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Mr Julian Garner
Equal Opportunity Review
C/- Department of Justice
Level 24, 121 Exhibition Street
Melbourne Victoria 3000

equalopportunityreview@justice.vic.gov.au

Dear Mr Garner

Re: Equal Opportunity Review Options Paper

I refer to the Equal Opportunity Review Options Paper released by the Department of Justice in March 2008.

In submitting Ai Group's comments to the Review, it is not our intention to comment on every issue raised in the Options Paper but rather to outline Ai Group's position on issues relating primarily to the operation of the options outlined in the Paper in workplaces and the impact on employers.

These submissions should be read in conjunction with Ai Group's earlier submission dated 14 January 2008 made in response to the Discussion Paper.

Ai Group

Ai Group is one of the largest national industry bodies in Australia, representing employers in the manufacturing, construction, food, automotive, transport, information technology, telecommunications, labour hire and related service industries.

Chapter 2: A new framework for the EO Act

This Chapter canvasses three issues:

1. Whether the objectives of the *Equal Opportunity Act* should be amended to recognise the links with the Charter, the Commission's obligations to promote the rights contained in the Charter, and the need to work towards achieving equality in its broader sense;
2. Whether the Act should be amended to incorporate an express obligation to make "reasonable adjustments" applying to all attributes and all areas covered by the Act;

3. Whether the Act should be amended to incorporate a positive obligation not to discriminate or a broader form of positive duty to promote equality.

On the first of the above points, Ai Group does not oppose the objectives being amended in any of the ways suggested. Amendments to the Act's objectives may be useful in focussing the Commission's educative and other functions, and to promote compliance with the spirit of the Act. However, any effect on the substantive provisions of the Act would need to be carefully considered, given the role of objects clauses in statutory construction. Ai Group would not support any amendments to the objects which would broaden the substantive obligations under the Act.

Ai Group opposes the Act being amended to include an express obligation to make "reasonable adjustments". While there may be uncertainty about the extent to which employers (and other respondents) are under an obligation to make adjustments to accommodate a person's attributes covered by the Act (primarily by virtue of the Act's indirect discrimination provisions) this could be redressed through appropriate education and information programs. It should also be recognised that many employers recognise the need to ensure workplace practices and arrangements accommodate the individual characteristics of an employee as far as possible and take steps to accommodate special needs and circumstances. However, a positive duty of the kind contemplated could interfere with the ability to properly manage and run a business. It may also increase compliance costs, with employers needing to consider all adjustments which might foreseeably be required by a person with a proscribed attribute and document all decision-making in the area. As with any increase to the already substantial regulatory burden upon employers, this may have negative employment effects.

The Act provides for an exception to impairment discrimination in the employment context where the applicant or employee requires special services or facilities in order to perform the inherent requirements of the job and it is not reasonable in the circumstances for those special services or facilities to be provided (s 22). In our view, this is an appropriate and more balanced way to deal with the issue than providing a positive obligation to make reasonable adjustments.

It may also be noted that although a right to request is included in the Government's Exposure Draft of the National Employment Standards released earlier this year, the Discussion Paper stated that whether an employer has reasonable business grounds for refusing a request would not be subject to third party involvement¹.

On the third issue identified above, Ai Group's view is that amending the Act to incorporate a positive obligation not to discriminate is unnecessary. It is widely and well understood by employers that discrimination is prohibited by the Act, the corollary being that there is an obligation not to discriminate just as there is an obligation not to contravene any law.

Insofar as the private sector is concerned, Ai Group would oppose the Act incorporating a positive obligation to take steps to promote equality. As appears from

¹ Department of Education, Employment and Workplace Relations, *Discussion Paper, National Employment Standards Exposure Draft, 2008*, p 10

the Options Paper, where such an obligation has been introduced, it has generally been confined to the public sector or to large businesses and would be strongly resisted by smaller employers in particular. Incorporating such a duty in the Act would simply increase the regulatory burden on business and is not likely to lead to positive views of this area of the law. A better approach would be to focus on the promotion of information tools, voluntary actions plans and non-enforceable codes of practice.

Chapter 3: Mechanisms for the elimination of discrimination

This Chapter outlines possible options for modifying the Commission's powers to improve the prevention and resolution of discrimination.

As indicated in our previous submission, Ai Group supports a focus on education programs and awareness-raising as being more likely to lead to improved workplace outcomes than prescriptive rules or a more punitive approach.

In Ai Group's view, Option 1 is the preferable model, with its focus on education and research. Of course, the effectiveness of such programs will depend on proper resourcing of the Commission. It may be appropriate to include in the Act an express power of the Commission to undertake consultation with stakeholders including business, industrial and community groups. Such a function exists in the *Anti-Discrimination Act 1997* (NSW), for example. This could serve to emphasise the importance of developing initiatives which are responsive to the needs of stakeholders and the need to work with key groups, including industry bodies such as Ai Group, to educate companies about their responsibilities.

