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COMMERCE AND INDUSTRY

ACCI SUBMISSION

CONSOLIDATION OF COMMONWEALTH
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Attorney-General's Department Discussion Paper

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Attorney-General's Department Discussion Paper – Consolidation of
Commonwealth Anti-Discrimination Laws

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Canberra Office

COMMERCE HOUSE
24 Brisbane Avenue
Barton ACT 2600

PO BOX 6005 Kingston,
ACT 2604 AUSTRALIA

T: 02 6273 2311

F: 02 6273 3286

E: info@acci.asn.au

Melbourne Office

Level 3, 486 Albert Street
East Melbourne VIC 3002

PO BOX 18008 Collins Street
East Melbourne
VIC 8003 AUSTRALIA

T: 03 9668 9950

F: 03 9668 9958

E: melb@acci.asn.au

W: www.acci.asn.au

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 28 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

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.

Attorney-General's Department Discussion Paper – Consolidation of Commonwealth Anti-Discrimination Laws

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 and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission in response to the Attorney-General's Department Discussion Paper (DP), titled "*Consolidation of Commonwealth Anti-Discrimination Laws*" (September 2011).
2. This submission is made without prejudice to ACCI or its members' views.
3. ACCI has welcomed the opportunity to participate in a multi-stakeholder forum in Canberra on 10 November 2011 and would welcome the opportunity to consult directly with departmental officials as part of this ongoing consultation process.
4. This submission mainly addresses issues raised in the DP as it relates to private sector business and in their capacity as employers.

The ACCI Network

5. ACCI is Australia's peak council of employer organisations and business associations (employer organisations), representing 37 separate member-based organisations including both principal State and Territory Chamber of Commerce, and national and sectoral Industry Associations. Our Chambers and Industry Associations provide broad based services to the business community and their corporate / employer members. ACCI represents Australian business in all major facets and operations.
6. ACCI is recognised as a "peak council" under the *Fair Work Act 2009* and represents business on a number of other statutory committees and consultative bodies, including the *National Workplace Relations Consultative Council Act 2002* (Cth).¹
7. ACCI, as the organisation most representative of employers in Australia, is also recognised internationally as an elected member of the International Labour Organisation (ILO).
8. ACCI has been extensively involved in policy debates at the federal level, with member involved at the State/Territory level. ACCI has participated in a range of Parliamentary and other recent inquiries, including: *HREOC Inquiry on Discrimination in Employment on the*

¹¹ Other bodies and forums include: Safe Work Australia, the ATO's Superannuation Consultative Committee, and the Minimum Wage Research Group (Fair Work Australia), Federal Justice Roundtable.

Basis of Criminal Record (2004); HREOC National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (June 2006); Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Sex Discrimination Act 1984 (2008); Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (2009); National Human Rights Consultation (2009).

9. In addition, ACCI has intervened and participated in numerous matters before industrial tribunals, including the most recent test case under the new Part 2-7 equal remuneration provisions of the *Fair Work Act 2009*.
10. ACCI's Chief Executive, Peter Anderson, in an article titled "*The Sex Discrimination Act: An Employer Perspective - Twenty Years On*". published in the *University of New South Wales Law Journal*, (Volume 27, Issue 3) also provides an analysis on the operation of discrimination laws from an industry perspective.
11. As a network we are well placed to respond to the matters raised in the DP, particularly from a workplace relations policy perspective.

3. RESPONSE TO THE DISCUSSION PAPER (DP)

3.1.1 General Principles

12. ACCI has considered the issues raised in the DP through the following principles:
- a. Any consolidation of existing federal anti-discrimination laws should result in:
 - i. A net improvement to the existing regulatory framework including the business community's capacity to comply with existing federal anti-discrimination laws;
 - ii. A framework which moves towards a single national anti-discrimination system, subject to the content of the legal duties and obligations being fair, reasonable and balanced;
 - iii. Consolidation of existing discrimination laws across the entire federal jurisdiction, not limited to the five main statutes,² including federal workplace relations laws which also provides for discrimination protections under the *Fair Work Act 2009* (FW Act);
 - iv. Clearer legal duties for all duty holders (employers, employees, customers, clients etc), including a strong emphasis that enforceable rights are pursued against the alleged wrongdoer directly and not against third parties (ie. against employers under vicarious or derivative liability provisions);
 - v. Calibrating the remedies regime to the actual damage or detriment suffered and taking into account the fault of the duty holder and community expectations as to what are reasonable compensation remedies (ie. the penalty must fit the crime);

² Noted in the DP at p.5 as the following: *Racial Discrimination Act 1975* (RDA); *Sex Discrimination Act 1984* (SDA); *Disability Discrimination Act 1992* (DDA); *Age Discrimination Act 2004* (ADA) and the *Australian Human Rights Commission Act 1986* (AHRC).

- vi. Creating a culture within the Australian community of resilience and education first, where litigation is considered a last resort to resolve disputes, consistent with the Attorney-General's *Access to Justice Strategic Framework*;
- b. Any proposed consolidation of existing federal anti-discrimination laws should *not* result in:
 - i. And recognising that the Government has already expressed an election commitment to add two new protected attributes, an increase in legally protected attributes at the federal level;
 - ii. The watering down of existing legal thresholds;
 - iii. The reversal of existing evidentiary or legal burdens of proof (ie. the defendant carrying the onus to prove that they did not engage in discriminatory conduct);
 - iv. A watering down of existing exemptions or exceptions for employers;
 - v. The ability for third parties to sue on behalf a litigant or seek penalties, fines or orders (ie. representative litigant or a statutory authority);
- c. There must be a robust evidence-based policy rationale for introducing any new changes to the existing federal legislative scheme which results in new legal rights and capacities;
- d. A cost-benefit analysis and a Regulatory Impact Statement must be considered prior to Government making a policy decision which would introduce new statutory causes of action;
 - i. In terms of a cost-benefit analysis, consideration of costs must include the probable costs an employer will incur as a result of seeking and obtaining legal advice and representation in the Australian Human Rights Commission (the Commission) and before the courts, if changes to the existing laws creates new capacities and opportunities to litigate;
 - ii. Costs should also take into account the range of damages which may be awarded;

- iii. The costs should also consider the impact an aggregate increase in litigation will cost taxpayers, who are required to fund the civil justice system.

3.1.2 Consideration of Impact on Business

13. Policy makers must be particularly mindful that many businesses are small to medium sized without recourse to in-house or external lawyers, and who may not have the resources that larger firms possess. Many owners work in their own business, work long hours, draw the equivalence of their employees' wages, and make their contribution to the community through paying taxes and providing employment opportunities.
14. As the Government is acutely aware, businesses are already subject to extensive regulation at all levels, particularly with respect to onerous workplace relations and OH&S laws.
15. Many businesses operate on tight margins, have limited access to finance, have mortgaged their family home and struggle to make a decent return. Other businesses, particularly large firms, clearly have better resources and capacities. Businesses are not homogenous and any regulatory proposal must be acutely aware of these differences.
16. All too often policy makers do not sufficiently take into account these issues when they make changes to the existing regulatory framework which would either create new obligations, increase red-tape on a business and/or introduce new costs (many times achieving a triple whammy). This is despite other arms of government extolling their policy objectives in reducing the administrative burden on business.

3.1.3 Employers Support Principles of Equity, Equality and Non-Discrimination

17. ACCI is in on the public record has being a strong supporter of well designed anti-discrimination laws with clear duties that balance the interests of all parties. In 2008, ACCI hosted a Sexual Harassment Employer Forum with the Commission and has continually expressed support for providing tools and resources to employers and employees to understand and comply with their legal obligations. In addition, ACCI has supported voluntary measures that increase the diversity within the workplace. ACCI supports government programmes which provide incentives to employers with respect to employment opportunities and

- recognises employer efforts in introducing initiatives to enhance equity and diversity.
18. However, ACCI does not support regulation to be created which is onerous on employers, creates ambiguous duties, increases red-tape and costs, or creates excessive litigation. ACCI supports policy outcomes and goals achieved through non-regulatory measures, such as targeted education and awareness campaigns and recourse to regulation where these non-regulatory measures fail to achieve policy goals. ACCI's formally adopted policies on equity maintain that employers expect anti-discrimination laws to *“represent a balance of interests and necessarily be qualified and targeted to specified conduct rather than imposing far reaching or general unspecified duties.”*³ Smarter regulation, as distinct from additional regulation, requires the development of appropriate and balanced laws that are targeted to address particular public problems.
 19. The development of appropriate and balanced laws are, however, simply one element of an effective discrimination framework. Education of employers and employees about the law and its purposes becomes central functions of a meaningful discrimination framework. ACCI is in strong support of human resource practices which incorporate these values in practice.
 20. It must be recognised that industry is reflective of society. It comprises a million businesses. It contains ten million employees and contractors. It interacts with twenty million Australians. It is not homogenous.
 21. The disparate views in society on discrimination issues will be found in industry as well. Not all forms of different treatment of individuals are regarded by the community as appropriately the subject of unlawful discrimination, and likewise in industry.
 22. It is through its parliaments that the community ultimately speaks to industry on the subject. Parliaments draw the line between unlawful discrimination and what is not. Industrial tribunals or other statutory or administrative bodies of government which interact with industry on discrimination matters, should operate within the framework of laws established by parliaments.
 23. Most workplaces are commercial businesses involving considerable private investment and risk. Employers are not social policy makers and there is no basis for industry to be required to move ahead of general

³ ACCI Modern Workplace: Modern Future - A Blueprint for the Australian Workplace Relations System 2002-2010, p.127.

community opinion on discrimination matters. Caution is advised before imposing obligations on industry that are not widely accepted by the community. However, programs of information and interaction with industry, which engage industry in the broader community debate, are supported.

