Using Human Rights in Employment & Industrial Law

Presented by

The Hon. Justice Lance Wright

President, Industrial Relations Commission of NSW

Sally Moyle

Director, Sex Discrimination Unit
HREOC

This paper was presented by NSW Young Lawyers on the 3rd August, 2000.
Published by NSW Young Lawyers, The Law Society of New South Wales, 170 Phillip Street, Sydney NSW 2000. DX 362 Sydney.

EXTRACTS FROM RECENT DECISIONS OF FULL BENCHES OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES WHERE HUMAN RIGHTS CONCEPTS HAVE BEEN CONSIDERED

(1) *Re Equal Remuneration Principle* [2000] NSWIRComm 113 (30 June 2000)

(2) *Principles for Review of Awards - State Decision 1998* (1998) 85 IR 38 (18 December 1998)

(3) *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416 (10 December 1998)

---

(1) *Re Equal Remuneration Principle* [2000] NSWIRComm 113

Consideration of the need for a new principle and general concepts

43 Every person has a basic human right to be treated equally and fairly in the sense that the person should not be dealt with on the basis of irrelevant considerations such as the person's sex, race, or age, and ... not ... discriminated against by reference to such considerations: see, for example, Kinley (ed) *Human Rights in Australian Law*, Federation Press, Sydney, 1988, and particularly the papers by Kinley, MacDermott, Bailey and Devereux, and Eastman and Ronalds. This right is reflected in various statutory provisions in New South Wales. The fixing of a rate of pay for, or the payment of a wage or salary to, a woman where that rate of pay, salary or wage has been fixed differently because of the woman's sex is presumptively an infringement of her human rights and inconsistent with the provisions of the 1996 Act.

44 The right of women to equal treatment irrespective of their gender generally and specifically in relation to the question of equal pay is also recognised, essentially for the purpose of the protection of the right, by a variety of international covenants: for example, the *Universal Declaration of Human Rights* 1948, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic Social and Cultural Rights* (ICESCR), the *Equal Remuneration Convention* 1951 (ILO Convention No. 100) and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW). Those instruments are usefully discussed in MacDermott "Labour Law and Human Rights" in Kinley (ed.) *Human Rights in Australian Law* at pages 194 - 196 and 203.

45 The statutory provisions which are particularly relevant for our consideration in the present proceedings (ss3(f), 19(3)(e), 21(1)(b), 23 and 169 of the Act) are provisions which exemplify human rights and human rights concepts and which protect or enforce such rights. Both the High Court and the Human Rights and Equal Opportunities Commission have emphasised the special responsibility of courts and tribunals, in construing such legislation, to take account of and give effect to the statutory purpose whether found in a statutory object or otherwise: see, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359; and *X v McHugh (Auditor-General for the State of Tasmania)* (1994) 56 IR 248 at 256 - 257. Reference may be made to the consideration of a number of those statutory provisions in the *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416 at 434 and *Principles for Review of Awards 1998* (1998) 85 IR 38 at 50 - 51.

46 As the historical material demonstrates, past awards in the State jurisdiction contained both remuneration and other conditions of employment which were directly or indirectly discriminatory against female employees on account of their sex. There were also cases of awards which discriminated against male employees, more usually in the conditions of employment fixed by those awards for male employees.

47 As a result of a number of developments, including the *1973 State Equal Pay Case,* steps subsequently taken by award parties to remove discriminatory award provisions by agreement and, more recently, as the result of reviews of awards conducted by the Commission under s19, directly discriminatory award provisions are increasingly difficult to find. Indirectly discriminatory provisions are, of course, more difficult to detect on the face of an award. Nevertheless, it cannot be doubted that efforts to remove such award provisions have been and continue to be made. Those steps accord with the requirements of s169 of the Act, which obliges the Commission to have regard to the principles contained in the *Anti-Discrimination Act* 1977 in carrying out its functions.

48 In the Act, the legislature has emphasised also the importance of awards providing for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value. This appears from the objects of the Act, as well as from the provision made therefor in ss19, 21 and 23.

49 The written submissions filed by the parties and the way in which this case was opened amply demonstrated the differences of opinion which existed between the parties as to the work which the

relevant provisions of the Act have to do; and, just as importantly, how the Commission should go about doing it. That difference of opinion arose not only from the parties' different approaches to the construction of the Act but also from two other matters. The first was the different views held by the respective parties as to the continuation of discrimination against women workers in some industries, occupations and workplaces and whether such discrimination continues to be reflected in the awards of this Commission. The second was the different views held by the parties as to the size of, and reasons for, the continued existence of a gap in earnings as between men and women workers and how the awards of this Commission perpetuate this gap. It was this second matter to which attention was directed at the hearing.

50 As these proceedings developed, and more particularly as the parties made their final submissions, it became clear that the issue before the Commission was no longer *whether* it should insert in the Commission's Wage Fixing Principles an Equal Remuneration principle but rather *what* should be the terms of the principle. That qualitative shift in the nature of the proceedings arose essentially from the agreement between the parties and the interveners that an Equal Remuneration principle should be included in the *State Wage Case* principles. We have reached the view that it is appropriate in this case to adopt the consent of the parties in that respect. This is an approach which Full Benches of this Commission and its predecessor have adopted on a number of occasions: see, for example, *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416. In this case, we have been satisfied that in accordance with ss50 and 51 of the Act the existing Wage Fixing Principles should be amended by the adoption of a new Equal Remuneration and Other

Conditions principle and that the existing Equal Pay principle should be rescinded.

---

62 The general view, however, was that the principle had been largely overlooked by those award parties in more recent years, with the Labor Council submitting that "the industrial parties have virtually forgotten about the existence of the principle". In those circumstances it was thought desirable to update the principle in the context of the present 1996 Act and to bring it together with the Commission's other Wage Fixing Principles so that it could not be overlooked in the future. That was considered to be the preferred course rather than leaving undervaluation claims to be processed under the Special Case principle. Professor McCallum described this as a need to 'rebadge' the principle and to bring it up to date.

63 That this common view developed is undoubtedly an important matter. The Commission has often observed that agreement reached by industrial parties is a significant matter which the Commission will take into account in considering cases advanced before it. Such agreement cannot, however, be determinative of any application, especially in a case such as this where much depends upon the proper construction of the Act and on the terms of the principle which the parties propose to give effect to the statute as properly construed. We will return to those aspects later.

64 We have concluded that it is appropriate to adopt a principle, albeit not one in the terms proposed by the various parties, which deals with the issue of equal remuneration. We have done so for a

number of reasons. The first is the considerations we have earlier referred to. That is, the significance both in policy terms and the requirements of the Act, such as ss3(f) and 169 thereof reflecting as they do important human rights, and that wage fixing principles in relation to the question of equal pay reflect the priority, importance and the failure hitherto of some awards to address appropriately the issue of equal pay for equal or comparable work. We consider that, provided necessary safeguards are built into the principle, an Equal Remuneration and Other Conditions principle should be inserted into the Commission's Wage Fixing Principles. We do not consider that the principles urged upon us appropriately reflect the evidence or provide a proper method for the Commission to address these matters.

65 Although the parties adopted different positions at one point as to the use to which the *Pay Equity Inquiry* might be put, there was finally a large degree of commonality in their respective approaches to that Report. The common ground was that the Full Bench was entitled to have regard to the Report and the findings contained therein; it was not, however, bound by the Report or those findings. Further, it was accepted that in a number of respects the Commission should carefully weigh the material put to her Honour before it acted upon any particular part of the Report or recommendations arising therefrom. In general terms, we accept that common position. The fact and nature of the *Pay Equity Inquiry* provides a wealth of information, material and considered recommendations which do indeed provide an appropriate starting point for our consideration of the material before us. It reflects a comprehensive and diverse body of evidence, representing a range of

informed opinion and collected data which facilitated the Full Bench's ability to deal with the important questions before it.

66 The next important consideration is the limited nature of the questions that are to be decided in these proceedings, to which we referred earlier. Although those questions are limited in scope, they are nevertheless of great significance to the future of the proper determination of rates of pay, especially for women employees, as well as for the integrity of the Commission's Wage Fixing Principles.

