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9 December 2016

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Email: 18Cinquiry@aph.gov.au

Dear Committee Secretary,

Re: Joint Parliamentary Committee Inquiry into Freedom of Speech in Australia

The Australian Chamber thanks the Committee for this opportunity to provide comment in relation to the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (RD Act).

The Australian Chamber opposes racial discrimination and supports a strong statutory framework of protections in this area. No one should face unlawful racial discrimination. However the laws that seek to achieve this outcome need to recognise that there are limits to the control employers have over the behaviour of their employees and agents. The Australian Chamber's concern regarding Part IIA of the RD Act relates to the imposition of vicarious liability and the narrow defence in these circumstances.

Part IIA of the RD Act was introduced in 1995 with the passage of the *Racial Hatred Act 1995* (Cth). While Part IIA is titled 'Prohibition of Offensive Behaviour Based on Racial Hatred', the text of the provisions within this part does not expressly adopt this terminology. In particular, section 18C expressly prohibits an act (other than in private) that is reasonably likely, in all the circumstances, to offend, humiliate or intimidate another person or group of people because of their race, colour or national or ethnic origin.

If an employee carries out an act that is unlawful under Part IIA of the RD Act an employer can be held vicariously liable for that employee's actions. In particular, subsection 18E(1) of the RD Act states:

> ***Vicarious liability***
> *(1) Subject to subsection (2), if*
> *(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and*
> *(b) the act would be unlawful under this Part if it were done by the person;*

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this Act applies in relation to the person as if the person had also done the act.

This imposition of vicarious liability on employers for the actions of their employees for acts done 'in connection with' the employment of an employee can be contrasted to the wording in section 57 of the *Age Discrimination Act 2004* (Cth) (AD Act) or section 123 of the *Disability Discrimination Act 1992* (Cth) (DD Act), which require the unlawful act to be committed 'within the scope of [the person's] actual or apparent authority'.

The Australian Chamber is concerned that a broad construction of what constitutes an act 'in connection with' an employee's employment has the potential to lead to employer liability for an employee or agent acting outside the scope of their authority (for example, by engaging in unauthorised, unlawful or illegal activities).

Laws should not give rise to circumstances where employers are held liable for employee actions that are '*connected'* to their employment based on a broad construction of that term, but which a reasonable person would consider to be private in nature or not sufficiently connected to the employee's duties as an employee.

Subsection 18E(2) provides employers with a defence to the vicarious liability provision in section 18E(1), stating:

> *(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.*

It can be difficult for employers to demonstrate that they have indeed taken *all* reasonable steps as set out in the RD Act to establish a defence. The exemption in 18E of the RD Act is too narrow in this regard and gives rise to uncertainty regarding compliance with obligations. This may result in increased costs for businesses that need to seek specialist legal advice to navigate the complexities within the legislation.

More broadly, employers face a complex and overlapping framework of anti-discrimination laws at the state and federal levels. Despite prior examination of the merits of consolidation, as it stands at the federal level the anti-discrimination regime is contained within the RD Act, DD Act, AD Act, *Sex Discrimination Act 1984* (Cth), *Australia Human Rights Commission Act 1986 (Cth)* and the *Fair Work Act 2009* (Cth) (FW Act), which provides protection against the taking of adverse action or termination of employment based on certain attributes.

Aside from moral and social considerations there are cogent commercial reasons underpinning an employer's interest in maintaining workplaces that are free from discrimination. These include ensuring a safe, healthy, harmonious and therefore

more productive working environment, mitigating reputational risk and attracting and retaining valued staff. This would broaden the pool of available talent and reduce costs associated with turnover, such as those relating to recruitment and retaining.

There are impediments in the workplace relations framework to addressing poor behaviour effectively. Employers are placed in a position of managing the complexities of individual human behaviour, which can be influenced by social factors beyond their control. Yet the FW Act imposes high levels of risk around action in response to inappropriate behaviour. This places employers in the challenging position where they can be held accountable for the actions of an individual yet can face liability when they seek to administer strong disciplinary action as inappropriate behaviour arises.

The Australian Chamber strongly supports well-designed anti-discrimination laws with clear duties that balance the interests of all parties. It is important that anti-discrimination legislation prevents inappropriate discrimination by ensuring that individuals are held directly accountable for their actions while ensuring employers are held accountable only for those actions falling reasonably within their control. Appropriate amendments to section 18E to address the concerns highlighted above would help to achieve better balance.

Yours faithfully,

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY