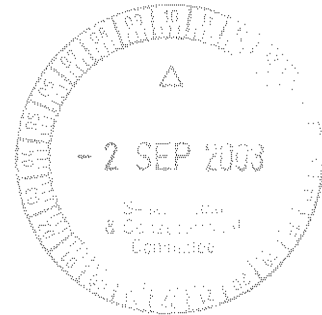
AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

1 September 2003



The Secretary
Senate Legal and Constitutional Legislation Committee
Room S1.61
Parliament House
CANBERRA ACT 2600

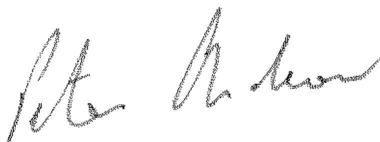
Dear Sir,

I write concerning the Age Discrimination Bill 2003. This Bill has been referred to the Committee for report by 18th September 2003.

I enclose a copy of the submission of the Australian Chamber of Commerce and Industry (ACCI) on this Bill. ACCI is Australia's peak national employer organisation, and led employer responses to this issue in the Core Consultative Group that preceded the introduction of this Bill.

I would be pleased to present evidence in support of this submission at hearings of the Committee.

Yours sincerely,



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ACCI SUBMISSION

TO THE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

AGE DISCRIMINATION BILL 2003

SEPTEMBER 2003

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Through our membership, ACCI represents over 350,000 businesses nationwide, including:
  - The top 100 companies.
  - Over 55,000 medium sized enterprises employing 20 to 100 people.
  - Over 280,000 smaller enterprises employing less than 20 people.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the concerns of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis. ACCI members, as individual business organisations in their own right, are able to also independently develop business policy within their own sector or jurisdiction.

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EXECUTIVE SUMMARY OF ACCI POSITION

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

2. ACCI strongly supports sensible measures to promote mature aged employment and youth employment in the labour market.

3. There is no demonstrated need for a national age discrimination law that regulates employment and workplace relationships.

4. There is no significant evidence of Australian industry applying policies or practices that improperly discriminate against people on the grounds of age such as to warrant a new national regulatory regime.

5. In any event, there are multiple existing anti age discrimination laws in States and territories and in federal workplace relations legislation which are more than sufficient to provide regulatory controls and redress in particular cases.

6. Despite our reservations, the Bill goes a considerable way to addressing industry concerns and attempting to balance the interests of stakeholders. However in a number of critical areas (particularly the capacity for productivity and performance measures to be challenged with a reverse onus of proof) it remains deficient and amendments suggested in this submission should be made during the parliamentary process.

7. If there is to be a national age discrimination law, this should ideally be in substitution for existing State and territory laws (not in addition) or alternatively in a form commonly agreed between the Commonwealth and States/Territories. Employers should not be exposed to an additional layer of regulation on an already regulated topic, creating multiple and differential rights and obligations, confusion and complexity. The Bill does not meet this objective.

8. If there is to be a national age discrimination law, it should be targeted to deal within specific conduct that warrants regulation. It should not automatically be modelled on sex discrimination laws where a broad prohibition exists and it is then for employers to argue for exemptions or make out defences. Rather it should regulate specific discriminatory conduct, and no more. The Bill does not meet this objective.

9. If there is to be a national age discrimination law, it should not include indirect discrimination in the context of the employment relationship. The concept of

indirect age discrimination in an employment context creates unintended consequences that are not adequately addressed by the statutory scheme as proposed to date. The Bill does not meet this objective.

10. If there is to be a national age discrimination law based on the sex discrimination model, it should provide for exemptions that balance employer and employee interests. The Bill meets this objective in part.

11. If there is to be a national age discrimination law it should not subject established performance and productivity standards, work practices and benchmarks used by employers to complaint or investigation under the guise of age discrimination laws. The Bill doe not meet this objective.

12. There should be an absolute and unqualified exemption for age based wage rates in awards and agreements, and conduct related to age based wage rates (such as advertising for employment at such rates). Age based youth wages are an integral and desirable feature of the Australian labour market that serve the public interest and the well being of young people and their employers, and must not be undermined in any way by proposed age discrimination laws. The Commonwealth government's election policy commitment to the retention of age based youth wages must be expressly provided for in the statutory scheme. The Bill meets this objective.

13. There should be an exemption for beneficial age related education and training programmes. The Bill meets this objective.

14. There should be an exemption for conduct which is intended to be beneficial for a particular age category. The Bill meets this objective.

15. There should be an exemption where the inherent requirements of the job justify age related conduct. The Bill meets this objective.

16. There should be a specific exemption where there are genuine occupational qualifications required that result in conduct that could have the effect of discriminating on the basis of age. The Bill does not meet this objective.

17. There should be a specific exemption where conduct is required for occupational health and safety purposes, or to comply with other acts or laws. The Bill does not meet this objective.

18. There should be an exemption where the conduct is undertaken pursuant to provisions in industrial awards (federal or state), certified industrial agreements, Australian Workplace Agreements or State industrial agreements. The Bill meets this objective in part only. It needs to extend the exemption to acts done in compliance with State registered agreements.

19. There should be an exemption from industrial matters within the jurisdiction of the Australian Industrial Relations Commission. The Bill does not meet this objective other than as above.

20. The law should not extend to the engagement of unpaid workers or volunteers. The Bill meets this objective.

21. There should be a catch all regulation making power for the making of further exemptions. The Bill meets this objective in part only.

22. In respect of employment, the proposed law should not confer upon the Human Rights and Equal Opportunity Commission (HREOC) jurisdiction over complaints that could be dealt with by the Australian Industrial Relations Commission (AIRC) or an appropriate Court. The Bill does not meet this objective.

23. Complainants should not be able to forum-shop between HREOC and the AIRC when deciding to lodge complaints or a dispute notification. The Bill meets this objective in part.

24. The consultative process undertaken in developing the Bill should be meaningful and substantial, and should be continued throughout the parliamentary process and in any implementation phase. To date, the Bill and its development meet this objective.

INTRODUCTION

Background

1. The federal government was re-elected in 2001 with a policy commitment to introduce new age discrimination regulation at the Commonwealth level.

2. During 2002 the Attorney-General convened a 'Core Consultative Group' to consider these matters. ACCI actively participated in this process and led employer responses to the policy proposals. Discussions within the Core Consultative Group were substantial.

3. As a result of these consultations, some employer concerns were addressed and reflected in the Attorney-General's Information Paper of January 2003, and have been incorporated in the Age Discrimination Bill 2003.

4. The Age Discrimination Bill 2003 was introduced into the federal parliament by the Attorney-General on 26th June 2003.

5. On 13th August 2003 the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Legislation Committee for report by 18th September 2003.

Employers and Discrimination Law – Key Principles

6. There is a substantial body of discrimination law in Australia, at both a Commonwealth and a State level.

7. Most discrimination law bears directly on the rights and responsibilities of employers and employees in the workplace. Regulating the contract of employment has been one of the major areas of attention by policy makers and parliaments when framing Australian discrimination law over the past twenty years.

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

9. In a broad sense employers accept the general principle of equal opportunity which underpins discrimination law. Discrimination law must however represent a balance of interests, must necessarily be qualified, and operates most efficiently when it is targeted to specific conduct rather than imposing far reaching or general unspecified duties.

10. Nor should employer acknowledgement of equal opportunity be a basis for the headlong pursuit of regulation. Indeed, intervention by governments in the absence of clearly demonstrated need can act as a hindrance rather than a help to effective and fair employment policy and practices.

Discrimination Policy and the ACCI *Modern Workplace: Modern Future 2002-2010* Policy Blueprint

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

12. In November 2002 ACCI released a detailed Blueprint for the development of the Australian workplace relations system over the course of the next decade. The *Blueprint, Modern Workplace: Modern Future 2002-2010* is an integrated plan that incorporates short, medium and long-term goals. It deals with each major aspect of employment regulation, from awards, agreements and industrial tribunals through to industrial action, work and family and wages and conditions of employment.

13. The Blueprint outlines specific objectives for workplace reform over the next decade, and a vision for Australian workplaces that should be widely supported:

> *'A workplace relations system that empowers employers and employees across the nation to work co-operatively and make decisions in their shared interests that lead to more jobs, higher living standards and a better future.'*

14. The Blueprint contains some challenging, and even controversial proposals – all of which are designed to promote debate and lead to a system that empowers employers to create new jobs.

15. In an overall sense, the Blueprint seeks to contain, and over time alleviate the heavy burden of complex regulation for employers and employees and assist in unleashing Australia's jobs potential. It advocates a whole of government approach by policy makers federal and State, to contain total costs, lift the burden of employment red tape, and improve the quality of industrial regulation.

16. The Blueprint is directly relevant to this submission on age discrimination in two ways:

    a) Chapter 9 of the Blueprint outlines broad principles which ACCI and employers generally apply when dealing with discrimination policy and

practice – principles which we would submit make commonsense and should be adopted by all policy makers; and

b) Chapter 2 of the Blueprint focuses on the nature of employment regulation, the duties regulators have when making and reviewing regulation, and highlights just how complex and regulated Australian employment remains, especially when all elements are taken into account.

17. On the question of employment regulation, chapter 2 of the Blueprint includes the following which is relevant to this submission:

> *"We still have a heavily regulated system. The scope and content of employment regulation in the current system is the combined accumulation of laws made over many decades by parliaments, governments and industrial tribunals based on the disputes and circumstances of the day. 'Ad-hockery' has characterised the regulation making process, and in qualitative terms regulation has far too often characterised employers according to the worst possible form of conduct. As a general rule, this is not the correct approach to labour market regulation:*
>
> *"Policy makers with a predilection for legislative and judicial solutions usually underestimate the capacity and goodwill of Australian managers and workers to sort things out for themselves."* Minister for Employment and Workplace Relations, Hon. Tony Abbott (2002) Speech to Queensland Industrial Relations Society, 5 July 2002.
>
> *"You do not approach your response to an industrial relations framework on the basis of the activities of a miniscule minority of people."* Shadow Minister for Industrial Relations, Robert McClelland (2002) Parliamentary Second Reading Speech, 24 June 2002.

