

NSW Law Reform Commission
Anti-Discrimination Law Review
Locked Bag 5000,
Parramatta NSW 2124

7 October 2025

To whom it may concern,

Re: Review of the Anti-Discrimination Act 1977 (NSW): Enforcement and Procedural Mechanisms
- Extending accountability for discrimination in the provision of goods and services

expressing concern over the narrow meaning and interpretation of the term “provide” in the context of a recent appeal decision of the NSW Civil and Administrative Tribunal (“NCAT”), known as *YMX v Becton Dickinson Pty Ltd [2025] NSWCATAP 193* (“YMX”).

While I am arriving late to the NSW Law Reform Commission (“LRC”) review process, I am writing now because I believe that there is a significant and systemic accountability gap in Australian law that enables companies to simultaneously control access to essential goods and avoid legal responsibility locally, by structuring distribution through third parties.

1. Introductory Overview

In the nearly 50 years since the assent of the ADA, the commercial realities surrounding the provision of goods have changed. Complex supply chains now frequently require that consumers access goods through intermediaries who are themselves reliant upon other entities who control market availability and access to products manufactured offshore.

Significantly, as the decision in YMX made plain, when the ADA fails to enable people facing indirect discrimination in the provision of goods and services, including essential medical products—such as specialised catheters and other devices such as tracheotomy tubes – there is currently no other effective means, under Australian law, for this class of affected consumers to seek protection and or redress from discriminatory practices, misleading conduct or irresponsible corporate behaviour.

Unlike other consumers, those who rely on access to essential medical products are not currently covered by Australian Consumer Law (“ACL”), which only addresses defects or misrepresentations of supplied, non-medical goods. Nor does the Therapeutic Goods Administration (“TGA”) offer an alternate pathway to complaint or redress, despite it being responsible for the approval and safety (ie not withdrawal) of medical products sold to Australians.

While I understand that the general lack of consumer protection for users of medical products is beyond the scope of the current ADA Review, the enforcement and procedural mechanisms that support the ADA are reviewable.

Having now read Consultation Paper 24 (2025), I offer the following comments in submission and response to the forthcoming second phase of the LRC's review into the ADA.

My comments will attempt to utilise issues raised in the YMX case to better illustrate and build upon the work contained in the Commission's Consultation Paper 24 (2025), pertaining to the narrow meaning of "provide" in respect of goods and services.

It is to be presented hereunder that the problems with "provide" extends beyond the definitional to include the enforcement mechanisms of the ADA which currently fail to reach entities that design, authorise, or profit from discriminatory conduct delivered through intermediaries or third-party distributors.

This submission recommends that the next phase of reform should not only broaden the meaning of "provide" and update the enforcement framework so that accountability can be extended beyond the immediate act of product delivery.

2. The YMX case and its wider implications

The YMX decision highlighted the consequences of structural gaps in both product regulation and anti-discrimination law, particularly in respect of the narrow definitional and procedural scope of "provide" and the subsequent, practical barriers to enforcement.

In YMX, a series of gender-specific medical devices were being supplied to Australian consumers through an authorised distribution network rather than directly by the manufacturer, operating offshore through a parent company. When harm and discriminatory treatment arose following a decision, made offshore, to discontinue the gender-specific devices used primarily by women and some people with specific disability-related product needs, the manufacturer disclaimed liability, asserting that it did not "provide" the goods in question - it merely authorised distribution in Australia, through third parties, to individual consumers.

Under the current ADA framework, the decision reached on appeal in YMX is technically correct: only the entity that "directly provides" the goods or services can be held liable for discrimination in provision. As a result, the party that exercised effective control over registration, marketing and distribution - and who benefited commercially - was beyond reach.

Being "beyond reach" also meant that the growing body of positive case law that is intended to ensure that complaints are "reasonably" and "generally assessed" (see *Clarke v Catholic Education Office*[2003] FCA 1085; *Catholic Education Office v Clarke* [2004] FCAFC 197), utilizing a "broad and liberal approach" (*Ryan as Personal Representative of the Estate of the Late Peter John Ryan v Sunshine Coast Hospital and Health Service* [2021] FCCA 1537 (6 July 2021)), could not be applied to the facts in YMX.

3. The enforcement problem

3.1 The structural gap

The ADA's existing structure requires direct transactions between providers and recipients. It does not accommodate the multi-layered supply chains and digital intermediaries that now dominate service delivery across multiple sectors, including health and retail.

Under current law (and as in YMX):

- A manufacturer, franchisor or platform operator can control service design, pricing, and consumer interaction standards without ever being considered a "provider;"

- The front-line intermediaries (ie distributors or retailers) -often a small business or contractor - carries sole liability, even where it lacks autonomy to remedy discriminatory practices; and
- Complainants and ADNSW have no procedural mechanism to join or hold to account the entity with actual power and systemic responsibility, particularly when the entity makes operational and or commercial decisions offshore but the “consequences” of the commercial decisions impact upon the local (Australian) market.

3.2 Cross-border corporate decision-making

As in YMX, contemporary service delivery is multi-layered and transnational. Key commercial and policy decisions - including those governing product design, eligibility criteria, pricing, accessibility, and the handling of consumer complaints - are frequently made by parent companies based offshore.

