



**CIVIL CONTRACTORS  
FEDERATION**

# POLICY DOCUMENT

Submission to the Senate Legal and Constitutional  
Affairs Committee Inquiry into the

*Human Rights and Anti-Discrimination Bill 2012*

*December 2012*

## Further information

Julie Abramson  
Deputy Chief Executive Officer  
Civil Contractors Federation National Office  
Level 1 /210 High Street  
Kew 3101  
Telephone: 03 9851 9900

*Constructing Australia's Infrastructure*

## **The Civil Contractors Federation (CCF)**

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development and industry issues.

Through our Federation we represent over 2000 small, medium and large sized contractors who in turn work in an industry of more than 350,000 people.

Our members are involved in a variety of projects and activities including the development and maintenance of civil or “horizontal” infrastructure such as roads, bridges, sewer, water and drainage pipelines, dams, wharves, commercial and housing land development.

Members are also involved in the preparatory works for mining and other resource developments.

We appreciate the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Human Rights and Anti-Discrimination Bill 2012*.

Employee Relations regulation including anti-discrimination laws and the Industrial Relations framework within which it takes place, plays a critical role in the productivity of the industry and is a primary concern of the CCF membership.

CCF has made a number of submissions on employment issues including in relation to the Senate Employment, Education and Workplace Relations Committee Inquiry into the Fair Work Bill 2008 (“our 2009 submission”). We have also made a number of submissions in relation to the future of the Australian Building and Construction Commission (ABCC).

Employee and industrial relations support and advice are key component services that our Federation State Branches provide directly to members.

At the outset it should be stated that CCF and its members support merit based employment. In doing so we do not condone conduct which seeks to deny employment opportunities to someone on the basis of their sex, race, disability or age (the current legislation).

Our policy statement on Workplace Relations includes the following key objective:

“Respect for the rule of law by both employers and employees -facilitated by meaningful sanctions, speedy enforcement mechanisms and a strong regulator to enforce such sanctions for unlawful industrial action”

This statement also encapsulates and supports our views that all people should have the ability to participate in meaningful employment free from discrimination including assumptions about their capacity to perform job tasks.

CCF and its members work in an industry which has traditionally had a low participation rate for women particularly in plant operation. This arises for a range of reasons including workplace culture, hours of work and the previous physical nature of the job. We are working hard with our members to attract women to civil construction.

Initiatives include supporting "Women in Civil" through networking opportunities, mentoring and targeted training initiatives. Ensuring women and other minority groups can properly participate in our workplaces is a key strategy in meeting skills shortages.

Our industry also has low retention rates for workers over 50. This is partly due to the physical nature of the job (which has been considerably improved by modern technology) and also other workplace culture issues. CCF is actively encouraging and supporting initiatives to support retention of older workers especially as workplace trainers and advisers, occupations which are currently in shortage.

Our submission is in two parts. Some general comments about the legislation and the position of small to medium sized employers in particular and then some detailed commentary on the Bill.

## EXECUTIVE SUMMARY

Whilst CCF welcomes the principle of consolidation we are extremely concerned about a number of aspects of the new provisions.

We also see that a real opportunity to work closely with the states and territories in aligning federal and state legislation has been missed with the outcome that there will actually be an increase in the regulatory burden on employers.

We do not support:

- The change in the test for discrimination and the expansive definition of “unfavourable treatment.”
- The increase in the so called “personal attributes” that can give rise to unlawful action
- The introduction of a broad exemption for justifiable conduct rather than reproducing the current exemptions.
- The vicarious liability provisions being on the basis of a connection rather than actual or apparent authority.
- The position on costs in that the starting point is that each party must bear their own costs.

We very strongly oppose

- The underlying philosophical approach which sees the highest test or standard in the 4 pieces of legislation become the default position regardless of the development of the law or practice in that particular area.
- The shifting of the burden of proof.

Additionally we see much merit in the consideration of an exemption for small business from the operation of the provisions of all or some of the provisions of the consolidated Act

## **PART A – general comments**

### **1 Overview – an over-regulated area**

At the outset, CCF welcomes initiatives to consolidate current legislation as a matter of principle. Competing legislation with different definitions and different tests causes confusion and regulatory red tape for employers.

However, our experience of harmonisation and standardisation is tempered by recent experience particularly with Work Health and Safety laws and our support for such initiatives is not without strong qualifications.

We make three substantive points on this issue as outlined below.

#### **1.1 Too much Regulation**

As has been identified previously this is an area which is regulated by both the Commonwealth and the States and Territories.