18. Critically, employment regulation has continued to apply unless and until removed by the very parliaments or tribunals that made them. There has been no significant mechanism in place that has effectively and systematically revised the regulatory content of the system once that regulation is enacted (award simplification could have, but has generally not achieved this goal). As a result, the regulatory burden of the system has increased step-by-step, year upon year.

19. The so-called 'deregulatory' initiatives have been outweighed by the continuing accumulation of individual regulatory burdens that of themselves may appear benign but which in combination mean that the current system still remains highly prescriptive in terms of regulatory process and content. Ironically, the overall regulatory burden of the system cannot be eased except by further legislative changes or by further orders of industrial tribunals.

20. The danger continues to exist that well meaning regulation sought for one purpose may in combination with existing or other proposed regulation

undermine the overall objectives of decentralism and the primacy of employer and employee, workplace-based, determination of employment terms and conditions. All new legislative or regulatory proposals must avoid this.

21. Fundamental goals of employment regulation should include:

a) Simplified regulatory obligations, and reduced prescription.

b) Proper recognition that all employers are not the same, and that employment law should not be formulated by reference to the activities of a minority of worst performing businesses, employees or organisations.

c) Promotion and support of mutually beneficial win-win workplace relations.

d) Entrenching ongoing workplace reform and creating more certainty in the impact of the system has in workplaces.

e) Less politicised and polarised workplace relations attitudes and cultures.

f) A reduction in the need to comply with multiple regulatory instruments drawn from both the federal and state jurisdictions.

22. On the issue of Discrimination policy in particular chapter 9 of the Blueprint highlights the following:

> *"Employers are subject to both federal and state anti-discrimination laws. Employers do not seek to conduct business operations or employment practices on a discriminatory basis. However, the regulation of employment practices by discrimination law raises multiple issues of public policy that can, if the law fails to properly take into account the interests of industry, unduly and inappropriately impede legitimate business decisions and employment practices.*
>
> *Multiple regulatory jurisdictions create multiple regulatory obligations. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the Workplace Relations Act 1996 (eg the form of awards, unlawful dismissal etc). This proliferation of obligations can be confusing and challenging to employers.*
>
> *During this parliamentary term, the Federal Government plans to introduce a national age discrimination law. The potential for significant overlap with state laws, as well as the federal and state workplace relations systems, exists. Whilst the Federal Government has – appropriately – indicated that such a law will not compromise age based youth wages, other areas of employment practice and business activities are potentially adversely affected by such a proposal.*

Unlawful discrimination is not an acceptable human resource practice, does not constitute an appropriate basis for human resource decision-making, and is contrary to the interests of business.

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

23. This chapter of the Blueprint then makes a number of specific recommendations which act as a frame of reference for ACCI and employers when considering the case for a national age discrimination law:

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

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

Objective 3: Discrimination law should not, other than in limited circumstances, apply the concept of 'indirect discrimination' to employment and workplace policy and practices. The concept of indirect discrimination does not provide the regulatory certainty required by employers, especially small business.

Objective 4: Any proposed extensions of discrimination law to include new grounds, or to extend/vary the application of existing law, should be examined under the principles of the proposed Employment Regulation Standard (ERS).

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

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

24. The full text of chapters 2.2 (Scope of Regulation) and 9.1 (Discrimination) of the Blueprint are attached to this submission. (**Attachments A & B**)

Need for the Bill

25. The Age Discrimination Bill 2003 is closely modelled on the regulatory proposal outlined on 9 January 2003 by the Attorney-General in the Information Paper on proposed Commonwealth age discrimination legislation.

26. The Bill raises multiple issues of interest and, in some cases, of concern to employers. Many of these are matters that were raised and discussed in the Core Consultative Group.

27. The stated justification for the Bill is that "age discrimination has increasingly become a significant problem for older Australians, as well as for children and young people." (Regulatory Impact Statement - RIS, page 2)

28. This is a broad assertion that is not made out by the material referred to in the RIS.

29. Age discrimination itself is a fluid concept which operates across age groups. This is not a proposal to preclude discrimination against a specified age cohort. It is a proposal to prohibit age discrimination *per se*. This is an important distinction.

30. When it comes to age, all employees have an age. What might be a programme or policy of benefit to one age group by definition is of detriment to those outside the age group if they are excluded from the programme or policy. Whilst much of the Bill and accompanying materials imply that it is mature aged persons or young persons who are the intended beneficiaries of this law, it is a law that would apply to all persons. The fact that two age cohorts at the extremes of the age spectrum are equally stated to be the proposed beneficiaries highlights the conceptual dilemma that employers face. For example, by definition a plan to employ more young people in a business is a plan not to employ others. It is not uncommon (and quite right) for politicians of all persuasions to encourage and congratulate employers for, say, doing specific things to employ young people. Those specific things mean that others are not preferentially treated.

31. Moreover, if an employer planned to employ more people of a young age and more people of mature age (i.e. the very groups said to be subject to some

disadvantage) this by definition means that persons of middle age in between these age cohorts are less favourably treated.

32. Such examples highlight the need for care and attention in developing policy in this area; it is not as straightforward as the established grounds for anti discrimination legislation, e.g. sex, race etc.

33. The Commonwealth advances this proposal as consistent with its broader policy objectives of valuing the skills and work of mature aged workers, of trying to increase the retention of workers in the labour force beyond current retirement ages, and in addressing economic and social consequences of an ageing population.

34. These are sound objectives. ACCI strongly agrees that there is a significant need to promote employment of young people and mature aged people in the labour force. Much of what we do and say on employment, economic policy and workplace relations is directed to these ends (see for example *ACCI Review May 2003 'Mature Age Employment – Changing Culture'* – **Attachment C**)

35. However what is the evidence that discrimination (i.e. differential and unfair treatment) of either of these (young and mature) age groupings is significant let alone increasing? The RIS makes this claim but does not present evidence in support of it.

Mature Aged Employment

36. ACCI is fully committed to measures and policies which increase labour force participation by all Australians seeking work in the labour market. Many of our policies, including those concerning economic reform education and training and workplace relations are discussed at that end.

37. ACCI sponsored a symposium on the Ageing Workforce held in Sydney on 27th August 2003. At that symposium ACCI outlined a multi dimensional strategy for a whole of government approach to increasing mature aged labour force participation (see ACCI Media Release of 27th August – **Attachment D**).

38. The ACCI strategy highlighted the need for a more flexible workplace relations system and the removal of workplace relations impediments as an important component of such a strategy. The measures outlined in the ACCI reform Blueprint *Modern Workplace: Modern Future 2002-2010* would go a long way to that end.

39. Consistent with the needs of business, ACCI concurs with the following observations made by the Prime Minister at the 27th August symposium:

"Labour markets will need to be sufficiently flexible to suit the needs of older workers. A regulated labour market diminishes the capacity of mature aged personnel to choose their working hours, retirement age and the specific rewards they want to receive." (Prime Minister media statement 27th August 2003, **Attachment E**).

40. ACCI is concerned that a national age discrimination proposal could have counterproductive effects for both mature aged and youth age groupings.

41. In the labour market employers act rationally. Employment decisions are influenced by cost and risk. The greater the risks of employment, the less likely those employers will employ. The higher the costs of employment the less likely employers will employ.

42. The Commonwealth government accepts this proposition in many areas of workplace policy – unfair dismissal laws are one example. In that area of policy the Commonwealth argues (correctly) that if employers are exposed to the risk of complaint or litigation when staff have to be put off then a prospective employer is less likely to employ the staff member in the first place. This is common sense and consistent with practice in the labour market.

43. The same principle applies to other risk factors that exist or are introduced into employment regulation.

44. Age discrimination laws, by their nature, create a cause of action in respect to alleged unlawful conduct.

45. This means that a mature aged person would, on the passage of these laws, be able to sue their employer if they believe that they have been discriminated against. Whether or not the complaint is upheld, the employer is put to cost, inconvenience and disruption in defending their position. In that sense, this is a proposal for a right to sue/complain.

46. In terms of both risk and cost this proposal has the potential to act against decisions to employ mature aged persons, and thereby act against their interests in the first place.

47. It would be perverse if, with the best of intent, the parliament was to introduce age discrimination laws to try to help mature aged people once they are in jobs if only to find that it is harder for employers to get them in jobs in the first place.

Youth Employment

48. This linkage between the risk/cost of employment and the potential effect of age discrimination laws is one of the very reasons which underpins the

(correct) policy of the Commonwealth to not have these laws impact adversely on age based youth wages.

49. As the AIRC found in 1998 (in its Junior Rates Inquiry as required by the Workplace Relations Act 1996) that age based youth wages have a clear public benefit and there is no viable alternative to them. The parliament in 1998, with support from both major parties, adopted this reasoning and entrenched age based youth wages in the provisions of federal workplace relations legislation (see, for example, sections 88B(4) and 143(D) Workplace Relations Act 1996). In doing so it is clear that public policy recognised that if the cost of employing young people went up then there would be fewer young people employed.

50. The fact that it is necessary in the public interest to exempt age based youth wages from this proposal underlines the danger that this proposal can have counterproductive effects in a labour market where employers are required to act in a rational and commercial way.

51. Neither ACCI, nor we understand the Commonwealth, and nor should the parliament, want any policy measure to be taken which makes it harder for employers to employ mature aged people or young people.

52. Whilst this is a powerful argument against the implementation of this proposal *per se*, it is equally relevant to a consideration of the terms of the proposal. If the Bill is properly balanced, has appropriately broad and workable exemptions, only deals with matters that actually require regulatory intervention and limits the scope for costly complaint resolution then the above mentioned risks are minimised – albeit not eliminated.

