Equity in the Workplace: The Implications of the Industrial Relations Reform Act 1993

Justice Deirdre O'Connor

The Ninth Foenander Lecture in Industrial Relations was delivered by
Justice Deirdre O'Connor, President, Australian Industrial Relations Commission,
at the Agar Theatre, The University of Melbourne on Tuesday 18 October 1994

I am honoured to be invited to give this lecture. Over the last seven months I have had the opportunity as President of the Australian Industrial Relations Commission (the Commission) to be part of a process of change. In late March 1994 major amendments to the *Industrial Relations Act* 1988 (the Act) came into effect. These amendments introduced into the Act new objects which among other things are directed to:

- encouraging and facilitating enterprise bargaining and agreements;
- protecting wages and conditions of employment through awards;
- ensuring labour standards meet Australia's international obligations;
- providing a framework of rights and responsibilities for the parties involved in industrial relations consistent with a less centralised system; and
- preventing and eliminating specified forms of discrimination, such as 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.

In this address I propose to review some of the wide-ranging changes which came about as a result of the introduction of the *Industrial Relations Reform Act* 1993 (the Reform Act). In spite of criticism that it needed to go further, the Reform Act does involve the most fundamental change to the industrial relations system in Australia since the *Conciliation and Arbitration Act* 1904. This is particularly true in relation to the subject of my address tonight — equity in the workplace.

In my view, several of its provisions are designed to ensure that principles of equality and freedom from discrimination in employment will play a major role in the area of industrial relations in the future.

It has been pointed out that discrimination issues have only recently become part of the industrial jurisdiction.[9] However, industrial arbitration has traditionally included a social justice element in that it has provided adequate minimum entitlements and extended some of the gains won by well-organised workers to weaker and more vulnerable groups, thereby achieving a degree of social justice across the workforce as a whole.[1] It is clear that one of the major aims of the Reform Act is to integrate equity measures into the mainstream industrial relations processes, not as a by-product of the system, but as a central feature of it.

Many of the new provisions are designed to protect more vulnerable workers. Such safeguards should ensure fairness and equity for all workers, but particularly for those from groups which have been disadvantaged in the past, such as women and workers from non-English speaking backgrounds.

The influence of these new provisions is already being reflected in the work of the Commission, playing a day to day role in our operations and having a significant impact on major cases such as the Review of Wage Fixing Principles. Other initiatives, such as the introduction of the National Training Wage and the "Supported Wage System" indicate that the industrial relations system is evolving to take issues of fairness and social justice into account more regularly. Whilst we must have a system which allows for change and

some flexibility in working arrangements, it is essential to ensure that the industrially weak are given some protection. In order to make sure that the system operates fairly, the legislation requires us to give social issues, as well as economic ones, serious consideration.

It is important that the Commission, employers and employees recognise and respond to the changing needs of the workplace. Such needs have been created by the increasing participation of women in the workforce and the recognition of the family responsibilities of workers. Figures released recently by the Australian Bureau of Statistics show that women now make up a record 42.9 per cent of the workforce, and that the strongest growth is in female employment[2]. This is perhaps partly attributable to the strong growth in part-time jobs, which is, in itself, a factor which must be taken into account when considering working arrangements and the provisions of awards.

The emphasis on enterprise bargaining as the main mechanism for negotiating workplace agreements means that such arrangements need to be monitored for their effects on wage outcomes. The safety net of the award system (including safety net increases) and continuing appropriate access to conciliation and arbitration are particularly important in providing for those who are most vulnerable in the labour market. It has been suggested, supported by statistical evidence, that despite the widespread belief that women are more disadvantaged under enterprise bargaining, that this is not actually the case.[3] It seems that greater problems of pay inequity between men and women are created by overaward payments, which are now able to be addressed under the equal pay provisions of the Act. I will deal with this issue in more detail later in this address.

I will now briefly outline some of the provisions of the Reform Act which have equity implications, and then deal with specific issues which have come and will come before the Commission, and assess their actual and likely impact on the industrial relations system.