There are currently 12 pieces of legislation in the States and Territories directly impacting on employment together with the Fair Work Act 2009 (“FWA”) which we refer to below.

As identified by Ai Group in their submission to the Discussion paper (“Ai Group Submission”)<sup>1</sup>

“Anti-discrimination law is found at Commonwealth, State and Territory levels. In total, 12 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment. These include:

- *Age Discrimination Act 2004* (Cth) (‘ADA’);
- *Disability Discrimination Act 1992* (Cth) (‘DDA’);
- *Racial Discrimination Act 1975* (Cth) (‘RDA’);
- *Sex Discrimination Act 1984* (Cth) (‘SDA’);
- *Anti-Discrimination Act 1977* (NSW);
- *Equal Opportunity Act 1995* (VIC);
- *Anti-Discrimination Act 1991* (QLD);
- *Equal Opportunity Act 1984* (WA);

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<sup>1</sup> See Australian Industry Group Submission No 220 1 February 2012 at [www.ag.gov.au](http://www.ag.gov.au)

- *Equal Opportunity Act 1984* (SA);
- *Anti-Discrimination Act 1998* (TAS);
- *Discrimination Act 1991* (ACT);
- *Anti-Discrimination Act* (NT).

Aspects of anti-discrimination law are also found in the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*), which is the principal piece of legislation regulating workplace relations in Australia."<sup>2</sup>

Accordingly, whilst in principle Federal consolidation is a meritorious idea this does little to assist employers working between states. Indeed in other areas the Commonwealth has specifically recognised the issue of multiple laws and regulations for example in our sector the reforms to prequalification in roads and bridges to implement a streamlined national system.

We agree and support the comments of Ai Group in their submission to the consolidation discussion paper that:

"It is clear that the area of anti-discrimination is overregulated. A consolidation bill, contrary the aims of the Consolidation Project, will not make the law clearer and more consistent for employers if the State and Territory anti-discrimination laws are allowed to continue to apply in areas covered by the Federal laws. It will only complicate matters for employers by duplicating their statutory obligations and increasing red-tape. It will also allow complainants to continue to 'forum shop' for a jurisdiction which would result in the more favourable outcome for their claim. This is inappropriate and unfair for duty holders, such as employers, who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different remedies."<sup>3</sup>

The Australian Chamber of Commerce and Industry ('ACCI') also makes this point:

"In an ideal best practice and smart regulatory environment, business should only have one clear set of legal duties to understand and comply with and not have to understand and comply with a cascade of different legal obligations arising from common law and federal, state or territory statutes, which applies to the same alleged conduct"<sup>4</sup>.

Whilst national harmonisation would be an appropriate goal great attention has to be paid to implementation. Whilst as noted we are very supportive of national prequalification which

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<sup>2</sup> Ibid 3

<sup>3</sup> Ai Group *opcit* page 4

<sup>4</sup> See ACCI Submission No 209 3 February 2012 at [www.ag.gov.au](http://www.ag.gov.au) at Page 9

has been undertaken with full consultation with industry, harmonisation of Work Health and Safety laws is not realising the positive outcomes that were expected due to implementation issues.

## 1.2 Harmonisation to the highest standard

Our concern which is reflected in this submission is that one of the drivers on consolidating the federal laws is clearly stated as:

“...(to) lift differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections.”<sup>5</sup>

In essence what is missing in this statement is the need to fairly balance the duties to vulnerable people with the obligations of the duty holders.

Importantly the legislation should in our view, whilst dealing with discrimination, be supportive of the need to encourage employment. At a certain point the regulatory burden actually discourages particularly small to medium -sized employers who find the compliance burden overwhelming.

Anecdotally this is certainly the experience of some of our members particularly with reference to the Fair Work Act which is dealt with in the next section of our submission below.

## 2 Interaction with Fair Work Act 2009

Division 3 of the Fair Work Act specifically sets out what was a new right under the Fair Work Act to take action under Section 340 for so called “adverse action”.