67 The issues before the Commission were limited to, firstly, whether an Equal Remuneration principle should be inserted into the Commission's Wage Fixing Principles and, secondly, if so, the terms of that principle. In deciding each of these questions it is important to stress the nature of the inquiry now before the Commission. To the extent that that inquiry involves the determination of issues of fact, that is to be approached in the traditional and usual manner of fact finding before courts and tribunals. That is, the determination of such issues is on the basis of the traditional test of finding 'on the balance of probabilities': see *Malec v J C Hutton Pty Limited* (1990) 169 CLR 438 at 642 - 643. It is not necessary to make findings on the basis of notions of absolute certainty. Such an approach to fact finding, which seemed to be pressed upon us at various stages of the proceedings, if not by the advocates then at least suggested by some of the witnesses, represents a significant misunderstanding of the nature of the role of courts and tribunals in the common law system of adjudication.

68 Another important consideration is the nature of the debate contained within the evidence before us. As we have already noted,

the Commission has had a range of evidence from many eminent witnesses in the fields of economics (particularly labour economics) and also labour and industrial law. Although there has been a degree of disagreement, in some respects quite sharp disagreement, particularly in the economic evidence, nevertheless a degree of common ground emerged in the evidence which led to the parties' eventual joint submission that it is appropriate for the Commission to establish a principle which addresses in a direct fashion the problems discerned. For example, Professor Wooden agreed that in situations where it was demonstrated a person had a wage fixed at a lower level than appropriate because of discrimination on account of sex a "market failure" was thereby demonstrated. He, like other witnesses, accepted that such a market failure should be addressed by an appropriate case-by-case approach.

69 We conclude that the evidence demonstrated, in a macro economic sense, that there is some disparity between the wages earned by women and those earned by men. Although it is difficult to identify in a precise way the areas in which such disparity occurs, it is more likely than not it does so in relation to the fixing of wages for women employed in female dominated industries or callings.

70 We take the view, however, that the principle made as the result of these proceedings, which will permit such disparities in wages to be addressed, should be such as to be integrated within the Wage Fixing Principles as a whole in order that they can operate in a consistent manner one with the other. This requires that claims be rigorously tested to ensure that there is no, or no more than unavoidably negligible, double counting in the wage fixing process and that any increase in the wages of affected employees occurs in

such a way as not to unduly impact upon employment in affected areas. This is of concern because, on the evidence, any unemployment flowing from claims advanced under the new principle would seem likely to occur in areas in which the majority of employees are women.

71 The principle is also designed to ensure there are no artificial barriers created to a proper assessment of wages on a gender neutral basis. We consider this will be achieved if the only criterion for a revaluation of the work and its work value is that it be demonstrated the rate of payment hitherto fixed does not represent a proper valuation of the work and that any failure is related to factors associated with the sex of those performing the work. By way of illustration only, this may be demonstrated in cases where a majority of the employees in the relevant field, industry or calling are women workers, a notion approached in the case as areas of employment where female employees represent at least 60 per cent of the workforce. It is unnecessary to form a concluded view as a general proposition about this, given the evidence which demonstrated that pay disparity between men and women workers increased as the number of female employees increased in a particular workforce. On the evidence, it seems improbable that any case could be established at any lower percentage.

72 We emphasise that we do not envisage the principle will permit or encourage the taking of preliminary points or issues in any proceedings under the principle. Such an approach would be inconsistent with the approach discussed in *Nagle (T/as WD and JL Nagle & Sons) v Tilberg* [1993] 51 IR 8 and is to be discouraged. We take the view that there is very limited scope for the taking of

preliminary points or the raising of preliminary arguments in relation to such cases. The proposed principle is intended to be expressed in wide terms to ensure that if there is demonstrated a case of gender affected wage fixation and a consequent wage disparity then the identified disparity may be remedied under the principle.

73 It must, however, be recognised that the corollary of this approach is that if a case mounted under the principle does not cogently demonstrate the factual ingredients required by the principle then the case will fail. Although the applicant in the proceedings may have been shielded to a large extent from preliminary issues and interlocutory decisions, there is nevertheless a risk that unless the applicant shows a clear and demonstrated case of gender related wage disparity a detailed and perhaps lengthy case will fail.

74 The other important safeguards that the principle should incorporate are clear. Like the Work Value principle, there must be a case-by-case approach. This does not need to be separately stated in the principle because it follows from the nature of the principle itself. However, it is appropriate in the light of our concerns that there be no adverse effect as to employment, particularly as to the employment of women, flowing from the introduction of the new principle and that adequate safeguards be built into it to deal with such matters. The principle will therefore allow respondents to such proceedings to raise such matters. Again, they should not be raised as preliminary or interlocutory issues but rather as to the way in which wage increases, if any, should be awarded or phased in. Any need for phasing should, of course, be addressed by evidence in the

proceedings. We stress that these safeguards are not being inserted in the principle for any reason other than their express purpose. They are not to be taken, or assumed to be related to, any intention to act as a disincentive to the bringing of appropriate claims since that would be contrary to the human rights considerations we have earlier identified as an important consideration in our conclusion.

The work of s10 of the Act

125 As we have already noted, s10 gives the Commission power to make awards which fix 'fair and reasonable' conditions of employment.

126 The Labor Council, the Minister and the Women's Organisations expressed concern that a number of awards of the Commission, which reflect agreements reached between the award parties rather than by determination of the Commission, perpetuate undervaluation of women's work. The Commission's principles have for many years now encouraged agreements. Currently, this is consistent with the requirements of the Act which, like its predecessors, encourages agreements. The objects of the Act in s3(g) and (h) deal expressly with such matters, as does s14, which requires awards to contain mandatory dispute resolution procedures and ss29-47 which deal with enterprise agreements. Those statutory requirements cannot be ignored. As a Full Bench of the Commission observed in *Re Principles for Approval of Enterprise Agreements* (1996) 94 IR 98 at 117:

> '... emphasises the continued devolution of industrial relations matters directly into the hands of those most immediately concerned, employers, employees

> and the industrial organisations which represent them. The Commission's role in this aspect of the legislation is protective and facilitative, rather than interventionist.'

127 It follows that rates of pay fixed by current awards reflect not only work value assessments conducted by the Commission of the particular work to which the award applies but other agreed factors as well. Some awards undoubtedly reflect agreements about matters of the kind which the Labor Council and the Minister accepted would be an inappropriate or irrelevant basis for comparison of the value of the work of disparate groups of workers. Such matters included agreed productivity improvements, attraction rates and retention rates. This approach is understandable given that such factors do not reflect the intrinsic value of particular work, even as assessed by the parties rather than by the Commission, in accordance with the Work Value principle. Presently, some awards of this Commission, for good reason unconnected with the value of the work to which the awards apply or the gender of the workers performing the work, provide for different rates of pay and other conditions for 'work of equal or comparable value'. Equally, however, we accept that some current awards may improperly undervalue the work performed by women.

128 These observations are relevant to a consideration of the concern to which this case was really directed, namely, alleged undervaluation of work performed by women. As we have already noted, the case advanced was in large measure one which flowed from a view that despite the existence of the Equal Pay principle and the Wage Fixing Principles generally since the 1970s, and in part from the legislative emphasis upon the desirability of

industrial parties reaching agreements about matters, the result has been that the rates of pay and other conditions fixed by some awards which apply to female dominated workforces undervalue that work. The possibility of other gender based discrimination was also advanced.

129 There was no real contest at the end of the day that such undervaluation should be addressed and corrected. Professor Lewis, for instance, gave evidence that in his view such undervaluation should be remedied and that there should be government intervention to remove discrimination against female employees. He warned against the difficulties of detection and proper analysis of such undervaluation, particularly when it was sought to be demonstrated by comparisons drawn between disparate occupations. He accepted, however, that remedying properly identified cases of undervaluation was likely, in the long term, to have positive rather than negative economic effects.