24. Some employers exercise their right to adopt workplace policies or human resource practices which move ahead of public opinion on discrimination matters. These employers may do so after having assessed the circumstances of their business and its labour force, or to help shape public opinion. Provided there is no compulsion on others to move ahead of community opinion as expressed through its parliaments, this should not be a matter of controversy, and in some cases can be welcomed. Such approaches should not, however, be used to impose obligations on all business to exceed generally accepted community standards.

3.1.4 SME Business Community

25. ACCI is particularly sensitive to the needs of small to medium sized businesses and will strongly advocate in their interests should the proposed consolidation project lead to a net increase additional red-tape, costs and litigation, particularly if there are not commensurate protections for business to be able to manage their business operations without the threat of being drawn in expensive and time-consuming legal action by a potential litigant.
26. Parliament is the gate-keeper of the justice system and the Government should be mindful that any new right to sue a business must be balanced by other policy goals and objectives. There must be a genuine recognition expressed in the consolidated bill that not all protected attributes are absolute, and that reasonable and appropriate exemptions must co-exist within the regulator framework.
27. For example, it is usually the grey areas, most particularly indirect discrimination, that creates the most uncertainty for business in having confidence that their contractual and operational arrangements are lawful. In the workplace environment, this can involve competing interests between the wishes of employees to have different working conditions and arrangements, against the desires of a business to be able to reasonably manage its business operations. The reality is that despite an employee having the protection of an attribute, there is no existing exemption or safe harbour for an employer to discuss the issue with the employee, without fear of a possible legal claim. Nor is there

any legal safe harbour for an employer who genuinely cannot afford to accommodate significant changes in the manner which work is to be performed or the conditions which have been agreed to as evidenced in the contract of employment and through workplace policies. The *raison d'être* of an employer in the private sector is run a profitable business that creates employment opportunities for Australians. There may be legitimate reasons why an employer is required to treat individuals differently and where it is reasonable, legitimate and solely connected to the operational requirements of the business or to ensure the health, safety and welfare of the community. In such cases, no employer should be exposed to potential litigation.

28. Employers have also experienced an increase in litigation where that involves disciplinary action (including performance management and general termination matters), with the protections afforded by discrimination regulation (both under anti-discrimination laws and the FW Act) used as a potent shield by employees to challenge the actions of the employer. An employer is in an invidious position when they are exposed to double jeopardy situations for merely attempting to comply with other laws or protecting their legitimate business' interests.
29. ACCI believes that there is merit in considering how small business or micro-businesses could be treated differently from certain parts of discrimination regulation. A small business exemption exists in other areas of federal regulation, including the FW Act and *Privacy Act 1988* and did feature in a number of state schemes. For example, s.21 of the then Victorian *Equal Opportunity Act 1995* allowed an employer who employed no more than the equivalent of 5 people on a full-time basis (including the people to whom employment is offered) to determine who may be offered employment, even if that would be considered discriminatory. This exemption had strong support from industry when the Victorian legislation was reviewed by the previous Victorian Government.⁴
30. In the United States, complaints against a business which have less than 15 employees which involves race, colour, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. A business is covered by the laws if it has 15 or more employees who worked for the employer for at least twenty calendar weeks (in this year or last). If a complaint involves age discrimination, the business is covered by the laws we enforce if it has 20 or more

⁴See for example the submission from Victorian Automobile Chamber of Commerce here: <http://www.justice.vic.gov.au/resources/2/4/242c2000404a4226a9b7fbf5f2791d4a/victorianautomobilechamberofcommercesubmission.pdf>

employees who worked for the company for at least twenty calendar weeks (in this year or last).⁵

31. To reiterate, targeted and appropriate exemptions for smaller firms are strongly supported.

3.1.5 Overlapping Regulation

32. At the federal level, in addition to the five main federal discrimination statutes, there remains significant duplication in legislation such as Part 3-1 of the FW Act (General Protections) and OH&S specific protections, contained in Part 6, Division 1 of the recently commenced *Work Health and Safety Act 2011 (Cth)*.
33. Overlap also occurs as a result of discrimination matters able to be pursued under common law, contract, tort, equity, unfair dismissal, and adverse action.
34. For example, allegations by an employee of wrongdoing by a co-worker (ie. sexual harassment), depending on the factual matrix, could be pursued against an employer under Part 3-1 or 3-2 of the FW Act (if the complainant's employment contract is terminated sometime during or after the reported incident), breach of contract, tort, equity, trade practices legislation, *Sex Discrimination Act 1984* or relevant state/territory discrimination legislation.
35. In the recent high profit case of *Kirk vs David Jones & Others*, the statement of claim filed in the Federal Court indicated that the alleged sexual harassment was a breach under numerous sources of legal obligations. Ms Kirk reserved her rights in relation to pursuing action under the SDA and FW Act for the same set of allegations and sought punitive damages approximately \$37 million (**Attachment A**).⁶
36. In an ideal best practice and smart regulatory environment, business should only have one clear set of legal duties to understand and comply with and not have to understand and comply with a cascade of different legal obligations arising from common law and federal, state or territory statutes, which applies to the same alleged conduct.
37. Allegations concerning discrimination in pay can be pursued under the SDA or under Part 2-7 of the FW Act. To limit duplication, ACCI

⁵ http://www.eeoc.gov/employers/coverage_private.cfm

⁶ See also ACCI's *Commerce & Industry*, Spring 2010 Volume 1, No 2, "US Style Litigation Means Less Law & Order" <http://www.acci.asn.au/Research-and-Publications/Publications/C-I>

- recommends consideration of moving Part 2-7 to the federal discrimination framework under sex discrimination provisions of the consolidated bill.
38. ACCI has not undertaken an audit of other federal statutes which contains discrimination protections, rights and remedies. This should be undertaken as part of the consolidation exercise to establish the full extent of regulation at the federal level.
39. At the State and Territory level, the following legislation also imposes obligations on business, with rights and remedies for individuals to seek redress:
- a. *Anti-Discrimination Act 1991 (Qld)*;
 - b. *Anti-Discrimination Act 1977 (NSW)*;
 - c. *Discrimination Act 1991 (ACT), Human Rights Commission Act 2005 (ACT), Human Rights Act 2004 (ACT)*;
 - d. *Anti-Discrimination Act (NT)*;
 - e. *Equal Opportunity Act 1984 (SA)*;
 - f. *Anti-Discrimination Act 1998 (Tas)*;
 - g. *Equal Opportunity Act 1995 (Vic), Racial and Religious Tolerance Act 2001 (Vic), Charter of Human Rights and Responsibilities Act 2006 (Vic)*;
 - h. *Equal Opportunity Act 1984 (WA)*;
40. ACCI has not undertaken an audit of other state/territory statutes which contain discrimination protections, rights and remedies. This should be undertaken as part of the consolidation exercise to establish the full extent of regulation at both federal and state/territory levels and the overall regulatory burden on business.

3.1.6 Other protections

41. It must also be acknowledged that rights exist outside of the regulatory framework, including common law, equity and tort. Where it is alleged that there are gaps in protections, this must be examined against the totality of legal rights and remedies which exist currently.

3.1.7 New Protected Attributes (excluding Sexual Orientation and Gender Identity)

42. At the federal level, ACCI anticipates that there will be a strong push by some individuals and interest groups to add additional and new attributes (or modify existing attributes), particularly by including attributes that are protected at the state/territory level. The desire to create new protections is understandable on one level given that those interest groups are concerned about real or perceived treatment of individuals or groups who possess that particular attribute. Any claim for new protections must be accompanied by a cost-benefit analysis done by those proponents, particularly outlining in detail how this would (a) actually reduce the incidence of real or perceived discrimination occurring, (b) whether creating new protections will result in a net increase in litigation which the taxpayer must ultimately fund (c) the impact on parties to cases, including small businesses that cannot, unlike litigants, rely on lawyers who offer “no win/no fee” or pro bono funding.
43. ACCI opposes the creation of a new protected attributes as part of this consolidation project. The Government's announcement of this project signalled to the business community that they would clearly be a beneficiary. Creating new legal obligations will be contrary to the Government's public commitment for an improved regulatory regime with simplified and clarified obligations which will reduce compliance costs for business.⁷ There will be no cessation to individuals and interest groups requesting that their attribute be protected and enshrined in discrimination legislation. Any claim for protection must be assessed on their own merits and should be subject to a thorough cost-benefit analysis.
44. There must also be policy coherence between different objectives. For example, if there is a policy goal of reducing the regulatory burden on small firms, then this must be reflected in a consolidated anti-discrimination legislation. The Government's *Access to Justice Strategic Framework and Report* must also be considered, particularly where there is an emphasis in reducing the workload and costs of the justice system and preventing every dispute from going to court. Any new protected attribute will add to the legal costs of business, the justice system and the entire community as the taxpayer.

⁷ Joint Media Release, Hon. Robert McClelland MP, Senator Hon. Penny Wong, “Launch of Discussion Paper on New Anti-Discrimination Law”, 22 September 2011.

