CLUBS AUSTRALIA SUBMISSION
LEGAL COST MODEL FOR COMMONWEALTH ANTI-DISCRIMINATION LAWS

Clubs Australia welcomes the opportunity to comment on proposed changes to the legal cost model for Commonwealth anti-discrimination laws.

SUMMARY OF RECOMMENDATIONS

Clubs Australia recommends that the Government:

- **Retain the status quo regarding how costs are awarded in discrimination matters.**

- **Adopt the soft cost neutrality model in the event that the status quo is not retained.**

- **Include speculative allegations as part of the mandatory criteria for soft cost neutrality. Clubs Australia also recommends the mandatory criteria for soft cost neutrality be reviewed after two years of operation.**

- **Consider the impact on management liability insurance premiums in any decision that would weaken a respondent's ability to recover legal costs if they are successful.**

- **Strengthen the Australian Human Rights Commission's power to terminate unmeritorious complaints, in a manner that would prevent the complainant proceeding to court without seeking leave.**

- **Amend the *Disability Discrimination Act 1992* to ensure the meaning of an assistance animal is clear in practice and verifiable.**

Club Industry

Clubs Australia represents over 6,400 clubs that directly employ more than 140,000 employees. Clubs provide a range of social, recreational, community and commercial services to their members.

All clubs are not-for-profit, owned by their members, and have a strong emphasis on assisting their local community.

Clubs take seriously their responsibility to provide a safe, respectful, and inclusive environment to all staff and patrons and Clubs Australia support all measures which advance this outcome.

Discrimination complaints against clubs

Clubs serve as a pillar for their local communities and have high patronage rates. Because of the high volume of interactions with the public, clubs tend to face a higher amount of discrimination claims.

Many discrimination complaints against clubs are unmeritorious.

For example, clubs had strict health restrictions in places, such as the wearing of masks, during the COVID-19 pandemic to ensure the safety of patrons and compliance with the law. Whilst trying to do the right thing, clubs often faced unmeritorious claims of discrimination by enforcing these health orders where antagonistic patrons refused to wear a mask or show vaccine certificates.

Many of these complainants later claimed to have a disability and used the discrimination system to seek compensation from clubs.

Soft Cost Neutrality

Clubs Australia supports the status quo in how costs are awarded in anti-discrimination cases, however, notes the Government has expressed a preference for a new cost model for anti-discrimination cases.

Therefore, Clubs Australia supports the soft cost neutrality model for Commonwealth anti-discrimination laws. Under this model, the default position is that parties bear their own costs, but the court would retain a broader discretion to award costs where they consider this would be in the interests of justice, in reference to several mandatory (but non-exhaustive) criteria.

Clubs Australia believes the soft cost neutrality model provides courts with the greatest discretion out of the models and would provide clubs, in their capacity as a respondent, with more opportunity to recover costs where proceedings are successful in their favour.

Under alternative models hard cost neutrality and equal access, clubs will be deterred from defending themselves in court because their legal costs will almost certainly exceed the settlement amount requested by the complainant.

Unlike tribunals, such as the Fair Work Commission, Federal Court costs frequently exceed $100,000. Because these costs are unlikely to be recovered, an employer with reasonable prospects of success would have little to no reason to defend the discrimination claim in court. Employers may therefore be compelled to pay or accept

significant settlements if the amount is less than the Federal court costs, even where the claim is vexatious and/or unmeritorious.

Clubs Australia notes that hard cost neutrality model increases the risk for unmeritorious discrimination complaints, that may not be vexatious, but lack substance. In conjunction with this, the equal access model will also risk the encouragement of unmeritorious complaints, given the financial risk and disincentive would shift almost entirely to the respondents. Therefore, the soft cost neutrality cost model is preferred by Clubs Australia.

Notwithstanding the above, Clubs Australia does hold some concerns and subsequent recommendations on the soft cost neutrality model.

Mandatory Criteria

The proposal for soft cost neutrality would empower the court to consider a range of factors relevant to the discrimination matter and balance and consider competing interests.