While these decisions are implemented in NSW through local subsidiaries or distributors, their substantive discriminatory effects are felt by consumers and service users here. For example, a parent company may determine:

- which products or features are made available to Australian consumers,
- whether accessibility features are included or omitted,
- which demographic groups marketing materials target or exclude, or
- how local distributors must handle complaints and refunds.

Under the current *Anti-Discrimination Act 1977 (NSW)(ADA)*, the parent entity is outside jurisdiction, because the discriminatory act - the decision itself - occurs offshore. Yet the impact of that decision (ie the “consequences”) manifest locally, through the policies, contracts, practices and procedures that local entities are obliged to follow.

This creates an enforcement gap:

- The entity with “actual decision-making power” and capacity to correct systemic discrimination is beyond reach,
- Local intermediaries, who lack the authority to act bear the burden of receiving complaints, and
- Consumers have “no effective avenue to challenge discriminatory outcomes” that are structurally embedded in corporate systems determined offshore.

To close this gap, enforcement mechanisms should be based on “the local impact (ie consequences) of discriminatory decisions”, rather than giving undue weight to the original decisions or to the geographical location where original decisions are made.

This change in emphasis would align the ADA with principles already reflected in other areas of law - such as consumer protection, and privacy - which apply to offshore entities whose conduct affects Australian markets. Enforcement failings such as “accountability evasion,” “fragmented responsibility” and “procedural futility” for complainants would cease. More significantly, ADNSW would be better equipped to address instances of corporate systemic discrimination.

4. Linking definition to enforcement

The Commission's current paper (CP 24) correctly notes that the ADA only covers discrimination in the "terms" of provision, not the "manner" of provision. Enforcement and definitional reform must proceed together.

The next phase of review should, at a minimum:

1. **Extend the meaning of "provide"** to include acts done through agents, distributors, franchisees, contractors, or digital platforms,
2. **Authorise enforcement** against entities that cause, authorise, or benefit from discriminatory practices and provision, and
3. **Introduce procedures** to better address systemic complaints.

5. Comparative and procedural models

5.1 Federal Examples

Other laws already provide enforcement measures that extend liability beyond direct actions:

- **Disability Discrimination Act 1992 (Cth) s 122** — extends liability to persons who "cause, instruct, induce, aid or permit" discrimination, and
- **Australian Consumer Law schedule 2 and s 18, *Competition and Consumer Act 2010 (Cwth)*** — defines "supply" broadly to include "sale, hire, lease, permission, grant and conferment" and permits action against those who engage in or authorise misleading conduct in trade or commerce;

These approaches recognise that enforcement must be linked to control, not proximity. The ADA's procedural reforms should be guided by the same principle.

5.2 Procedural implementation options

The Commission could consider:

- **Joint liability:** permitting Anti-Discrimination NSW or complainants to join multiple respondents where each exercises control over a discriminatory service model,
- **Extended liability:** adding a provision similar to s 122 of the *Disability Discrimination Act* to reach those who authorise or permit discrimination,
- **Systemic investigations:** empowering ADNSW to investigate corporate networks where discrimination is built into product design, marketing or distribution frameworks,
- **Cross-border accountability:** clarifying that discrimination occurs in NSW when decisions made overseas have discriminatory effects within NSW; and
- **Codes of practice or regulatory guidance** clarifying when franchisors or manufacturers will be treated as "providers" for ADA purposes.

6. Alignment with systemic equality objectives

Extending accountability to controlling entities is consistent with the Commission's discussion in CP 24, Chapter 11, on promoting "substantive equality" and addressing "systemic discrimination."

Substantive equality cannot be achieved if the law allows powerful actors to externalise discriminatory outcomes to intermediaries or to offshore decision-making centres. Effective enforcement requires that procedural mechanisms reflect real-world operations and power structures so that legal responsibility is meaningfully actionable.

This approach is also consistent with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023), which recommended stronger accountability for corporate and institutional actors in service delivery chains.

7. Recommendations

1. **Broaden “provide”** in the ADA to include acts done directly or indirectly through third parties, contractors, or intermediaries.
2. **Recognise local impact of overseas decisions:** expressly provide that discrimination occurs in NSW where conduct, policies or decisions made elsewhere have discriminatory effects within NSW.
3. **Introduce a broader liability clause** (modelled on s 122 of the *Disability Discrimination Act 1992* (Cth)) to capture those who cause, authorise, induce or permit discriminatory provision.
4. **Enable Anti-Discrimination NSW** to join multiple respondents and pursue systemic complaints where discriminatory conduct arises within corporate networks.
5. **Publish enforcement guidance** clarifying when franchisors, licensors, or manufacturers will be deemed providers under the ADA.
6. **Integrate these reforms with procedural improvements** to ensure complainants can access effective remedies against entities with real control over the discriminatory conduct.
7. **Consider a statutory duty of care** for foreign manufacturers who operate in Australia to supply essential medical products to the local market.

8. Conclusion

The YMX case illustrated a structural deficiency that goes beyond definition - it is an enforcement gap that reflects outdated assumptions about how goods and services are delivered.

Reform must enable the ADA to reach those in control - those who design, authorise, or profit from discriminatory systems - ensuring that no entity can evade accountability simply by outsourcing the act of provision or relocating decision-making overseas.

I would welcome the opportunity to discuss this submission further.

Kind regards,