3.1.8 Protection of Sexual Orientation and Gender Identity

45. ACCI notes that the Government has committed to introducing new protections at the federal level to cover sexual orientation and gender identity, which are generally covered under various state/territory laws and the FW Act.
46. As with any other protected attribute, a workable definition must be clearly defined and appropriate limits of what is and is not discrimination made clear in either the legislation and/or the explanatory materials.
47. For example, it would be reasonable and appropriate for a business which operates a fitness centre to continue to provide for male and female only toilets and change room facilities, without the prospects of legal action for discrimination by a person who does not identify as either a male or a female. However, it would not be appropriate for a business to only advertise for heterosexual workers, where this has no bearing on the operational requirements of the business or requirements of the job to be performed.
48. The difficulty for duty holders is where an attribute is not overt and readily observable. In the case of gender identity and sexual orientation, unless the person reveals in some objective way that they possess or could possess the attribute, an employer may nonetheless discriminate directly or indirectly, recalling that intention or motive is not required. The DP rightly concedes that “*gender identity is a complex concept*” and for a small or large business to (a) understand the concept, (b) be aware of how an individual may possess the attribute, and (c) ensure that it or its employees do not discriminate against the individual is fraught with difficulty.⁸ This challenge is not limited to this particular attribute, but can also be extended to ensuring that employers do not discriminate against persons who have disabilities that are not objectively manifest, such as psychological and genetic disorders/predispositions.
49. ACCI has previously outlined the difficulty employers face in dealing with a number of matters which involve allegations of disability discrimination, mainly due to the wide and amorphous definitions of disability, which is not limited to debilitating and long term physical and mental disabilities, but also includes those conditions that involve anti-social behaviours or criminality.

⁸ DP, p.22.

50. Any new attribute of sexual orientation should not be defined in a conceptual manner, as this would lead to ambiguity for duty holders and result in inevitable disputation and litigation. It may also lead to persons who are required to work in particular situations (ie. with children) have engaged in unlawful sexual activities (ie. paedophilia) able to rely on the protections. This will lead to legal uncertainty for employers in situations of recruitment and termination. Any definition of sexual orientation, sexual preference or sexuality, should therefore exclude unlawful sexual activities (see also ACCI proposals in relation to definitions of disability discrimination at **[3.1.13]**).
51. ACCI will respond to the exposure draft in terms of providing further input into defining any new attributes and ensuring that there are no unintended consequences for employers.

3.1.9 Tests for Discrimination

52. Discrimination law requires duty holders to consider a significant range of diverse circumstances. In some cases, it will be obvious to the duty holder that the person possesses the attribute (ie. the person requires the assistance of a wheelchair).
53. However, in other cases it will not be readily apparent either because the person has not disclosed that they possess the attribute to the duty holder, or they possess an attribute that is not obvious (ie. genetic conditions, mental impairments which are episodic etc).
54. The existing laws place an onerous burden on all employers to ensure that they do not breach the existing framework of federal, state/territory regulation. A duty holder is expected to know what each attribute means, obtain external advice on how to comply with laws, and keep up to date with new judicial rulings on various attributes.
55. Employers are generally expected to have policies in place dealing with discrimination, provide some level of training to staff and are expected to understand that imposing requirements or conditions in the workplace must not disadvantage persons who possess that attribute (whether those persons are known or unknown). They will then be required to make a judgement call as to whether the conditions or requirements are reasonable in cases where a person who possess the attribute can not comply with the condition or requirement.
56. However, often allegations of discrimination occur after a breakdown in the employment relationship or during a workplace dispute or

- grievance, and this can be unrelated or incidental to the allegations of discrimination.
57. In relation to disability discrimination, it is not uncommon to have a complex situations where an employee is already subject to performance management for either misconduct or unsatisfactory work performance, claiming a workplace injury and raises allegations of discrimination if they are aggrieved by the outcome.
 58. The Australian workplace environment invariable involves personal interactions on a daily basis, and this poses a significant challenge to employers that all workers, be they supervisors and management do not engage in unlawful behaviour. Even with the best policies, procedures, training, seminars and human resource management tools available, it is difficult for an employer to be certain that they have done all they could to either prevent the discrimination from occurring, or when it does occur, that they have acted appropriately and lawfully. In cases of sexual harassment alleged by a co-worker the employer is caught in an Catch 22 situation in attempting to comply with discrimination laws, whilst also complying with unfair dismissal and adverse action laws. There must be greater certainty for employers that they are able to confidently make decisions to prevent discrimination without fearing legal action against the alleged wrongdoer.
 59. Where a duty holder such as the employer/owner engages in direct discriminatory behaviour, the law should be there to provide remedies to the affected individual. However, in most cases, allegations of discrimination pursued against the employer under vicarious liability provisions and not against the wrongdoer co-worker.
 60. Any recasting of the existing tests must take these factors into account and any new test which simply makes it easier for an individual to establish discrimination, will not be supported.

3.1.10 Unified Test

61. ACCI prefers the existing tests of discrimination. However, ACCI's preliminary view at this stage is that if there is one unified test for all discrimination matters, it must be based on a number of elements:
 - a. Firstly, there must be a robust test which establishes that causation is directly linked to the protected attribute;
 - b. Secondly, there must be actual detriment suffered;

- c. Thirdly, there must be defences and exemptions available to a defendant based on public policy factors which recognise that certain actions are necessary, legitimate, proportionate or reasonable in the circumstances.

3.1.11 Knowledge of the Protected Attribute

62. In determining causation in a particular matter, it should be a complete defence or exemption if the alleged wrongdoer did not know or could not have possibly known that the person possessed the attribute, at the time of the contravention.
63. It is unfair to impose legal liability in circumstances where the person honestly does not know that the person possesses an attribute. The onus of establishing this would shift to the defendant, and therefore it is appropriate for an employer to be able to satisfy a court to the requisite evidentiary standard to rely upon this defence.

3.1.12 Age Discrimination

64. ACCI believes that there should be limitations in what circumstances a person is able to allege discrimination based on age. Other jurisdictions, particularly European Union Member States have employment specific exemptions in this regard.
65. For example, under the Council Directive 2000/78/EC (27 November 2000) the European Community Directive establishes a general framework for equal treatment in employment and occupation, and allows Member States pursuant to Article 6 to⁹:

... if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

⁹An official copy of the Directive can be accessed here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

66. The consolidated bill should clearly set out that it is not age discrimination in circumstances involving redundancy, long service leave, or any other workplace condition or entitlement whereby payments are calculated on the basis of time served (or could be seen as a proxy for age), for statutory youth based wages and conditions, including vocational education and training.¹⁰

3.1.13 Disability Discrimination

67. Discrimination based on disability, including mental and physical impairments, should be prohibited in circumstances that the community believes is reasonable and warranted. This means that the definition of discrimination should be re-considered and considered against its historical context. Recent decisions have suggested that the scope of the existing definition under the DDA is expansive, amorphous and imposes significant risk to employers.

68. The Declaration on the Rights of Disabled Persons was Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975. It defines a disabled person as follows:¹¹

The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.

¹⁰ The National Training Wage Schedule of most modern industrial awards calculates wages based on a trainee's years out of school.

¹¹ Schedule 5, *Australian Human Rights Commission Act 1986*.

69. The most recent UN Convention on Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006. Article 1 of the Convention defines “a person with disabilities” as follows:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

70. ACCI believes that the consolidation bill needs to clearly articulate the scope of “disability” to ensure that employers are able to understand their legal obligations and to set reasonable limits on which types of disability attributes should be protected. There should be clear boundaries set by parliament as to what types of conditions should be protected under discrimination legislation. It should not be left to litigants and the courts to determine.
71. The courts and tribunals have taken an extremely expansive interpretation of disability in recent years. Where a disability is claimed to be a mental impairment this has posed as a particular difficulty for employers.
72. The courts have found that a person satisfies the “technical” definition of a mental impairment under DDA and state/territory laws, including for addictive disorders, including gambling and drug addictions. These disorders are defined under the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision, also known as (DSM-IV-TR), which is a manual published by the American Psychiatric Association (APA) that includes all currently recognised mental health disorders.
73. The DSM-IV-TR is also used to diagnose mental health conditions in Australia and courts do have regard to diagnoses which fall under the DSM framework. In *Forest v Queensland Health* [2007] FCA 936 (22 June 2007) the court held that a personality disorder was a “disability” under the DSM. The relevant extracts can be found below:

APPLICANT’S DISABILITY

31 So far as relevant in this case, s 4(1) DD Act defines “disability” in relation to a person as:

...

...

...

(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

32 In summary, the applicant has submitted that, in addition to substance abuse disorder and dependence, he suffers a disability in the nature of a personality disorder, which is a disability within the meaning of s 4(1)(g). The respondent conceded in submissions, both written and oral, that the applicant did suffer a disability, however there was some conflict in the medical evidence as to the exact nature of the disability suffered by the applicant. Notwithstanding the concession as to existence of a disability, Mr Murdoch for the respondent submitted that there is a need for the Court to come to a factual conclusion as to the nature of the applicant's disability, because the concept of alleviation of a disability in the meaning of s 9 DD Act (upon which the applicant's case to a significant degree rests) can only be considered properly and effectively in this case in light of a precise, factual decision as to the disability held by applicant (TS p 286 ll 38-45). I agree.

33 At the hearing, expert evidence as to the nature of the applicant's disability was given by consultant psychiatrists Dr Paul Trott and Dr Alston Unwin. There was no dispute as to the expertise of either Dr Trott or Dr Unwin.

34 The evidence was that the applicant's disability was either:

(a) a personality disorder of the mixed type. This was the diagnosis of Dr Trott at p 6 of his report dated 25 February 2005 (attached to Dr Trott's affidavit sworn 20 December 2005). Both affidavit and oral evidence of Dr Trott were called by the applicant

(b) alternatively, schizo-typal personality disorder. This was the diagnosis of Dr Unwin on p 8 of his report dated 11 January 2006 (attached to Dr Unwin's affidavit sworn 20 June 2006). Both affidavit and oral evidence of Dr Unwin were called by the respondent.