Clubs Australia recommends that as part of the mandatory criteria, consideration should be given to the inclusion of a criteria for allegations that rely on speculation by the courts when determining an application for costs.

Clubs Australia believes that as part of considerations to the mandatory criteria, the criteria below should be included and reviewed after the first two years of operation to ensure that it is an appropriate criterion to be utilising.

Clubs Australia recommends that speculative allegations be included as part of the mandatory criteria for soft cost neutrality and the criteria is reviewed after two years to ensure it is operating as intended.

Insurance Premiums

Clubs Australia notes that the higher likelihood of business liability arising may result in higher management liability insurance premiums where unmeritorious claims occur.

Whilst some clubs may be able to continue to pay a higher premium for insurance such as employment practices liability and/or third-party liability cover, Clubs Australia is concerned that small to medium clubs may be disproportionately impacted and discontinue their insurance.

Clubs Australia recommends considering the impact on management liability insurance premiums in any decision that would weaken a respondent's ability to recover legal costs if they are successful.

Broader Powers for the Australian Human Rights Commission

If the soft cost neutrality model is introduced, the Australian Human Rights Commission (AHRC) needs stronger powers to terminate unmeritorious complaints.

Amendments to the complaints system were made in 2017 by the *Human Rights Legislation Amendment Bill 2017* to empower the AHRC to terminate unmeritorious complaints.

Despite these changes, Clubs Australia have observed that the AHRC commonly terminates seemingly unmeritorious complaints on the ground that the dispute cannot be conciliated, thereby entitling the complainant to proceed to the court without seeking leave. Many of these complainants appear to rely on highly speculative evidence.

For instance, a complainant who is ejected from a club for being intoxicated may later claim that they observed other people who were also intoxicated. On this basis, the person could claim that the real reason to eject them was due to a protected characteristic, rather than intoxication. In these circumstances, clubs often need to disprove the claim, such as searching their logs for evidence that other people without the protected characteristic were also ejected for being intoxicated.

We note that the AHRC is not a judicial body and may therefore be unable to determine that a certain claim is not properly substantiated.

If it will become harder for court costs to be ordered against an applicant, improvements to the discrimination system must also be made to ensure the AHRC can effectively dismiss discrimination cases that are unmeritorious or highly speculative. This change will ensure that only genuine, meritorious cases proceed to court.

Clubs Australia also recommends that consideration be given to limiting the circumstances where complainants can proceed to court without seeking leave.

Clubs Australia recommends strengthening the AHRC's power to terminate unmeritorious complaints, in a manner that would prevent the complainant proceeding to court without seeking leave.

Disability Discrimination Act 1992

The proposed changes to the cost model will alter a club's risk equation in deciding whether to defend a discrimination claim. To give businesses more certainty so that they can making an informed decision, it is important to clarify the discrimination law where necessary. While there are many examples of unclear legislation, the DDA causes the greatest confusion and, particularly, assistance animals.

Particularly, it is unclear which animals may qualify as assistance animals and how clubs can verify a person's claim about an assistance animal. The confusion stems primarily from s 9(2)(c) of the *Disability Discrimination Act 1992* (DDA), which effectively allows a person to train their animal to be an assistance animal. Further, there is no definition of the appropriate standards of hygiene and behaviour for assistance animals.

Clubs commonly encounter emotional support animals which do not appear to be trained or hygienic. However, the lack of a robust accreditation system, coupled with the practical ambiguity of s 9(2)(c), compels clubs to accept a person's claim without scrutiny. By admitting an animal that is unhygienic or poorly behaved, clubs risk breaching various other legal obligations like food handling and work, health and safety laws. Clubs also expose themselves to tort liability, for instance if a dog attacks or trips a patron.

Clubs Australia recommends amending the *Disability Discrimination Act 1992* to ensure the meaning of an assistance animal is clear in practice and verifiable.

Conclusion

Clubs Australia appreciates the opportunity to provide a submission. For further information, please contact Simon Sawday, Executive Manager of Policy and Government, on [redacted].