Industrial Relations Under the NSW System: Emerging Issues and Challenges

WORKING PAPER 53

Proceedings from "Industrial Relations Under the NSW System: Emerging Issues and Challenges" - Conference, Sydney, 31 July 1998.

Australian Centre for Industrial Relations Research and Training (ACIRRT)
Institute Building H03
University of Sydney NSW 2006 Australia
Phone: (02) 9351 5626
Fax: (02) 9351 5615
Email: acirrt@econ.usyd.edu.au
Web: http://www.econ.usyd.edu.au/acirrt/

ACIRRT Working Paper No. 53
OCTOBER 1998
ISBN 1 86487 013 3

WORKING 53 PAPER

University of Sydney

ACIRRT

AUSTRALIAN CENTRE FOR INDUSTRIAL RELATIONS RESEARCH AND TRAINING

Contents

1.	Security or insecurity in the labour market*	3
2.	An assessment of the New South Wales Industrial Relations Act 1996 two years on: A time of uncertainty	11
3.	Agreements in NSW: What's going on?	15
4.	Unfair dismissal law in New South Wales	21
5.	The NSW pay equity inquiry: What might it all mean?	33
6.	In defence of the right to fairness in work: Rights for employees and non-employees – the role of section 106 of the Industrial Relations Act, 1996 (NSW)	47
7.	Workplace reform in the NSW Public Sector: Introducing total quality management teams	59

1. SECURITY OR INSECURITY IN THE LABOUR MARKET*

Jeff Shaw Q.C.**

A difficult issue facing us in the late 1990's can be summed up in one word - **insecurity** - both on an economic and a social level. This sense of insecurity manifests itself in a number of ways.

Businesses are insecure about their viability in a marketplace that becomes increasingly global with each passing day. As a result, many companies are reticent about hiring or keeping workers for fear of being saddled with an additional 'burden' during an 'inevitable' downturn in the economy.

Trade unions are losing members and the ranks of casual employees are swelling, thereby undermining the traditional role of unions in the industrial framework. Workers are becoming increasingly insecure about maintaining and finding work. This is particularly true in a labour market that demands a highly skilled and a learning workforce.

GLOBALISATION AND THE CHANGING NATURE OF WORK IN AUSTRALIA

While economic insecurity is not a new issue, its current manifestation can be traced, in a large part, to the opening of Australia's markets to international competition.

In the past few decades, Australia has progressively dismantled its tariff barriers that, in the past, protected jobs and wages. As a result of these pressures, working patterns in Australia have been forced to change - and change at an exceptionally rapid pace - to ensure that our industries remain competitive in a global marketplace.

To quote from ACIRRT Working Paper No. 43, *The Future of Work: Likely Long Term Developments in the Restructuring of Australian Industrial Relations:*

> Work organisation has been driven by the need to compete, and empirical evidence suggests that considerable change in work organisation is taking place in Australian industry. Rapid technological changes in...electronics, information and computer technology are revolutionising the manufacturing and service sectors.[1]

It is clear that the winners in this 'revolution' will be those robust domestic industries that can survive international competition and harness the potential of these technological changes.

However, it is equally clear that there are losers in this equation - the unskilled.

---

* Address to a conference held by the Australian Centre for Industrial Relations Research and Training (ACIRRT), Sydney, 31 July, 1998.

** NSW Attorney General and Minister for Industrial Relations

1 P. Gollan, R. Pickersgill & G. Sullivan, **ACIRRT** (1997) **Working Paper No. 43**, *The Future of Work: Likely Long Term Developments in the Restructuring of Australian Industrial Relations,* ACIRRT, University of Sydney, Sydney, p8.

THE NEED FOR POLICY DIRECTIONS FOR THE LOW SKILLED

The social cost of international competition has been striking - the most stunning example can be seen in the decline of Australia's manufacturing sector. The reality is that Australian industry, with its relatively high cost of labour, cannot compete with cheap imported goods from newly industrialised countries overseas. In addition, technological advances in Australia have replaced the need for unskilled labour.[2] The experts indicate that low-skilled, labour intensive industries will simply die out in Australia. The economic rationalists say "so be it" - as these industries are uncompetitive.