35 In providing their expert opinions as to the personality disorder suffered by the applicant, Dr Trott and Dr Unwin referred to the Diagnostic and Statistical Manual of Mental Disorders (4th ed text

revision, American Psychiatric Association Washington, 2000) ("DSM-IV"), as a reference providing authoritative definition of personality disorders. General diagnostic criteria for a personality disorder are there defined as:

a. an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture. This pattern is manifested in two (or more) of the following areas:

(1) cognition (ie ways of perceiving and interpreting self, other people, and events)

(2) affectivity (ie the range, intensity, lability and appropriateness of emotional response)

(3) interpersonal functioning

(4) impulse control

b. the enduring pattern is inflexible and pervasive across a broad range of personal and social situations

c. the enduring pattern leads to clinically significant distress or impairment in social, occupational, or other important areas of functioning

d. the pattern is stable and of long duration, and its onset can be traced back at least to adolescence or early adulthood

e. the enduring pattern is not better accounted for as a manifestation or consequence of another mental disorder

f. the enduring pattern is not due to the direct physiological effects of a substance (eg a drug of abuse, a medication) or a general medical condition(eg head trauma).

36 A personality disorder as defined by DSM-IV, and as diagnosed by each expert, clearly satisfies the definition of "disability" within s 4(1)(g) DD Act.

74. What is particularly concerning to employers is that the DSM also covers conditions that involve manifestations of anti-social and criminal behaviour and can be used as a shield against employers. This includes: personality disorders, paedophilia, exhibitionism, voyeurism, compulsive

gambling, kleptomania, pyromania and addiction to illicit psychoactive substances.¹²

75. According to the ABS Cat 443.0 Survey of Disability, Ageing and Carers, four million people in Australia (18.5%) reported having a disability in 2009. For the purposes of ABS survey, the term “disability” is defined as any limitation, restriction or impairment which restricts everyday activities and has lasted or is likely to last for at least six months. Examples range from loss of sight that is not corrected by glasses, to arthritis which causes difficulty dressing, to advanced dementia that requires constant help and supervision.
76. The glossary of ABS Cat provides that the definition of “disability” is as follows:¹³

In the context of health experience, the International Classification of Functioning, Disability and Health (ICF) defines disability as an umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environment and personal factors).

In this survey, a person has a disability if they report they have a limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities. This includes:

- loss of sight (not corrected by glasses or contact lenses)
- loss of hearing where communication is restricted, or an aid to assist with, or substitute for, hearing is used
- speech difficulties
- shortness of breath or breathing difficulties causing restriction
- chronic or recurrent pain or discomfort causing restriction
- blackouts, fits, or loss of consciousness
- difficulty learning or understanding
- incomplete use of arms or fingers
- difficulty gripping or holding things

¹² An online summary of DSM classifications can be accessed here: <http://allpsych.com/disorders/dsm.html>

¹³ ABS Cat 443.0 (2009), p.27.

- incomplete use of feet or legs
- nervous or emotional condition causing restriction
- restriction in physical activities or in doing physical work
- disfigurement or deformity
- mental illness or condition requiring help or supervision
- long-term effects of head injury, stroke or other brain damage causing restriction
- receiving treatment or medication for any other long-term conditions or ailments and still being restricted
- any other long-term conditions resulting in a restriction.

For more information about group of disabilities see Appendix 2.

77. This ABS definition, which is in turn drawn from the ICF, is more reflective of the original legislative intention of discrimination laws designed to protect persons with a manifest and serious impairment from differential treatment.
78. ACCI believes that there should be a re-calibration of the existing definition of disability which would ensure that only significant impairments are protected.
79. ACCI reiterates its concern with the problems surrounding the wide scope of the term "disability" under federal and state/territory laws. Two recent decisions illustrate this concern. In 2006 the Victorian Civil and Administrative Tribunal decision of *McDougall v Kimberley-Clark Aust. Pty. Ltd (Anti Discrimination)* [2006] VCAT 1563 (3 August 2006) ruled that a "gambling addiction" is an psychological impairment that can give rise to a claim of discrimination under Victorian laws. In 2000, the Federal Court ruled in the case of *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* that a heroin addiction was a "disorder, illness or disease".
80. ACCI's submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Disability Discrimination and other Human Rights Legislation Amendment Bill 2008* which sets out the concern over the current definition attached (**Attachment B**).¹⁴

¹⁴ See in particular chapter 3, pp. 17-21.

81. Disability discrimination under s.351 of the FW Act has been interpreted recently by the courts differently to the DDA. This means that the compliance burden on employers is higher due to different standards applying. In *Hodkinson v The Commonwealth [2011] FMCA 171* (31 March 2011), Cameron FM held that “disability” under the FW Act should be interpreted according to its ordinary meaning and not given the same interpretation as the DDA. In that case the applicant alleged disability discrimination under s.351 of the FWA and ss.5 and 6 of the DDA, with the relevant extract from that decision set out below:

Dismissal – disability discrimination

138. Section 351 of the FWA relevantly prohibits an employer from taking adverse action against an employee because of the latter’s physical or mental disability. Section 351(2) provides, amongst other things, that that prohibition does not apply to action that is not unlawful under any anti discrimination law in force in the place where the action is taken. Section 351(3) defines “anti-discrimination law” to include, relevantly, the Disability Discrimination Act.

139. The applicant submitted that her dismissal was taken “for a reason which included her physical disability, in a manner which breaches the provision fo [sic] the DD Act”. She postulated some interaction between s.351 and the Disability Discrimination Act, particularly its ss.5 and 6 which, for the purposes of that Act, define direct and indirect disability discrimination. Although the applicant’s submissions concerning the allegedly discriminatory conduct of the respondent, and the possible relevance of the Disability Discrimination Act to s.351, related principally to her allegations of injury in employment, alteration of her position to her detriment and discrimination between employees, they are also relevant to her allegation that her dismissal contravened s.351. Consequently, it is useful at this point to consider whether the interpretation of s.351 and its prohibition on adverse action because of an employee’s disability is affected or informed by the content of the Disability Discrimination Act, particularly as the applicant has also submitted that that Act’s definition of disability should be taken into account when interpreting that word where it appears in s.351.

140. Although s.351 is headed “Discrimination” this heading is not to be taken as part of the Act: s.13(3), Acts Interpretation Act 1901. The section does not prohibit “discrimination” as such but, rather, identifies conduct which is generally considered to be discriminatory. It is by demonstrating the occurrence of adverse action and the fact that it was motivated for a reason prohibited by s.351(1), such as a person’s disability, that a contravention is proved. The criteria found in s.351(1) rely in no way on the Disability Discrimination Act.

141. Further, s.351 does not employ the word “discrimination” other than as a term by which to identify other Acts which provide exceptions to the operation of s.351(1). The absence of that word from the list of prohibited reasons for adverse action found in s.351(1) means that there is no grammatical link between that sub-section and ss.5 and 6 of the Disability Discrimination Act. There is, therefore, no term in s.351(1) whose proper construction may be understood by reference to what is contained in ss.5 and 6 of the Disability Discrimination Act.

142. Additionally, the fact that s.351(1)'s operation is limited by reference to exceptions derived from anti-discrimination legislation provides no basis to conclude that other features of those Acts should also influence the operation of s.351. Section 351(2) is dependent upon s.351(1) and is concerned with limiting s.351(1)'s scope, not with expanding it. Consequently, the fact that certain conduct mentioned in the Disability Discrimination Act is expressly excluded from the reach of s.351(1) does not, in the circumstances, suggest that conduct mentioned in the Disability Discrimination Act which is not so excluded is to be included in the proscriptions in s.351(1) other than to the extent that the sub-section's express terms already prohibit it. That is to say, s.351(2)'s exclusion of certain conduct from the operation of s.351(1) by reference to, amongst others, the Disability Discrimination Act, is insufficient to incorporate into s.351(1) conduct referred to in those Acts which is not excepted by s.351(2).

143. For these reasons, conduct which contravenes the Disability Discrimination Act does not, by reason of that contravention, also contravene the FWA.

144. The applicant's allegation of disability discrimination also raises the question of the proper interpretation of the word “disability” where it appears in s.351(1). If a term is used in different statutes in different contexts, then the definition of that term in one statute is unlikely to assist in interpreting that term in the other: *M Collins & Son Ltd v Bankstown Municipal Council* (1958) 3 LGR 216 per Sugerman J at 220. However, if the two statutes deal with related concepts then a definition in one may assist in the interpretation of the other although it will not fix the meaning of the term in the second statute: *R v Scott* (1990) 20 NSWLR 72 per Gleeson CJ at 77.

145. Disability is defined in s.4 of the Disability Discrimination Act in the terms quoted above at [15]. That definition appears to reflect the particular objects of the Disability Discrimination Act. By contrast, nothing about the way the word “disability” is used in s.351(1) suggests that it should be understood other than according to its ordinary meaning or that it should have the extended meaning which it

is given in the Disability Discrimination Act. To the extent that the Disability Discrimination Act defines “disability” in terms consonant with the ordinary meaning of that word, it can assist in its interpretation where it appears in s.351(1). However, it is by reference to that ordinary meaning that it should be understood. In that regard, the Macquarie Dictionary (5th ed.) relevantly defines “disability” as:

1. lack of competent power, strength, or physical or mental ability; incapacity.
2. a particular physical or mental weakness or incapacity.

