisions to employ, not to employ, to advertise for employment, to discipline or terminate employment on lawful grounds, to undertake redundancies and restructuring, and to measure or reward employee productivity or performance; and

6. There should be a greater emphasis on education, promotion and problem solving, and less emphasis on sanctions in the implementation of discrimination law in employment.[26]

A particular aspect of any review should be the complaint and compliance processes under the *SDA*. Generally speaking, the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioners have, over the life of the Act, put in place reasonable

[25] Ibid 127 <http://www.acci.asn.au/text_files/blueprint/Chapter9.pdf> at 7 October 2004.

[26] Ibid 158 <http://www.acci.asn.au/text_files/blueprint/Recommendations.pdf> at 7 October 2004.

arrangements for conciliation and complaint management, and have balanced these against the need for education and awareness-raising.

However, employers continue to be exposed to the 'compensation mentality' that is created by a 'rights-based' complaint system. Like unfair dismissal laws, a complaint can be made by an aggrieved employee irrespective of whether the employer has breached the law or not. The costs of defending the business against complaints are high, especially for small and medium-sized employers. Apart from the pressure to make pay-outs that arises from views expressed by conciliators, the risks of continued litigation and adverse publicity create an environment where an employer who may not have breached the *SDA* nonetheless feels compelled to offer monetary compensation simply to dispose of the matter. This is a poor public policy outcome and should be a matter considered in any statutory review.

DIRECT AND INDIRECT DISCRIMINATION

Employers have very little dispute with the concept of direct discrimination. In the *SDA* context, it is well understood and supported.

However indirect discrimination is an area of greater concern. This is not because indirect discrimination is not as unacceptable a practice as direct discrimination, but because of difficulties with the application of the concept. In particular, some decisions of tribunals and courts have applied discrimination law to conduct not originally thought to have been covered, with attendant uncertainty thereby being created for business policy, management and planning.

As has also been noted by commentators on the topic:

> the notion of indirect discrimination has … significant implications for policy making. [One] … is to show that treating different people in the same way, without due consideration for the specific circumstances or context of the disadvantaged, may, in some instances, perpetuate or even deepen existing inequalities instead of reducing them. This implies that, in some cases, giving effect to equality means treating different people differently.[27]

As a result, industry needs to keep a close eye on the outcomes of cases of indirect discrimination to ensure that business practices and polices will not be challenged for being in breach of the *SDA* or other discrimination legislation.

EXEMPTIONS

The *SDA* contains a range of exemptions, many of which are well established. The 'genuine occupational qualification'[28] exemption is a fundamental one – and logically sits as a qualification to the policy of the Act that employment should be based solely on merit.

As the scope of discrimination law varies according to changes in our society and labour force, so must the nature of the exemptions provided for in the *SDA*. Industry looks to policy-makers to ensure that exemptions are provided which reflect accepted forms of

[27] Manuela Tomei, 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142 *International Labour Review* 401, 403.

[28] *Sex Discrimination Act 1984* (Cth) s 30.

commercial conduct or in cases where there is clear public benefit, whilst not disturbing the fundamental underpinnings of the Act.

EDUCATION CAMPAIGN

As is the case with the primary discrimination provisions of the *SDA*, employers and employees are increasingly aware of community intolerance to the practice of sexual harassment in the workplace, made unlawful by the *SDA*.

Whilst most employers and employees deal with sexual harassment issues in a common sense fashion, these issues must be pro-actively managed. Reasonable steps should be taken in advance to prevent their occurrence. The 2004 report of the federal Sex Discrimination Commissioner on sexual harassment provided a timely insight into the nature and extent of sexual harassment in workplaces.[29] It found examples of significant alleged breach, despite there being a relatively small population which has experienced sexual harassment in the past five years.

These findings should not be used to tar all employers, managers, or workplaces with the same brush. However, they underline a continuing role for the *SDA* and the importance of taking reasonable steps to prevent sexual harassment. They also underline the need for business managers to intervene at an early stage in cases of known or suspected harassment. A key focus in this regard should be continuing workplace information, education and awareness-raising. This is particularly important given the increasing mobility of the labour force and increasing participation rates, as well as the number of new businesses commencing each year.

