

**SENATE LEGAL &
CONSTITUTIONAL
AFFAIRS LEGISLATION
COMMITTEE**

**Inquiry into the Human Rights
(Parliamentary Scrutiny) Bill
2010**

ACCI SUBMISSION

July 2010

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1. INTRODUCTION

1. ACCI welcomes the opportunity to provide this written submission into the Committee's inquiry of the *Human Rights (Parliamentary Scrutiny) Bill 2010* (the primary bill) and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* (consequential bill).
2. This submission is made without prejudice to ACCI or ACCI members' further consideration of these matters.

1.1 NATIONAL HUMAN RIGHTS CONSULTATION

3. ACCI was one of the leading business organisations that participated in the National Human Rights Consultation (NHRC) in June 2009. A copy of ACCI's submission is attached for the Committee's information.
4. ACCI was well placed to make a constructive and considered contribution to the debate on human rights, through its extensive experience in international affairs.
5. ACCI Chief Executive, Mr Peter Anderson, is an elected member of the International Labour Organisation's (ILO) Governing Body, representing Australia and Asia-Pacific employers in the world forum. ACCI has participated in the formation, debate and ratification of many important international instruments, as well as having significant experience in scrutinising conventions/recommendations before specialised ILO committees. ACCI is recognised as the most representative organisation of employers in Australia by both the ILO and the International Organisation of Employers (IOE).
6. ACCI also actively represents employers on the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the Organisation for Economic Co-operation and Development (OECD), the Confederation of Asia-Pacific Chambers of Commerce and Industry (CACCI), and the Confederation of Asia-Pacific Employers (CAPE).
7. This well-developed and long standing international representation experience is important, given that the national debate on human rights appeared to focus on human rights based international instruments (in the form of various conventions, treaties, protocols and declarations) and how they may or may not be adequately addressed in domestic law or practice.

8. ACCI strongly supports the principles underpinning human rights based legislation and international instruments, many of which Australia is a signatory party. However, ACCI believes that only Parliament should implement international obligations into domestic law and practice according to Australia's specific circumstances. The alternative should be consideration of constitutional amendments by way of a national referendum which will ultimately reflect the will of the Australian people on such issues.
9. A fundamental principle of Australian law is that ratification of an international instrument by the Executive Government does not automatically become part of domestic law. Parliament must give effect to international obligations through further legislative action. Despite assertions to the contrary, the fact that, constitutionally, Australia must implement broadly constructed instruments, according to Australia's cultural, socio-political and economic circumstances, is a crucial safety-valve that protects the integrity of our Parliamentary sovereignty.
10. Business and industry therefore did not support proposals which would include a national Charter of Human Rights (or any other similar statutory scheme such as a Human Rights Act). ACCI also strongly opposed proposals which would explicitly allow courts, tribunals or decision makers to interpret domestic law by reference to general "human rights" outlined in a statutory Charter, international instruments (binding or non-binding) or international jurisprudence. This would ultimately lead to a situation whereby the original intention of Parliament could be brought into doubt and threaten the sovereignty of Parliament which is a fundamental cornerstone in our federal system of governance.
11. As ACCI's submission to the NHRC inquiry emphasised, the introduction of a Charter or statutory interpretation principles would create uncertainty for judicial decision makers, litigants, and their representatives. Predictability of legal obligations remains vital to the private sector.
12. However, ACCI did not have an in-principle objection to proposals which would consider existing parliamentary committee processes in the context of considering human rights issues, stating:¹

... Business would not have an in-principle objection to proposals concerning parliamentary scrutiny of legislation. This is consistent with ACCI's primary belief that Parliament is best placed to consider and make laws with respect

¹ ACCI submission to the National Human Rights Consultation, p.6.

to human rights issues. It has the capacity through various committees and transparent processes to scrutinise legislation through a human rights prism, in addition to any other policy prisms that it considers appropriate.