Further, the Shorter Oxford English Dictionary (6th ed.) relevantly defines “disability” as:

3. An instance of lacking ability; now spec. a physical or mental condition (usu. permanent) that limits a person’s movements, activities, or senses.

146. Where it is used in s.351(1), I conclude that the word “disability” should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person’s movements, activities or senses. Examples can be found in the definition of disability in the Disability Discrimination Act. Importantly, however, while physical or mental limitations may be a disability or an aspect of a disability, their practical consequences, such as absence from work, are not. This distinction is significant when a party is required to identify the disability said to be the reason of adverse action alleged to have been taken against them.

82. A subsequent Federal Magistrates’ Court decision also found that the term disability, as it appears in s.351(1), should take its ordinary meaning.¹⁵
83. A definition of “disability” in the consolidation bill should re-align with relevant principles underpinning international instruments. ACCI has also considered overseas jurisdictions which delineate between different disabilities to make clear what is protected and what is not for employers. This approach is superior in terms of providing clarity to duty holders and should be adopted in Australia.
84. One possible formulation could be based on the United States *Americans with Disabilities Act 1990* which is a combination of deeming and exclusion provisions.

¹⁵ *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) at [81]

85. The *ADA Amendments Act of 2008* (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.” It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA.¹⁶
86. ADAAA and the regulations define “disability” as:
- a. a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an “actual disability”); or
 - b. a record of a physical or mental impairment that substantially limited a major life activity (“record of”); or
 - c. when an employer takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”).
87. The relevant regulations identify specific types of impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.
88. It also excludes a number of mental impairments defined in the regulations as:
- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
 - (2) compulsive gambling, kleptomania, or pyromania; or
 - (3) psychoactive substance use disorders resulting from current illegal use of drugs.

¹⁶ See **Attachment C** which extracts two documents from the EEOC website: “*Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*”: http://www.eeoc.gov/laws/regulations/adaaa_aa_small_business.cfm; and “*Section 902 Definition of the Term Disability*”: <http://www.eeoc.gov/policy/docs/902cm.html#902.1c>

89. The term "illegal use of drugs" refers to:

drugs whose possession or distribution is unlawful under the Controlled Substances Act, 21 U.S.C. § 812. It "does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law." 42 U.S.C. §§ 12111(6)(A), 12110(d)(1); see also 29 C.F.R. § 1630.3(a)(2). The term does include, however, the unlawful use of prescription controlled substances. 29 C.F.R. pt. 1630 app. § 1630.3(a)-(c).

90. Other jurisdictions have also limited the definition of disability in a similar way. For example, the UK *Equality Act 2010* (EA 2010) defines disability in the following terms:

s.6 Disability

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

...

91. Schedule 1 of the EA 2010 allows regulations to make provision for a condition of a prescribed description to be, or not to be, an impairment and expands upon the what a "*substantial and long-term adverse effect*" is for the purposes of s.6.

92. **Attachment D** extracts s.6 and Schedule 1 of the EA 2010.

93. Therefore, ACCI recommends that a definition of disability in the consolidation bill should be clear and explicit about what types of disabilities are protected and be re-defined as follows. A disability should:

d. Substantially limit one or more major life activities and not be minor or transitory;

e. Could specify that impairments include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder,

bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia;

- f. Should specify that it does not include: pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs (or similar disorders, impairments or illnesses).¹⁷
 - g. Allow regulations to prescribe categories, classes of impairments which is not a “disability” for the purposes of the consolidated bill (ie. where there are emerging “new” disorders which are similar to those exclusions set out above in paragraph (c)).
 - h. Clarify that it is permitted and lawful for an employer to require an employee to undergo a medical examination by a qualified medical practitioner to determine whether the employee is able to perform the inherent requirements of a job or to ascertain whether the employee possesses a health and safety risk to themselves or others before the stage of engagement or during engagement. Whilst the exemptions relating to inherent requirements may already cover this situation, the explanatory materials at the very least should provide an example that such actions would not be considered direct or indirect discrimination.
94. ACCI continues to strongly support employment opportunities for workers who do have an physical or mental impairment and programs which increase awareness and equality in the workplace.
95. Notwithstanding, if one objective of the consolidation exercise is to clarify the legal obligations of employers and to provide a balanced framework, it is important that consideration is given to a re-aligned definition of disability which balances the legitimate rights and interests of all duty holders and allows business to put in place reasonable systems of human resource management.

¹⁷ Only illicit drugs should be part of the exemption. See the Disability Discrimination Amendment Bill 2003 for an example of how to set out the proposed exemption.

3.1.14 Reasonable Adjustments

96. ACCI does not support provisions which would create positive obligations on employers to make reasonable adjustments to address persons with specific attributes. Such a duty is significant in the context of the definition of disability. Before such a concept is extended, it must be assessed to consider unintentional consequences on duty holders.
97. The overwhelming majority of existing discrimination laws do not impose a separate legal duty to make reasonable adjustments. Only the DDA and recently commenced Victorian laws require positive behaviour and these are relatively new and untested provisions. The effects are not known in any meaningful way.
98. In recognition that the Government has only recently introduced the additional and new obligations under the DDA, it should remain limited to disability discrimination under the consolidated bill.

3.1.15 Positive Duties

99. ACCI does not support positive duties for the private sector for the reasons expressed in its submission to the Senate Inquiry into the operation of the SDA.

3.1.16 Vicarious Liability

100. Vicarious liability or derivative liability provisions are significant extensions in attributing legal fault on an entity that did not actually commit the wrongdoing. Whilst the concept may be a longstanding part in some statutes, it is important that employers should only be liable for conduct which the employer could have influenced in some real way and which there is a sufficient nexus to the workplace.
101. It should not extend to unlawful acts by employees or agents which are serious and wilful and which have a limited connection to the workplace or legal working contractual arrangement.
102. In the case of the latter, the legal liability should, as a matter of public policy, rest with the actual wrongdoer. This is particularly in the case of unlawful conduct that occurs outside of the normal work environment and that has a limited connection to the employer or is something that the employer could have not prevented. For example, there have been a number of cases involving sexual harassment and assault which

occurred outside of the work place and in private premises that occur between co-workers, whereby the employer has notwithstanding been found to be vicarious liable.¹⁸ With the advent of social media and online communications, there is a new challenge for employers in ensuring that employees do not engage in unlawful behaviour during or outside the workplace. Moreover, where it does occur, there are restrictions in taking action as a result of the unfair dismissal laws and adverse action provisions of the FW Act.

103. Therefore, ACCI prefers that the tests under the ADA and DDA which require the unlawful act to be committed "*within the scope of [the person's] actual or apparent authority*", rather than the alternative formulation contained in the RDA and SDA of an act to be "*in connection with*" the person's employment or duties as an agent be retained in the consolidated bill. It should also be clarified by specifically stating in the consolidation bill that an employer will not be vicariously liable for discriminatory acts that are committed by employees or agents that are or akin to serious or wilful misconduct.
104. There should be clear circumstances where the reasonable precautions or reasonable steps of an employer is a complete defence to allegations of vicarious liability, particularly in the case of a small to medium sized business.
105. For example, under the FW Act, the employer who is a small business, as defined, is able to rely upon the prescribed Small Business Fair Dismissal Code (SBFDC) which provides a complete defence to an unfair dismissal claim if the Tribunal is satisfied that the employer complied with the Code.¹⁹
106. The development of a code(s) for the purposes of complying with discrimination regulation should be considered.²⁰ The code(s) could cover issues dealing with policies in the workplace, training, education and protocols for preventing and dealing with discrimination (ie. sexual harassment). The code(s) as with the SBFDC should be developed in conjunction with input from industry. This will assist employers in being able to rely upon a set of guidelines.

¹⁸ See *Lee v Smith* [2007] FMCA 59. Where the court found that the Commonwealth (Department of Defence) was vicarious liable and the nexus with the workplace was not broken despite the rape occurring at a co-worker's premises.

¹⁹ See Part 3-2, Division 3, *Fair Work Act 2009*.

²⁰ ACCI was involved in the development of the Commission's Sexual Harassment Code of Practice. Codes of Practices could be called up by the consolidated bill (or regulations) for the purposes of compliance and vicarious liability.

107. Consideration should be given to overseas laws, such as under German legislation, which states that an employer has a duty to take measures necessary to ensure protection against discrimination, which also includes preventative measures.²¹ It is also deemed to be a “*violation of their contractual obligations*” if an employee commits discriminatory²². An employer is taken to fulfil their positive duty where an employer has “*trained his or her employees in an appropriate manner for the purposes of preventing discrimination*”.²³
108. The German laws specify that if employees commit discriminatory acts, the employer “*shall take suitable, necessary and appropriate measures, chosen in a given case, to put a stop to the discrimination; this may include cautioning, moving, relocating or dismissing the employee in question*”.²⁴ An employer is also able to “*take suitable, necessary and appropriate measures, chosen in a given case, to protect the employee in question*”.²⁵
109. The German model of essentially codifying what type of preventing measures an employer can take to satisfy legal obligations (ie. providing training to staff), and what actions an employer can take in response to discrimination occurring in the workplace between co-workers and third parties, could be adapted into a code under the consolidated bill.
110. Reliance on the code could provide an exemption under vicarious liability provisions.

3.1.17 Associate Discrimination

111. ACCI believes that a general concept of associate discrimination is not necessary, as the DP rightly highlights that the FW Act and the ILO discrimination provisions under the AHRC do not cover associates.
112. However, if these provisions remain, only specific and defined prohibitions for certain associates, rather than generic associates, should be retained. Associate discrimination should be confined to existing attributes and should not be extended to other attributes.