This includes under Section 342:

<b>Meaning of <i>adverse action</i></b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b><i>Adverse action is taken by ...</i></b>	<b><i>if ...</i></b>
1	an employer against an employee	the employer:  (a) dismisses the employee; or  (b) injures the employee in his or her employment; or

<sup>5</sup> See Fact Sheet at [www.ag.au](http://www.ag.au)

		(c) alters the position of the employee to the employee's prejudice; or  (d) discriminates between the employee and other employees of the employer.
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And in Section 2

2	a prospective employer against a prospective employee	the prospective employer:  (a) refuses to employ the prospective employee; or  (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
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The general protection provisions have in our view become an avenue to claims lacking in merit. Our experience is that they are often used when employees do not have access to unfair dismissal provisions because they are out of time or they have only been employed for a short period of time and also given that the onus of proof lies on the employer.<sup>6</sup>

We would also make the general observations about these provisions that because they are so broad they lend themselves to speculative and unmeritorious claims. They cover a range of "rights" from freedom of association, termination of employment for an unlawful reason, coercion, sham contracting and *include discrimination* amongst other matters.

This section creates therefore an additional right to claim discrimination in the employment relationship which would also appear to be covered in the current federal discrimination legislation.

We support a view that the Government should actually remove the anti-discrimination provisions from the FWA beyond those that have been in the Federal workplace relations legislation for many years.

For example - the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason.

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<sup>6</sup> We note that the government has recently enacted new timeframes which will commence from January 2013.

We support the comments made by Ai Group that:

“The major expansion in the anti-discrimination provisions implemented via *Fair Work Act* has created another layer of red tape for employers and higher costs for employers and the community. For example, the new provisions have required the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman.”<sup>7</sup>

We also strongly oppose the operation of the reverse onus of proof in these provisions and comment on the approach taken in this consolidation for discrimination laws to also operate on this basis.

### **3 Need for small business exemption**

We also support calls for consideration of an exemption for small business in relation to the provisions of the consolidated Act. We note that in responding to the Discussion Paper ACCI stated<sup>8</sup>:

“ACCI believes that there is merit in considering how small business or micro-businesses could be treated differently from certain parts of discrimination regulation. A small business exemption exists in other areas of federal regulation, including the FW Act and *Privacy Act 1988* and did feature in a number of state schemes. For example, s.21 of the then Victorian *Equal Opportunity Act 1995* allowed an employer who employed no more than the equivalent of 5 people on a full-time basis (including the people to whom employment is offered) to determine who may be offered employment, even if that would be considered discriminatory. This exemption had strong support from industry when the Victorian legislation was reviewed by the previous Victorian Government.”<sup>9</sup>

We endorse and support these comments for consideration by the Committee.

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<sup>7</sup> Ai Group *opcit* Page 4

<sup>8</sup> ACCI *opcit* page 8

<sup>9</sup> See for example the submission from Victorian Automobile Chamber of Commerce here: <http://www.justice.vic.gov.au/resources/2/4/242c2000404a4226a9b7fbf5f2791d4a/victorianautomobilechamberofcommercesubmission.pdf>

## **PART B – Specific comments on the legislation**

### **4 Grounds for discrimination**

The consolidated Bill expands the grounds for unlawful discrimination to include as personal attributes relationship status, gender identity, sexual orientation, religion, industrial history, immigrant status, medical history and social origin.

In relation to industrial history it is our understanding that the Fair Work Act already covers the issue of industrial history so we would question the case for including this as a ground for unlawful conduct under this Act.

In any event it is our view that substantial education and information will need to be provided for employers in relation to what these grounds encompass.

We also foresee some real practical difficulties in the operation of grounds such as medical history when considering inherent requirements of a job and the operation of the exclusions.

### **5 Test for discrimination**

#### **5.1 Direct discrimination – moving to a detriment test.**

We note that in bringing consolidation the Government has moved from the so called “comparator test” which is we understand used in the ADA, SDA, DDA, and in all States and Territories other than Victoria and the ACT to one based on “unfavourable treatment. Discrimination will occur when a person is treated “unfavourably” because they have a “protected attribute”. This is known as the “detriment test”.

In our view rather than meeting the goals set for the legislation of “clearer and more efficient laws”<sup>10</sup> this adds considerable complexity as it departs from tests which have been the subject of judicial interpretation since inception of the Acts.

The Discussion Paper recognises the issues with moving to this test stating:

“...although the detriment test is a departure from the complexity of the comparator test with its explicit focus on comparison, there is some risk that courts might interpret the test in substantially the same way as the comparator test”<sup>11</sup>

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<sup>10</sup> See Fact Sheet *opcit*

<sup>11</sup> Attorney-General's Department *Discussion Paper Consolidation of Commonwealth Anti-Discrimination Laws* September 11 2011 at page 10

It is important to focus not just on legal definitions but the practical way in which these laws are to be interpreted and used in the workplace.

By introducing “unfavourably” this in our view substantially expands the definition and combined with the reverse onus of proof adds significantly to the regulatory burden and disincentives on employment for business.