However, the decline of our domestic manufacturing sector has had a devastating impact on our unskilled labour force - leaving them chronically unemployed or very poorly paid. This is particularly true of recent migrants from non-English speaking backgrounds ('NESB'). According to a recent study by ACIRRT, government policies have largely failed the migrant unemployed. The ACIRRT study found that between 1978 to 1995, the situation for NESB long term unemployed has deteriorated significantly - relative to Australian born individuals[3]. Understandably, some have had difficultly accessing new employment opportunities due to their level of English language skills. Australian-born individuals with limited skill levels have analogous difficulty.

At the same time, we are witnessing a growing polarisation between the highly skilled - those in IT, computers, engineering, etc. and those with low skills. Those with high skill levels are in constant demand and are well paid. However, the unskilled are consigned to insecure and low paying occupations with little future and even less opportunity to gain marketable skills. These low skilled individuals are progressively marginalised and tragically, they are falling into the ranks of the chronically unemployed.

There are numerous social costs associated with a lack of work and unemployment including low self esteem, alcohol and drug abuse, family breakdown, increases in criminal activity - to name but a few obvious consequences.

Beyond these 'social costs', there is a strong argument to be made that we cannot, as a society, afford to marginalise a growing sector of the population. To quote from Harry Arthurs, an academic from York University in Toronto, Canada:

> ...a society which tolerates a regime of exclusion which is too egregious, too commonplace, or too long-lasting will sooner or later become incapable of providing the necessary environment for successful enterprise activity[4].

By continuing to exclude large sectors of the workforce from productive and meaningful work, we run the real risk of undermining the social fabric of our society.

This begs the question, what can we as a society do for the low skilled?

---

2 Ibid p.13.

3 T. O'Loughlin and I. Watson, *Loyalty is a One Way Street: NESB Immigrants and Long-Term Unemployment*, ACIRRT, University of Sydney: Sydney.

4 Human Resources Development Canada, Harry Arthurs in *Priorities for Governments* (Ottawa: Human Resources Canada, 1998) at 7 - refer to www.hrdc.gc.ca/corp/stratpol/arbsite/research/change/prior.

The most obvious solution to this problem is to facilitate training initiatives that will ensure that the cycle of unemployment is broken.

Beyond English language training, our educational and training system must respond to those people's needs - or we will consign them to a never ending cycle of unemployment and poverty.

In simple terms, we must, as a society, make a commitment to lifelong training and learning. While admittedly governments are limited in their ability to provide training due to budgetary constraints; we simply cannot afford to ignore this issue.

To quote from a British research paper entitled *Redefining Work,*

> In twenty years time, the need for 'lifelong learning' must be as commonly understood as the fact that there are no jobs for life. The pace of change in the economy and society is so great, and so unpredictable, and will continue to be so, that every individual will need to update continuously his or her understanding of how to function, and succeed in, and to enjoy, the world. The one certainty is that the education 'platform' for effective performance will continue to rise."[5]

NSW is making efforts to promote best practice and the development of a 'learning workforce' and 'lifelong learning' through workplace reform initiatives, innovative enterprise bargaining arrangements and promoting training.

I would argue that more can and must be done to coordinate these efforts between private enterprise, university centres - such as ACIRRT - and across Governments. By this, I mean not only a coordinated approach by State and Federal Governments, but also intra-governmental initiatives.

In other words, a coordinated approach must be taken to skill-building initiatives. These efforts would involve industrial relations, training and basic education, industry, finance and other portfolios.

Without first creating strategies to develop marketable skills in our workforce, our industrial relations system in NSW cannot address one of the major root causes of insecurity in Australian society - the ability to adapt to a constantly changing marketplace.

CHANGING WORK PATTERNS AND WORKFORCE

Another major source of insecurity can be seen in the changing work patterns. In the past, the so-called standard working model was based upon a five day, 9 to 5 forty hour work week. This was almost very much a 'male' model of the working week. Today's workforce is much more fragmented, regularly works along 'irregular' lines and is increasingly more feminised.

Over the last fifteen years, there has been a dramatic increase in the number of employees defined as casual in Australia: from approximately 15.6% in 1983 to 25.7% in August 1997.[6]

---

[5] V. Bayliss, (1998) *Redefining Work: An RSA Initiative,* The Royal Society, London, p. 59.

[6] A. de Ruyter, (1997) 'Workforce Casualisation in Australia': A Shift Share Analysis, *Australian Journal of Labour Economics*, 1(2), October p. 144.