130 Having heard the evidence and submissions advanced by the parties, we are satisfied that if such a case was demonstrated on the evidence brought it would properly follow that the award in question did not fix 'fair and reasonable conditions of employment' for the work to which it applied and that, in accordance with s10 of the Act, the Commission should act to rectify the problem so demonstrated. We have therefore concluded that the new principle which we establish will permit gender undervaluation applications to be advanced and considered separate from the Special Case principle.

---

153 We observe also that in framing the principle we have rejected the submission of the Employers' Federation that the principle should be confined to claims of discrimination. Claims of undervaluation may be based on identification of discriminatory matters. We are satisfied, however, that if it can be demonstrated that particular work is undervalued an appropriate adjustment to the applicable award rate should follow, without the necessity of establishing also that the undervaluation flowed from a particular act of discrimination.

(2) *Principles for Review of Awards - State Decision 1998* (1998) 85 IR 38 at 49 - 51

(d) The meaning of the word 'discrimination' in s19(3)(e)

Another issue debated at the hearing was the meaning of the word 'discrimination' in s19(3)(e). The issue between the parties was whether the word is used in a wide or in a narrow sense. The word is not defined in the 1996 Act.

The wide sense urged by the Labor Council, the Crown and the President of the ADB was that it included all discrimination prohibited by the *Anti-Discrimination Act* and by the *Racial Discrimination Act* 1975 (Cth.), *Sex Discrimination Act* 1984 (Cth.), *Human Rights and Equal Opportunity Commission Act* 1986 (Cth.) and *Disability Discrimination Act* 1992 (Cth.). The narrow sense urged by the employers was that it comprehended only unlawful

discrimination under the *Anti-Discrimination Act.* There is, of course, a third possibility - that in s19(3)(e) the word is used in its ordinary meaning, untrammelled by constraints imposed by any of the legislation to which the parties made reference.

The construction of the word must of necessity begin with its ordinary meaning. 'Discrimination' is defined in the *Macquarie Dictionary* (2nd ed, 1991) at p504 as:

> '**1.** The act of discriminating. **2.** The resulting state. **3.** The making of a difference in particular cases as in favour of or against a person or thing. **4.** The power of making nice distinctions; discriminating judgment...'

In the *Compact Oxford English dictionary* (2nd ed, 1991) it is defined at p 445 as:

> '1a. The action of discriminating; the perceiving, noting, or making a distinction or difference between things; a distinction (made with the mind, or in action). Also with *against.*
>
> 1b. The fact or condition of being discriminated or distinguished.
>
> 1c. The making of distinctions prejudicial to people of a different race or colour from oneself; racial discrimination.'

The word must also be considered in its statutory context. In s19(3)(e) the phrase used is 'any issue of discrimination under the awards'. The word is used in a variety of other contexts in the 1996 Act: in s3(f) the use is as an object of the statute, 'prevent and eliminate discrimination in the workplace'; in the definition of 'industrial matter' in s6(2)(f) 'discrimination' is used by reference to employment in any industry (including remuneration or other

conditions of employment) on a ground to which the *Anti-Discrimination Act* 1997 applies; 'discrimination in the workplace' is again referred to in s158(1); in s167(2) the President of the ADB has a right to intervene in any proceedings if he establishes that the proceedings concern 'unlawful discrimination under the *Anti-Discrimination Act* 1977; and, finally, in s169(4) an industrial instrument (award, enterprise agreement, public sector industrial agreement, former industrial agreement, contract determination or contract agreement) may be varied to remove 'any unlawful discrimination arising from the instrument'. That provision appears in the setting of s169(1) which provides:

> 'The Commission must, in the exercise of its functions, take into account the principles contained in the *Anti-Discrimination Act* 1977.'

It may be observed that the statutory draftsman clearly drew distinctions in various provisions of the 1996 Act between the wider concept inherent in phrases such as 'an issue of discrimination under the awards' and 'discrimination in the workplace' compared with the narrower concept inherent in the references to unlawful discrimination under the *Anti-Discrimination Act* or discrimination on a ground to which that Act applies. Subject to one qualification, it necessarily follows from this approach to the drafting of the legislation that there are references made to discrimination in the 1996 Act in both the narrower and wider senses. In s19(3), it seems to us, it is the wider use of the word which is encompassed.

The qualification referred to above is, however, an important one. Section 169(1) requires the Commission in the exercise of its functions to take into account the principles contained in the *Anti-*

Discrimination Act; that obligation applies to award reviews conducted under s19(1). The concept was recently discussed by a Full Bench of the Commission in the *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416. It follows that in dealing with 'an issue of discrimination under the awards' in a s19 review the Commission is to take account of 'the principles contained in the *Anti-Discrimination Act'.*

It is perhaps trite, but important to observe, that in reviewing 'any issue of discrimination under the award' in a s19 review the Commission would not change an award inconsistently with the provisions of the *Anti-Discrimination Act;* to do so would only invite an application for variation of the award under s169(4) of the 1996 Act and , it seems to us, that would have to be avoided. Section 169(4) provides:

> '(4) An industrial instrument may be varied at any time by the Commission in order to remove any unlawful discrimination arising from the instrument. An application for such a variation:
>
> (a) may be made by a party to the instrument, and
>
> (b) may be made by the President of the Anti-Discrimination Board with the leave of the Commission.'

(3) *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416 at 427 - 434

At the request of the Commission, and in the light of the significant issues then raised between the parties, particularly the CCER and

the ADB, the Crown made detailed submissions to the Commission as to these issues. The relevant sections of those submissions are as follows (observing however that they were also made in the context of the provisions of the 1996 Act):

2. As a preliminary observation however, the Minister/PEO submit that it is the intention of the IR Act that the primary source of assistance to the Commission on anti-discrimination matters will be the President of the Anti-Discrimination Board ("the ADB"), particularly as to questions involving the operation in detail of the A-D Act. This intention is apparent in sections 34(2)(d), 167(2), 169(4) and 187(d) of the IR Act. This is not to say, of course, that the Minister/PEO's rights are limited in any way; the IR Act gives specific rights to the Minister in Industrial Relations Commission proceedings (see section 167(1)), and the Minister/PEO would always reserve the right to make submissions on questions involving general industrial relations policy and matters affecting the State Government as an employer.

3. These submissions deal with the following issues, which have either assumed importance in the proceedings or about which the Commission has requested assistance:

   (1) The meaning of section 169(1) of the IR Act;

   (2) The relationship between the principles of the A-D Act and the exemption provided to religious bodies under section 56 of the A-D Act; and

   (3) The significance of agreements reached between parties in the context of section 169 of the IR Act.

<u>Section 169 of the IR Act</u>

4. Section 169 of the IR Act provides as follows:

   169(1) The Commission must, in the exercise of its functions, take into account the principles contained in the Anti-Discrimination Act 1977.

It should first be noted that this is not an entirely new provision in the New South Wales industrial jurisdiction. Section 351(1) of the *Industrial Relations Act 1991* ("the 1991 Act") was similar but not identical to this provision. However, it appears that little if any consideration was given to the meaning of s.351(1) while the 1991 Act remained in force.

5. Section 169(1) is one of a number of provisions which run through the IR Act which together form a scheme designed to incorporate A-D Act concepts into the industrial jurisdiction. These other provisions generally had no analogy in the 1991 Act, and show that the importance of anti-discrimination concepts in the IR Act has been substantially elevated when compared with the 1991 Act. These other provisions include:

Section 3(f):	this makes prevention and elimination of discrimination in the workplace an object of the Act.
Section 6(2)(f):	this includes as an example of an "*industrial matter*" discrimination in employment in any industry on a ground to which the A-D Act applies.
Section 19(3)(e):	in the review of awards, any issue of discrimination under the award is to be taken account of.
Section 34(2)(d):	the President of the ADB can with leave appear at proceedings for approval of an enterprise agreement.
Section 35(1)(a):	an enterprise agreement is to be approved, but the Commission must be satisfied that the agreement complies with, *inter alia*, the requirements of the A-D Act.
Section 158(1):	the president of the Commission is to designate particular Deputy Presidents to deal with, *inter alia*, discrimination in the workplace.