THE *SEX DISCRIMINATION ACT* AND BUSINESS MANAGEMENT

The *SDA* not only imposes obligations on employers, but also makes employers vicariously liable for the (unlawful) conduct of employees.[30] Whilst the public policy basis for this proposition is generally understood, it remains controversial – particularly as courts and tribunals extend employer liability beyond the requirement to take all 'reasonable steps' to meet their obligations and into the realm of responsibility for the unknown, the uncontrollable or even the unknowable.

Further, other mandatory requirements which impact on employment can compromise the operation of the SDA. For example, employment laws that make it hard for employers to discipline or sack staff for sexual misconduct or privacy laws that stop employers from controlling employee misuse of technology,[31] serve to compromise the capacity of management to eliminate sexual harassment and sex discrimination from the workplace.

Policy-makers need to ensure that they are providing consistent messages to employers and employees. The basic proposition is this – if discrimination law is to make employers liable for any (mis)conduct that occurs in a workplace context, then employers are entitled to

[29] Human Right and Equal Opportunity Commission, *20 Years On: The Challenges Continue – Sexual Harassment in the Australian Workplace* (2004), <http://www.hreoc.gov.au/sex_discrimination/challenge_continues/challenge_continues.pdf> at 12 October 2004.

[30] *Sex Discrimination Act 1984* (Cth) s 106

[31] *Privacy Act 1988* (Cth) s 13.

demand that other (workplace relations, dismissal or privacy) laws do not compromise the right of employers to manage their businesses in a way that eliminates such conduct or the risk of it occurring.

MULTIPLE DISCRIMINATION LAWS

One unresolved issue that confronts business is the multiplicity of sex discrimination (and anti-discrimination) laws existing within each Australian jurisdiction as well as across the different jurisdictions. This multiplicity of regulation creates uncertainty and confusion, adds to regulatory cost, imposes transactional costs, gives rise to forum shopping and is generally a poor public policy outcome.

Business is looking for a more rational system of regulation of discrimination law. One jurisdiction leapfrogging the other is not a sound basis for public policy or law-making.

A related, and not less complicating factor, is the existence of multiple discrimination laws in the one jurisdiction. For example, apart from the *SDA* regulating discrimination in employment, other Commonwealth laws such as the *Workplace Relations Act 1996* (Cth) ('*WRA*') cover the very same ground, both in terms of objects and in terms of substantive provisions. Both sets of laws create mandatory obligations for employers on the same issue, yet may not enact the same substantive provisions, exemptions, remedies or processes.

Australian policy makers have not grappled with this issue in a discrimination law context, but need to do so as our economy has not only a national focus but is also part of a global economy that does not recognise State borders.

USE OF DISCRIMINATION LAWS FOR EXTRANEOUS PURPOSES

An additional area of concern for Australian employers is the use of the *SDA* and its emerging jurisprudence as a basis for establishing economy-wide regulation of new employment standards through workplace relations law.

In 2004, this is a real and pressing issue given that the Australian Council of Trade Unions commenced a national test case in the Australian Industrial Relations Commission in 2003 which seeks to introduce five new national employment standards based, in part, on the prohibition of discrimination against workers with 'family responsibilities' under the *WRA* and the combined jurisprudence of federal and State tribunals and courts when dealing with the *SDA* and its State equivalents.

For employers, this is a worrying development. The *SDA* sets out certain legal obligations. Case law pursuant to the Act is based on the application of the statute to the particular facts of each case. Use of the Act in a way that would impose the orders made against one employer acting unlawfully upon the bulk of employers acting lawfully is an unwelcome extension of the basis on which economy-wide employment law is made. It also risks undermining the confidence of industry in the *SDA* if employers see it being used as a platform to impose additional employment obligations that go beyond the regulation of gender-based discriminatory conduct.

CONCLUSION

The general approach of Australian employers and of representative business organisations is to support the continued operation of the *SDA*, but to do so with a constructively critical eye on its operation and with a mind to encouraging regular review.

For its part, ACCI supports the principle of equal opportunity and non-discriminatory workplace policies and practices. Support for these principles does not, however, mean a blank cheque for regulatory intervention or additional regulatory intervention. Regulation should only be introduced where there is a demonstrated need and where alternatives to regulation have failed.