²¹ General Act on Equal Treatment of 14th August 2006 (Federal Law Gazette I, page 1897). An official English translation by the German Federal Anti-Discrimination Agency is available here: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile

²² Ibid, § 7 III .

²³ Ibid, § 12 II.

²⁴ Ibid, § 12 III.

²⁵ Ibid, § 12 IV.

113. In the case of the DDA, s.7 should be omitted and s.8 should be retained as the latter deals with the particular types of persons who may be discriminated against on the basis of caring or assisting a person with a disability.
114. The alleged wrongdoer must know that the person is a defined associate of a person who possesses a protected attribute.
115. Section 9 of the DDA should be amended to require a person who does use an assistance animal to have some form of certificate to be able to show duty holders that the animal is accredited. Section 9(2)(c) possess significant issues for a duty holder regarding occupation health and safety of a premises, given that the animal need only be trained and satisfy requirements which may not be objectively determined by reference to a certificate or registration.

3.1.18 Requests for Information

116. Employers should be able to request information from future or existing workers, in order to comply with existing OH&S and legitimate reasons connected to the operation of the business. Any prohibition on allowing employers to request information should not be cast narrowly given the importance for a business to legitimately and reasonable use information for non-discriminatory purposes. The onus should rest on the person alleging that the information was requested for the dominant purpose of discrimination.

3.1.19 Exceptions and Exemptions

117. On a daily basis, the workplace involves countless interpersonal interactions between management, co-workers, customers, clients which are inherently personal in nature. Therefore issues of discrimination can potentially arise on a daily basis. If one was to multiply these interactions across the entire public and private sector, there could be countless instances whereby an individual may have legitimate grounds to pursue litigation for unlawful discriminatory conduct.
118. Whilst recognising that direct and overt discrimination should be sanctioned, there must be appropriate defences and exemptions available to balance the rights and interests of individuals against the compliance burden and risk to businesses.

119. ACCI supports consideration of a general limitations clause as outlined in the DP.²⁶ However, ACCI supports a general limitations clause which would operate in conjunction with a sub-set of specific exemptions and would strongly oppose the removal of the existing inherent requirements exemption or general occupational requirements exemption.
120. A rationalised exemption should apply to all areas of work and for all protected attributes.
121. The exemption should apply to actions which are for a legitimate purpose related to the operational requirements of the business or undertaking (this includes compliance with discrimination legislation and any other federal, state or territory legislation) and for which the requirement is proportionate to fulfil that objective.

3.1.20 Fair Work Act Safety Net Entitlements & Industrial Instrument - Exemption

122. There should be a general exception in employment matters where a an entitlement under a contract of employment relates to matters covered by the FW Act. This would include any condition or matter relating to a modern award, National Employment Standard (NES) or an applicable industrial instrument (enterprise agreement).
123. A definition of safety net contractual entitlement can be drawn from s.12 of the FW Act:

safety net contractual entitlement means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:

- (a) subsection 61(2) (which deals with the National Employment Standards); or
- (b) subsection 139(1) (which deals with modern awards).

124. The consolidated bill could make cross-references to relevant definitions and parts of the FW Act in relation to enterprise agreements.
125. As Fair Work Australia must ensure that modern awards and enterprise agreements do not contain discriminatory matters (see ss.153, 95, 218 FW Act) and the NES is a Commonwealth law that employers must comply with, there should be certainty for employers that they are able

²⁶ Page 37.

to provide enhanced conditions in contracts of employment that meet binding safety net entitlements and enterprise agreement conditions, without being subject to discrimination claims.²⁷

3.1.21 Other Exemptions

126. ACCI supports the retention of existing exemptions, so as to avoid doubt that Parliament has evinced an intention that there should be a change to the existing framework.
127. ACCI also supports consideration of the following exemptions which would apply to all attributes, which are drawn from the *Victorian Equal Opportunity Act 1995* (Vic) prior to being recently amended:
 - a. Section 18 – Exception – political employment.
 - b. Section 20 – Exception – family employment.
 - c. Section 21 – Exception – small businesses.
 - d. Section 23 – Exception – reasonable terms of employment.
 - e. Section 24 – Exception – standards of dress and behaviour.
 - f. Section 25 – Exception – care of children.
 - g. Section 27 – Exception – youth wages.
 - h. Section 33 – Reasonable terms of partnership.
 - i. Section 36 – Exception – reasonable terms of qualifications.
128. ACCI supports consideration of extending existing state/territory law exemptions, for either some or all attributes in the following circumstances:
 - j. The serving of food or drink, dramatic performance/entertainment/artistic/photographic model for reasons of authenticity;
 - k. The delivery of welfare services;

²⁷ To ensure consistency in application, the exemption should apply to all employers as if they were covered by the FW Act as this would include unincorporated employers in Western Australia who are not covered by the FW Act but who are also required to meet similar minimum safety net conditions.

- l. If the person is not able to respond adequately to an emergency situation that should be reasonably anticipated. (ACCI believes that this should be extended to deal with situations where it was necessary to discriminate in order to prevent the immediate health or safety of persons or destruction of property).
129. An employer must not breach or contravene a term of a modern award, NES or enterprise agreement. Penalties range from \$33,000 for body corporates to \$6,600 for individuals, in addition to compensation and other orders that the court may make. It is therefore important that to avoid any uncertainty for employers in their obligations under industrial relations laws, that employers are exempt from discrimination if they are complying with the relevant legal obligations contained in federal, state or territory laws, such as the FW Act (see below).

3.1.22 Special Measures / Temporary Exemptions

130. ACCI believes there is merit in framing a broad based special measures provision that does not require authorisation from a third party. It should not require a duty holder to substantiate that it was necessary, but the action was to promote substantive equality. Guidance could be produced by the Commission working in conjunction with employers and industry.
131. If special measures are application based, there should be added flexibility in the consolidated bill which would allow the Government by regulation to prescribe other exemptions/exceptions. This would be a disallowable instrument and therefore reviewable through the normal Parliamentary processes. The benefit of being able to prescribe additional exemptions is that it is able to deal with emerging issues quickly and responsively.
132. The relevant Minister should also be empowered to make a legally binding determination in exceptional circumstances, particularly if this relates to issues of health and safety of the community or parts thereof.

3.1.23 Complaints and Compliance

133. The DP presents a number of methods for enhancing compliance with discrimination law from a business point of view, and outlines a number of models.

134. ACCI believes that models such as co-regulation do have merit within the framework of anti-discrimination laws. Moreover, there should be consideration of how standards (internally developed or industry developed) can be utilised to enhance compliance.
135. The consolidated bill should allow for documents, such as standards or policies, or codes to be recognised which has the effect of limiting legal liability for unlawful discrimination (for example, reliance on a sexual harassment action plan would limit liability or would reduce the quantum of damages to be paid). This would be a positive motivator for businesses to ensure that they have taken steps to prevent or minimise unlawful behaviours that is within its reasonable control.

3.1.24 Conciliation

136. According to recent independent research commissioned for Fair Work Australia, more than 90% of conciliations are conducted by telephone conference and almost all unfair dismissal applications proceeded to conciliation.²⁸ While this high degree of early settlement could be interpreted as a positive outcome in isolation, 76% of employer participants reported that it was the “cost, time, inconvenience or stress of further legal proceedings” that was the significant factor in their decision to settle the matter at conciliation rather than proceeding to hearing.²⁹ This issue remains a major concern to employers who feel that the unfair dismissal system supports the payout of unmeritorious claims in order to avoid further legal costs.
137. While the justice system plays an integral role in enforcing private and public legal controversies or contraventions of the law, the reality is that most businesses have little or no experience with our adversarial judicial system and no desire for that to change.³⁰
138. It is critical that any changes to the existing framework of compulsory conciliation prior to judicial proceedings do not act to encourage a net increase in new discrimination claims, or result in more settlements out of court which have little merit.

²⁸ TNS Social Research, *Fair Work Australia Unfair Dismissal Conciliation Research Survey Results*, November 2010, p 2, <http://www.fwa.gov.au/documents/dismissals/report.pdf>, viewed 1 June 2011.

²⁹ *Ibid* p 51. Only 19% of respondents felt that this factor had “a weak or no influence at all” on the decision to settle at conciliation.

³⁰ *Strategic Framework*, p 2: “People have, and will continue to have, disputes. Mostly these are resolved without resorting to the machinery of formal justice (such as lawyers, courts or dispute resolution services)”, and see also p 5: “Courts are not the primary mechanism through which people seek to resolve disputes or potential disputes”.

139. Feedback to ACCI through the member network suggests that many discrimination claims are settled out of court for similar reasons to those found in the unfair dismissal study.
140. ACCI prefers a two-tiered approach to complaints which involves conciliation in the first instance before being able to commence judicial proceedings. This is conditional on a new process which would require a certificate to be issued by the Commission following an unsuccessful conciliation, which states whether the claim has any reasonable prospects of success. The certificate would then be considered by the court when issues of costs are to be determined. It would provide an onus on the Commission to not only attempt to settle the matter, but if the matter cannot be settled at conciliation, provide some indication as to the strength of the complainant's application and hopefully reduce the number of speculative or frivolous claims.³¹
141. The conciliation process should be compulsory, however, there should not be any powers of compulsion (either for persons to appear or for documents). If a certificate process was not introduced, ACCI's preliminary view is that a conciliation before the Commission should not be compulsory and a matter may be elected to proceed before the courts upon the election of either the plaintiff or defendant.