We note that in examining option 3 (the model implemented in this legislation) the Regulatory Impact Statement outlines costs to business as follows:

“As with Option Two, there may be familiarisation costs, such as updating policies to reflect the changes to the Acts, identifying which changes would impact on them, and put in place policies and procedures to reflect this. In addition, there may be additional costs associated with updating printed material, refreshing training material and advising employees of their new obligations.

Many businesses and not-for-profit organisations are likely to consider that the replacement of most existing specific exceptions and exemptions with a general principle increases uncertainty. This is because the definition of what is justifiable will be left to the Commission and courts to develop over time, rather than being specified in legislation. *As a result, some businesses may become more cautious and either spend more on legal advice or potentially adopt less efficient practices to avoid challenge, such as not firing unproductive staff where they have a protected attribute (our emphasis).* The extent of this behaviour cannot be estimated, but to help avoid this cost the measures at part 4) are also proposed. A small number of businesses may also incur legal costs in clarifying the new provisions through the courts. Over time, however, uncertainty should decrease as case law develops.”<sup>12</sup>

In our view this analysis outlines the point that we made in section 1 of our submission being the potential for dampening employment of the very people the legislation is designed to support.

## **5.2 A significant expansion of what will be considered to be unfavourable treatment.**

We also note that “unfavourable” treatment has a particular meaning under the Bill and is broader than an objective test but is rather conduct will be deemed to be “unfavourable treatment” if the conduct offends, insults or intimidates the other person. In other words a subjective test.

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<sup>12</sup> Regulation Impact statement Page 44 at [www.ag.gov.au](http://www.ag.gov.au)

This is different from the current test which is objective and based on a reasonable person having anticipated the possibility that the person exposed to the conduct would be offended, insulted, humiliated or intimidated.

By introducing “unfavourably” this in our view substantially expands the definition and combined with the reverse onus of proof adds significantly regulatory burden and disincentives on employment to business.

The change in the test is not just about paper based policies it is about how people in these cases employers behave in the workplace and whilst it is true that over time the new test will be understood and interpreted it is difficult to see what benefit is gained by making such extensive and far reaching change at this time.

“Uncertainty” in regulation is a real and often overlooked issue for policy makers. Business is already having to process and manage a range of new laws from the Carbon Tax through to a number of changes in taxation laws.

This expansion so that conduct will be deemed to be “unfavourable treatment” if the conduct offends, insults or intimidates the other person has been the subject of considerable criticism and concern.

We note the comments of His Honour James Spigelman in his Human Rights Day Oration<sup>13</sup>:

“ I am not aware of any international human rights instrument or national anti-discrimination statute in another liberal democracy that extends to conduct which is merely offensive.. so far as I have been able to determine we would be pretty much on our own in declaring conduct which does no more than offend to be unlawful. In a context where human rights protection draws on a global jurisprudence, this should give us pause when we re-enact s18C and before we extend such protection to other contexts.

Section 19 (2) (b) of... the Bill... introduces “offending” into the definition of discrimination for all purposes not just for racial vilification. None of the other pre-existing Commonwealth Acts covering sex, disability and age discrimination - extends the concept of discrimination to conduct which only offends.”<sup>14</sup>

We can see no justification for such a radical change to the existing law at this time and strongly oppose it.

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<sup>13</sup> See His Honor James Spigelman “ Hate Speech and Free Speech: Drawing the line” Human Rights Day Oration Australian Human Rights Commission Sydney 10 December 2012

<sup>14</sup> Ibid 7

### **5.3 Indirect discrimination**

We note that the Draft legislation adopts a definition of indirect discrimination based on the concept of discrimination by imposition of policies - which includes a condition, requirement or practice.

However, there is no requirement that to be unlawful the policy must be unreasonable rather the Act provides a defence of “justifiable discrimination” which the employer must establish.

We are not convinced such changes are warranted and note that it introduces a significant additional burden on employers and other persons. This is related to our view on the burden of proof requirements in the Act which are outlined below.

## **6 Exclusions and defences**

The new consolidated Act provides a range of exceptions to the strict operation of the Act. These provisions are contained in Division 4 with the main exceptions being for justifiable conduct, inherent requirements of work and what is a reasonable adjustment in the case of disability discrimination.

The discussion paper asked for comments on whether there should be a so called general limitations clause. The “justifiable conduct” clause would appear to give this proposition effect.