Both social and economic conditions are bringing industry closer to a realisation that policies and practices that are non-discriminatory enhance labour market participation and underpin the contemporary business case. Balanced and workable laws providing remedies against discriminatory conduct have a part to play, but education should be the priority for regulators rather than a narrow focus on punishment and court-enforced compliance.

Business is also aware that the community expects the corporate sector to take its non-discriminatory obligations seriously, in word and in deed.

In turn business expects the community, through its legislators and regulators, to apply a common sense, balanced and reasonable set of standards against which business performance on discrimination matters can be judged.

ATTACHMENT B – PENDING POLICY CHANGES

Labor's 10 National Employment Standards (*Forward With Fairness IR Policy, 2007*)

A Rudd Labor Government will guarantee the following minimum standards in law for all Australian employees:

1. Hours of work
Under Labor, the standard working week for a full time employee will be 38 hours. Employees may be required to work additional hours, but cannot be required to work unreasonable additional hours.

2. Parental leave
Labor recognises that many families want to have a parent provide all or most of the care for a child during the first two years of the child's life.

A Rudd Labor Government will guarantee that both parents have the right to separate periods of up to 12 months of unpaid leave associated with the birth of a baby.

Where families prefer one parent to take a longer period of leave, that parent will be entitled to request up to an additional 12 months of unpaid parental leave from their employer.

The employer may only refuse the request for the additional 12 months' leave on reasonable business grounds.

This will guarantee that Australian working families have the flexibility of up to 24 months' unpaid leave to provide care for their child.

3. Flexible work for parents
A Rudd Labor Government will guarantee a right for parents to request flexible work arrangements until their child reaches school age.

Employers will only be able to refuse any request on reasonable business grounds.

4. Annual leave
All full time non casual employees will be guaranteed 4 weeks' paid annual leave each year. Part time employees will be entitled to 4 weeks' annual leave paid pro rata. Shift workers will be entitled to an additional paid week of annual leave.

5. Personal, Carers and Compassionate leave
All full time non casual employees will be entitled to 10 days' paid personal and carers leave each year. Part time employees will be entitled to 10 days' personal leave paid pro rata.

These employees will also be entitled to 2 days' paid compassionate leave on the death or serious illness of a family member or a person the employee lives with.

All employees will be entitled to an additional 2 days of unpaid personal leave where required for genuine caring purposes and family emergencies.

6. Community Service Leave

Employees will be entitled to leave for prescribed community service activities, for example paid leave for jury service and reasonable unpaid leave for emergency services duties.

7. Public holidays

Labor's industrial relations system will guarantee public holidays including Christmas Day Boxing Day, New Year's Day, Australia Day, Anzac Day, Queen's Birthday, Good Friday and Easter Monday. Public holidays prescribed in State law such as Labour Day, Easter Saturday, Easter Tuesday, and local public holidays like Cup Day, will also be recognised in those States in which they are prescribed.

Where an employee works on a public holiday, they will be entitled to an appropriate penalty rate of pay or other compensation. This will be set out in the applicable award.

8. Information in the workplace

Employers must provide all new employees with a Fair Work Information Statement which contains prescribed information about the employee's rights and entitlements at work, including the right of the employee to choose whether to be or not to be a member of a union and where to go for information and assistance.

9. Termination of Employment & Redundancy

All employees will be entitled to fair notice of termination in accordance with the following scale:

Length of continuous service	Minimum period of notice
Less than 1 year	At least 1 weeks
More than 1 year but less than 3 years	At least 2 weeks
More than 3 years but less than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

Where an employee is over 45 years of age and has at least 2 years' continuous service, the employee will be entitled to one additional week of notice.

Employees who are made redundant and who are employed in workplaces with 15 or more employees will also be entitled to redundancy pay as determined by the Australian Industrial Relations Commission in the 2004 Redundancy Test Case:

Length of continuous service	Redundancy pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

10. Long Service Leave

As part of its commitment to national industrial relations laws, Labor will work with the States to develop nationally consistent long service leave entitlements. In the transitional period, Labor's guaranteed entitlement to long service leave will reflect the long service leave arrangements currently contained in State laws or federal awards and federal agreements.

Under Labor, long service leave entitlements accrued under these arrangements will be protected in the transition to nationally consistent long service leave entitlements so Australian employees are not disadvantaged.