3.1.25 Representative Actions

142. ACCI does not support amending the existing legislation to allow representative actions (or similar actions) and believes that the current framework strikes an appropriate balance for all parties. If representative organisations are able to commence proceedings before the courts, this may lead to a culture of interest based litigation, whereby organisations are not acting in the interests of the individual but for a wider group and possibly for social-political purposes. Once again, business would be forced to fund its own defence in such proceedings and may lead to settlements out of court to avoid costs, notwithstanding the claim may be frivolous, vexatious or without merit.

3.1.26 Costs

143. ACCI supports the historical approach of costs following the event, with the court retaining wide discretion in relation to how they award costs. The rule of costs is not only fair for both parties to litigation, but it also

³¹ This occurred under repealed provisions of the *Workplace Relations Act 1996* for matters involving unfair dismissals.

sends a signal that unmeritorious, frivolous or vexatious claims should not be pursued.

144. The requirement for the Commission to issue a certificate as outlined by ACCI above would be important in this regard.

3.1.27 Remedies

145. ACCI supports a reformulation of available remedies where a complainant is successful.
146. Importantly, there should be consistent limits on the quantum of compensation available to reflect the community's expectations of what type of remedies are appropriate for discrimination. The Parliament should establish the boundaries as to what are reasonable remedies, including compensation or damages available.
147. Therefore, there should be a reformulation of the remedies that may be available to an individual where they have successfully established discrimination which takes into account the level fault and the actual damage suffered. ACCI recommends that a new regime of remedies should take into account the following:
 - i. The court should retain ultimate discretion to not make an order, even if the plaintiff has succeeded in their cause of action. This is because the damage suffered may be nominal and there may have been attempts by the defendant to make reparations which have been rejected as adequate by the complainant.
 - j. Non-compensatory orders should be considered first by the courts (ie. an apology or undertaking for employer to provide training in the workplace). If the court finds that these non-compensatory remedies are not appropriate in all of the circumstances, then monetary damages/compensation should then be considered.
 - k. The compensation available to an individual should be capped.
 - l. The amount that could be ordered against an individual or body corporate should be limited to a reasonable quantum to reflect the community's view of what are appropriate remedies. The cap should be aligned with existing laws. For example,

under NSW³², NT³³ and WA³⁴ laws, there is a cap on compensation of \$100,000, \$60,000 and \$40,000 respectively. Under unfair dismissal provisions, compensation is capped under s.392 of the FW Act³⁵. Pecuniary penalties under analogous discrimination provisions of the FW Act are capped at \$33,000 for body corporates and \$6,600 for individuals. Compensation limits could also be based on the number of employees employed by the business at the time of the discrimination.³⁶ Alternatively, a tiered approach could see damages above the nominal maximum only be considered if the discriminatory conduct is egregious or malicious and up to a an actual maximum quantum;

- m. To recognise the fact that the employer was not the primary wrongdoer in vicarious liability cases, compensation and orders against an employer should also reflect the level of fault/liability. Where a court finds against an individual or body corporate under vicarious liability provisions, the compensation should be a reduced percentage of the maximum that reflects the level of fault (ie. by 2/3rds);
 - n. Compensation should be tiered depending on whether the employer is an individual or body corporate (ie. a higher quantum for a body corporate than an individual similar to the FW Act).
148. Compensation should be available to be paid in instalments by application and if the court thinks it is reasonable in the circumstances.

³² Section 108(2)(a).

³³ Section 88(1)(b).

³⁴ Section 127(b)(i).

³⁵ Capped at \$59,050 as of 1 July 2011.

³⁶ According to the US Equal Employment Opportunity there are limits on the amount of compensatory and punitive damages a person can recover for discrimination claims. These limits vary depending on the size of the employer:

- For employers with 15-100 employees, the limit is \$50,000.
- For employers with 101-200 employees, the limit is \$100,000.
- For employers with 201-500 employees, the limit is \$200,000.
- For employers with more than 500 employees, the limit is \$300,000.

<http://www.eeoc.gov/employees/remedies.cfm>

3.1.28 Role of the Australian Human Rights Commission

149. ACCI believes that the main work of the Commission should be focused on education and awareness and working in conjunction with duty holders and industry. The Commission should work closely with employers and industry to develop appropriate and relevant tools to assist business to comply with all discrimination laws. This means a consistent set of guidelines which could apply to both federal and state/territory discrimination laws.
150. As a result of the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*, ACCI recommends that inquiries by the Commission should only be initiated following a written request or reference by the relevant Minister.
151. Section 7 of recently commenced *Human Rights (Parliamentary Scrutiny) Act 2011*, provides that the functions of the Parliamentary Joint Committee on Human Rights will more comprehensively take over the historical role of the Commission. Relevant provisions provide as follows:

7 Functions of the Committee

The Committee has the following functions:

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

152. The list of "human rights" are outlined in s.3 as follows:

3 Definitions

- (1) In this Act:

human rights means the rights and freedoms recognised or declared by the following international instruments:

(a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);

(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

153. Given that the Parliament has determined that it will conduct inquiries traditionally commenced by the Commission, the Commission would be better placed to provide expert submissions to the new Joint Committee as required.
154. It is arguable that the FW Act implements Australia's obligations under C111 Discrimination (Employment and Occupation) Convention, 1958 and that the existing functions for the Commission in respect to C111 are no longer required. ACCI would suggest that further consideration be given to how duplication can be removed.
155. ACCI strongly opposes the Commission be empowered to conduct enforcement or investigations into allegations of unlawful discrimination. This would be incompatible with the independent functions of continuing to conduct compulsory conciliations.

3.1.29 Exemptions for Direct Compliance Cth and State/Territory Laws

156. ACCI recommends that there be a unified exemption for actions done in order to comply with any other laws (including federal, state or territory and the consolidated anti-discrimination laws), regulation, or order of the court/tribunal, similar to the NSW legislation formulation.

157. For example, it would exempt employers from actions which are bona fide attempts at complying with OH&S laws which carry onerous criminal liability and would cover situations where the employer is complying with industrial relations laws, including the FW Act as discussed above.
158. A broad based exemption based on compliance with other laws would have the benefit of not requiring hundreds of potential laws to be prescribed.

3.1.30 Consolidated Bill to “Cover the Field”

159. ACCI believes that the consolidated bill should “cover the field” in terms of discrimination in all employment situations at the federal level. This would mean that the allegations of discrimination which are covered by the consolidated bill would not be able to be pursued under the FW Act.
160. The discrimination provisions of the FW Act are a new and significant regulatory duplication which causes significant resources for businesses to ensure compliance with two different regulatory regimes at the federal level. There is no policy basis for such duplication.
161. To be clear, ACCI opposes the unbalanced discrimination provisions in the FW Act which reverses the onus on proof on an employer. The new provisions replaced unlawful termination provisions that implemented relevant ILO conventions and are manifestly unfair to employers. ACCI does not support the FW Act discrimination provisions in its current form and does not support the consolidated bill to align with the provisions of the FW Act. The leading discrimination laws in Australia are the federal discrimination statutes, not the FW Act.
162. Submissions in response to the DP may suggest that there are significant gaps in coverage, however, State and Territory discrimination laws cover those attributes which are not covered by the Commonwealth discrimination legislation and this means that there are no so-called gaps in the existing framework. Rather and on the contrary, there is significant duplication of legal duties and duplication of institutional arrangements, with the Federal Government having to fund the FWO, the FWA and the Commission.

163. ACCI believes that the consolidation exercise will be largely irrelevant for employers across Australia if the discrimination provisions remain in the FW Act and regulatory overlap at the federal level remains. The end goal should be one set of federal laws that relate to discrimination and then a further progression of a nationally consistent set of discrimination laws, noting of course industry must be satisfied that the content of any national discrimination framework must be reasonably balanced.
164. At a minimum, the consolidated bill should ensure that where an attribute is covered by the FW Act, then no action for adverse action based on discrimination should be available for a complainant.
165. The FW Act should be amended as part of the consequential amendments to ensure that a complainant cannot make any applications that relates to discrimination in terms of unfair dismissal and adverse action, if that is capable of being covered by the consolidated bill.

4. CONCLUSION

166. Further to the recommendations and principles articulated by ACCI in this submission, ACCI will respond to the exposure draft in more detail.
167. To reiterate, ACCI supports a co-operative approach between federal, state and territory governments, in conjunction with industry, to work towards a single national and consistent framework of anti-discrimination laws. These laws should involve a clear set of obligations and duties for all duty holders, including employers and employees. The content of the duties remains paramount and business support of a single national framework is conditional upon how balanced those obligations are for employers.
168. The announcement of a consolidated national discrimination law framework was made by then relevant Ministers in 2010 through the following joint media release, which indicated, inter alia, that:³⁷

The project, to be delivered through a Better Regulation Ministerial Partnership, will also provide the basis for the development of harmonised State and Territory anti-discrimination laws which is currently being progressed through the Standing Committee of Attorneys-General (SCAG).

“Better Regulation Ministerial Partnerships form a key part of the Government's deregulation agenda and ensure a disciplined and coordinated approach to delivering regulatory reform across government.

“Consolidating all Commonwealth anti-discrimination legislation into one Act will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business.”

169. The business community looks forward to considering the detail of an exposure draft consolidated bill which meets the expectations of the business community.

³⁷ Joint Media Release, Hon Robert McClelland MP and Hon Lindsay Tanner MP, Reform of Anti-Discrimination Legislation, 21 April 2010.