Direct and Indirect Discrimination

53. From an employer perspective, there are other general observations that can be made.

54. Age discrimination laws should not be allowed to adversely impact on the rights of employers to implement beneficial policies or practices in the workplace towards a particular age group, nor should they compromise commercially driven labour force productivity or performance criteria. We strongly agree with the Bill (clause 16) that age should be the "dominant reason" before a discrimination claim is made out.

55. Almost all businesses establish formal or informal performance or productivity benchmarks or standards. Indeed, this is to the national good – our living standards are only paid for by increasing our national productivity.

56. At first blush it may not be apparent that there is any connection between these benchmarks or standards and age discrimination laws. However, there is.

57. The proposed age discrimination law would extend not only to prohibit direct discrimination but also indirect discrimination.

58. Direct discrimination, as characterised by the RIS, is broadly expressed. The mere fact that an employer seeks workers "with computer skills" is said to be in itself an example of a directly discriminatory act against older people (RIS para 14, Bill clause 14). This is a conclusion that does not accord with common sense, nor general community views. This example should be removed from the RIS. It is not an acceptable basis to develop legislation.

59. As the RIS also points out, indirect discrimination arises where conduct is not on the face of it discriminatory but where, in the application of that conduct, one group is treated differently than the other.

60. It is quite conceivable that, without proper exemptions in place, generally accepted and currently operating performance or productivity criteria in industry would be exposed to complaint or challenge under the indirect age discrimination concept. It is even more concerning that the government, through the RIS, contemplates that this is intended. The RIS says expressly that "certain productivity standards for competitiveness or to meet external requirements" can be indirect discrimination – made the worse by the fact that the Bill then imposes a reverse onus of proof on the employer to disprove that their productivity standard is not indirect discrimination. (RIS, para 20).

61. Then effect of this is that a mere complaint together with a performance or productivity standard makes the employer guilty of an offence unless the employer proves their case to the contrary. This is not acceptable.

62. For example, an employer has a well-established performance criteria that a specified quantity of product is manufactured per employee in a given day. It is possible that an aggrieved employee (say a 61 year old) could obtain from a sympathetic doctor or expert (and as the workers' compensation system shows, there are many competing expert views) indicating that the performance criteria is not reasonably achievable for persons in this particular age cohort (above 60). The employer in this case would have to front HREOC or other authorities and justify their performance or productivity measure. The pressure would be on the employer to reduce the measure, thereby reducing their output (hardly a good outcome for the business or the economy). Next time that employer comes to make an employment decision it is most unlikely that the employer would think about employing people above 60.

63. The consequence of this example is twofold – reduced productivity in the business, and less likelihood of employing mature aged people. A double blow to what is generally regarded as necessary and desirable.

64. It may also mean that employers are required to increasingly provide light or limited duties for persons of a particular age category to avoid the risk of complaint or litigation. This is clearly undesirable; employers already experience similar problems in the workers compensation system which requires the creation of artificial jobs of limited function or productivity.

65. Additionally, the Bill, when coupled with the already existing difficulties encountered by employers with unfair dismissal laws, may make it more difficult for employers to dismiss those mature aged workers whose performance or productivity may slowly deteriorate as the years advance. The Bill does not propose any relief for employers from the burden of unfair dismissal laws when dismissal is required on performance or productivity grounds. It should. A schedule of ACCI initiatives developed by employers in 2002 is attached as indicative of amendments we urge to unfair dismissal laws. (**Attachment F**)

66. Another topical example could be productivity on the Australian waterfront. Australia now has, thanks to hard won government and industry reform, a waterfront that is meeting international benchmarks – and the government target of 25 crane lifts per hour. It would be quite counterproductive if, say a union or an aggrieved stevedore, impugned the lawfulness of this productivity measure on the strength of some sympathetic expert or medial practitioner who concluded that this target was in general terms less favourable or achievable for workers of a specified age cohort.

If State Laws Exist, why not a Federal Law?

67. Given the fact that federal industrial instruments (such as awards and agreements under federal law) override inconsistent State laws, it is not enough to argue that employers are bound by State age discrimination law and therefore a federal age discrimination law carries no additional impact. It does - because State laws are subservient to the federal industrial system. If federal age discrimination laws do not contain qualifications and exemptions then the rights of employers under federal awards and agreements will be altered by a federal age discrimination law.

68. In considering this matter it must also be recognized that age discrimination laws already exist in most Australian jurisdictions that prohibit discrimination on the grounds of age. As mentioned, in an employment context the federal *Workplace Relations Act 1996* has specific anti age discrimination objectives and provisions (as well as specific treatment of age based youth wages in that context). The federal proposal is not advanced as a substitute for State anti-age discrimination laws or federal workplace relations laws. It would be in addition thereto. That too is a problem.

69. There are significant issues which need to be addressed about the interaction of these multiple laws, why we need to have these multiple laws on the same topic in the first place, and how forum shopping across multiple jurisdictions can be prevented.

70. Other complexities arise when exploring what one would think, at first glance, is a fairly simple anti age discrimination proposal.

71. As the RIS and the January 2003 Information Paper point out, many pieces of legislation (federal and State) affecting employment and industry (eg superannuation, insurance, workers compensation) as well as government labour market programmes (work for the dole, training and new apprenticeships) have direct reference to age based criteria.

72. If a national age discrimination law was enacted, then its provisions would need to cater for these circumstances where it has been well accepted that age based criteria is provided for.

73. Further, in the workplace relations field there is no limitation on industrial awards or industrial agreements (whether Certified Agreements, Australian Workplace Agreements or State Agreements) including provisions which refer to age criteria for specified purposes - nor should there be. In respect of awards, the Australian Industrial Relations Commission has a broad jurisdiction to make awards and orders on the merits of the case. In some circumstances (such as its 1984 redundancy test case) it prescribes entitlements for employees above a prescribed age (such as additional notice of termination or payment in lieu if over 45 years of age). A national age discrimination law has the potential to inhibit the existing discretion of the AIRC to make such awards or orders. The ACTU is currently seeking national test case orders to increase the level of redundancy payments – including those payable to persons above the age of 45.

74. The Bill seeks to deal with these issues by way of exemption. This is a consequence of the model it advocates, where discrimination in employment on the prohibited ground (in this case, age) is rendered unlawful and then a series of exemptions are prescribed. The problem is that a model like this which generally prohibits age discrimination but then tries to deal with these adverse or counterproductive consequence by exemption is always at risk of not having adequately dealt with all of the circumstances that warrant exemption.

75. There is a real risk under this model that even with the best of intent there will be matters justifying exemption that do not fall within the express exemptions. For this reason ACCI proposed that there be a catch all power for the government of the day to make additional exemptions by regulation in the event that legislation is up and running. Our preference is that this exemption

power be by regulation of the government of the day, rather than by HREOC as proposed in the Bill.

DISCRIMINATION

Direct and Indirect Discrimination

76. For reasons mentioned above, ACCI does not support the concept of indirect discrimination applying to age discrimination laws. Even the example given for direct discrimination (computer skills being required) is extreme and excessive (beyond that discussed in the Core Consultative Group) – then how much more extensive would the indirect discrimination concept be?.

77. If it is to apply, then it is crucial that exemptions be structured to not impugn performance or productivity benchmarks or criteria. ACCI advocates a specific exemption in this regard, yet the Bill goes in the opposite direction – apparently with deliberate intent.

78. One option the parliament should consider if it does not intend to limit the proposal to direct discrimination only, is to provide a period of time before the indirect discrimination concept applies. This would enable employers to assess the potential impact of the legislation on work practices and policies.

79. The suggestion (in the January 2003 Information Paper) that HREOC issue guidelines and practical guidance on the issue of indirect discrimination is a useful but inadequate response to industry concerns. ACCI does not support HREOC being an adjudicator on performance or productivity benchmarks or criteria in private industry. Guidelines or guidance material would have to have industry input and support if they were to carry any weight with employers.

Definitional Issues

80. ACCI is concerned about the application of this proposal to both "age' and an "age group" (clause 5). The potential application to an age group highlights the scope for a particular age cohort being identified as disadvantaged when work practices or workplace productivity or performance criteria are under challenge.

Age-Discrimination and Disability Discrimination

81. ACCI agrees that age discrimination legislation should not create a second or alternative avenue for complaints of disability discrimination, and that complaints of age discrimination that would be covered by the Disability Discrimination Act should be dealt with under the legislative regime established by that Act (clause 6).

82. However ACCI points out that the Disability Discrimination Act itself may require a broader range of exemptions to address the interface between its statutory scheme and age discrimination. ACCI would not want a situation

arising where conduct is exempt under age discrimination law only to find that the complainant argues that the age factor was a "disability" within the meaning of the disability legislation, and for the employer to have committed an offence simply because the disability legislation did not exempt the conduct.

PROHIBITIONS ON AGE DISCRIMINATION

Prohibitions on Age Discrimination in Work and Definition of Employment

83. ACCI repeats its view that a case has not been made out for a new or general regulatory regime operating across the employment relationship, whatever definition of "work" is proposed.

84. The definition of "employment" and work that is proposed is relatively broad. Given that, the critical issue will be the adequacy of exemptions.

85. ACCI does not support the operation of these laws (and discrimination law generally) beyond the contract of employment. Relationships between principals and contractors are commercial relationships (contracts for services) and not in the same class as employer/employee relationships.

Unpaid Work

86. ACCI did not support applying the proposal to unpaid work. It is undesirable for impediments to be placed that could inhibit the opportunities for volunteers to provide their services in the community. An organisation securing services of a volunteer may think twice before doing so if they are at risk of an age discrimination complaint from that person down the tack. Given that many of these organisations are community based and not for profit then it would seem unnecessary for the proposal to have this reach without fully exploring the consequences.

Contract Workers

87. As mentioned above, ACCI does not support the operation of these laws (and discrimination law generally) beyond the contract of employment ("employment" definition, clause 5 para (b)).