As I have already said, a number of specific provisions relating to discrimination were introduced by the Reform Act.[4] These include sections regarding certifying agreements and implementation of enterprise flexibility agreements, and those dealing with termination of employment and equal pay. There are also general requirements to prevent and eliminate discrimination, and to take account of the needs of workers with family responsibilities. The Commission is required by section 93 of the Act to *"take account of the principles embodied"* in the *Racial Discrimination Act*, the *Sex Discrimination Act* and the *Disability Discrimination Act* 1992, and section 93A requires the Commission to take account of the *"principles embodied in the Family Responsibilities Convention 1981"*[5]. These provisions are of a general nature, yet they apply to all the decision-making of the Commission and are intended to play a major part in guiding its operations.

As well as the widespread changes to the objects of the Act, the Commission has a specific obligation to ensure, so far as possible, that the award system provides for *"secure, relevant and consistent wages and conditions of employment"* [section 90AA(2)] so that it is an effective safety net *"underpinning direct bargaining"* [section 88A(b)].

Award Safety Net

The safety net of wages and conditions provided for in the Reform Act (along with other employee protections) is particularly important on social justice grounds, as a mechanism for protecting the living standards of all workers. As I have already indicated, under section 90AA(2), the Commission must ensure that the award system provides secure, relevant and consistent wages and conditions of employment. When deciding whether awards are relevant and consistent, the Commission must consider the objects and statements of legislative intent contained in the Act, including those I have highlighted in this address.

The award safety net may be reviewed and adjusted from time to time, consistent with the Commission's obligations to ensure that employees are protected by awards which set fair and enforceable wages and conditions of employment that are maintained at that relevant level.[6] The decisions resulting from the Review of Wage Fixing Principles[7], which took place this year, recognise that the award system should operate in a way which protects employees who may be unable to reach enterprise agreements, while maintaining an incentive to bargain for such agreements. These provisions of the Act establishing a safety net are designed to prevent inequity when applied to the industrially weak.

Section 150A Review Process

The legislation gives to the Commission an active role in the maintenance of the award system. Section 150A obliges the Commission to review each award on a three yearly basis to identify and remedy deficiencies, including where the award contains discriminatory provisions.

The process of review under section 150A has already been given some consideration during the Review of Wage Fixing Principles. The Commission sees this process as a means of improving the award system so that it is best able to meet the objects of the Act. To construe section 150A as being designed to weaken the award system so that it is less relevant, would be inconsistent with the Commission's obligation to ensure that the safety net of the award system remains "secure, relevant and consistent" [as provided by section 90AA(2)]. Such an approach would, over time, expose the industrially vulnerable.

This is not to say that the award system should not change, nor that it should not change significantly. The role of the award system is to provide a safety net underpinning enterprise bargaining. It must follow that it should not be an impediment to bargaining by being available as a competing system. However, when one looks at the objects of the Act and the provisions of section 90AA(2), it is, in my view, intended to be a safeguard for the industrially weak who have no bargaining power, and it is intended to be changed over time to reflect greater equity in the workplace.

An obvious way in which awards can be changed to enhance the needs of the enterprise and support enterprise bargaining is to make their operation more flexible and facilitative, by using flexibility and facilitative clauses. The use of such clauses allow individual enterprises to tailor their actual arrangements to suit the needs of employers and employees. This is the great benefit of decentralisation — allowing very great flexibility to occur without affecting the whole system or requiring constant changes to award provisions.

In the section 150A review process the Commission intends to conduct a pilot award review programme. A conference to establish the framework for the progress of this pilot programme is scheduled for 4 November 1994. At this time responses from the parties will be sought on a range of issues including the following:

- the establishment of an appropriate mechanism through which the review can proceed;
- identifying, at the commencement of the review of each award, all the relevant parties and inviting them to participate;
- establishing the priorities for review of each award;
- establishing the role of HREOC in the review process;
- establishing a programme of regular and timetabled reports on progress aimed at finalising the review process by August 1995; and
- establishing a mechanism to assess the pilot programme.

All of the above issues refer to particular initiatives and processes to make the award system more consistent, less prescriptive, more flexible, more facilitative and less discriminatory. The pilot programme will test and reveal the best ways to achieve these goals.

The outcome will be, I expect, an award system better able to perform its function at the enterprise as a safety net delivering equity to the workplace, while underpinning and enhancing enterprise bargaining.

Other Initiatives

As well as these important developments which the Commission has undertaken and will be undertaking under the Reform Act, I would like to refer to two initiatives of all the industrial parties which have, in my view, enhanced equity in the workplace — the National Training Wage and the Supported Wage System.