At present whilst we acknowledge that there are differing exceptions across the range of the Acts the benefit is that they are tailored to the particular discrimination the subject of the Act. Whilst some important exceptions have been retained for example inherent requirements of work (particularly relevant to the DDA) this new concept of justifiable conduct will need to be interpreted and defined by the courts over time.

This increases uncertainty for employers. We are not convinced about the necessity for such change and why the current defences and exclusions could not be replicated in the consolidated Act.

## **7 Vicarious Liability Provisions**

We note that the approach taken in the legislation is to use the concept of being “connected with” an area of public life for example employment. The exception is then provided if the principal (employer) has taken reasonable precautions and exercised due diligence to prevent the conduct.

We do not support this approach – our preference is that the definition used be the one currently in the ADA and DDA which requires the unlawful act to be committed “within the scope of the persons actual or apparent authority” combined with the exception based on reasonable precautions and the exercise of due diligence.

It is our view in line with that of other stakeholders that employers should only be liable for conduct which the employer could have influenced in some real way with a nexus to the workplace. The principle underpinning this is that the wrongdoer should be personally accountable for their actions.<sup>15</sup>

## **7.1 The use of social media**

These issues are a real and present problem for employers with the advent and proliferation of social media. Employers should not be subject to exposure to liability outside of the normal workplace.

It is entirely foreseeable that an employer will be made party to an action in a sexual harassment claim by one employee against another employee on Facebook or through twitter.

If the “connection” test is used then it can be argued that because both people are “employees” of the employer there is a connection to employment. In responding to such issues an employer will also be constrained by what action can be taken under the Fair Work Act.

These very issues and the difficulties that arise for employers were recently canvassed in an article by Clay Lucas in the Age Newspaper where he reported that:

“An increasing number of workplaces across Australia are banning staff from accessing social media at work, and simultaneously trying to prevent them commenting on their employer after hours.

Across Australia, 91 business have sought to formally ban their staff from accessing Facebook, Twitter and other social media sites, as part of a workplace agreement.

The first enterprise deals featuring such bans began appearing in 2010, and increased five-fold in 2011, Fair Work Australia agreement searches show.

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<sup>15</sup> See ACCI *opcit*

The agreements potentially expose employees to disciplinary action if, during working time, they use social media, defined in most agreements as Facebook, Twitter, YouTube, Myspace and "all other internet sites whose function provides for social networking".

"In two recent (workplace) agreements, for bus charter companies Westernport Roadlines and Sandringham Coaches in Melbourne, employees are specifically warned that any comments made via social media that refer to their employment or personal life, on sites such as Facebook or Twitter, could result in disciplinary action, "up to and including termination".<sup>16</sup>

We also note further in the article:

"Kate Jenkins, a partner at Herbert Smith Freehills specialising in employment law, said there was a rising number of employers having to tackle workers making "abusive comments about co-workers, threats, sexual remarks, racist remarks, often about managers" on social media sites.

She said that many people did not understand that their personal use of social media could cost them their job."<sup>17</sup>

However, there is now at least one court case where an employer has dismissed an employee over comments made about the workplace on social media only to be taken to Fair Work Australia and for the employee to be re-instated.

In Glen Stutsel v Linfox<sup>18</sup> Mr Stutsel brought proceedings pursuant to s.394 of the *Fair Work Act 2009* (the Act) in relation to the alleged unfair termination of his employment by Linfox Australia Pty Ltd. Particularly it was alleged by the company that:

" "1. on your Facebook profile page, which was open to the public, you made a number of statements about one of your managers, Mr X<sup>19</sup>, that amounted to racially derogatory remarks;

2. on your Facebook profile page, which was open to the public, you made a statement about one of your managers, Ms Y, which amounted to sexual discrimination and harassment; and

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<sup>16</sup> Age Newspaper 14 December 2012

<sup>17</sup> Ibid

<sup>18</sup> Glen Stutsel v Linfox [2011] FWA 8444

<sup>19</sup> The names of the co-workers appear in the judgement

3. you made extremely derogatory comments about your managers, Mr X and Ms Y<sup>20</sup>.”

In these circumstances the company terminated his employment stating that:

“the above conduct is extremely serious, and Linfox cannot in any way condone or fail to deal with these matters appropriately.”

Ultimately Commissioner Roberts found in favour of Mr Stutsel noting amongst other matters that the company did not have a social media policy.