WORK / EMPLOYMENT EXEMPTIONS

Youth Wages, Job Training and Younger Workers

88. For reasons mentioned above, ACCI strongly supports the proposed exemption relating to age based youth wages.

89. The independent Australian Industrial Relations Commission concluded, after months of inquiry in 1998, that age based youth wages were of substantial public benefit.

90. The Australian Parliament subsequently amended the federal Workplace Relations Act 1996 (in respect to both awards and agreements) to entrench age based youth wages in Australian workplaces. This was legislation passed with the support of both major parties – a remarkable display of common ground which underlined just how convincing the case was for the retention of age based youth wages.

91. Age based youth wages, where they apply, provide direct benefit to employees in being able to secure employment that operates as a transition from schooling into the world of work, or which supplements studies. They serve the public interest. Without age-based youth wages more than 200,000 jobs of employees in the retail industry alone would be at risk.

92. The Commonwealth government's undertaking to maintain age based youth wages is fundamental to the development of this proposal.

93. ACCI is concerned to ensure that this exemption applies to all conduct that would rely upon age based youth wages. For example the exemption needs not only to allow the employer to pay the legally determined age based youth wage, but to also advertise for a person who is eligible to receive that age based youth age and do whatever else is incidental to the operation of age based youth wages.

94. For reasons mentioned above, ACCI strongly supports the proposed exemptions relating to job training, work experience, community work programmes, work for the dole and the like. It is crucial that age discrimination laws do not prejudice training schemes targeted at younger or older persons. This should include training schemes that are publicly funded and that are privately funded, or part public funded and part private funded.

Inherent Requirements of the Job

95. ACCI supports the proposed exemption for inherent requirements of the job. This is a common and essential feature of discrimination law.

96. However ACCI is concerned that this exemption does not go far enough. The interpretation of this concept by the courts has been narrow. In part this is because discrimination law is remedial legislation and the courts are not inclined to liberally interpret exemptions, given that exemptions constrain the overall statutory objects.

97. By way of example, a recent case in the New South Wales Administrative Decisions Tribunal ruled that an employer must consider changing the nature of a disabled workers job if they intended to rely on the inherent requirements of the job defence for dismissing such a worker. In that case a worker was unable to lift the minimum weight required to perform the work of an armoured vehicle operator. After a period of restricted duties provided by the employer the worker was still unable to meet this requirement and his employment was terminated. The tribunal held that the concept of inherent requirements of the job was not made out despite the weight requirement being a core condition of employment. The employer had to do more to make out this defence. Damages were awarded. (*Perlidis v Brambles Security Services Ltd. [2003] NSWADT11, 17th January 2003*)

98. In particular, ACCI is not satisfied that our concerns about work practices and performance and productivity criteria are capable of being adequately dealt with by the inherent requirements exemption. At best this concept would need to be interpreted at its very outer edges if it is to include the circumstances that give rise to our concerns (discussed above). Given the fundamental nature of our concerns, it is not acceptable that they try to be slotted into the outer edge of an exiting exemption. They are concerns that are central to this debate, and they require an exemption that deals with them at its core, not its outer edge.

99. In addition to the inherent requirements exemption, there should be a specific exemption for reasonable productivity or performance criteria that is established in the workplace.

Acts Done in Accordance With Awards and Agreements

100. The Bill and accompanying papers rightly points out that acts done in accordance with industrial awards and workplace agreements is an issue of significant importance to employers. Indeed, this proposed exemption (clause 39(8)) is absolutely fundamental, not just to employers but to the operation of the award system and the federal Workplace Relations Act 1996.

101. Under that Act a complex and sophisticated system of industrial regulation is established. That system has been developed by the parliament (with corresponding systems by State parliaments) based on its assessment of how best to balance the interests of employers, employees and the general community. Policy making around the workplace relations system is contentious enough (as the ACCI *Modern Workplace: Modern Future 2002-2010*

shows) without having age discrimination laws operating to weaken the rights and responsibilities created by awards and agreements established and approved by the system.

102. Having employed persons under awards made by the Australian Industrial Relations Commission or under agreements approved by the AIRC or the Office of the Employment Advocate an employer and an employee are entitled to rely on those rights and obligations with certainty without risk that the age discrimination laws will come in over the top of those rights an obligations at some future stage. Apart from being a grossly unfair outcome, this would introduce an undesirable degree of uncertainly into the employment relationship. Uncertainty creates risk, and risk deters employment.

103. It should be borne in mind that awards and agreements in the workplace relations system are legally sanctioned instruments. They are both heavily regulated instruments. They can only apply if they are made in accordance with law, and in the case of agreements if they met statutory tests relating to their substantive terms (such as the 'no-disadvantage test') and meet all approval and processing requirements.

104. It is necessary that the legislative provisions exempt awards and agreements under both federal and State industrial relations systems, given that the potential coverage of the proposed national age discrimination law would overlap persons employed under both federal and state instruments of regulation. The Bill does not exempt State industrial agreements – only State awards. This is an anomaly with no basis for the distinction, and needs amendment.

105. It is also necessary to have recommendations made by the AIRC given recognition – disputes can be settled by conciliation with recommendations made but no formal order (award) made – it would be odd indeed if parties applying a work practice recommended by the AIRC were subsequently to find themselves before HREOC with those work practices under challenge.

106. Another important issue raised in the Bill is whether the exemption relating to awards and agreements should include acts done "in direct compliance with" these instruments (as proposed by the Bill) or acts done "pursuant to" these instruments.

107. This is a relevant issue because awards and agreements are increasingly facilitative in character – they establish a safety net of provisions but provide some discretion in implementing these provisions. For example, an award may require a 38-hour week to be worked but not be prescriptive about how it is worked in a given rostering cycle – it may provide options available to the employer but not compel one particular option over another.

108. ACCI believes it is necessary to make sure that acts done pursuant to award provisions, even if they are not directly acts done to comply with an award should be covered by this exclusion. Although a subtle distinction, there is a difference in meaning that could have some significance. In part this may fall on the meaning of the phrase "compliance with". If actions taken under facilitative provisions in awards can be described with some certainty as falling within the notion of "compliance with" then this may be sufficient without the need for broader language. However ACCI is not satisfied that such an outcome is assured in the event of court interpretation being required. Whilst a statutory note indicating that this is the statutory intent may be of assistance (and should be considered) a preferable approach is to use a broader expression such as "acts done pursuant to awards and agreements" in framing this exemption.

109. A fundamental issue raised by this exemption is the relationship between the jurisdiction of HREOC and the jurisdiction of the AIRC. Whilst it is acknowledged that HREOC currently takes into account the status of proceedings (actual or past) in the AIRC this is only the product of custom and practice. It is preferable that industrial disputes (individual or collective) which have an age related component to the complaint (e.g. a complaint of indirect discrimination arising from a work practice) be dealt with (if there has to be intervention at this level) by the AIRC rather than HREOC (of course, such matters are best dealt with at the workplace level and/or by the use of dispute resolution processes established in the business or in applicable awards/agreements).

Domestic Employment

110. ACCI agrees with the proposed exclusion for domestic employment.

OTHER EXEMPTIONS

Age Discrimination in Relation to Goods, Services and Facilities

111. The Bill provides a generally sound basis to proceed to develop exemptions in these areas. In each of the three areas under consideration (goods, services and facilities) specific issues arise that require policy attention. The Bill recognises, correctly, that in the areas of superannuation, insurance and financial services there are fundamental reasons for age based criteria – and this is acknowledged by exemptions in State laws. These exemptions ought to be broad so as to not unduly impede existing conduct that has a reasonable commercial, industrial or social basis or purpose to it.

112. The New South Wales exemption regarding superannuation is a worthwhile example to consider; it is important that in any of these areas that the exemption not be limited simply to actuarial or statistical data on which it is reasonable to rely. Rather, two concepts are involved here – actuarial and statistical data on the one hand, and other data on which it is reasonable to rely on the other. Actuarial statistical data is just one subset of data that would be relevant. The New South Wales definition draws this distinction and rightly so. The Bill appears to meet this position.

113. ACCI does not support any compulsory employer superannuation contributions above the exiting 70 years of age. The existing 70-year provisions in the Superannuation Guarantee legislation must be retained. This age discrimination proposal must not impose any direct cost on employers; expanding the eligibility of employees for compulsory superannuation purposes through the backdoor of age discrimination legislation is not appropriate and would have adverse cost impacts on employers and employment.

Age Discrimination in Relation to Commonwealth Laws and Programs

114. ACCI agrees that it is necessary to exempt acts done to comply with Commonwealth laws and programmes. Indeed, it is necessary to ensure that the exemption applies to the Commonwealth legislation itself.

115. From an employers point of view there is no distinction between a legally operating obligation created by a State/Territory law or a Commonwealth law. Acts done in compliance with legislation of any jurisdiction should be exempted.

116. ACCI supports the proposal to exempt acts done to comply with Commonwealth laws (note however the submission above concerning acts

done pursuant to awards and agreements, including those under Commonwealth laws).

117. ACCI supports the proposed exemption for acts done to comply with State and Territory laws. This may be an adequate basis to address ACCI's abovementioned concerns about occupational health and safety duties, although ACCI would prefer a specific exemption in that regard.

118. This is particularly important in the context of occupational health and safety laws. An employer has extensive duties of care, indeed almost strict liability under occupational health and safety laws. These are almost exclusively laws of the States. Under those laws there are very limited defences available to an employer in cases of a breach of the duty of care. There is no defence available to claim that the duty was breached because the employer was seeking to comply with, say, age discrimination law.

119. ACCI is concerned that employers will be caught in double jeopardy unless there is a specific exclusion for acts done in meeting duties under occupational health and safety legislation. If for example employees of a particular age are not offered work of a particular kind or are required to work under differential work practices because that is necessary to meet the duty of care, then employers should not be exposed to a breach of age discrimination law. This is a particular concern given that occupational health and safety laws require an employer to actively put in place policies and work practices that prevent workplace injuries – hence employers will act to develop work requirements that eliminate risk factors or exposure to risk factors. This is not an issue dealt with in the Information Paper, but needs to be.