Section 167(2): the President of the ADB may intervene in any proceedings of he/she establishes that the proceedings concern unlawful discrimination under the A-D Act.

Section 169(4): An industrial instrument may be varied at any time to remove unlawful discrimination arising under the instrument, at the application of a party, or the President of the ADB with leave.

Section 187(d): the President of the ADB may appeal to a Full Bench if the President considers a decision is inconsistent with the principles contained in the A-D Act.

It is in the context of the above provisions, which establish the fundamental importance of anti-discrimination concepts in the IR Act, that section 169(1) of the IR Act must be interpreted.

6. Section 169(1) by use of the word "*must*" is mandatory in nature and imposes a requirement upon the Commission in all circumstances where it exercises its jurisdiction. The nature of this requirement however is described by the words "*take into account*". This phrase was considered in some detail by Batt J of the Supreme Court of Victoria in *Roads Corporation v Dacakis* [1995] 2 VR 508 at 536 as follows:

> *In my view, the expression "take into account" here means "pay attention to in the course of an intellectual process" or to "take into consideration"... The expression seems to me to be very similar in effect to the expression "have regard to", which has been interpreted as meaning to take into account and give weight to as a fundamental element in making the decision.... A duty to have regard to or to take into account certain considerations does not require a specific finding to be made in respect of each of these*

considerations or require each of them to be given any particular weight; it is, rather, a duty to consider each of the considerations and whether any or any particular weight should be given to each.

A failure to take into account a consideration that the tribunal or person concerned was bound to take into account constitutes a mis-exercise of discretion and an error of law.

The above decision referred to the High Court decision of *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, in which at p.333 Gibbs CJ equated "have regard to" to taking into account.

7. It is clear therefore that when section 169(1) requires the Commission to "*take into account*" the principles of the A-D Act, it is not required to automatically apply them, but it is required to consider them in the exercise of its discretion. In this way, the provision is similar to section 146(2), under which the Commission "*must take into account the public interest in the exercise of its functions*". Section 169(1) is to be contrasted however to section 35(1), referred to above, where in the case of an enterprise agreement the Commission is only to approve the agreement if it is satisfied that the agreement "*complies with all relevant statutory requirements (including the requirements of this Part and of the Anti-Discrimination Act 1977)*". Section 35(1) leaves no scope for the exercise of discretion by the Commission, and requires the application of the provisions of the A-D Act to enterprise agreements. Section 169(1) however gives a direction as to the way in which discretion is to be exercised, so that the "*principles*" of the A-D Act are to be treated as a consideration (albeit a fundamental one) in the decision-making process rather than statutory provisions to be applied in a non-discretionary way.

8. What is to be taken into account under section 169(1) are the "*principles*" of the A-D Act. The A-D Act itself does not contain any provisions which are in terms described as its principles, and nor is the word "principles" a term commonly used in law to refer to the provisions of a statute or any particular part of a

statute. The best approach then is to interpret the word "principles" according to its ordinary meaning. "Principle" has different shades of meaning, but the most apposite definitions would seem to be "*a fundamental, primary, or general truth, on which other truths depend ...a fundamental doctrine or tenet*" (see Macquarie Dictionary, 2nd ed., p.1350). Therefore the use of the word in section 169(1) seems directed at picking up the foundational concepts of the A-D Act.

9. This is not to say that the word "principles" excludes the actual provisions of the A-D Act, but rather includes those in a broader conceptual framework. This proposition derives support from the decision in *New Zealand Maori Council v Attorney General of New Zealand* [1994] 1 All ER 623, in which the Privy Council was called on to consider the meaning of a statutory reference to the principles of the Treaty of Waitangi. The Court said at p.629:

> *Both the 1975 Act and the 1986 Act refer to the "principles" of the treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the treaty places on the parties. They reflect the intent of the treaty as a whole and include, but are not confined to, the express terms of the treaty ... With the passage of time the "principles" which underlie the treaty have become much more important than its precise terms.* [emphasis added]

10. Any doubt as to whether the word "*principles*" was intended to included the express provisions of the A-D Act can be laid to rest by reference to the Second Reading Speech by Minister for Industrial Relations on the *Industrial Relations Bill 1995* (this speech was adopted by the Minister in his Second Reading Speech on the *Industrial Relations Bill 1996*). The Minister said (Hansard, 23 November 1995, p.3857): "*More generally, the commission is required to take into account the principles contained in the Anti-Discrimination Act, which includes, when dealing with matters relating to employment in the New South Wales public sector, part 9A relating to promoting equal employment opportunity for designated groups*". Here the Minister refers to the

principles of the A-D Act as including a specific set of provisions within it.

Section 56 of the A-D Act and section 169(1) of the IR Act

11. Section 56 of the A-D Act provides as follows:

> *56 Religious bodies*
>
> *Nothing in this Act affects:*
> *(a) the ordination or appointment of priests, ministers of religion or members of any religious order,*
> *(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
> *(c) the appointment of any other person in any capacity by a body established to propagate religion, or*
> *(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

The question that has arisen in the proceedings is whether section 56 of the A-D Act falls within the principles of the A-D Act that the Commission is required to take into account

12. It follows from the approach taken in paragraphs 7-9 above that section 56 of the A-D Act is picked up in section 169(1) of the IR Act. That is, the term "*principles*" includes all the express provisions of the A-D Act, including section 56. It might be added to this that even on a broader conceptual level, it would seem to be a fundamental feature of the A-D Act that it was not intended to interfere with the operation of religious bodies. Accordingly, the exemption in section 56 is a principle of the A-D Act that must be taken into account by the Commission in the exercise of its discretion.

Agreements between parties and section 169(1) of the IR Act

13. Consent between parties has always been given considerable weight by the Commission in the exercise of its discretion, both under the IR Act and its predecessor Acts. However, the Commission has never, in the general exercise of its functions, been compelled to accept agreements between parties as being determinative of its own decision-making process (although enterprise agreements and their approval fall into a special category with different criteria applying). This may be illustrated by the way in which the Commission has over the years dealt with consent awards involving wage increases over and above those allowed by the State Wage Case principles. Prior to the current "special cases" principle, which allows consent awards to be approved subject only to the provisions of the Act, proposed consent awards which provided for wage increases above the standard allowable increases were required to be approved by way of a special case before a Full Bench. Such proposed consent awards were rigorously tested in light of the public interest considerations then applying in favour of wage restraint, and a number were not approved. This shows that agreement between the parties has only ever been one matter to be considered in the exercise of the Commission's discretion. In the current environment, which favours agreement-making, consent between the parties is given significantly greater weight than in years before, but the Commission is not required to approve an agreement between the parties which it considers to be clearly against the public interest (given its obligation under section 146(2) to take the public interest into account).

14. Similarly, agreement between the parties is a factor which must be balanced against the requirements of section 169(1). That is, the Commission will in exercising its discretion take into account a number of factors, which will include any consent as between parties, but also the principles of the A-D Act and the public interest. Sometimes there may be conflict between these, but it is fundamentally the role of the Commission to weigh and balance competing considerations in the exercise of its jurisdiction. In this sense, although section 169(1) introduces a new consideration into the decision-making process, the basic task facing members of the Commission is not a new one. Section 169(1) does not, as stated earlier, eliminate the general discretion which the Commission has, and consequently it is open to the Commission to give effect to

the principles of the A-D Act in a way appropriate to the circumstances of each case before it.

In considering the terms of the ADB submission earlier set out, it is to be noted that the CCER had foreshadowed that it would rely upon s46A, s49ZO(3) and s55 to s57 of the *Anti-Discrimination Act* and it was, as we understand it, on this basis that the ADB responded to reliance upon those provisions. In the light of the decision which we have come to and the form of the provisions finally agreed to by the parties, it unnecessary for us to consider or analyse in any detail the terms or significance of those provisions which are in the following terms:

...