Option 1 includes an option of allowing the Commission to initiate investigations of its own motion into possible breaches of the Act. Under the current provisions of the Act, the Commission has the power to initiate investigations into possible breaches in various circumstances, including when it becomes aware of a possible breach as a result of its education and research activities, but the Minister's consent is required. The focus of the existing power is on endeavouring to bring the parties together to resolve the matter through conciliation or otherwise refer the matter to the Tribunal. It is unclear how the suggested power would differ from the existing function, other than that Ministerial consent would not be required. More detail is required. Generally, an investigation function going beyond a focus on conciliation, including any power of the Commission to pursue complaints on its own behalf, would not be supported by Ai Group and would not be compatible with the Commission's other functions, which require impartiality.

Option 1 also raises the option of the Commission being able to undertake inquiries into systemic discrimination of its own motion. Ai Group would not oppose this function, and indeed a public inquiry function is common in other anti-discrimination bodies/commissions in other Australian jurisdictions. The outcomes of such inquiries would most usefully be targeted at improving education and information programs, rather than (or in addition to) the focus on reports being tabled in Parliament, as suggested.

Option 2 (“the facilitator role”) covers a mix of functions. Ai Group does not oppose a power of the Commission to issue guidelines and codes of practice, provided that contravention was not evidence of unlawfulness but could be used as part of a defence to a complaint. Similarly, Ai Group would not oppose the Commission encouraging voluntary action plans to be adopted in the private sector, in conjunction with its education and information functions.

A number of other functions canvassed under Option 2 are not supported by Ai Group, including the powers which are proposed as following from an own-motion inquiry and investigation function, including a power for the Commission to agree to enforceable undertakings to remedy or prevent breaches, empowering the Commission to initiate complaints and to apply to VCAT to issue an unlawful act notice. These functions appear inconsistent with the Commission being a non-partisan body and represent a move to a more prosecutorial and regulatory body which is not supported.

Option 3 (“the enforcer role”), with its focus on punitive, quasi-criminal powers, is strongly opposed. The range of enforcement powers, including the power to issue unlawful act notices and to apply to VCAT for the enforcement of those notices as well as a power to apply for injunctions, are ill-suited to this area, and are not at all conducive to encouraging employers to take a positive view of this area of law. Ai Group also opposes a power to issue enforceable codes of practice, which would increase complexity and the regulatory burden on business.

Chapter 4: Dispute resolution

Generally speaking, there does appear to be merit in the continuing existence of a body to screen or filter complaints and attempt to resolve complaints before they proceed to the Tribunal stage. There is also sense in having the complaint-handling function undertaken by the same body which undertakes education and research activities in the area, as synergies exist between the two. Complaint-handling in the Commission also allows the development of expertise in the area.

However, the Commission’s complaint-handling function should not exist merely as a means to ‘slow down’ the process and place an administrative barrier in the way of access to the Tribunal. There would be merit in the Commission adopting a more proactive approach to resolving complaints. As our previous submissions set out, this could involve the Commission adopting a process similar to the conciliation of unfair dismissal matters under the *Workplace Relations Act 1996* (Cth), and would involve the Commission providing more active guidance to the parties. At the end of the conciliation process, the Commission could provide an assessment of the merits of the application, recommending, where appropriate, that the applicant not pursue a ground or grounds of the application and advise whether he or she considers that the application has no reasonable prospects of success.

As suggested in Option 1 in this section, there may be merit in considering whether a range of ADR processes could be used by the Commission. Assisted negotiation is one possibility. However, Ai Group would not support a function going so far as arbitration or the imposing of outcomes by the Commission. The focus should be on

encouraging the parties to reach and agree to solutions, although the Commission can play an active part in this.

It is unclear what type of “agreements” are contemplated as part of Option 1. The Commission already has the power to draw up conciliation agreements at a party’s request, and such agreements can be registered and enforced in the Tribunal. Ai Group’s view is no change to this process is warranted.

Options 2 and 3 are both based on the Commission not having a complaint-handling function. In Option 2, the Commission would have some role in providing ADR services, whereas under Option 3, such services would only be provided by VCAT. While Ai Group does not oppose either of these models, the general points made above are relevant.

Legal advice and representation

Ai Group opposes the Commission having a role in providing legal advice and representation (Option 1). These functions are incompatible with any of its other functions.

Any problems with access to legal representation and advice would best be met by better funding of existing legal service providers in community legal centres and Victorian Legal Aid (Option 2). The Commission would of course play a useful role in linking people to these services and possibly coordinating access to them.

The creation of an independent statutory office of equal opportunity proceedings would not appear necessary given the existing structures in place (being community legal centres and Victorian Legal Aid). Furthermore, Ai Group does not support the creation of any new offences that the Options Paper suggests that such a body could be involved in prosecuting.

In summary, as set out in our earlier submissions, the Act is working effectively and sweeping changes are not necessary or desirable.

Should you have any queries about Ai Group’s position, please contact Samantha Edwards, Adviser – Workplace Relations Policy of Ai Group on 02 9466 5421 or myself.

Yours sincerely



Heather Ridout
CHIEF EXECUTIVE