120. In considering the proposed exemption for Commonwealth laws, it is necessary to consider that the Workplace Relations Act 1996 not only protects age based youth wages, but also specifies retirement ages for members of the AIRC. These existing provisions relating to retirement ages (which were reviewed by government in recent years) should not be disturbed by age discrimination laws.

121. It is important that the proposed review of Commonwealth laws within two years is not used as a backdoor way of re-opening the debate about age based youth wages. ACCI does not understand that to be the government's intention, and this should be made clear.

Positive Discrimination

122. ACCI agrees with the proposal for a positive (age) discrimination exemption. This is an essential and generally well-accepted provision in discrimination legislation. It is particularly important in the context of employment policies and programmes designed to benefit one particular age cohort (see discussion

in the Introduction to this submission). The difficulty though is trying to determine what is "positive" discrimination in this context. Positive discrimination to one age cohort is by implication negative towards other age cohorts who do not get the benefit of the discriminatory conduct. It is important to make sure that this exemption is available as a defence against a complainant who is denied the benefit of the 'positive discrimination'.

Compliance with Orders of Courts and Tribunals

123. ACCI agrees with the proposed exemption for acts done in compliance with orders of a Commonwealth, State or Territory court or tribunal – subject to our abovementioned submissions concerning: the need to extend this to awards and agreements made or approved by such tribunals or by authorities appointed under legislation; the need to include recommendations of the AIRC or State industrial tribunals; and the need to broaden the expression "in compliance with" to include "pursuant to".

OTHER DISCRIMINATION ISSUES

Harassment

124. ACCI did not support a separate cause of action based on 'age harassment'. We do not understand the victimisation provisions of the Bill to extend this far.

125. As the January 2003 Information Paper noted, employers and business groups are of the view that the concept is too vague and could give rise to spurious complaints about legitimate workplace requirements. State and Territory legislation, to the extent that it is relevant does not go this far.

126. Is it "harassing" for an employer of a young apprentice to give the young apprentice the menial jobs that arise in the workplace, in preference to older more experienced workers getting the 'better' type of work? Is it 'harassing' for one employee to tell another employee 'you're younger – you lift this', and then expose the employer to liability under vicarious liability principles?

127. These examples illustrate the dangers of extending the whole concept of age discrimination too far.

Vicarious Liability

128. ACCI recognises that anti discrimination law has for some time codified specific provisions relating to vicarious liability, and that the bill is broadly consistent with these principles. In part these provisions are drawn from common law principles. ACCI is concerned however that these provisions (and their proposed application in the Information paper) take employer liability too far. The ACCI *Modern Workplace: Modern Future 2002-2010* Blueprint (chapter 6.5) raises this issue as a matter of broader policy concern and advocates review of vicarious liability as part of broader tort reform.

OFFENCES

Victimisation

129. ACCI does not oppose this provision provided it is consistent with the structure of victimisation provisions in the federal Workplace Relations Act 1996.

Advertising

130. ACCI is concerned about the extent of the prohibitions in clause 50.

131. It should not be unlawful for an employer to advertise to employ a person who is to be employed under an age based youth wage. ACCI understands this would not be caught by this offence if age based youth wages are exempted (clause 25).

132. However, would it be unlawful for an employer to advertise for, say, a 55 year old – or say a retired person? It would appear so. In this case the Commonwealth needs to consider carefully the messages it is communicating to employers. In February 2003 the Secretary to the federal Treasury Mr. Ken Henry argued that employers need to improve their approach to the employment and retention of mature aged workers. Politicians increasingly are suggesting to employers that they must do more and be proactive in employing mature aged workers. The RIS itself says that "the promotion of a mature aged workforce" is a government priority (RIS, page 10).

133. In this context, will an employer trying to meet these expectations by advertising for a mature aged worker find themselves foul of age discrimination laws? These matters need to be considered on a whole of government basis so that clear and consistent messages are provided to the employer community.

134. Beyond this, it is also important to recognise that introduction of laws such as these (if they do prohibit age related advertising, directly and indirectly) take industry some time to adapt. Education and information is important, as is clear and consistent guidance. It would be appropriate for this offence to be addressed through sensible education rather than heavy-handed prosecution or compliance activities. Guidelines may be useful, but only if they are developed in conjunction with industry input.

135. More generally, the operation of any national statutory regime needs to have a considerable transition period before its commencement to allow education and information exchange, the obtaining and consideration of advice and assessment and modification to any employment or work practices.

CONCLUSION

136. Given the existing body of federal, State and Territory discrimination and employment law, ACCI is not convinced that a national age discrimination law is necessary.

137. The proposal is apparently simple, but on closer analysis raises fundamental policy issues with potentially significant implications in the workplace and to employment practices.

138. Given the fact that federal industrial instruments (such as awards and agreements under federal law) override inconsistent State laws, it is not enough to argue that employers are bound by State age discrimination law and therefore a federal age discrimination law carries no additional impact. It does because State laws are subservient to the federal industrial system. If federal age discrimination laws do not contain qualifications and exemptions then the rights of employers under federal awards and agreements will be altered by a federal age discrimination law.

139. Despite our reservations, the Bill goes a considerable way to addressing industry concerns and attempting to balance the interests of stakeholders. However in a number of critical areas (particularly the capacity for productivity and performance measures to be challenged with a reverse onus of proof) it remains deficient and amendments suggested in this submission should be made during the parliamentary process.

140. The consultation process with industry undertaken by the Commonwealth has, to date, been beneficial and should continue during the parliamentary process and any implementation phase.

2.2 SCOPE OF REGULATION

ACCI POLICY PRINCIPLES:

"ACCI supports a labour relations system that is characterised by decentralism and voluntarism...

ACCI believes that only employers and employees can select the approach that best suits their particular circumstances...

ACCI's overarching policy objectives are: to achieve legislative reform which will permit greater flexibility and efficiency in the operations of the enterprise.

Specific, immediate policy objectives include: the promotion of freedom of choice for employers and employees in their workplace arrangements." [30]

POLICY AUDIT & ANALYSIS:

- We still have a heavily regulated system. The scope and content of employment regulation in the current system is the combined accumulation of laws made over many decades by parliaments, governments and industrial tribunals based on the disputes and circumstances of the day. 'Ad-hockery' has characterised the regulation making process, and in qualitative terms regulation has far too often characterised employers according to the worst possible form of conduct. As a general rule, this is not the correct approach to labour market regulation:

  "*Policy makers with a predilection for legislative and judicial solutions usually underestimate the capacity and goodwill of Australian managers and workers to sort things out for themselves.*" Minister for Employment and Workplace Relations, Hon. Tony Abbott[31]

  "*You do not approach your response to an industrial relations framework on the basis of the activities of a miniscule minority of people.*" Shadow Minister for Industrial Relations, Robert McClelland[32]

- Critically, employment regulation has continued to apply unless and until removed by the very parliaments or tribunals that made them. There has been no significant mechanism in place that has effectively and systematically revised the regulatory content of the system once that regulation is enacted (award simplification could have, but has generaly not achieved this goal). As a result, the regulatory burden of the system has increased step-by-step, year upon year.

- The so-called 'deregulatory' initiatives have been outweighed by the continuing accumulation of individual regulatory burdens that of themselves may appear benign but which in combination mean that the current system still remains highly prescriptive in terms of regulatory process and content. Ironically, the overall regulatory burden of the system cannot be eased except by further legislative changes or by further orders of industrial tribunals.

- The current workplace relations system in only a very limited way promotes voluntarism. Legislative standards are mandatory. Compulsory conciliation and compulsory arbitration characterise award making.

Concepts of 'genuine bargaining', and some recent decisions implying an obligation of 'good faith bargaining' and the broad 'right to strike' in agreement making, create a legal and practical compulsion to bargain with third parties and even at times to settle 'agreements' on non preferred terms.

- The system also has a long way to go before it reflects either a structure for voluntary conciliation or voluntary arbitration as contemplated by ACCI policy. There is however scope for voluntary mediation in the current system (but no statutory recognition of the concept), and it is subject to all existing mandated 'rights' of compulsory conciliation and arbitration. There is also scope for some voluntary arbitration of non-allowable matters (a device though which is being used in dispute resolution provisions in s170LJ agreements to circumvent – not enhance – the statutory limitations on the powers of compulsory arbitration).

- The current system has principal objectives that substantially reflect aspects of the ACCI policy with respect to the primacy of agreement making at the workplace. However the operation of the system provides great scope for this objective to be undermined through third party interference in award setting and agreement making.

- The danger continues to exist that well meaning regulation sought for one purpose may in combination with existing or other proposed regulation undermine the overall objectives of decentralism and the primacy of employer and employee, workplace-based, determination of employment terms and conditions. All new legislative or regulatory proposals must avoid this.

- Fundamental goals of industrial regulation should include:
  - Simplified regulatory obligations, and reduced prescription.
  - Proper recognition that all employers are not the same, and that employment law should not be formulated by reference to the activities of a minority of worst performing businesses, employees or organisations.
  - Promotion and support of mutually beneficial win-win workplace relations.
  - Entrenching ongoing workplace reform and creating more certainty in the impact that the system has on workplaces.
  - Less politicised and polarised workplace relations attitudes and cultures.
  - A reduction in the need to comply with multiple regulatory instruments drawn from both the federal and state jurisdictions.