13. And further:²

Whilst ACCI believes current Parliamentary oversight mechanisms do afford a reasonable opportunity to consider human rights based issues, ACCI would support the inquiry considering mechanisms within the current Parliamentary framework. This may be achieved by reviewing current House and Senate Committees to ensure that they remain relevant and can adequately consider human rights based issues. ACCI would expect an opportunity to provide further input and feedback on the detail of such proposals to ensure that this does not have unintended consequences.

1.2 AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

14. ACCI therefore welcomed the Government's "*Australian Human Rights Framework*" (the Framework) and its decision not to introduce a Charter or Human Rights Act.

15. An extract from ACCI's media statement of 21 April following the Government's announcement is set out below:³

BUSINESS WELCOMES BILL OF RIGHTS DECISION

Statement by Mr Peter Anderson, Chief Executive

The Australian Chamber of Commerce and Industry (ACCI), Australia's largest and most representative business organisation, has welcomed today's announcement by the Federal Attorney-General of a suite of practical measures to promote and protect human rights and to not pursue a national Charter or Bill of Rights.

"Australian industry and business organisations have a strong commitment to working with governments and the community to uphold human rights domestically and abroad. Today's decision is well balanced and targets our human rights activities towards areas where a meaningful difference can be made, and away from the legal ambiguities and divisiveness that would have accompanied a Charter or Bill of Rights."

"A legislative Charter or Bill could have also led to counterproductive or unintended consequences for industry and citizens going about their lawful business and thus impinged on rights that are currently not in contest."

Throughout the Human Rights Review process ACCI concluded that no compelling case was made as to why Australia needed additional human

² Ibid, p.26.

³ http://www.acci.asn.au/text_files/media_releases/2010/051-10.pdf

rights bodies or laws, or how parliament as an institution was unable to deal with alleged human rights shortcomings.

“Australia’s robust system of parliamentary democracy and existing courts remain the most appropriate mechanisms to consider human rights issues.”

“Business requires legal certainty to meet obligations to employees, customers and the broader community. That certainty is compromised by Charters or Bills of Rights open to myriad interpretations and appeals.”

16. A number of these initiatives, including the consideration of Parliamentary oversight mechanisms with respect to human rights, and funding for education initiatives were recommended by ACCI in its submission to the NHRC inquiry as alternatives to a Charter.
17. ACCI will over the coming months continue to work constructively with the Government on a number of these initiatives, including the Government’s proposal to combine federal anti-discrimination laws into a single anti-discrimination Act.

2. PROPOSED BILLS

18. The primary and consequential bills subject to this inquiry appear to be founded on the principle of *“improving human rights protections, including greater parliamentary scrutiny”* which was outlined by the Attorney-General, Hon Robert McClelland MP in the Framework policy document.⁴
19. Given the choice between a Charter and the proposed measures, ACCI does not oppose the bills. However, we do raise a number of important issues in relation to the proposed Parliamentary Joint Committee on Human Rights (JCHR) (Part 2 of the primary bill) and the proposal for all new bills to be accompanied by a *“statement of compatibility”* (Part 3 of the primary bill).
20. The primary bill is right to focus only on UN conventions which Australia has ratified. ACCI does not express a view as to whether the proposed UN conventions are appropriate.
21. There are a number of reasons why the Executive Government of the day ratifies a treaty or instrument, and it is important that statements of compatibility reflect this aspect of international law making.
22. Statements of compatibility must be considered by reference to the particular context and time when the Executive ratified the particular convention. This is because domestic and international pronouncements, decisions and opinions on conventions ratified by Australia vary significantly prior to, during and after ratification. The issue for business is fundamentally one of interpretation (including the source, weight and authority attached to that interpretation), rather than the text of generally expressed human rights contained in treaty instruments. Interpretations of international laws are generally subject to controversy and contention.
23. This is why business has previously expressed its concern at the prospect of new or existing legislation being viewed within a *“human rights”* prism, coloured by various interpretations as determined by academics, jurists, international institutions, commissions, councils, committees, tribunals, courts and other judicial or quasi-judicial bodies. These third parties, notwithstanding their merits or virtues, are not part of our federal Parliamentary democracy. Whilst they can assist and inform a policy debate