Recent statistics from the NSW Department of Industrial Relations indicate that this trend is mirrored in NSW.

There are a number of reasons for the rapid expansion of Australia's casual workforce. These include:

- corporate restructuring following the recession of the early 1990s;
- cost minimisation efforts by companies;
- the deregulation of the labour market; and
- outsourcing of operations;[7]

However, what is most striking is the breakdown of those statistics along gender lines. More than 55% of casual workers in NSW are female[8]. In addition, 23% of all employees in NSW work part-time and the vast majority of these part-time employees are female - some 73%[9].

Despite the rapid growth in women's employment, women tend to be paid less than men and, in many cases, for work that is largely similar. The NSW Government is seeking to address this inequity through a number of avenues such as the Ministerial Inquiry into Pay Equity.

It is hoped that the principles distilled from that inquiry will enable the NSW Industrial Relations Commission to make meaningful comparisons in work value and thereby address this inequity.

However, these efforts only address the problems of those individuals already inside the NSW industrial framework. The reality of the situation is that there is a growing sector of the working population that is unregulated. In NSW alone, nearly 17% of the working population - almost ½ of a million workers - are classified as award free - that is they fall outside of both the State and federal industrial systems[10].

The solution to this dilemma may involve expanding the State's industrial jurisdiction and possibly creating a new wages policy in NSW. We also need to facilitate equity initiatives that will be felt throughout the entire industrial landscape as well as ensuring that all employees are guaranteed basic wages and working conditions.

I think that all of us here, regardless of political stripe, would agree that certain minimum community standards should be maintained for workers in NSW.

BALANCING WORK AND FAMILY/COMMUNITY RESPONSIBILITIES

Despite the increase in part-time and casual work, there has been a significant increase in the amount of overtime - and unpaid overtime - performed by full time employees[11]. This trend

---

7 A. de Ruyter, (1997) 'Workforce Casualisation in Australia': A Shift Share Analysis, *Australian Journal of Labour Economics*, 1(2), October p.154.

8 DIR, *Industrial Relations in NSW 1997 Report*, p.2.

9 DIR, *Industrial Relations in NSW 1997 Report*, p.1.

10 DIR, *Industrial Relations in NSW 1997 Report*, p.5.

11 DIR, *Industrial Relations in NSW 1997 Report*, p.3.

can be, in part, attributed to work culture. However, it may also be traced to demands made by employers who can readily exploit fears over job security and the ever-present spectre of unemployment. As businesses have demanded more time and effort from their workers, this can have a debilitating effect on family and community life.

Similarly, research has shown that men's share of domestic and caring work does not increase as their wives take up part-time work.[12] This, in turn, increases the level of stress and fatigue experienced by women - in balancing work with family commitments. The net result is that many highly skilled individuals are forced out of the workforce or into lower skilled or casual work in an effort to more effectively manage their family commitments.

This is unacceptable - both from a social policy and economic standpoint.

I would argue that workplaces must be more responsive to the needs of employees and their families. The NSW Government has launched a number of strategies that seek to meet the challenge of balancing work and family - such as the NSW Government's *Work and Family Strategy.*

A good example can be seen in the expansion of entitlements to personal carers. As a basic entitlement under NSW awards, carers are now permitted to use their own sick leave to care for ill family members. Recent surveys indicate that the working parents take an average of 9.9 days off work per year to care for children and 3.5 of these days were spent caring for sick children.[13] These efforts goes a long way to addressing an ongoing problem of balancing child care responsibilities with work commitments.

However, more efforts must be made to sell the message that an employee's life does not end when she or he leaves the shop floor. It is a simple, but often overlooked, fact that a workforce will be more productive, loyal and dedicated if they are better able to manage their personal lives.

It is here that we are faced with one of the greatest challenges in industrial relations -

How do you balance the needs of the individual - be those family, social or otherwise - with the demands of internationally competitive industries? I would argue that the way to combat the insecurity of modern business is to ensure that employers and workers alike work smarter - rather than harder. Part of this dynamic involves taking into account the employee's personal life and responsibilities.

PROTECTING ENTITLEMENTS

With the growth in 'irregular' forms of employment, employees generally have less stability and security in their work.

Generally speaking, this sector of the workforce has a low level of union membership and is more likely to accept poor conditions - out of sheer necessity.