- A new commitment to implement 'best practice' approaches should be sought from regulators. This could be done by regulators adopting (as a matter of policy, practice or legal obligation) an **'Employment Regulation Standard' (ERS)**. This would provide that new industrial regulation that increases the cost or compliance burden of employers should not be created unless the following are satisfied:

  1. A regulatory impact assessment is prepared by the regulator in advance of its decision. The regulatory impact statement discloses the nature of the proposed regulatory burden, the estimate of the social, industrial and economic impact on those who would be affected, the factors that mitigate in favour of and against the imposition of the regulatory burden, the measures proposed to minimise the regulatory impact, the

particular impacts that the regulatory burden has on small and medium employers, the extent to which workplace agreements could be used to better achieve the proposed outcome at a workplace level and a clear statement of how the proposed regulatory burden would impact on employment.

2. Any new proposals to vary (increase) the regulatory burden on employers should wherever possible be accompanied by a concomitant proposal to decrease the regulatory burden by at least an equivalent extent.

3. Proposals to vary the regulatory burden on employers should, wherever possible, be imposed for a set period only and cease to operate beyond that period unless extended by the decision maker following an open review of the actual regulatory impact in the workplace.

- The ERS would act as a charter of mutual regulatory responsibility between policy makers and those who must work under the system. It should set out standards for the operation of employment regulation and the quality of regulation employers and employees are entitled to expect from the system.

- The key to the standard will be mutuality, and recognition that the obligations on employers and employees under the system are matched by obligations on the system to properly facilitate employment growth and support and encourage compliance.

- The ERS, or charter of mutual regulatory responsibility, may also for example provide broad principles that:

  – Regulation should be clearly accessible to those who must comply, in an appropriate form to facilitate and support compliance.

  – Regulation should be contained in the minimum possible sources, which can be easily delineated and accessed by users.

  – There should be a presumption against the making (and maintenance) of detailed and delineated obligations.

  – Regulation should change as infrequently as possible.

  – Where there are changes in regulation, these must be supported by proper information and due notice.

NOTES

[30] ACCI Labour Relations Policy

[31] Minister for Employment and Workplace Relations, Hon. Tony Abbott MHR, (2002) Speech to Queensland Industrial Relations Society, 5 July 2002

[32] Shadow Minister for Industrial Relations, Robert McClelland (2002) Parliamentary Second Reading Speech, 24 June 2002

RECOMMENDATIONS:

Objective 1: **The scope of all industrial regulation must be designed to further the principal objects of the decentralised system envisaged by the 1993 and 1996 federal reforms.**

Objective 2: **A three-step mechanism of regulatory accountability, the Employment Regulation Standard (ERS) should be created as a Charter of Mutual Regulatory Responsibility. It should be adopted by policy makers and introduced to counteract the continuing ad-hoc build-up of employment regulation, and preferably reduce the level of employment regulation. The ERS involves:**

- **pre decision regulatory impact assessments**
- **measures to counterbalance any regulatory impost**
- **reviews of regulatory impact and objectives after set periods.**

Objective 3: **The regulation of workplace agreements should support – not hinder – effective low cost agreement making.**

9.1 DISCRIMINATION

ACCI POLICY PRINCIPLES:

Employers accept the general principle of equal opportunity which underpins discrimination law.

Discrimination law must however represent a balance of interests and must necessarily be qualified and targeted to specified conduct rather than impose far reaching or general unspecified duties.

POLICY AUDIT & ANALYSIS:

- Employers are subject to both federal and state anti-discrimination laws. Employers do not seek to conduct business operations or employment practices on a discriminatory basis. However, the regulation of employment practices by discrimination law raises multiple issues of public policy that can, if the law fails to properly take into account the interests of industry, unduly and inappropriately impede legitimate business decisions and employment practices.

- Multiple regulatory jurisdictions create multiple regulatory obligations. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the *Workplace Relations Act 1996* (eg the form of awards, unlawful dismissal etc). This proliferation of obligations can be confusing and challenging to employers.

- There have been reforms in this area since 1996. Reforms appear to have emphasised improving processes and the operation of various bodies administering law in this area. Changes to the foundations of policy (ie the existence of redress for discrimination, and the statutory prohibition of discrimination) have not been pursued and do not appear set to be pursued.

- The Human Rights and Equal Opportunity Commission (HREOC) was considerably reformed in 1999, including the transfer of certain powers from HREOC to the Federal Court and Federal Magistrates Service, and from individual Commissioners to the President.

- The Equal Opportunity for Women in the Workplace Agency replaced the Affirmative Action Agency in 1999. This included replacing the focus on affirmative action under the previous legislation.

- During this parliamentary term, the Federal Government plans to introduce a national age discrimination law. The potential for significant overlap with state laws, as well as the federal and state workplace relations systems, exists. Whilst the Federal Government has – appropriately – indicated that such a law will not compromise age based youth wages, other areas of employment practice and business activities are potentially adversly affected by such a proposal.

- Unlawful discrimination is not an acceptable human resource practice, does not constitute an appropriate basis for human resource decision-making, and is contrary to the interests of business.

- Direct discrimination based on the various prohibited grounds long recognised in state and federal discrimination law should be prohibited.

- Anti-discrimination law should have a clearly delineated scope of operation, and provide specifically identifiable obligations and avenues for redress. General anti-discrimination goals/ objects should only be included in legislation where supported by detailed operational provisions that properly support compliance.

- Anti-discrimination law should generally be contained in dedicated anti-discrimination statute or an employment statute, unless there is a requirement to address it in other legislation affecting employment.

- In the context of employment, there is a sound basis to have employment tribunals continue to be solely responsible for the variation of the industrial instruments they make, including in regard to discrimination.

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

- Change to employment arrangements, including moves into agreement making without union involvement, should not constitute any form of prohibited discrimination unless there was, or should reasonably have been, a proven intention to discriminate.

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

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

RECOMMENDATIONS:

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

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

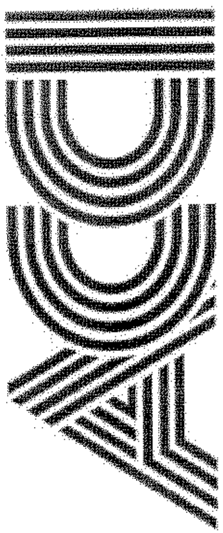
Objective 3: **Discrimination law should not, other than in limited circumstances, apply the concept of 'indirect discrimination' to employment and workplace policy and practices. The concept of indirect discrimination does not provide the regulatory certainty required by employers, especially small business.**

Objective 4: **Any proposed extensions of discrimination law to include new grounds, or to extend/vary the application of existing law, should be examined under the principles of the proposed Employment Regulation Standard (ERS).**

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

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

Attachment C



AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

MATURE AGE EMPLOYMENT CHANGING CULTURE

There has been increasing public debate over declining birth rates and the ageing of the Australian population. The issue effects all, including business. What is perhaps not recognised is the need to develop a comprehensive strategy across governments and industry to address issues relating to the mature-aged is now – not in 2020!

There is definitely a culture that has developed in Australia that disadvantages many mature age workers. Employers need to counteract this unhelpful culture. However, as in many cases, black letter law solutions can have unintended consequences.

Generally, people regarded by governments as 'mature-aged' are those 45 years and above. It is evident that treating this large group of people with one solution is unrealistic. Therefore although this paper refers to this group collectively, it is imperative that the overall group is segmented and different strategies are adopted to meet different elements of the group.

Some facts outlined in a range of material produced by government and industry include:

- As at June 2000, the median age of the Australian population was 35.2 years. An increase by 5.8 years in the last 20 years.
- Mature aged employment is growing. Three quarters of people between 45 and 54 are employed.
- Average age of retirement is around 60 years.
- Labour force participation declines sharply with age from 78.3 per cent for people aged 50 to 54 falling to over 36 per cent for people aged 60 to 64.
- Mature aged Australians are less likely to hold a post-compulsory qualification and less likely to undertake formal education and job related training.
- If mature aged people become unemployed then they will be unemployed for significantly longer than young people.
- Nearly 30 per cent of 50 to 64 year olds are welfare dependent.

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- Some industries or occupations already show older workforces. For example, the average ages of farm operators is 53, miners is 48 and manufacturing worker is 39.
- As at 2001, nearly one third of all workers in all occupations were 45 or over.
- Life expectancy at the average effective retirement age is now 18 to 20 years, about 5 or 6 years longer than it was 30 years ago.
- One in 4 new entrants to the labour market comes from overseas, either through migration or temporary work visas. The number of skilled migrants has tripled to more than 60,000 a year in the past decade. It should be recognised that Federal Governments will continue to set limits on levels of migration and it is not expected that this will meet the demand for labour.
- Since June 1980 there has been a very slow growth in the number of children (aged 0 to 14 years). In fact, there has been a 10,500 decrease in the number of children aged 0 to 4 years since 1980.
- The workforce entrants for the next twelve years are already in school and there is only a slight increase in their number which is insufficient to meet projected labour demand.

Although these issues do occur in other western countries, Australia does not necessarily compare favourably with them.

The Proposed Approach

Given the current situation, ACCI advocates a comprehensive whole of government approach in consultation with industry to address the issues and opportunities arising out of the ageing of the Australian workforce. It is evident that this must have the capacity to meet short, medium and long-term objectives. The matrix will also require the ability to address the needs of those post-65 years of ago, the group currently between 45 and 64 and younger people who will face these issues in later life.

ACCI proposes a six-tiered strategy as outlined below. Under each identified issue some discrete areas of activity are identified for further collaborative work. It is proposed that governments and industry undertake a joint approach with a view to an agreed national framework being adopted in early 2004.

1. Population

Australia's economic prospects and social fabric are dependent upon the level and composition of the resident population.

The age profile and the education/training standards of Australia's population will underpin our economic competitiveness, while the cultural mix and spatial distribution of the populace will have a powerful influence on our society.

Successive Australian Governments traditionally have not pursued explicit, extensive or transparent population policies. Rather, 'population policy' in Australia has been

conducted implicitly through various mixes of immigration, education and training, regional development and infrastructure policies.