⁴ Attorney-General Hon Robert McClelland MP, Media Release, *Australia’s Human Rights Framework*, 21 April 2010.

to a certain extent, they are no substitute for the deliberate will and intention as expressed by our elected Parliamentarians when it creates new laws or modifies existing laws.

24. All treaties are generally tabled in Parliament with a "*National Interest Analysis*", which notes the reasons why Australia should become a party to a treaty. This can include canvassing issues such as: foreseeable economic, environmental, social and cultural effects; financial cost to Australia; and how it will be implemented. Treaties which affect business or restrict competition are also required to be tabled with a Regulation Impact Statement. The Joint Standing Committee on Treaties (JSCoT) also plays an important role in scrutinising treaty instruments.
25. Considerations, apart from statements of compatibility, are also cogent in the context of whether a bill is compatible with a prescribed UN convention. An unintended consequence to clause 8 is the possibility that a court, tribunal or decision maker may unnecessarily attach too much weight to a statement of compatibility (regardless of whether a provision is ambiguous or unclear as is generally required by the *Acts Interpretation Act 1901*). It will be the reasons as articulated by the relevant Minister (through Parliamentary drafters and officers of the relevant Department) contained in the statement which will be the focus of any debate.
26. It is unclear as to what will actually be contained in a statement of compatibility, what sources of law will be relied upon, and more significantly, what impact it will have on the interpretation of legislation in future.
27. To reiterate, ACCI believes that statements of compatibility should be drafted within a narrow context (ie. by reference to the UN convention at the time it was ratified by Australia and taking into account any relevant National Interest Analysis or other document). Any expression of a human right within our domestic law must be done in a clear, transparent and democratic manner, and must reflect the sovereignty of our Parliament.

2.1 PARLIAMENTARY COMMITTEES

28. The requirement for a Member of Parliament to prepare a statement of compatibility for each new bill (or disallowable instrument) means that human rights' principles will be given prominence to the Parliamentary and community debate on proposed laws.

29. Whilst no one can doubt that human rights issues are important considerations, there are a range of other factors that must be considered, many of which may accord equal or higher weight, depending on the subject matter of the legislation. This includes considering how new legislation will impact on individuals, business, particular sectors of industry, the national economy, the environment, and on our international trading partners.
30. Specialist and dedicated Parliamentary Committees should continue to deal with legislation in a manner that examines not only human rights (as defined), but particular aspects of legislation as it affects various stakeholders. In other words, specialist Committees should continue to deal with specialist legislation where members of that Committee are familiar and have developed expertise in particular areas of public policy.
31. Specialised Committees should not be precluded from dealing with legislative proposals which may impact upon or deal with those human rights as set out in proposed clause 3 of the primary bill, as a result of creating a new JCHR.
32. Furthermore, just because a strong element or theme of a bill may impact on human rights - conceivably, nearly all future bills will do so given the broad range of enumerated rights contained in the UN conventions listed at clause 3 - does not mean that all future bills should necessarily be scrutinised by the JCHR in each and every case.

2.2 SENATE SCRUTINY OF BILLS COMMITTEE

33. It will ultimately be for Parliament to determine how the proposed JCHR will operate and function within the context of other select and standing Committees.
34. Whilst not directly relevant to the terms of reference for this inquiry, ACCI believes there is merit in the continuation of the Senate Scrutiny of Bills Committee (and the related Standing Committee on Regulations and Ordinances) which could arguably (as others have also advocated) perform the functions of the proposed JCHR. ACCI notes that this may require minor amendments to Standing Orders 23 and 24 as appropriate.