“At the time of Mr Stutsel’s dismissal, Linfox did not have any policy relating to the use of social media by its employees. Indeed, even by the time of the hearing, it still did not have such a policy. The Company relies on its induction training and relevant handbook (see paragraphs 28 and 29 above) to ground its action against Mr Stutsel. In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies. Linfox did not.”<sup>21</sup>

The fraught position of employers is highlighted in this decision. If a company fails to take action then it could be pursued by those employees who claim the behaviour by the offending employee particularly in the broader definition of the consolidated bill offended, insulted or intimidated them. If they do take action they can face a claim for unfair dismissal.

For these reasons we are extremely concerned about the vicarious liability provisions and do not support the use of the “in connection” test.

## **8 Burden of proof**

We do not support and indeed oppose the shifting of the burden of proof to the model which is now used for Adverse Action claims under the Fair Work Act. That is if the applicant establishes a *prima facie* case that the unfavourable treatment was for a discriminatory reason, then the onus switches to the respondent (eg, the employer) to establish that the unfavourable treatment was not for that reason.

It is the direct experience of our members as noted previously that these provisions in the Fair Work Act have led to the return of payment of “go away” money.

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<sup>20</sup> The names of the co-workers appear in the judgment

<sup>21</sup> The decision is the subject of Appeal

It is our view in relation to the FWA provisions that small employers are in an even more difficult position, unwilling or unable to expend money on a protracted dispute they will pay money to settle the claim even with little or no merit.

As noted earlier this is the direct experience of our industrial advisers and the consultants who provide support to our members.

For these reasons we do not support introducing this into the consolidated Act and indeed strongly oppose it.

## **9 Processes for resolving complaints**

Generally speaking we of course support the key principle underpinning the reforms stated to be”

“A streamlined complaints process, to make it more efficient to resolve disputes that do arise.”<sup>22</sup>

However, we foreshadow that the change in the test for discrimination, the new expanded concept of unfavourable treatment and the shifting of the burden of proof will actually expand the number of claims under the Act.

As noted in the section on the shifting of the burden of proof we will see employers especially small employers pay money in relation to non meritorious claims as they lack the resources to argue out in full a claim.

Recent research conducted by Fair work Australia in relation to conciliation under the Fair Work Act provides some data on just this point.

That research found that more than 90% of conciliations are conducted by telephone conference and almost all unfair dismissal applications proceeded to conciliation.<sup>23</sup> Whilst this is positive it needs to be seen in conjunction with other findings such as 76% of employer participants reporting that it was the “cost, time, inconvenience or stress of further legal proceedings” that was the significant factor in their decision to settle the matter at conciliation rather than proceeding to hearing.<sup>24</sup>

Anecdotally this is also the experience of members in relation to anti-discrimination laws. In other words settlement at conciliation is not necessarily an indication that conciliation

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<sup>22</sup> See the Fact Sheet *opcit*

<sup>23</sup> TNS Social Research, *Fair Work Australia Unfair Dismissal Conciliation Research Survey Results*, November 2010, p 2, <http://www.fwa.gov.au/documents/dismissals/report.pdf>, viewed 1 June 2011.

<sup>24</sup> Ibid p 51. Only 19% of respondents felt that this factor had “a weak or no influence at all” on the decision to settle at conciliation.

proceedings are key to resolving disputes. Moreover, in some jurisdictions an employer is not able we understand to be represented or have such a person in attendance at any conciliation conference leading to issues of the fairness of outcomes for employers.

We also note the change in cost arrangements so that unlike most litigation costs no longer follow the event but rather

“Each party to a court dispute to bear its own costs, ensuring greater access to justice (and ensuring courts have discretion to award costs in the interests of justice).”<sup>25</sup>

This will also in our view increase complaints and it would be our preference that the starting point be that costs are a discretionary matter for the judicial officer hearing the complaint.

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<sup>25</sup> See Fact Sheet *opcit*

## **PART C**

### **10 Conclusion**

Whilst CCF welcomes the principle of consolidation we are extremely concerned about a number of aspects of the new provisions.

We do not support:

- The change in the test for discrimination and the expansive definition of “unfavourable treatment.”
- The increase in the so called personal attributes that can give rise to unlawful action
- The introduction of a broad exemption for justifiable conduct rather than reproducing the current exemptions
- The vicarious liability provisions being on the basis of a connection rather than actual or apparent authority
- The position on costs in that the starting point is that each party must bear their own costs.

We very strongly oppose

- The underlying philosophical approach which sees the highest test or standard in the 4 of pieces of legislation become the default position
- The shifting of the burden of proof.

Additionally we see much merit in the consideration of an exemption for small business from the operation of the provisions of all or some of the provisions of the consolidated Act.

As always we would be happy to provide any further detail or information as requested.