National Training Wage

Earlier this year, several applications were made to the Commission for an award providing for a National Training Wage, as contemplated by the Commonwealth Government's White Paper on Jobs Growth entitled "Working Nation". In progressing these applications, there was a great deal of agreement amongst the union movement (represented by the ACTU), employer organisations and Commonwealth, State and Territory Governments, as to the making of the award. Some of the most important initiatives contained in "Working Nation" were the integration of the long term unemployed back into the workforce, and the provision of skills to young people via traineeships. In its decision on this matter[8], the Commission was of the view that the establishment of such a system of traineeships was therefore in the public interest. The Commission is now in the process of calling on its awards to have the training wage provisions inserted into them where appropriate. This will allow considerable access for the long term unemployed and the young to the scheme.

Supported Wage System

Another recent decision of the Commission dealt with the implementation of the Supported Wage System[9]. This is another example of greater access to the workplace being made available to those who have traditionally been disadvantaged. The Supported Wage System is designed to facilitate the employment of workers with disabilities in open employment, and is therefore an important social and industrial advance. As with the National Training Wage, this matter came about by consent applications to vary a number of awards, and also made provision for a model clause to be inserted into other awards. The initiative received overwhelming support from all parties involved, and the Commission was pleased to be able to play its part. The model clause contains a number of safeguards to protect workers with disabilities from exploitation, and it is hoped that this initiative will encourage industry to employ workers with disabilities, and assist their integration into the general workforce, which, in my view, enhances the equity of the industrial relations system.

Certified and Enterprise Flexibility Agreements

Amongst the changes introduced by the Reform Act were the insertion of Divisions 2 and 3 of Part VIB dealing with certified agreements and enterprise flexibility agreements.

Before such agreements can be approved, the Commission must be satisfied that a number of safeguards have been complied with. The "no disadvantage" test operates to enable awards to act as benchmarks for certification and approval of agreements. The Commission must refuse to certify agreements if they are discriminatory [see sections 170MD(5) and 170ND(10).]

The Commission must be satisfied that all employees have been properly informed and consulted about the content of an agreement and the consequences of certification, particularly those groups of employees which are considered vulnerable [sections 170MG and 170NG].

Enterprise flexibility agreements may also be rejected by the Commission on public interest grounds [section 170ND(3)].

The Act makes provision for annual reporting on the outcomes of enterprise bargaining, particularly its impact on women, part-time workers and workers from non-English speaking backgrounds. The Commission is currently in the process of establishing a data base on the content of certified agreements and enterprise flexibility agreements, and will make publicly available a report regarding developments in enterprise bargaining on a quarterly basis.

In the August Wage Fixing Principles Decision the Commission proposed that its Rules be amended to provide that applications for the certification of an agreement or to approve the implementation of an enterprise flexibility agreement state the number of employees who are covered by the agreement and the number of those employees who are women, young persons and persons whose first language is not English.[10] This information will assist in the monitoring of enterprise bargaining. Data bases which report on the outcomes of these legislative initiatives will be important tools in making sure that the legislation is achieving its goals.

Minimum Entitlements

The Reform Act introduced a new Part VIA, "Minimum Entitlements of Employees" into the Act, which introduced a range of minimum entitlements based on international conventions.

The new Part VIA creates minimum entitlements for wages, equal remuneration for work of equal value, termination of employment, parental leave and leave to care for one's immediate family — each of these entitlements depends on an international covenant or recommendation of the ILO.

I propose now to deal with some of these initiatives.

Equal Pay

The Commission may make orders under Division 2 of Part VIA of the Act providing for equal remuneration for men and women workers, upon application by an employee, union or the Sex Discrimination Commissioner. The Commission must be satisfied that there is no equal remuneration for work of equal value in the particular circumstances, and an order must be reasonably regarded as giving effect to various anti-discrimination conventions [see section 170BC(3) and (4)].

The equal pay provisions are based on a number of international instruments to which Australia is a signatory, including ILO Convention 100 — Equal Remuneration (1951)[11], and the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women. The object of Part VIA, Division 2 is to give effect to these conventions and other ILO recommendations [section 170BA]. The Commission, therefore, must now make reference to the relevant conventions, rather than the 1972 Equal Pay Principles[12].