Fresh ideas for Work and Family (Government Policy, 2007)

Overview

Only Federal Labor is committed to effective measures that will help all working parents balance their work and family responsibilities. Only a Rudd Labor Government will be committed to helping businesses manage their workforce to achieve greater participation and productivity.

Federal Labor's existing commitments in this area include:

- more flexible parental leave;
- flexible working arrangements for parents;
- a new Office of Work and Family;
- new child care centres; and
- reinvigorated National Work and Family Awards.

Federal Labor is also announcing new measures to support and assist those small businesses wanting to develop family friendly practices, including:

- small grants funding for small business to pursue family friendly measures;
- distribution of industry specific information in work and family practices; and
- making experts available to help small businesses develop new work and family arrangements in their workplace.

Parental leave

Under Federal Labor's industrial relations policy, Forward with Fairness, parental leave is included in Labor's 10 National Employment Standards that will apply to all employees. Under a Rudd Labor Government, it won't be possible to reduce or exclude these Standards in a workplace agreement.

Under Federal Labor's Parental Leave Standard, each parent will be entitled to separate periods of up to 12 months' unpaid parental leave to be taken in conjunction with the birth of their child. This will give families the choice of having a parent at home for the crucial first two years of a child's life.

Where a family would prefer one parent to take a longer period of leave, that parent will be entitled to request from their employer up to an additional 12 months' unpaid leave. The employer will be able to refuse an employee the additional leave in excess of 12 months on reasonable business grounds.

There will be no third party involved in determining whether the employer has reasonable business grounds for refusal of additional parental leave. The employer will only have to provide the reasons for refusal in writing.

The United Kingdom experience has shown that this approach has been extremely successful in meeting the needs of parents and businesses.

Under a Rudd Labor Government families will have more choice about how to best balance work and family life following the birth of a child.

Flexible work for parents

Federal Labor's 10 National Employment Standards will also include a right for parents to request flexible work arrangements from their employer until their child reaches school age. Flexible work arrangements might include part-time work, non-standard start or finish times, working from home, working "split shifts" or job sharing.

Again, the employer will only be able to refuse such a request on reasonable business grounds.

Once again, there will be no third party involved in determining whether the employer has reasonable business grounds for refusal of flexible work arrangements. The employer will only have to provide the reasons for refusal in writing.

Once again, the UK experience has shown that this approach has been extremely successful in meeting the needs of parents and businesses.

Office of Work and Family

Federal Labor will work to continuously improve policies that help to relieve the pressures on Australian working families as they juggle work and family responsibilities. This policy development will be driven by an Office of Work and Family that will be established within the Department of the Prime Minister and Cabinet.

The Office of Work and Family will be placed inside the Department of the Prime Minister and Cabinet to ensure that the formulation of policies to get the balance right between work and family life takes place at the highest level and is central to all Rudd Labor Government policy decisions.

One of the first tasks of the Office of Work and Family will be to work with child care providers and the states and territories to:

- provide parents with helpful information about local child care centres such as vacancies,

- their accreditation status and fees so parents are better informed about quality and price;

- develop a strong quality accreditation and ratings system, that drives quality improvement

- and informs parents about the standard of care, including any breaches of quality standards;

- ensure child care services provide parents with notice about proposed fee increases; and

- examine options to improve child care affordability, including increasing workplace-based child care so that parents can be closer to their children.

New child care centres

Federal Labor is committed to developing up to 260 new child care centres on school sites and other community land to provide convenient child care places in areas where there are shortages. This will help to reduce waiting lists and contain the costs of child care.

Using school locations, where possible, is one way of assisting parents with the morning rush as they attempt the "double drop-off" of getting children to school and child care before the working day begins.

National Work and Family Awards

A Rudd Labor Government will create incentives for businesses to make family-friendly changes in their workplace by supporting the further development of the existing National Work and Family Awards.

A Rudd Labor Government will expand the number of available awards by offering separate awards for the leaders in various industry sectors, such as retail, mining, hospitality, manufacturing and finance. This will help businesses to identify innovative arrangements and best practice for their industry sector.

Following each year's awards ceremony, a Rudd Labor Government will fund full page advertisements in the employment pages of major newspapers right across Australia. Those advertisements will list the winners of the awards and highlight their special achievements.