However, our present view is that the general principle of construction in relation to those provisions is that set out in *Waters v Public Transport Commission (Vic)* (1991-1992) 173 CLR 349 at 369 and 382 – that is, that such exemptions should normally be construed narrowly. Further, that irrespective of which approach to construction should be adopted, it is doubtful that those provisions other than s56(d), in their terms, have any relevance to the present proceedings. On the other hand, we consider that the CCER submission is on firmer ground in its reliance upon the provisions we have earlier referred to – that is, s25(3)(c), s38C(3)(c), s40(3)(c), s49D(3)(c) and s49ZH(3)(c) of the *Anti-Discrimination Act*. In our view, the effect of the provisions earlier referred to is to remove from disconformity, which might otherwise arise, with the provisions of the *Anti-Discrimination Act* those sections of the awards proposed to be made for the Catholic Schools sector and also the Independent Schools sector. Thus, in accordance with the mandate upon us

under s351, the Commission's obligation to take into account the principles contained in the *Anti-Discrimination Act* also requires it give appropriate effect to the exemption provisions contained in those sections relating to private education authorities. We also consider that we are required to consider the implications of s56(d) for the provisions we are requested to award.

It is convenient at this point to comment upon the submissions made on behalf of the Crown. We have carefully considered the various, and to some extent competing, submissions in relation to the approach to be adopted by the Commission in relation to the inter-relationship between the *Industrial Relations Act* and the *Anti-Discrimination Act.* We have earlier referred to the relevance of the approach of the High Court in *Waters v Public Transport Commission.* Subject to that important consideration, and subject also to the consideration that the submissions put on behalf of the Crown dealt largely with the approach to be adopted in applying s169 of the 1996 Act in a different statutory context, we consider that the submissions of the Crown usefully set out the appropriate approach that should be taken in relation to s351(1) of the 1991 Act.

Thursday, 3 August 2000

Human Rights and Labour Law: Using human rights in employment and industrial law

Annual Human Rights in Practice Seminar Series 2000

This seminar will provide an overview of international human rights law and its relevance to employment and industrial law. The speakers will consider relevant International Labour Organisation conventions and how these conventions have been applied by Australian industrial tribunals.

Australian Lawyers for Human Rights and NSW Young Lawyers

3 August 2000

Law Society of NSW
170 Phillip St
Sydney

Sally Moyle

Introduction

I am pleased to be able to discuss today's topic - human rights and employment law. Employment and industrial law are areas that are often overlooked in human rights discussions. Human rights scholars and activists remain surprisingly ill-informed concerning the work of the ILO.[1] Conversely industrial relations commentators and students have often ignored human rights issues.[2]

This is despite the fact that rights in employment are central to the protection of human rights, and despite the long history of the development of industrial and employment rights internationally.

Australia, too, has a pretty impressive history of recognising the centrality of economic equality to the enjoyment of human rights.

This oversight may in part be a result of the ideological perceptions that the discussion of human rights should be limited to civil and political rights. Certainly, Australia, along with other western nations has been slower to provide explicit recognition of economic, social and cultural rights as rights than of civil and political rights. There is an argument that western nations deliberately avoided direct implementation of economic, social and cultural rights, presuming that to do so would smack of communism. Some people go so far as to argue, as one commentator has noted, that the "...concept of human

---

[1] Virginia Leary "Lessons from the experience of the international Labour Organisation" in Phillip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* Clarendon Press Oxford 1992, 580.

[2] Braham Dabscheck "Human rights and industrial relations" (1998) 4 *Australian Journal of Human Rights* 10, 14.

rights... has fulfilled an ideological role of buttressing prevailing relations of economic power."[3]

Of course, this is not to say that economic rights are not recognised in Australia; of course they are, but there has been limited recognition that employment issues can raise human rights concerns. Statutory protection of employment rights has been provided in Australia with little reference to international standards or agreements. This makes it more difficult to introduce human rights concepts into industrial matters and to have such arguments accepted.

The Human Rights and Equal Opportunity Commission, and the Sex Discrimination Commissioner in particular, have a record of promoting the linkages between employment law and human rights, but more work is needed in order to establish these links more directly. One of our often repeated slogans is that "equality is a meaningless concept without economic equality", a slogan that we lifted from Mary Gaudron.

Today I would like to give a brief overview of the major international human rights instruments that create the employment rights framework. Then I intend to discuss the federal *Workplace Relations Act 1996* (WR Act) and fit it into this human rights framework.

Finally, I would like to discuss some of the work that the Sex Discrimination Commissioner has done to advance the recognition of human rights in employment law in order to promote women's equality in Australia. In particular, during 1998 and 1999 the Sex Discrimination Commissioner undertook the first national inquiry into pregnancy discrimination in the Australian workplace. This inquiry squarely took the view that there is a degree

---

[3] N Stammers "Human rights and power" (1993) XLI(1) *Political Studies*, 75.

of common ground between the workplace relations and anti-discrimination systems, as both aim to assist the fair and equitable operation of employment relationships.

Labour law and international human rights obligations

Both the ICCPR and the ICESCR make provision for the protection of rights at work.

The ICCPR provides for the right to freedom of association[4] and prohibits slavery, servitude and compulsory labour[5].

Article 6 of the ICESCR provides a rights of everyone to work. Article 7 requires that "States Parties recognize the right of everyone to the enjoyment of just and favourable conditions of work..." In particular, it requires the provision of fair wages and equal remuneration for work of equal value and a decent living for workers and their families. It provides for equality of opportunity and OH&S and for "[r]est, leisure and reasonable limitation of working hours..."

Article 8 requires States Parties to ensure the right of everyone to form trade unions and join the trade union of their choice. It provides that "...no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others..." It also provides for a right to strike, "...provided that it is exercised in conformity with the laws of the particular country."

---

[4] Art 22.
[5] Art 8.

It requires special protections to be given to women and children, and for paid maternity leave or appropriate social security provisions to be provided for women following childbirth.

However, it is the International Labour Organisation (ILO) that is primarily responsible for regulating working conditions in international law.

The ILO is a part of the United Nations System and is responsible for monitoring labour standards globally. It was created in 1919 as part of the Treaty of Versailles that finalised the First World War. It was established primarily for the purpose of adopting international standards to cope with the problem of labour conditions involving "injustice, hardship and privation".

The Declaration of Philadelphia was made in 1944 reaffirming the work of the ILO, and this Declaration was incorporated into the Constitution of the ILO. It broadened the ILO's standard setting mandate to include more general, but related, social policy, human and civil rights matters. International labour standards are essentially expressions of international agreement on these matters.

The ILO and standard setting

The ILO's standards take the form of International Labour Conventions and Recommendations. The ILO's Conventions are international treaties, subject to ratification by ILO member States. Its Recommendations are non-binding instruments -- typically dealing with the same subjects as Conventions -- which set out guidelines which can orient national policy and action. Both forms are intended to have a concrete impact on working conditions and practices in every country of the world.

The annual International Labour Conference may also agree on codes of conduct, resolutions and declarations. These documents are often intended to have a normative effect but are not referred to as part of the ILO's system of international labour standards.

The organization has adopted more than 180 Conventions and 185 Recommendations covering a broad range of subjects.

International labour standards are considered to provide the following benefits:

- International labour standards contribute to the possibility of lasting peace.
- International labour standards can help mitigate potentially adverse effects of international market competition.
- International labour standards can help the development process. [6]

The ILO's Constitution requires that international labour standards be set with due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstance make the industrial conditions substantially different.

The ILO's mandate is nevertheless to set generally applicable standards that are universal. All countries should be able to implement and ratify them - regardless of their stage of economic development, or social or economic system.

Because of this, standards are often written with certain flexibility in their obligations. Several very important standards set only goals for national policy

[6] ILO Website.

and a broad framework for national action. When ratified, these promotional standards oblige a country to use means appropriate to national circumstance to promote these goals -- and to be able to demonstrate progress over time in achieving the goals.

Fundamental rights under the ILO

There are eight ILO Conventions that are considered fundamental to rights at work. They fall into four categories, and the latest Convention was only passed last year. It has yet to be ratified.

In June 1998, in Geneva, the ILO Declaration on fundamental principles and rights at work was passed. The Declaration states "... that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

The eight fundamental conventions are:

Freedom of association

- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (124 ratifications of 174 member states as of Februry 2000)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98) (141 ratifications)

The abolition of forced labour

- Forced Labour Convention, 1930 (No. 29) (150 ratifications)
- Abolition of Forced Labour Convention, 1957 (No. 105) (140 ratifications)

Equality

- Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (137 ratifications)
- Equal Remuneration Convention, 1951 (No. 100) (140 ratifications)

The elimination of child labour

- Minimum Age Convention, 1973 (No. 138) (77 ratifications)
- Worst Forms of Child Labour Convention, 1999 (No. 182) (no ratifications as of February 2000)

While Australia is not free from either issues of forced labour or servitude, (particularly in the context of sexual servitude), or of issues relating to child labour (by any means, particularly in the case of child outworkers and some child agricultural workers), it is the areas of equality of non-discrimination and of freedom of association or union membership that are of most relevance from an Australian point of view.

Case study: Maternity Protection

In the 87th Session (1999) of the International Labour Conference the revision of the Maternity Protection Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95) were discussed.

> Maternity protection of women at work has been of core importance to the International Labour Organization since its establishment in 1919. The Maternity Protection Convention, 1919 (No. 3), was among the first instruments to be adopted. In 1952, this Convention was revised to take into consideration developments in national law and practice, especially

in the realm of social security. The years since 1952 have similarly seen dramatic changes, notably in the participation of women in the workforce, and an ever growing commitment to eliminate discrimination in employment.

The 1999 International Labour Conference addressed the question of the revision of the Maternity Protection (Revised) Convention, 1952 (No. 103), and Recommendation, 1952 (No. 95), in accordance with the double-discussion procedure ...[of the ILO].[7]

The second discussion took place at the 2000 International Labour Conference on June 15 and a revised Convention was passed.

Australia remains one of only six countries that does not provide universal paid maternity leave. This aspect of Australia's position is particularly relevant in that only this year, Australia took action to remove its only other outstanding reservation against CEDAW - in relation to employing women in front-line combat positions in the defence forces. Needless to say, Australia has not ratified the maternity protection convention.

The Australian industrial relations system

Australian Workplace Relations Act 1996

Australia has always had a centralised system of industrial relations, where the Commonwealth (and States and Territories) had responsibility for conciliating and arbitrating disputes and for setting levels of wages. This has meant that unions had a guaranteed place in Australian industrial relations, and the Australian system produced wage outcomes that have been reasonably

[7] From the ILO Website.

equitable. Until the early 90's, Australia had one of the smallest gender wage gaps amongst OECD nations, for example.

The WR Act replaced the *Industrial Relations Act 1988* and presented "...a new landscape for industrial relations in Australia" [8]

The Act sought to emphasise relationships at the workplace and enterprise level, and to hand primary responsibility for industrial negotiations to employers and employees at the enterprise and workplace level. It was intended to dismantle the collective apparatus of industrial regulation.

The principal object of the WR Act spells out the basic thrust and intent of the legislation and encapsulates the new directions intended for the industrial relations system. Section 3 of the WR Act states that "[t]he principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia."

It provides that it should do this including by "respecting and valuing diversity of the work force by helping to prevent and eliminate discrimination" on the basis of sex, amongst other things.

Providing assistance with respect to giving effect to Australia's international obligations in relation to labour standards is another element evidenced within the WR Act.

In full the specific provisions of the objects clause of the Act reads:

---

[8] Therese MacDermott "Labour law and human rights" in David Kinley *Human Rights in Australian Law* Federation Press Sydney 1998, 196.

a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and

c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

d) providing the means:

> **i)** for wages and conditions of employment to be determined as far as possible by agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and
>
> **ii)** to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members and are able to operate effectively; and

h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and
j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
k) assisting in giving effect to Australia's international obligations in relation to labour standards.

The WR Act emphasises the role of informal agreements in the industrial relations system. It retains an award system as a minimum safety net but provides for the alternatives of award coverage, certified agreements (CAs) and Australian workplace agreements (AWAs). The language used is of "choice". There is a choice of having a certified agreement as a union agreement or without the union's involvement. A person negotiating an AWA may appoint a bargaining agent on their behalf, and this may be a union representative.

The WR Act limited to 20 the number of matters which the AIRC may include in an award by specifying the matters that it can regard as the subject of an industrial dispute. Subsection 89A(2) lists the allowable award matters.

Provisions incidental to the allowable matters and necessary for the effective operation of the award (for example, date and period of operation of the award, and facilitative provisions) are also allowed under the Act.

The AIRC is also able to include in an award a model anti-discrimination clause (s.89A(8)) and an enterprise flexibility clause (s.113A). The Act recognises that in exceptional circumstances there may be some 'non-allowable' matters in relation

to which it would be harsh or unjust not to make an order, and in the absence of the parties being able to reach agreement, it may be appropriate for the AIRC to exercise its arbitral powers.

The reduction of matters which may be included in an award was introduced along with an award simplification process.

Non-Discrimination and equality at work

The WR Act includes a range of provisions intended to help prevent and eliminate discrimination on the basis of race, colour sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

These provisions relate to the principal object of the WR Act, as well as to awards, agreements, and termination of employment. Specific provisions also deal with ensuring equal remuneration for work of equal value without discrimination based on sex, and the prevention of discrimination on the basis of union membership or non-membership.

In addition to the non-discrimination provision in the Objects clause of the WRA, that clause also refers to assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers (s.3(i)).

The Act requires the AIRC to take account of the principles embodied in three anti-discrimination Acts concerning discrimination in relation to employment. These are the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* (the Sex Discrimination Act), and the *Disability Discrimination Act 1992* (s.93).

The AIRC is also required to take account of the principles embodied in the International Labour Organisation's *Workers with Family Responsibilities Convention* (ILO 156), including those relating to preventing discrimination against workers who have family responsibilities (s.93A).

A range of provisions are intended to prevent and eliminate discrimination in awards. These provisions specifically require the AIRC to have regard to the need to prevent and eliminate discrimination on the specified grounds in the performance of its award-making functions (s.88B(3)(e)). The AIRC must also have regard to the need to apply the principle of equal pay for work of equal value without discrimination based on sex (s.88B(3)(d)).

The AIRC is required to ensure that new awards, variations to awards, and orders affecting awards do not contain provisions that discriminate on the specified grounds (s.143(1C)(f)).

There are certain exemptions to this, including in relation to junior rates of pay, inherent requirements of the job and in relation to work in a religious institution. (section 143(1D).)

If discriminatory provisions are identified, the AIRC may take whatever steps it considers appropriate to address the discrimination (s.49(9) and 51(8)). Similar exemptions apply as apply to the making of new awards. In addition, the legislation specifically indicates that the model anti-discrimination clause endorsed by the AIRC in its October 1995 Safety Net Adjustment and Review decision can continue to be included in awards (s.89A(8)).

The AIRC must refuse to certify an agreement, whether made between employers and unions, or directly between employers and employees, if the agreement discriminates against an employee on any of the specified grounds (s.170LU(5)). Similar exemptions apply as those applying to awards (s.170LU(6) and (7)).

The President of the Human Rights and Equal Opportunity Commission may not deal with a complaint about discrimination in awards or certified agreements, but must refer any discriminatory award or agreement to the AIRC. The President is then considered to be a complainant before the AIRC (s50A Sex Discrimination Act and ss 111A and 113(2A)WR Act). These provisions are yet to be used and the provisions build in all the limitations of an individualised complaint-based procedure.

One of the major problems in dealing with discrimination in an industrial forum is that industrial practitioners and participants have traditionally had very little contact with, understanding of, or respect for discrimination issues. Australia's industrial system has always operated collectively and anti- discrimination systems in an individual complaints-based system.

The Sex Discrimination Commissioner is keen to ensure that there are greater relations built between the two systems that really operate on parallel tracks and that should be able to feed more directly into each other. As Therese MacDermott says,

> ...the integration of labour law and anti-discrimination principles is an important developing theme in labour law discourse. While anti-

> discrimination law is a distinct form of legal regulation it should be acknowledged as an integral aspect of labour law regulation. [9]

Anti-discrimination provisions are a very useful tool much under-utilised.

Equal remuneration provisions are found in Division 2, Part VIA of the WR Act. The AIRC is able to make orders, on application, to ensure equal remuneration for men and women workers for work of equal value without discrimination based on sex (s.170BC(1)). Applications can be made by an employee, a trade union with relevant coverage, or the President of the Human Rights and Equal Opportunity Commission (s.170BD).

The provisions will cover award rates, rates specified in agreements (including either certified agreements or AWAs), overaward pay and non-monetary benefits. While no limits are placed on the type of orders that can be made under the provisions, orders can provide for increases in remuneration to ensure that there will be equal remuneration for work of equal value (s.170BC(2)).

The phrase 'equal remuneration for men and women workers for work of equal value' has the same meaning as in the International Labour Organisation's Equal Remuneration Convention (s.170BB). This convention defines 'remuneration' as including

> the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or Indirectly, whether in cash or in kind, by the employer to the workers and arising out of the worker's employment.

---

[9] Therese MacDermott "Labour law and human rights" in David Kinley *Human Rights in Australian Law* Federation Press Sydney 1998, 196.

Once again, these provisions are under-utilised. The first completed case failed at first instance because of the Commission's decision on how to determine the work value test.[10] It was re-litigated and settled in mid 1999.

The federal workplace relations framework, then, can be seen to provide some explicit recognition of the human rights parameters of the world of work, and in this respect it is to be applauded. This is despite the fact that some of the recognition is contained in objects clauses that have limited direct application and that incorporation of human rights obligations is in other respects is quite piecemeal.

Also, some of the provisions that provide direct redress for alleged breaches of human rights are, as noted above, little used. So far, of the few complaints received alleging discriminatory provisions in awards or agreements, the Commissioner has not been satisfied that the discrimination was made out or that any discrimination could be attributed to a provision of an award or agreement.

There may be may be structural reasons why more complaints are not brought to the Commission, but the Sex Discrimination Commissioner considers that this is also partly to do with the fact that, as we have discussed, industrial relations practitioners, including lawyers and unionists, are often unaware of the human rights parameters of their work.

Many commentators are quite pessimistic about the future protection of workers' rights in Australia. As one commentator has noted,

> With increased globalisation and associated genuflection at the altar of the market it is likely that industrial relations dimensions of human rights will worsen rather than improve.[11]

The Sex Discrimination Commissioner considers, however, that there is room to manoeuvre in the federal sphere using human rights arguments.

First, practitioners should make use of the statements in the objects clauses of the WR Act as an aid to interpretation, and, where appropriate, should introduce arguments that draw on international agreements. As you would be aware, one of the standard tools of interpretation is that where a piece of domestic legislation uses the same language as an international agreement, it is assumed that the legislators were intending to implement its obligations in that regard and the statute must be given the same meaning as the international instrument.[12]

Where only part of a treaty is referred to in or incorporated into legislation, the balance of the instrument can be referred to as an aid to interpretation.[13]

Another relevant principle of statutory interpretation is that

> ...where an Australian statute has the objective and purpose of protecting human rights, the courts have indicated that human rights legislation

---

[10] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries Ltd* (1998) AILR 3-739.

[11] Braham Dabscheck "Human rights and industrial relations" (1998) 4 *Australian Journal of Human Rights*, 38.

[12] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71ALR 381 at 383 per Brennan CJ. See Eastman and Ronalds "Using human rights law in litigation" in David Kinley (ed) *Human Rights in Australian Law* Federation Press Sydney 1998, 321.

[13] See *De L v Director General NSW Department of Community Services* (1996) 187 CLR 640.

should be construed broadly to give effect to the objectives of the legislation. In doing so, international instruments may be used to identify objectives. This interpretive approach is often applied in discrimination proceedings.[14]

Those objects clauses in the WR Act should be used strategically, but they should be used, and used more often.

In addition, the specific provisions in the WR Act such as the equal remuneration provisions and those that involve the Commission, should also be considered more often.

Finally, strategic use of anti-discrimination provisions should be made and practitioners should take advantage of the linkages that exist in workplace relations and anti-discrimination legislation.

For example, in December 1998, Commissioner Di Foggo found that the decision of an employer to dismiss a woman for taking time off to care for her seriously ill child was harsh, unjust and unreasonable.[15]

The Commission found that the employee's failure to attend work on two occasions because she had to care for her daughter was "legitimate and unavoidable".

The Commission ordered the employer Kew Aged Care Pty Ltd to pay employee Dianne Johnston, four months wages as compensation for unfair dismissal.

---

[14] Eastman and Ronalds "Using human rights law in litigation" in David Kinley (ed) *Human Rights in Australian Law* Federation Press Sydney 1998, 325.

The WR Act prohibits employers from dismissing employees on the basis of family responsibilities. This decision has confirmed that only where the absence is intrusive and long, resulting in the employee being unable to perform the inherent requirements of the job, would there be a prospect of the employer successfully defending the dismissal action.

This case is also of interest in that it is a case where federal industrial legislation has dealt with similar issues to those covered by the federal Sex Discrimination Act in relation to employees with family responsibilities.

As I am sure many of you are aware the Sex Discrimination Act makes it unlawful to discriminate on the grounds of sex, marital status, pregnancy and presumed pregnancy. It also prohibits sexual harassment, dismissal on the basis of family responsibilities and victimisation.

This case brought before Commissioner Foggo produced a result that is consistent with the outcomes of similar cases lodged under the Sex Discrimination Act.

The Sex Discrimination Commissioner has always taken a very active role in workplace and industrial issues, as is appropriate given the importance of work in women's lives. For the 1998-99 year over 80% of all complaints were employment related and some 84% of complaints lodged under the Sex Discrimination Act in the 1998-99 financial year were made by, or on behalf of women.

An example of the Commissioner's involvement in such issues recently is the National Inquiry into Pregnancy and Work.

---

[15] *D Johnson v Kew Aged Care Pty Ltd* 9 December 1998 1476/98 M Print Q9544.

The Report of the National Pregnancy and Work Inquiry was tabled in parliament and launched on 25 August 1999. The Inquiry was granted to the Human Rights and Equal Opportunity Commission under the auspices of the federal Sex Discrimination Act by the Attorney-General, Daryl Williams, in August 1998.

Complaints relating to pregnancy or potential pregnancy discrimination make up a significant proportion of complaints. In 1997-98 complaints to the Human Rights and Equal Opportunity Commission on the ground of pregnancy or potential pregnancy made under the Sex Discrimination Act constituted some 15% of all complaints. In the 1998-99 financial year this increased to 18%.

This type of discrimination is more widespread than this figure suggests however. State and territory anti-discrimination bodies also receive complaints independently. Plus other cases are dealt with by private mediators, internal company procedures and unions. Additionally, as indicated by the Pregnancy Inquiry, many women do not report instances of discrimination because they fear retribution or are overwhelmed by their pregnancy or newborn child and are unable to expend extensive energy going through the formal complaint process.

The Inquiry received well over 100 written submissions. Extensive consultations with women's organisations, other non-government organisations, unions, employer groups, and individual women also provided a wealth of additional valuable data.

Entitled *Pregnant and Productive: It's a right not a privilege to work while pregnant,* the report was released on 25 August 1999. Examples of case studies cited in the report include the following.

- An employer dismissed a pregnant bar attendant on the basis that she might fall on the slippery floors and injure her unborn child. Floors should be safe for all employees.

- A Judge's Associate who was eight months pregnant was told by the Judge that he wasn't going to support her application for maternity leave because she had chosen a new career. He believed women should stay at home with their children.

- One worker was given repeated assurances that a permanent position would only be advertised internally, so that if she still wanted the job permanently it would be hers. However when the employer found out she was pregnant the position was advertised externally and the woman did not get the job.