The development of an integrated and transparent population policy is a critical component of addressing issues around ageing Australia. This needs to bring together a range of policy responses such as immigration, education and training, health, regional development, infrastructure and transport. In particular, key issues which need substantial research and debate include:

- is there an optimum population levels nationally and within Australia?
- levels of immigration required and appropriate categories of entry
- possible incentives for individuals which directly lead to an increase in domestic population growth over time
- potential impact of developed policy programs and services on metropolitan, regional and remote areas.

2. Fiscal Impact

A major issue is how the Commonwealth will successfully manage budgetary pressures that will inevitably arise as costs increase – principally within key social areas such as health, aged care and welfare.

Key platforms of ACCI's employment policy involve a range of simultaneous objectives including strong rates of economic growth, continuation of wider micro economic reform and stimulating productivity growth while containing the cost of labour. Any work in this area must take account of these requirements.

As part of last year's Commonwealth Budget, the Treasurer released Australia's first Intergenerational Report. The Report provides a basis for considering the Commonwealth's fiscal outlook over the long term, and identifying emerging issues associated with an ageing population.

The Report lists seven key priorities which would ensure fiscal sustainability. They are:

- achieving budget balance over the economic cycle. Continuing the Government's current medium-term fiscal strategy will ensure Commonwealth Government debt remains low as pressures due to an ageing population begin to build significantly around 2020
- maintaining an efficient and effective medical health system, complemented by widespread participation in private health insurance
- containing growth in the Pharmaceutical Benefits Scheme (PBS). Rapid PBS growth over the past decade means it could be one of the most significant areas of future spending pressure on the Commonwealth

- developing an affordable and effective residential aged care system that can accommodate the expected high growth in the number of very old people (people aged 85 or over)

- preserving a well-targeted social safety net that encourages working-age people to find jobs and remain employed

- encouraging mature age participation in the labour force

- maintaining a retirement incomes policy that encourages private saving for retirement, and reduces future demand for the Age Pension.

Over the past three decades Commonwealth health spending has more than doubled, to 4.0 per cent of GDP in 2001-02. In recent years, spending on PBS has been the fastest growing component, also more than doubling in the decade to 2000-01 as a percentage of GDP.

Although population growth and ageing affect health spending, these factors account for only around one-third of the recent growth. Much of the growth has come from the demand for new technology and treatments. Australians now expect to access more expensive diagnostic procedures and new (and more expensive) medications listed on the PBS. Unless addressed, these trends are likely to continue to drive health spending over the next four decades, pushing up Commonwealth health spending to 8.1 per cent of GDP in 2041-42. In all areas of health, spending is projected to increase, with PBS spending projected to rise from around 0.6 per cent of GDP in 2001-02 to 3.4 per cent by 2041-42, more than a five fold increase in its share of the economy.

As the number of very old people increases, spending on aged care is also projected to increase from 0.7 per cent of GDP in 2001-02 to 1.8 per cent of GDP in 2041-42. Aged care is the most demographically sensitive area of government spending and the number of very old people is expected to increase significantly.

Key issues which need substantial research and debate include:

- options for long-term taxation reform in line with changing revenue patterns

- development of sophisticated modelling methodology to support accurate forecasting

- incentives for family care of older Australians

- an examination of demand, cost and public funding of residential aged care

- capacity of existing medical programs and services to respond to increasing and changing demand.

3. Participation and Labour Market Assistance

A key concern of industry has been the ageing of the workforce, the overall decline of youth entering the labour market over time, and the impact these issues may have on

the future supply of skills. Increasingly employers must have dual strategies to attract the most suitable young employees and retain older workers with enhanced skills.

Industry Employment by Median Age and Older Age Groups

Industry	Median	45+	55+
	Years	%	%
Agriculture, Forestry and Fishing	43.5	49.0	26.6
Mining	39.6	35.9	8.1
Manufacturing	38.4	35.3	12.0
Electricity, Gas and Water Supply	40.5	37.9	9.5
Construction	36.2	29.3	10.3
Wholesale Trade	37.9	33.9	12.8
Retail Trade	29.2	23.7	8.7
Accommodation, Cafes and Restaurants	30.3	23.2	8.4
Transport and Storage	40.0	38.6	14.9
Communication Services	37.5	28.8	8.3
Finance and Insurance	34.7	25.8	7.4
Property and Business Services	37.5	34.5	13.7
Government Administration and Defence	40.2	39.4	10.6
Education	43.0	47.3	14.0
Health and Community Services	41.3	42.9	14.1
Cultural and Recreational Services	33.5	26.9	10.0
Personal and Other Services	37.3	33.2	12.0
Total	**37.4**	**33.9**	**12.0**

Note: small estimates are subject to high sampling variability.
Source: ABS, Labour Force (Super Tables) February 2003

Accordingly the table above shows all industries have significant numbers of mature aged workers already in the workplace with continued increases in workers over 55 years of age.

The Australian National Training Authority (ANTA) is establishing new industry advisory arrangements which will focus on the development of a comprehensive information and planning process to identify current and future skill needs for industry. It is recognised that the array of data sources available from the range of government departments and other agencies needs to be brought together to inform future vocational education and training direction and product and service development. This new mechanism will be particularly important in assisting in addressing potential demand for labour and identification of skills required. Obviously, the outcomes of this work will only be a guide.

The need to develop a more responsive education and training system to enhance the skills of older workers is a priority for industry. Currently there is no clear strategy to target existing mature aged workers to enhance their skills and productivity. There is additional urgency in developing this approach given the impact of new and emerging technologies on all workplaces, the lack of post-compulsory qualifications held by mature aged Australians, and the need for some mature aged people to update their skills as they move employment.

To assist in addressing this problem, ACCI advocates for the establishment of a learning bonus. There is general support by employers for establishing some form of financial assistance for existing employees to undertake training in the formal training system. Therefore, a learning bonus scheme is proposed which provides an allocation to an employer for employees who complete a formal qualification at AQF 3 or above. This would not be limited to New Apprenticeships. The bonus would simply be a financial incentive for employers to encourage their workforce to undertake formal rather than, or in addition to, informal training. The measurable outcomes of the scheme would be the formal recognition of skills of the Australian workforce and encouragement of up-skilling workers.

It is envisaged that a limit would be placed on the total number of workers for which an employer could receive the bonus in any given year. At this stage a limit of 250 participants has been proposed. The bonus would only be made available to employers by providing proof of qualification by the respective Registered Training Organisation (RTO) to the New Apprenticeship Centre (NAC). The payment would be the same amount as the relevant commencement payment for entry-level training.

The bonus would be paid to the employer but could be used for any purpose. In some cases the employer may use the payment as a reimbursement for undertaking skills assessments for their workforce, or wish to pass on the bonus to the employee to assist them in meeting costs, or as an incentive for them to undertake training out-of-hours. It is recognised that some workers may require less formal training than others to complete a qualification. It is recognised that the costs associated with this would be different for each worker, however, it is important that one level of bonus is introduced.

It is also important that the State/Territories examine the impact of the proposed bonus on the training activity undertaken by their RTOs and potential use of public training monies. However, it is not envisaged that all training undertaken by companies in receipt of the bonus will attract public funds. It is imperative that the Commonwealth evaluates the impact of the bonus in increasing formal training and employer numbers participating in the national training system. The benefits of introducing a learning bonus in skilling the Australian workforce would be to make formal learning options attractive to employers and employees alike.

It is also important for State and Territory governments to examine the potential of allocating a specific element of their vocational education and training budgets to addressing mature aged existing workers. There also needs to be considerable work undertaken on improving the incentive for providers to offer recognition of prior learning which lessens the requirement for experienced individuals to undertake the same extent of 'off the job' training.

4. Workplace Relations Impediments

The are also a number of workplace relations issues which may place impediments on mature aged people staying on in the workplace.

In January 2003, the Federal Government released an Information Paper outlining the proposed Commonwealth age discrimination legislation. Although Australian

employers have become familiar with State and Territory age discrimination laws over a number of years, a national law raises new issues about how Commonwealth and State laws on the same subject interact, and whether an age discrimination law helps or hinders employment of the mature aged.

The Commonwealth advances this proposal as consistent with its broader policy objectives of valuing the skills and work of mature aged workers, of trying to increase the retention of workers in the labour force beyond current retirement ages, and in addressing economic and social consequences of an ageing population. These are sound objectives.

Age discrimination laws already exist in most Australian jurisdictions. In an employment context the federal *Workplace Relations Act 1996* also has specific anti age discrimination objectives and provisions. The new Commonwealth proposal is not advanced as a substitute for State anti-age discrimination laws or federal workplace relations laws. It would be an additional law.

Discrimination law must be careful to avoid unintended consequences, as well as duplication in regulation. Whilst we all understand that age discrimination means treating people differently solely on the basis of age, the government's plan is not a proposal to preclude discrimination against a specified age cohort. It is a proposal to prohibit age discrimination *per se*. In addition, it must take into account the ability to perform the requirements of a job and allow for employers to have the flexibility in the type of duties they may employ an older person to undertake while avoiding a risk of complaint or litigation.

In addition, other regulatory or legislative requirements may also provide undue restrictions or potential risks for employers. These include inflexibilities around existing industrial relations arrangements, particularly awards that restrict part-time work or limit flexibilities around times older employees may wish to work.

Each of these regulatory requirements impact negatively on employer willingness to engage or continue employing older workers.

There is a lack of understanding by employers of recent improvements made to the Job Network to increase the extent and efficiencies of services to mature-aged job seekers. Commencing in July 2003, a single provider will work with each mature-aged job seeker with providers having an ability to link with State and Territory government labour market programs targeting the mature-aged. This is a good example of governments creatively linking their programs and services to address the needs of a client group.

The key issues to be addressed in this area include:

- better cross government workforce and skills projections

- consolidation of work undertaken to analyse workplace barriers to on-going employment of older Australians

- improved assistance available through post-compulsory education options, particularly vocational education and training
- better promotion of available active welfare and job seeker support programs and services
- development of support information for employers
- introduction of incentives to undertake further skills development
- extent of small business opportunities for older Australians
- introduction of new support services for older workers
- reform of regulations and legislation which inhibits employment.