The ILO Convention provides a definition of *"equal remuneration for work of equal value"* as referring to *"rates of remuneration established without discrimination based on sex"*, which is adopted by section 170BB of the Act. "Remuneration" includes all components of pay, including overaward payments, bonuses, superannuation and allowances.

Both the discussion during the negotiation of the Convention and the interpretation of the Convention by the supervisory bodies of the ILO since its adoption indicate that the concept of equal remuneration goes beyond a reference to equal pay for the same work. The meaning of "equal pay" under the Convention includes an objective comparison of the content of jobs being done, with job appraisals being conducted, if necessary.[13]

The history of the principle of "equal pay for work of equal value" in Australia is relatively recent. Under the basic wage system which prevailed until 1967 women's wages were set at a substantially lower rate than that of their male equivalent, on the basis that the male basic wage contained a "breadwinner" component not applicable to women. The adoption of equal pay principles theoretically meant that males and females were to be treated equally in wage determination — however, it has been argued that true equality has not been

achieved because women are mainly employed in areas that are female-dominated areas, which has had a greater influence on their wage rates than any notion of comparable work. That is, rates for women's work were often set in comparison to other undervalued female-dominated occupations, and few cases involved any consideration of work value.[14]

As well as the specific provisions relating to equal remuneration for work of equal value, other provisions, such as sections 170MD(5) and 170ND(10) dealing with agreements, can be relied upon by parties in individual cases to ensure that the issue of equal pay is addressed. Such provisions will guide the Commission in its implementation of the wages system, and it is intended that issues relating to discrimination and pay equity will also be addressed during the Section 150A review process. The Commission has received from the Sex Discrimination Commissioner, on behalf of the Human Rights and Equal Opportunity Commission (HREOC), an offer of any relevant assistance in the section 150A review and we expect to be working closely with HREOC particularly during the pilot programme.

It is hoped that these new provisions will encourage further developments in equality of remuneration.

Family Leave

Section 170KAA compels the Commission to hold a hearing to determine the circumstances in which leave to care for the immediate family should be granted, as soon as possible after 1 March 1994, unless an application is made before this date. An application was made by a number of unions supported by the ACTU for paid carers' leave to be provided for in awards, and a hearing took place in August. A bench of five, of which I am a member, is now considering its decision in this matter. The Bench has received a great deal of evidence on the issue of the needs of workers to address their family responsibilities, and particularly the need for flexible working arrangements.

Parental Leave

Section 170KA provides minimum entitlements to parental leave totalling up to 52 weeks following the birth of the child. Division 2 of the regulations provide for an analogous system of unpaid adoption leave.

Termination of Employment

The Reform Act introduced rights for all employees in relation to unfair dismissal, which had previously been available to some employees (and to varying degrees) under state law and some federal awards. These rights, including remedies of reinstatement and limited compensation, are now available generally as a result of the implementation of international covenants, filling the gaps that had previously existed in this kind of protection for employees.

Under section 170DE(1), employment must not be terminated without a "valid" reason which is connected with the employee's capacity or conduct, or based on the operational requirements of the business. Section 170DE(2) provides that the reason is not valid if the termination is harsh, unjust or unreasonable. Section 170 DF(1) prohibits termination of employment on various specific grounds, including race, colour, sex,

sexual preference, age, mental or physical disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin.

The Act also requires that, before terminating employment, an employer must give an opportunity for the employee to defend himself or herself against allegations made, unless the employer could not be reasonably expected to do so; that is, the process of dismissal must also be fair.

Procedural changes recently announced by the Chief Justice of the Industrial Court[15] will make the process of lodging a claim for unlawful termination of employment an easier one. The changes, which include the introduction of plain English court forms and fast track procedures to reduce costs, are specifically designed to assist employees and employers who represent themselves in Court. In most cases, the parties will now attend the Commission for conciliation before they are required to attend the Court. All these measures should help make the system more accessible by being quicker and cheaper.