---

[12] B. Probert, (1994), 'The overworked and the out-of-work: redistributing paid work, unpaid work and free time', p.48 in *The Future of Work,* Pluto Press: Australian Council of Social Service, Annandale

[13] R. Kramar, (1996), *The Business Case for a Family Friendly Workplace*, DIR, Sydney, pp.10-12.

In addition, much of the work that is available is largely transient - with most employees staying with one employer for shorter and shorter periods of time. In fact, the latest ABS statistics indicate that 24% of all workers were classified as 'job mobile' or had changed their job, business or locality of work during the last year.[14]

It follows that with an increasingly casual, transient and low paid workforce, individuals cannot plan for the future - for the simple reason that they cannot count on the work and a pay cheque arriving at the end of the week.

With this being said, the problem is not limited to so-called irregular workers. The recent spate of insolvencies, such as at the CSA mine in Cobar, are a testament to the precarious position that workers are in. In those instances, workers were denied their rightful industrial entitlements. The reason is that federal insolvency legislation ranks employees' claims after other secured creditors - leaving few assets to pay for these entitlements.

Given the impact of federal insolvency laws, efforts to address this inequity will require the co-operation of the Federal Government and that of the other States. In this context, the NSW Government is currently examining ways to protect employees' benefits in the event of an insolvency or restructure. However, this only deals with the immediate issue of enforcing a rightful claim for these benefits. It does nothing to address the real issue of finding work for these people.

Government also must ensure that after the employment relationship ends - due to an economic downturn, restructuring or insolvency - workers will have basic entitlements to enable them to make a smooth transition from working to 'looking for work'.

Governments must ensure that workers will have marketable skills to find new work and opportunities in these situations.

At the same time, the Government must balance its desire to protect employees' benefits with the reality of the Australian business community - which is struggling to compete both nationally and internationally.

I would argue that these two goals are not irreconcilable and that we, in NSW, have the tools and the resources to strike this balance.

CREATING A CULTURE OF SUPPORT RATHER THAN DIVISION

In particular, I think that Government has a key role to play in building consensus and a spirit of cooperation in industrial relations. This, more than any other factor, will enable our State, to survive the challenges facing its industrial framework.

I believe that the NSW Government has been successful in building that spirit in our industrial practice in this State. That spirit of cooperation stands in stark contrast to the confrontational and belligerent tactics employed by the Federal Government in recent months.

---

[14] Commonwealth of Australia, *ABS: 1998 Yearbook Australia*, p.191.

The Federal Government championed the cause of Patrick Stevedores and supported the wholesale sacking of its workforce. This policy further entrenched an already deeply adversarial approach to labour relations management on Australia's waterfront.

Rather than working cooperatively with the parties, the Federal Government actively contributed to a culture of fear and insecurity that now pervades many Australian workplaces. For a Government that was elected to represent all Australians, this type of behaviour is wrong. This is not the NSW way. The promotion of division and acrimony are not the proper role of Government.

We, in NSW, seek to create an environment in which consensus and cooperation is the rule - not the exception.

It is counter-intuitive to believe that an employee will work productively in an environment that is characterised by uncertainty, fear and bullying. Coercive tactics can at most ensure that employees attend at the worksite. However, it cannot guarantee the *quality* of performance which is required to meet contemporary competitive pressures.

Progressive management strategies understand that workers who take pride in their labours, who take an active role in the direction of the company and who are seen as more than simple extensions of cranes and machinery - are empowered and thereby more productive.

Empowering the workforce and creating an environment of trust and cooperation is the approach of the NSW Government.

CONCLUSION

I believe that the State has a legitimate role to oversee the labour market to ensure that industrial relations are transacted in a civilised way.

Civilised, because work is one of the touchstones of modern life. In the post-modern era, work gives meaning to our lives in ways which go beyond pedestrian issues - such as remuneration and working conditions.

From the time we get up in the morning, to the amount of money we make, to where we live and with whom we interact - all of these issues are shaped by our work.

To a large extent, work defines who we are and how we see ourselves. In McCallum's and Pittard's text on labour law, the authors note that:

> The employment relationship is also a significant social relationship, not simply because workers and employers have to co-operate harmoniously in the production process, but because the work environment is, itself, central to our culture and quality of life.[15]

I think that the sense of insecurity pervading our workplaces will do more to undermine our culture and quality of life than any other aspect of contemporary labour relations

Our challenge is to create a sense of security in an increasingly insecure world.