5. Retirement Income

Early retirement has become more widespread in OECD countries in recent decades, in part because the practice was encouraged by government policies. However, in light of the challenges arising from ageing populations, many OECD countries have recently changed their policies with respect to early retirement, and are now aiming to increase labour participation of older workers. Analysis by the OECD includes the effects of recent reforms and also takes into account the effects of taxes on pension benefits.

A main finding is that ordinary public old-age pension systems now do not generally give strong incentives to retire before the statutory age. However, it is clear that regardless of the nominated retirement age, many people are retiring prior to this.

Early withdrawal from the labour market often remains an option, through special early retirement schemes, unemployment related transfer schemes, disability pensions and occupational pensions. While some of these schemes have also been tightened recently, they still provide important fiscal incentives to retire before the statutory retirement age.

Further reforms are needed to eliminate the distortions that encourage workers to withdraw early from the labour market.

The ageing of the population means that the proportion of retirees will continue to increase substantially and the demand for pensions, health care and aged care will also increase. In 1976 Australia had 1.3 million people over the age of 65 years – 9 per cent of the population. By 2016 it will be 16 per cent or 3.6 million people. In addition labour force participants are spending less time in the workforce, and are less likely to be full-time employees – resulting in more pressures on the existing system. The tax base will come under greater pressure as Australia's age dependency ratio (the ratio of those of working age compared to those not of working age) declines.

Consequently, the sustainability of the current system of superannuation, tax funded pensions and subsidised aged care is in question. This is particularly significant, given

that 83 per cent of Australians over 65 currently rely, to some degree at least, on the pension or an equivalent government payment.

The level of household savings in Australia has been dropping steadily for 20 years and shows no sign of recovery. Compared with many overseas nations, our level of household savings is low. This is reducing the level of domestic capital available for investment, forcing increased borrowing from overseas, and having an adverse impact on our international competitiveness. New initiatives are necessary to help restore domestic savings to an acceptable level.

Key platforms in the reform of retirement savings policy should include:

- access to tax funded pensions should ensure that funds drawn from tax revenue are directed towards those most in need. In other words, legislators should ensure that taxation revenue being directed into retirement incomes is spent as effectively as possible and encourages people to prepare and save for their own retirement

- if compulsory employer contributions are to continue, they must be supplemented by compulsory employee contributions

- regulations should discourage tax funded early retirement

- in principle, the system should encourage income streams as opposed to lump sum payments

- there should be minimal exemptions from coverage of compulsory superannuation

- the taxation of retirement savings must be aimed at encouraging private contributions – not maximising current taxation revenue.

Issues which require a coordinated policy development include:

- all aspects of superannuation

- continued reform of the welfare system to provide incentives for work longer

- the treatment of assets by welfare and tax regimes

- development of a savings strategy

- financial incentives to maintain employment for longer.

6. Market Impact

There also exists tremendous potential for business in meeting the changing demographics of Australia. Business has another reason for a concerted effort into increasing mature aged participation other than necessary supply of skilled labour and reduction in welfare or pension dependency. The importance of older people as consumers is of vital importance to business.

The over 55s account for 21% of Australia's population, but head up households that own 39% of the nation's household wealth, and account for 25% of all disposable income.

The coming decade will see further rapid growth in the importance of the older population to manufacturers and retailers.

A key issue which will greatly impact on Australian business is their ability to seize new commercial opportunities (both at home or overseas) resulting from the ageing of populations. This is a very important incentive for business and industry to be actively involved.

Matters which should be considered include:

- export opportunities for products/services targeting ageing markets
- changing spending patterns
- product, service and distribution redesign
- differential impact across industry sectors
- re-alignment of marketing and sales effort.

The development of a comprehensive approach which takes account of the five key nominated areas outlined above, is the major challenge for Australian industry and governments through this decade. It is important that public debate is generated whilst acknowledging that the fundamental changes are already occurring and must be addressed as soon as possible. An important landmark in addressing these issues will be a forum conducted later this year with the Federal Government, organisations representing older Australians and other interested organisations.

Employers will need a range of information and support products and services to be developed to assist them in meeting this challenge. But there are also considerable opportunities for older Australians to contribute towards their own economic prosperity and individual businesses benefiting from a changing world.

ACCI, governments and other important stakeholders must combine their efforts, existing issues and research, to produce a clear, 'whole of Australia' strategy for 2004.

ACCI Review No.99 – May 2003

Attachment D

ABN 85 008 391 795

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

MEDIA RELEASE

27 August 2003

ACCI WELCOMES PRIME MINISTER'S FOCUS ON THE AGEING WORKFORCE

Statement by Peter Hendy, Chief Executive

The Australian Chamber of Commerce and Industry (ACCI), Australia's largest and most representative employer organisation, has welcomed news that the Prime Minster has asked the Community Business Partnership Panel to look at ways employers can encourage mature-age workers to stay in the workforce.

This panel, which includes two ACCI Board Members, Mr Robert Gerard AO and Mr Tony Howarth AO, will provide advice to the Prime Minister on how best to address the effects on Australian workplaces of Australia's ageing population.

There is definitely a culture that has developed in Australia that disadvantages many mature age workers. Employers need to counteract this unhelpful culture.

ACCI has proposed a strategy which will incorporate a whole of government approach, in collaboration with industry, to address some specific areas affected by this demographic shift.

Population – It is very important that a population policy bring together a range of responses from the immigration, education and training, health, regional development, infrastructure and transport portfolios.

Fiscal Impact – A major issue in this debate is how the Commonwealth will successfully manage budgetary pressures that will inevitably arise as costs increase – principally within key social areas such as health, aged care and welfare.

Participation and Labour Market Assistance – A key concern of industry in recent years has been the combined effects of the ageing workforce, the overall decline of youth entering the labour market over time and the impact these issues may have on the future supply of skills. Increasingly, employers must have dual strategies to attract suitable young employees and retain older workers with enhanced skills. ACCI also advocates the introduction of a "Learning Bonus."

Workplace Relations Impediments – Restrictions on part-time work in some awards hinder the employment of older Australians.

Retirement Income – Early retirement has become more widespread in Australia in recent decades, in part, according to the OECD, because the practice was encouraged by government policy. In recent years, government policy has shifted on this issue to encourage workers to stay in the workforce longer. However, more reform on government policy, in particular the current system of superannuation, tax funded pensions and subsidised aged care, is required.

Market Impact – A key issue which will greatly impact on Australian business is their ability to seize new commercial opportunities (both at home or overseas) resulting from the ageing population. Australians over 55 account for 21% of Australia's population, but head up households that own 39% of the nation's household wealth and account for 25% of all disposable income.

For further information:

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Attachment E

PRIME MINISTER

SHARED RESPONSIBILITY TO ENCOURAGE OLDER WORKERS

It is critical that all levels of government, business and the community work together to help encourage older workers so that Australia can sustain its high levels of economic growth into the future.

For our part I will be asking the Prime Minister's Community Business Partnership to suggest practical ways the Government could encourage the private sector to employ more mature workers.

We are also looking at other ways to ensure that this wealth of talent is not lost. These include:

- information campaigns aimed at both employers and employees to help improve attitudes about mature age employment; and
- encouraging people to consider part-time and contract work for the time they wish to remain in the workforce beyond current retirement ages.

Labour markets will need to be sufficiently flexible to suit the needs of older workers. A regulated labour market diminishes the capacity of mature age personnel to choose their working hours, retirement age and the specific rewards they want to receive.

Changing our culture of early retirement will largely require improving community understanding of the immense value of older workers and the importance of increasing labour force participation.

Research shows that mature age workers have many qualities valuable to business, including experience, loyalty, corporate knowledge, commitment, strong work ethic, reliability and low absenteeism.

For these reasons, business have a vital role to play in encouraging more older workers.

I acknowledge businesses who are setting an example for others by recruiting more mature employees, utilising older workers as mentors and adopting a more flexible working environment. Such firms are already experiencing the benefits gained from investing in older employees.

I believe both governments and the private sector have a role to play in lifting the workforce participation rate of older Australians.

Small, well-targeted steps taken now will help ensure that we can avoid more drastic steps in twenty, thirty, or forty years' time.

27 August 2003

Attachment F

SUMMARY OF ACCI UNFAIR DISMISSAL REFORM PROPOSALS 2002

1. Amend statutory objects to express the 'fair go all round' concept.

2. Improve the prospects of resolution at conciliation conferences.

3. Limit automatic access to arbitration following conciliation.

4. A tighter test of what is an "unfair dismissal".

5. Relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration.

6. Preventing, so far as possible, excluded employees from making similar claims against the employer under other Acts or laws.

7. Extending the qualifying period to the first six months of employment.

8. Increasing the filing fee to $100.

9. Exempting unfair dismissal claims based on genuine redundancy.

10. Limiting the scope for constructive dismissal claims (that is, resignation based claims).

11. Requiring the consideration of business size and the presence/absence of a human resource manager to apply to all dismissals, not just those for "unsatisfactory performance".

12. Providing a schedule of legal/representative fees, and providing for costs orders to be generally available against solicitors, not just parties.

13. Not permitting extensions of time in cases of failure by an applicant' representative.

14. Requiring the Commission to conduct its hearings expeditiously.

15. Requiring a dismissed employee to have a statutory obligation to mitigate loss and declare all earnings, and require reinstatement and back wages orders to be discounted by the earnings, redundancy pay, social welfare payments or workers compensation payments the employee is entitled to keep.

16. Orders for payment of compensation not to include non-economic loss (pain, suffering, hurt feelings).

17. For smaller businesses, if no full exemption is provided, then: • Longer qualifying period for small business (9 or 12 months).

    • Lesser procedural requirements (valid reason plus opportunity to explain).

    • Family members to be excluded from claims.

    • Flexibility in the time and location of conferences.