Relationship with the Sex Discrimination Act

Although not part of the Reform Act, recent amendments to the *Sex Discrimination Act* 1984[16] reinforce the increasing role of equal opportunity in industrial relations. These amendments allow complaints of discrimination relating to new federal awards and agreements to be made to the Human Rights and Equal Opportunity Commission, and enable the Sex Discrimination Commissioner to refer discriminatory awards to the Commission. Complementary amendments were made to the *Industrial Relations Act* compelling the Commission to convene a hearing to review an award which is referred to it, and giving it the power to set aside or vary an award which it considers discriminatory[17]. To date no activity has occurred in this area.

However, as a result of the Reform Act, the Sex Discrimination Commissioner has powers to initiate equal pay and other discrimination applications. These powers, and the likelihood that HREOC will play a substantial role in the Section 150A Review process which I have referred to above, indicate that the Commission and HREOC should have a good working relationship in the future which will assist the process of making Australian workplaces more equitable.

Conclusion

These changes introduced by the *Industrial Relations Reform Act* present a challenge to the Commission. The new provisions have placed legislative requirements on the Commission to ensure that principles of equity and fairness are taken into account in exercising many of its functions. Because now included in legislation rather than applied in practice only from time to time, an increased emphasis on these principles as they apply to the duties of the Commission in carrying out its work is created. In my view, the amendments have the capacity to secure social justice in the Australian workplace as effectively as they secure greater emphasis on bargaining, productivity and efficiency. The result, hopefully, will be a better, fairer and in every sense richer working environment for all Australians.

Notes

[0] Sex Discrimination Commissioner's written submission to the Review of Wage Fixing Principles (June 1994), p 8.
[1] Bennett, L (1994) "Women and Enterprise Bargaining: The Legal and Institutional Framework", *The Journal of Industrial Relations*, Vol 36 No 2, p 209.
[2] *The Australian*, 14 October 1994, p 2.
[3] Speech delivered by Jennie George, ACTU Assistant Secretary, to the Women, Management and Industrial Relations Conference at Macquarie University on July 6 1994.
[4] E.g. sections 93, 93A, 150A, 170MD(5), 170ND(10) and Division 2 of Part VIA.
[5] Workers with Family Responsibilities Convention 1981.
[6] Wage Fixing Principles Decision August 1994 (Print L4700) - Principle 3.1.
[7] Wage Fixing Principles Decision August 1994 (Print L4700) and September 1994 (Print 5300).
[8] Print L5188, 12 September 1994.
[9] Print L5723, 10 October 1994.
[10] Print L4700, p 31.
[11] Ratified by Australia in 1974.
[12] 147 CAR 172.
[13] ACTU, "Changes in Industrial Relations - Summary of the Industrial Relations Reform Act 1993" (published by TUTA), p 28.
[14] Sex Discrimination Commissioner's written submission to the Review of Wage Fixing Principles (June 1994), p 30.
[15] Media release dated 14 October 1994.
[16] Sections 50A and 50B were introduced in 1992.
[17] Section 111A and subsections 113(2A) and (5). These provisions came into operation on 13 January 1993.

The Foenander Lecture

The Foenander Lecture in Industrial Relations has been established to commemorate the life of Dr. Orwell de Ruyter Foenander. Orwell Foenander had a long and distinguished association with the University of Melbourne which began with his attendance as a student of law in 1909 and ended only with his death on February 22, 1985 at the age of ninety-four. Throughout this long period of association Orwell served the University with great distinction. He obtained first-place and the award of the Supreme Court Prize in the final honours examination in law in 1914. Thereafter he occupied a number of University positions, including a part-time lectureship in Economics and Industrial Relations, and eventually Associate Professor and Head of the Department of Industrial Relations in the Faculty of Commerce. For much of this time he was also a tutor in Ormond College.

Apart from his teaching and administration, Orwell's main academic achievement was in pioneering the study of Australian industrial relations, and in particular the study of the operation of the systems of conciliation and arbitration. This interest developed from advice given to him by the founder of federal arbitration, Henry Bournes Higgins, during World War I. In the period from 1937 to 1970, Orwell published no less than eleven books on industrial regulation. To this splendid achievement must be added the numerous papers and articles published by Orwell in international and local journals.

Orwell Foenander continued his formal association with the University and the Faculty of Economics and Commerce after his retirement in 1957. He worked as a part-time teacher in the Faculty until 1969, and thereafter continued to give the benefit of his extensive learning and experience to Faculty members through his frequent visits to the University.