



## Inquiry into Freedom of Speech in Australia

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Parliamentary Joint Committee on Human Rights  
Committee hearing, Canberra  
Friday, February 17, 2017

Opening Address by Alana Matheson, Deputy Director of Workplace Relations at  
the Australian Chamber of Commerce and Industry

**--Check against delivery--**

### Introduction

The Australian Chamber thanks the Committee for this opportunity to address it.

As noted in our [brief submission](#) dated 9 December 2016, the Australian Chamber opposes racial discrimination and actively supports a strong statutory framework of protections in this area.

To keep this introduction brief we wish to emphasise a few short points:

The Australian Chamber is not seeking to advance an employer position on the appropriate wording of s.18C – rather our concerns are focussed on the practicality and navigability of the law, and appropriate and balanced liabilities for employers.

Debate on the Racial Discrimination Act has focussed on claimants and respondents – but employers are also involved, and may incur significant costs and disruptions when actions are taken under the Racial Discrimination Act and indeed the broader framework of protections.

Employers need to be able to manage Australian workplaces to be discrimination free – and need the capacity to act, and be seen to act promptly and clearly on peer-to-peer discrimination and unacceptable employee conduct.

However, risks of unlawful discrimination are being perpetuated by employers being forced to delay or refrain from disciplinary action through concerns about unfair dismissal and the prospects of litigation, damages and reinstatement.

In short, competing laws are leaving employers in a damned if you do, damned if you don't situation when inappropriate behaviour occurs in the workplace – and employers feel unable to take the remedial actions they want to take when unacceptable employee conduct comes to light.

Returning to the Racial Discrimination Act, there is a need for our anti-discrimination and employment law frameworks to:

- Provide clarity around the nature of protections and defences available to an employer in terms of their liability for an employee's conduct.
- Ensure unmeritorious claims can be knocked out prior to imposing unfair cost, personal, reputational and business impacts – and irreconcilable workplace problems.

We note in this regard the proposal of Mr Leeser – which seems a broadly sensible one.

Finally some brief comments on vicarious liability for employers –under s.18E(1) of the Racial Discrimination Act.

As noted in our written submission, 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 inflate employer liabilities for the actions of employees acting outside the scope of their authority (for example, by engaging in unauthorised, unlawful or illegal activities).

The Racial Discrimination Act 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 rather the test should be against what a reasonable person would consider to be private in nature or not sufficiently connected to the employee's duties as an employee. The Act should not expose employers to liability for acts of an employee or agent committed outside the scope of their authority.

We acknowledge that this Committee is not directly tasked with addressing all these problems, however through the submission process employer representatives have identified options for modest improvements to Part IIA of the Racial Discrimination Act:

The Australian Chamber has submitted that the exemption in section 18E of the Racial Discrimination Act is too narrow and has advocated for amendments to achieve better balance and that remains our position.

We note that our friends at the AiGroup have suggested changes to section 18C to narrow the actions captured by the provision which may also have the practical effect of reducing employer exposure.

Other options such as better empowering the relevant tribunals to dismiss unmeritorious claims early on in the process are also worthy of consideration.

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 damaging 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 and direction.