ABOUT ACCI – LEADING AUSTRALIAN BUSINESS

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

Our motto is "Leading Australian Business."

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

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

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

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

Our Activities

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

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

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.

- Business representation on a range of statutory and business boards, committees and other fora.
- Representing business in national and international fora including Fair Work Australia, Australian Industrial Relations Commission, Safe Work Australia, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.
- Research and policy development on issues concerning Australian business.
- The publication of leading business surveys and other information products.
- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

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

- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.
- Issue papers commenting on business' views of contemporary policy issues.
- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.
- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.
- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.
- The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.
- Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.
- Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.
- Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.
- Education and training reports and discussion papers including ACCI's Skills for a Nation 2007-2017 Blueprint.
- The ACCI Annual Report providing a summary of major activities and achievements for the previous year.
- The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.
- The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

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

ACCI MEMBERS

ACT and Region Chamber of Commerce & Industry

12A Thesiger Court
DEAKIN ACT 2600
Telephone: 02 6283 5200
Facsimile: 02 6282 5045
Website: www.actchamber.com.au

Australian Federation of Employers and Industries

PO Box A233
SYDNEY SOUTH NSW 1235
Telephone: 02 9264 2000
Facsimile: 02 9264 5699
Website: www.afei.org.au

Business SA

Enterprise House
136 Greenhill Road
UNLEY SA 5061
Telephone: 08 8300 0000
Facsimile: 08 8300 0001
Website: www.business-sa.com

Chamber of Commerce & Industry Western Australia

PO Box 6209 Hay Street East
EAST PERTH WA 6892
Telephone: 08 9365 7555
Facsimile: 08 9365 7550
Website: www.cciwa.com

Chamber of Commerce Northern Territory

Confederation House
Suite 1, 2 Shepherd Street
DARWIN NT 0800
Telephone: 08 8982 8100
Facsimile: 08 8981 1405
Website: www.chambernt.com.au

Chamber of Commerce and Industry Queensland

Industry House
375 Wickham Terrace
BRISBANE QLD 4000
Telephone: 07 3842 2244
Facsimile: 07 3832 3195
Website: www.cciq.com.au

New South Wales Business Chamber

Level 15, 140 Arthur Street
NORTH SYDNEY NSW 2060
Telephone: 132696
Facsimile: 1300 655 277
Website: www.nswbusinesschamber.com.au

Tasmanian Chamber of Commerce and Industry Ltd

GPO Box 793

HOBART TAS 7001

Telephone: 03 6236 3600

Facsimile: 03 6231 1278

Website: www.tcci.com.au

Victorian Employers' Chamber of Commerce & Industry

GPO Box 4352

MELBOURNE VIC 3001

Telephone: 03 8662 5333

Facsimile: 03 8662 5367

Website: www.vecci.org.au

ACCORD

Fusion Building, Suite 4.02,
Level 4, 22-36 Mountain Street
ULTIMO NSW 2007
Telephone: 02 9281 2322
Facsimile: 02 9281 0366
Website: www.accord.asn.au

Agribusiness Employers' Federation

GPO Box 2883
ADELAIDE SA 5001
Telephone: 08 8212 0585
Facsimile: 08 8212 0311
Website: www.aef.net.au

Air Conditioning and Mechanical Contractors' Association

30 Cromwell Street
BURWOOD VIC 3125
Telephone: 03 9888 8266
Facsimile: 03 9888 8459
Website: www.amca.com.au

Association of Consulting Engineers Australia

Level 6, 50 Clarence Street
SYDNEY NSW 2000
Telephone: 02 9922 4711
Facsimile: 02 9957 2484
Website: www.acea.com.au

Australian Beverages Council Ltd

Suite 4, Level 1
6-8 Crewe Place
ROSEBERRY NSW 2018
Telephone: 02 9662 2844
Facsimile: 02 9662 2899
Website: www.australianbeverages.org

Australian Food and Grocery Council

Locked Bag 1
KINGSTON ACT 2604
Telephone: 02 6273 1466
Facsimile: 02 6273 1477
Website: www.afgc.org.au

Australian International Airlines Operations Group

c/- QANTAS Airways
QANTAS Centre
QCA4, 203 Coward Street
MASCOT NSW 2020
Telephone: 02 9691 3636
Facsimile: 02 9691 2832

Australian Made, Australian Grown Campaign

Suite 105, 161 Park Street
SOUTH MELBOURNE VIC 3205
Telephone: 03 9686 1500
Facsimile: 03 9686 1600
Website: www.australianmade.com.au

Australian Mines and Metals Association

Level 10, 607 Bourke Street
MELBOURNE VIC 3000
Telephone: 03 9614 4777
Facsimile: 03 9614 3970
Website: www.amma.org.au

Australian Paint Manufacturers' Federation

Suite 1201, Level 12
275 Alfred Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 3955
Facsimile: 02 9929 9743
Website: www.apmf.asn.au

Australian Retailers' Association

Level 10, 136 Exhibition Street
MELBOURNE VIC 3000
Telephone: 1300 368 041
Facsimile: 03 8660 3399
Website: www.retail.org.au

Bus Industry Confederation

Suite 6, 6 Lonsdale Street
BRADDON ACT 2612
Telephone: (02) 6247 5990
Facsimile: (02) 6230 6898
Website: www.bic.asn.au

Live Performance Australia

Level 1, 15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
Facsimile: 03 9614 1166
Website: www.liveperformance.com.au

Master Builders Australia

Level 1, 16 Bentham Street
YARRALUMLA ACT 2600
Telephone: 02 6202 8888
Facsimile: 02 6202 8877
Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia

525 King Street
WEST MELBOURNE VIC 3003
Telephone: 03 9329 9622
Facsimile: 03 9329 5060
Website: www.plumber.com.au

National Baking Industry Association

Bread House,
49 Gregory Terrace
SPRING HILL QLD 4000
Telephone: 1300 557 022
Website: www.nbia.org.au

National Electrical and Communications Association

Level 4, 30 Atchison Street
ST LEONARDS NSW 2065
Telephone: 02 9439 8523
Facsimile: 02 9439 8525
Website: www.neca.asn.au

National Fire Industry Association

PO Box 6825
ST KILDA ROAD CENTRAL VIC 8008
Telephone: 03 9865 8611
Facsimile: 03 9865 8615
Website: www.nfia.com.au

National Retail Association Ltd

PO Box 91
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Website: www.nra.net.au

Oil Industry Industrial Association

c/- Shell Australia
GPO Box 872K
MELBOURNE VIC 3001
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia

PO Box 7036
CANBERRA BC ACT 2610
Telephone: 02 6270 1888
Facsimile: 02 6270 1800
Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc

Level 1, Unit 7
651 Victoria Street
ABBOTSFORD VIC 3067
Telephone: 03 9429 0670
Facsimile: 03 9429 0690
Website: www.pacia.org.au

Printing Industries Association of Australia

25 South Parade
AUBURN NSW 2144
Telephone: 02 8789 7300
Facsimile: 02 8789 7387
Website: www.printnet.com.au

Restaurant & Catering Australia

Suite 17, 401 Pacific Highway
ARTARMON NSW 2064
Telephone: 1300 722 878
Facsimile: 1300 722 396
Website: www.restaurantcater.asn.au

Standards Australia Limited

Level 10, 20 Bridge Street
SYDNEY NSW 2000
Telephone: 02 9237 6000
Facsimile: 02 9237 6010
Website: www.standards.org.au

Victorian Automobile Chamber of Commerce

7th Floor
464 St Kilda Road
MELBOURNE VIC 3000
Telephone: 03 9829 1111
Facsimile: 03 9820 3401
Website: www.vacc.com.au