---

[15] R. C. McCallum & M. J. Pittard, *Australian Labour Law,* 3rd ed., Butterworths: Sydney, 1995, p.3.

2. AN ASSESSMENT OF THE NEW SOUTH WALES INDUSTRIAL RELATIONS ACT 1996 TWO YEARS ON: A TIME OF UNCERTAINTY

Ronald C McCallum

INTRODUCTION

On Wednesday 2 September 1998, the Industrial Relations Act 1996 (NSW) will celebrate its second birthday. As I perceive my task this morning, it is to give a general report card on the achievements of this statute. Given that I was a participant in the Industrial Relations Act Review Task Force which planned the 1996 Act, my assessment is hardly an objective one. Yet, I hope that my appraisal is fair, far sighted and future oriented.

I shall begin by re-visiting - albeit briefly - the making of this statute because its achievements can be judged best in the light of the events and circumstances surrounding Australian industrial relations in 1995. Next, the key operational portions of this statute will be critically yet constructively analysed. Finally, I wish to adopt a futuristic stance and ask what challenges are facing the New South Wales system at the end of this millennium and beyond.

SPEAKING NOTES

Set out below are my speaking notes for this oral presentation. They are designed primarily for the conference audience. In this light, I hope these notes may be an 'aide memoire' to participants. If others also find them useful without the oral presentation, so much the better.

In writing what follows, I shall not set out detailed references. In relation to the history of the 1996 Act, I shall be relying primarily upon my published account of these events. R C McCallum, 'Two Approaches to Industrial Relations Reform in New South Wales: The Industrial Relations Act 1991 and the Industrial Relations Act 1996', in D. R. Nolan (ed.), *Industrial Relations Reforms in Australasia in the Late 20th Century*, Leichhardt, Federation Press, 1998, 89. The 1997 statistics which I shall use are taken from the 1997 report from the Industrial Relations Department of New South Wales, *Industrial Relations in New South Wales in 1997*, (New South Wales Department of Industrial Relations, 1998), available on the internet at <http://www.dir.nsw.gov.au/pdfs/report.pdf>.

THE MAKING OF THE 1996 ACT- 1995 AND BEYOND

The first meeting of the Industrial Relations Act Review Working Party took place on Friday 28 April 1995. Over the next seven months, what eventually became the 1996 Act was crafted. At that time, the ALP Federal Government was still in office and the Howard Government's *Workplace Relations Act 1996* (Cth) had not been written out in statutory form. From my observations, a large number of New South Wales employers no longer supported the Greiner Government's *Industrial Relations Act 1991* (NSW). Its centrepiece -

rather mild enterprise bargaining - had not received a high take up rate, and instead most employers were content to rely upon consent awards at the enterprise level.

The Carr Government's *Industrial Relations Act 1996* was - especially in the deregulatory mood which was then sweeping the nation - rather conservative. Much of the statute did away with the Greiner reforms i.e. merging the Industrial Court and the Industrial Relations Commission (the 'Commission') back into a single Commission where judicial matters would once again be dealt with by the Commission in Court Session. Enterprise bargaining was once again given back to the Commission, albeit in a rather different form.

What the 1996 Act established was a collectivist industrial relations system with several key features. First, the mechanisms in the act were flexible i.e. the enterprise bargaining machinery accommodated most situations. Second, the statute was written in a plain English form, was well set out and clearly comprehensible and user friendly. Third, a mild attempt was made to integrate into the mainstream of New South Wales industrial relations, principles and practices of equal opportunity. The desire was to at long last give women a place in the system.

THE NEW SOUTH WALES ACT AFTER TWO YEARS - A REPORT CARD

Awards

Approximately 38.2% of New South Wales employees - 1,050,570 persons - have some of their terms and conditions of employment regulated by New South Wales Awards. The 1996 Act set up an award review mechanism (s 19), yet it is only now that a Full Bench of the Commission will sit to consider award review principles.

Enterprise Bargaining

Compared to enterprise bargaining under the 1991 Act, current enterprise bargaining arrangements appear to be working well. In 1997 - the first full calendar year of the Act's operation - 253 enterprise agreements were lodged for approval with 234 being approved by the end of that year. However, during the same period 243 enterprise awards were lodged with the Industrial Relations Commission. This shows that much bargaining in the State jurisdiction is still conducted by way of consent awards, and in most situations these have a less consultative review mechanism than do enterprise agreements. In my view, thought should be given to a phasing out of consent awards in the private sector, in order to encourage full-blooded and enterprise bargaining.