- A casual receptionist became pregnant and needed some time off from work to see her doctor. Although she gave her employer two weeks notice of her unavailability on the day of her appointment, her employer threatened to sack her if she did not turn up at work on that day. She went to the doctor as planned and two weeks later she was dismissed.

- A contract worker with five years of service with the same employer informed her boss that she was pregnant. She requested maternity leave and her employer refused, saying that contract workers did not get maternity leave and added that if anyone was to be dismissed, she'd be the "first to go".

- A car manufacturing company repeatedly refused to provide a pregnant worker with seating, despite the employee providing several medical certificates requesting seating due to bleeding and extreme pain. Seven months into the pregnancy, the employee collapsed at work; her child was born by Caesarean, seven weeks premature with an underdeveloped heart.

- A TAFE Casual Supply teacher had been teaching continuously for two years. Her teaching load was 4 days, 4 hours and 15 minutes. This is half an hour short of a full-time teaching load. The teacher applied for maternity leave payment but was denied on the basis that she was a casual teacher who had not taught a full load.

These are not isolated stories. They represent a sprinkling of the experiences detailed about poor workplace management of pregnancy.

Marginalised women clearly face great challenges in the workplace. Some young women for example, who work as apprentices and trainees face blatant discrimination on the ground of pregnancy or potential pregnancy, especially if they work in male-dominated areas. For example, 45% of workers surveyed at a construction site for the Inquiry said that if they were the boss they would be less likely to employ a tradeswoman or female apprentice of child bearing age than a man. This is outrageous blatant discriminatory stereotyping, not to mention illegal! But this is reality on the ground. The thought that almost half of the respondents would not employ a young woman because she might become pregnant sometime in the next 20 years says an awful lot about the industry, the 1950s mindset that operate within it, and in turn reflects the biased attitudes that prevail in parts of our society.

The Inquiry found that a significant number of young women have limited knowledge of anti-discrimination laws, and that when they are aware of their rights, they are reluctant to speak out in fear of losing their apprenticeship or traineeship; past experience and the treatment they've witnessed colleagues suffer clearly dictates their silence.

During a TAFE focus group, it was reported that most women in the group had been told directly at some stage in their working lives that "It's a waste of time giving you an apprenticeship 'cos you're going to get pregnant."

Denying a woman the opportunity to start or complete an apprenticeship or traineeship because of pregnancy results in both short and long term disadvantage.

The Pregnancy Inquiry also evidenced that women living in rural and isolated areas also face additional difficulties, including lack of access to basic prenatal services. The inquiry was told these difficulties result in some women and their partners deciding not to have children, or the decision to limit the size of the family. These circumstances add to the complexities of attracting and keeping skilled workers in rural areas.

For example, the Australian Education Union cited pregnancy and work related difficulties as a major reason why women educators of child bearing age often refuse work in rural areas.

A different example was evidenced by the story of a long-term temporary employee of Queensland Health who was working in a remote location. She was unable to secure permanent employment there because she was pregnant. Permanent positions were available but, until her union intervened, her

managers were not going to offer her one. This is even more extraordinary given the difficulty the management had recruiting nurses to this remote location.

Government, industry and local residents need to make a long term commitment in order to achieve the cultural change needed; it can only benefit both workers and the community. However, as submissions to the Inquiry indicated, there are some short term practical solutions which would assist pregnant employees in rural and remote areas. Improved communications to rural areas, based on Internet and satellite technology and a national mobile phone network would dramatically increase women's access to services and information.

The Inquiry indicated women from culturally and linguistically diverse backgrounds require information that is culturally astute and sensitive. During the Inquiry, barriers that still operate to exclude women from culturally and linguistically diverse backgrounds became apparent. These women also stated that they were often reluctant to seek information when pregnant.

Barriers included language proficiency, cultural differences, migrant status, skills and qualifications recognition and a lack of awareness of procedures and services. For some women, a fear of government, police, or other authority figures, management for example, ultimately prevented them from seeking information about their rights, let alone doing anything to enforce such rights.

A project undertaken by the New South Wales Indo-China Chinese Association found that, on average, 60.7% of Chinese women interviewed had no knowledge of agencies that offer assistance in work-related discrimination issues. To address issues such as these, the Inquiry recommended that strategic action be taken to educate and empower all women using many different mechanisms about their rights and responsibilities in relation to pregnancy and potential pregnancy.

The Inquiry evidenced that many Aboriginal and Torres Strait Islander women were also unaware of anti-discrimination laws covering pregnancy and potential pregnancy at work.

It is common for Aboriginal and Torres Strait Islander women to want/need to return home for the birth of their child. They want to have their babies where they were born. To travel the required distance many women have to use part of their unpaid maternity leave. For some this impacted upon/reduced their options when returning to work.

Consultations with Working Women's Centres revealed some Indigenous women resigned when they became pregnant because they believed there was no alternative. These women were not aware of laws covering pregnancy or their right to unpaid maternity leave.

The fact that Indigenous women resign when they become pregnant, or in some cases terminate their pregnancy rather than risk losing their job, is tragic.

The Inquiry found much of the current resource material on workplace pregnancy is too complex and culturally alienating.

This discourages many women and in particular Indigenous women from seeking information themselves when employers who have a legal responsibility to provide the relevant information have failed to do so.

The Inquiry recommended that culturally specific material for Indigenous women and their families be produced.

The needs of partners also featured in Inquiry findings. Pregnancy is rarely the sole preserve of the pregnant woman, it usually involves partners, relatives and friends.

Unfortunately however, there are some employers who refuse to acknowledge partners' needs in such circumstances.

Not only have men been denied leave to attend significant medical appointments with their pregnant partners - they have been denied leave to attend the birth!

Even in situations where an industrial award or company policy is family friendly, men noted they are often reluctant to use the policies for fear of covert discrimination or being labelled as uncommitted. Unfortunately real life doesn't mirror the policy rhetoric in certain organisations (both public and private sectors). Australian workplace cultures continue to make it hard for men to ask for time off to support their pregnant partners and some men have made it clear that it's in their best interests at work not to mention their family.

Men need and should be encouraged to be involved in family life. They should not be penalised for parenting.

The main recommendation arising from *Pregnant and Productive: It's a right not a privilege to work while pregnant* concerns the immediate need for education, guidance and awareness raising programs around pregnancy and work. Other recommendations address how this could be done.

We made some recommendations for incidental amendments to the Sex Discrimination Act, such as to provide for explicit coverage of breastfeeding as a ground of unlawful discrimination and to ensure coverage of unpaid workers.

We also recommended that the Attorney-General amend the provisions in relation to award of compensatory damages in the Act to also enable the award of punitive damages.

We made a number of recommendations to strengthen Australia's observance of international human rights standards, such as that the federal Government remove its current reservation to article 11(2)(b) of CEDAW on paid maternity leave.

We recommended that Australian Governments, in particular through the federal Office of the Status of Women and its State/Territory counterparts, and State/Territory anti-discrimination bodies, encourage broad national debate regarding the amended draft text of ILO Convention 103 with a view to ratifying and implementing the Convention.

And we made a number of recommendations that were intended to strengthen the linkages between the anti-discrimination forum of the Human Rights and Equal Opportunity Commission with employment and industrial relations forums such as the Employment Advocate and the AIRC.

For example, we recommended that the Human Rights and Equal Opportunity Commission be able to take complaints of discriminatory awards to the AIRC directly of its own motion, and we recommended the establishment of protocols for information sharing between the Commission and the AIRC.

The Inquiry confirmed that to be granted a human right is not necessarily ensure its realisation. However, we consider that the Inquiry provided an opportunity to support Australian women and their families and to assist in the better realisation of their human rights in this regard.

We believe that women, who are encouraged by society to have children, should be supported in that task. As the title of the report suggests, it is a woman's right to both work and have a family. Unfortunately, the federal Government is yet to provide a formal response to the report.

Employment is firmly within the human rights framework, and I would encourage legal practitioners to recognise this fact. We all need to work towards a better understanding of the human rights parameters of employment law and to the implementation of human rights in Australian industrial forums.