5. ACCI MEMBERS

ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY

12A THESIGER COURT
DEAKIN ACT 2600

T: 02 6283 5200
F: 02 6282 2439
E: chamber@actchamber.com.au
W: www.actchamber.com.au

AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES

PO BOX A233
SYDNEY SOUTH NSW 1235

T: 02 9264 2000
F: 02 9261 1968
E: afei@afei.org.au
W: www.afei.org.au

BUSINESS SA

ENTERPRISE HOUSE
136 GREENHILL ROAD
UNLEY SA 5061

T: 08 8300 0000
F: 08 8300 0001
E: enquiries@business-sa.com
W: www.business-sa.com

CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA

PO BOX 6209, HAY STREET
EAST
EAST PERTH WA 6892

T: 08 9365 7555
F: 08 9365 7550
E: info@cciwa.com
W: www.cciwa.com

CHAMBER OF COMMERCE NORTHERN TERRITORY

CONFEDERATION HOUSE
SUITE 1, 2 SHEPHERD
STREET
DARWIN NT 0800

T: 08 8982 8100
F: 08 8981 1405
E:
darwin@chambernt.com.au
W: www.chambernt.com.au

NEW SOUTH WALES BUSINESS CHAMBER

LEVEL 15, 140 ARTHUR
STREET
NORTH SYDNEY NSW 2060

T: 132696
F: 1300 655 277
W: www.nswbc.com.au

VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY

GPO BOX 4352
MELBOURNE VIC 3001

T: 03 8662 5333
F: 03 8662 5462
E: vecci@vecci.org.au
W: www.vecci.org.au

ACCORD

SUITE 4.02, LEVEL 4, 22-36
MOUNTAIN STREET
ULTIMO NSW 2007

T: 02 9281 2322
F: 02 9281 0366
E: bcapanna@accord.asn.au
W: www.accord.asn.au

AGRIBUSINESS EMPLOYERS' FEDERATION

GPO BOX 2883
ADELAIDE SA 5001

T: 08 8212 0585
F: 08 8212 0311
E: aef@aef.net.au
W: www.aef.net.au

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Commonwealth Anti-Discrimination Laws

**CHAMBER OF COMMERCE &
INDUSTRY QUEENSLAND**

INDUSTRY HOUSE
375 WICKHAM TERRACE
BRISBANE QLD 4000

T: 07 3842 2244
F: 07 3832 3195
E: info@cciq.com.au
W: www.cciq.com.au

AUSTRALIAN BEVERAGES COUNCIL

SUITE 4, LEVEL 1
6-8 CREWE PLACE
ROSEBERRY NSW 2018

T: 02 9662 2844
F: 02 9662 2899
E: info@australianbeverages.org
W: www.australianbeverages.org

**AUSTRALIAN FOOD & GROCERY
COUNCIL**

LEVEL 2
2 BRISBANE AVENUE
BARTON ACT 2600

T: 02 6273 1466
F: 02 6273 1477
E: info@afgc.org.au
W: www.afgc.org.au

**TASMANIAN CHAMBER OF
COMMERCE & INDUSTRY**

GPO BOX 793
HOBART TAS 7001

T: 03 6236 3600
F: 03 6231 1278
E: admin@tcci.com.au
W: www.tcci.com.au

**AUSTRALIAN MINES &
METALS ASSOCIATION**

LEVEL 10
607 BOURKE STREET
MELBOURNE VIC 3000

T: 03 9614 4777
F: 03 9614 3970
E: vicamma@amma.org.au
W: www.amma.org.au

**AUSTRALIAN PAINT
MANUFACTURERS'
FEDERATION**

SUITE 1201, LEVEL 12
275 ALFRED STREET
NORTH SYDNEY NSW 2060

T: 02 9922 3955
F: 02 9929 9743
E: office@apmf.asn.au
W: www.apmf.asn.au

**AIR CONDITIONING &
MECHANICAL CONTRACTORS'
ASSOCIATION**

30 CROMWELL STREET
BURWOOD VIC 3125

T: 03 9888 8266
F: 03 9888 8459
E: deynon@amca.com.au
W: www.amca.com.au/vic

CONSULT AUSTRALIA

LEVEL 6, 50 CLARENCE STREET
SYDNEY NSW 2000

T: 02 9922 4711
F: 02 9957 2484
E: acea@acea.com.au
W: www.consultaustralia.com.au

**LIVE PERFORMANCE
AUSTRALIA**

LEVEL 1
15-17 QUEEN STREET
MELBOURNE VIC 3000

T: 03 9614 1111
F: 03 9614 1166
E: info@liveperformance.com.au
W: www.liveperformance.com.au

**AUSTRALIAN INTERNATIONAL
AIRLINES OPERATIONS GROUP**

C/- QANTAS AIRWAYS
QANTAS CENTRE
QCD1, 203 COWARD STREET
MASCOT NSW 2020

T: 02 9691 3636
F: 02 9691 2065

**AUSTRALIAN MADE, AUSTRALIAN
GROWN CAMPAIGN**

SUITE 105, 161 PARK STREET
SOUTH MELBOURNE VIC 3205

T: 03 9686 1500
F: 03 9686 1600
E: ausmade@australianmade.com.au
W: www.australianmade.com.au

**NATIONAL BAKING INDUSTRY
ASSOCIATION**

BREAD HOUSE, 49 GREGORY TERRACE
SPRING HILL QLD 4000

T: 1300 557 022
E: nbia@nbia.org.au
W: www.nbia.org.au

**NATIONAL ELECTRICAL &
COMMUNICATIONS ASSOCIATION**

LEVEL 4
30 ATCHISON STREET
ST LEONARDS NSW 2065

T: 02 9439 8523

**AUSTRALIAN RETAILERS'
ASSOCIATION**

LEVEL 10
136 EXHIBITION STREET
MELBOURNE VIC 3000

T: 1300 368 041
F: 03 8660 3399
E: info@retail.org.au
W: www.ara.com.au

**BUS INDUSTRY
CONFEDERATION**

SUITE 6
6 LONSDALE STREET
BRADDON ACT 2612

T: 02 6247 5990
F: 02 6230 6898
E: isuru@bic.asn.au
W: www.bic.asn.au

**OIL INDUSTRY
INDUSTRIAL ASSOCIATION**

C/- SHELL AUSTRALIA
GPO BOX 872K
MELBOURNE VIC 3001

T: 03 9666 5444
F: 03 9666 5008

**PHARMACY GUILD OF
AUSTRALIA**

PO BOX 7036
CANNBERRA BC ACT 2610

T: 02 6270 1888
F: 02 6270 1800

MASTER BUILDERS AUSTRALIA

LEVEL 1, 16 BENTHAM STREET
YARRALUMLA ACT 2600

T: 02 6202 8888
F: 02 6202 8877
E: enquiries@masterbuilders.com.au
W: www.masterbuilders.com.au

**MASTER PLUMBERS' &
MECHANICAL SERVICES
ASSOCIATION OF AUSTRALIA
(THE)**

525 KING STREET
WEST MELBOURNE VIC 3003

T: 03 9329 9622
F: 03 9329 5060
E: info@mpmsaa.org.au
W: www.plumber.com.au

**RESTAURANT & CATERING
AUSTRALIA**

SUITE 17
401 PACIFIC HIGHWAY
ARTARMON NSW 2604

T: 02 9966 0055
F: 02 9966 9915
E: restncat@restaurantcater.asn.au
W: www.restaurantcater.asn.au

**HOUSING INDUSTRY
ASSOCIATION**

79 CONSTITUTION AVE
CAMPBELL ACT 2612

T: (02) 6245 1300
F: (02) 6245 1444



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Commonwealth Anti-Discrimination Laws

F: 02 9439 8525
E: necanat@neca.asn.au
W:www.neca.asn.au

**NATIONAL FIRE INDUSTRY
ASSOCIATION**

PO BOX 6825
ST KILDA CENTRAL VIC 8008

T: 03 9865 8611
F: 03 9865 8615
W:www.nfia.com.au

NATIONAL RETAIL ASSOCIATION

PO BOX 91
FORTITUDE VALLEY QLD 4006

T: 07 3251 3000
F: 07 3251 3030
E:info@nationalretailassociation.com.au
W:www.nationalretailassociation.com.au

AUSTRALIAN HOTELS ASSOCIATION

24 BRISBANE AVENUE
BARTON ACT 2600

T: 02 6273 4007
F: 02 6273 4011
E: aha@aha.org.au
W: www.aha.org.au

E: guild.nat@guild.org.au
W:www.guild.org.au

**PLASTICS & CHEMICALS
INDUSTRIES ASSOCIATION**

LEVEL 1, 651 VICTORIA
STREET
ABBOTSFORD VIC 3067

T: 03 9429 0670
F: 03 9429 0690
E: info@pacia.org.au
W:www.pacia.org.au

**PRINTING INDUSTRIES
ASSOCIATION
OF AUSTRALIA**

25 SOUTH PARADE
AUBURN NSW 2144

T: 02 8789 7300
F: 02 8789 7387
E: info@printnet.com.au
W:www.printnet.com.au

W: www.hia.asn.au

**VICTORIAN AUTOMOBILE
CHAMBER OF COMMERCE**

7TH FLOOR
464 ST KILDA ROAD
MELBOURNE VIC 3004

T: 03 9829 1111
F: 03 9820 3401
E: vacc@vacc.asn.au
W:www.vacc.com.au

**AUSTRALIAN DENTAL
INDUSTRY ASSOCIATION**

LEVEL 5, 757 ELIZABETH STREET
ZETLAND NSW 2017

T: 1300 943 094 OR 02 9319 5631
F: 02 9319 5381
E: adia@adia.org.au
W: www.adia.org.au