A Rudd Labor Government will also fund and support the development of a special symbol that can be used by winners in print and online job advertisements for a period of three years from winning the award. That symbol will assist businesses to attract skilled job-seekers as a result of the commitments they have made to assist its employees to achieve work-family balance.

As part of the National Work and Family Awards, Federal Labor will accredit all employers that obtain certain standards (as determined by the judging panel of the awards) in relation to the achievement of work-family balance.

Such accreditation would be available each year and, for that year, accredited employers would be able to use a special but different symbol in print and online job advertisements.

Helping small businesses be family friendly

In addition to previously announced measures, a Rudd Labor Government will also provide targeted support to smaller businesses to pursue practices that help employees balance their family obligations, and that assist parents who return to work to better balance their career and caring responsibilities.

There is a need to provide targeted support to smaller businesses to pursue practices that help employees balance their family obligations because this leads to:

- better productivity as workers have reconciled their work and family obligations;

- better retention of workers resulting in lower costs for employers; and

- better workplace health and safety.

In the absence of these policies, national surveys of work life outcomes tell us that long, unsocial hours of work, a lack of quality part-time work and traditional leave arrangements make it difficult for both men and women to balance work and family life. According to demographer Graeme Hugo, women in their prime working age are taking on multiple roles, including paid and unpaid work, and voluntary work. He has recognised that the implications

of this are often serious, including health related issues arising from work load stress. Small businesses often lack the time and resources to pursue such measures even when their benefit can be readily identified.

To assist small businesses and families, a Rudd Labor Government will invest $12 million in a national initiative that will:

- provide small grants to small businesses to pursue family friendly measures;

- distribute business and industry specific information and support work-based family friendly practices; and

- employ experts in each state and territory office of Federal Labor's Fair Work Australia offices to liaise with local small businesses, local government and business and community groups, providing a source of support, expertise and advice for small business and community organisations wanting to pursue family friendly arrangements in their workplace.

Part of this $12 million commitment will include small grants, generally ranging from $5,000 to $15,000 for small businesses to implement innovative family friendly workplace programs or initiatives, including:

- getting assistance to draw up rosters based on school terms and alternative "core hours", for example, 10am to 3pm;

- developing workplace policies on unpaid leave for carers and workers who have children with a disability;

- providing facilities for employees with young children such as family rooms and lactation breaks; and

- workplace mentoring.

Federal Labor's program will begin in the 2008-09 financial year with the full program up and running from 1 January 2010.

Federal Labor understands that to maintain an economy with high levels of productivity and participation there must be support for parents to balance their caring responsibilities with their careers.

According to the ABS, women are the largest group of underemployed workers, either looking for a job or for more hours. The biggest barriers to women finding a job or the extra working hours they seek are their caring responsibilities.

Almost 50 per cent of women not in the labour force were prevented from seeking the job they wanted due to child care, pregnancy or other caring responsibilities. For parents and working women, this Rudd Labor Government initiative will also:

- help meet the needs of working families;

- provide for continuity of employment;

- ensure greater attachment to the workforce; and

- improve career opportunities due to longer term attachment to one firm/business. If Australia is to stay competitive and productive, more parents, carers and groups with special needs will need to participate in the labour market. Flexible working initiatives attract such employees.

According to the UK experience with promoting family friendly work practices, 68 per cent of employers believe that the opportunity to work flexibly has had a positive effect on employee attitudes and morale.

For small businesses and, in particular, those with fewer than 15 employees, this Rudd Labor Government initiative will:

- help them retain skilled workers;

- reduce the additional costs associated with high employee turnover;

- assist in attracting workers in a tight labour market; and

- maintain workforce motivation, which results in demonstrably higher level of productivity.

Similar initiatives funded and administered by the Victorian Government and community based organisations are having an impact on local small businesses and, in particular, those businesses owned and managed by women. The Victorian initiative involved 10 small businesses, employing 90 employees, and achieved tangible results for both small businesses and workers, including:

- helping to develop employee choice rostering practices;

- the introduction of family rooms and job sharing arrangements;

- the development of purchased annual leave clauses;

- pride in business and greater motivation of workers; and

- increased business viability.

With the right encouragement and support, small businesses can be endlessly creative about the means of driving change. By facilitating change and creating the incentives for change, Federal Labor's fresh approach will help Australians balance work and family life.

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