Only 12.8% of 1997 agreements were made directly with employees. Given that over 70% of the private sector workforce are non-unionists, the penetration of non-union agreements is at a not unexpected low level.

Unfair Dismissals

In 1997, 6501 unfair dismissal claims were lodged with the New South Wales Industrial Relations Commission. Given that the Federal Government had lessened the coverage of its unfair dismissal laws at the close of 1996, it is not surprising that the New South Wales Commission dealt with 81% of unfair dismissals in this State. However, although all employees under New South Wales instruments are covered, non-award employees only

receive protection from unfair dismissal if they earn less than $68,000 per year. This figure appears to me to be unreasonably low and that a figure of $100,000 annual income would appear warranted.

In Moore v Newcastle City Council (1997) 77 IR 210, a Full Bench of the Commission held that lower income federal award employees could not come under the New South Wales regime. This means that federal award employees in New South Wales whose employers are sole traders or partnerships have no unfair dismissal protection. This requires remedying by both governments.

Unfair Contracts

The New South Wales system has a long history of giving redress for unfair contracts and for unfair conduct undertaken in relation to contracts. Since the coming into force of the 1996 Act, this jurisdiction has been greatly expanding. In 1997, 278 unfair contract applications were received by the Commission. On 8 April 1998, a Bill was introduced into the Legislative Council of New South Wales to limit this jurisdiction with respect to terminations. This measure is being hotly debated at present, especially in legal circles. In my judgement, if the income threshold for award-free employees to receive unfair dismissal protection was raised to $100,000, much of the sting would be taken out of the unfair contracts jurisdiction.

Women and the New South Wales System

Approximately 43% of all employees in New South Wales are women. Although only 23.9% of all employees are classified as part-time, 73% of part-time workers are women. Under the 1996 Act, continues to make provision for employers and employees to enter into part-time work agreements. In 1997, 540 part-time work agreements were lodged under the Act, but as one would expect, approximately 79.3% of employee signatories are women. This is why the State Part-Time Work Case (1998) 78 IR 172 was of critical importance. While this is a good beginning, a close watch needs to be kept upon part-time employment.

In respect of pay equity for women, the Attorney-General and Minister for Industrial Relations - Mr J W Shaw QC - has requested the Commission to hold an inquiry into pay equity. At present, we are waiting for the result of this inquiry and as one of those persons who gave evidence before this inquiry, may I venture the hope that at long last a breakthrough may be made in New South Wales.

Assessment

In the light of the deregulatory forces which are sweeping our nation like a Summer bushfire, the report card of the first two years of the life of the 1996 Act has to be a high commendation. Enterprise bargaining is working well, unfair dismissals are being resolved and the needs and aspirations of female employees are receiving some consideration.

TOWARDS THE NEW MILLENNIUM AND BEYOND

Immediate Improvements

It is clear that several issues require immediate attention. First, as I have already mentioned, the income level of non-award employees for the purposes of unfair dismissal protection

should be raised to $100,000 per annum. Second, the industrial disputes mechanism in the 1996 Act needs to undergo further examination. In my judgement, these provisions require clarity and firmness. Third, the *Annual Holidays Act 1944* (NSW) and the *Long Service Leave Act 1995* (NSW) should be repealed and their content should be written into the 1996 Act in plain English and with regard to modern conditions of employment. This is a matter which as I understand the position, the Department of Industrial Relations already has in hand.

Long-Term measures

Several long-term measures appear to me to be apposite for comment here. First, the 1996 Act deliberately does not contain any workplace agreements mechanism. This is because it is unavowedly collectivist. However, workplace agreement mechanisms which currently operate federally and in several of the States have shown that some form of individual agreement-making mechanism has its uses. Provided that agreement-making is not kept secret and is placed in the mainstream of the New South Wales system, thought needs to be given to some form of agreement-making mechanism. It may be that only persons who earn more than say $50,000 per annum should be allowed to make such arrangements. I venture to think that whatever political party is in power at the opening of the new millennium, some form of individual agreement making mechanism will be inserted into the system.

Second, given that federal awards have been overhauled to some 20 allowable award matters, careful thought needs to be given to simplifying New South Wales awards. If this can be done through the award review mechanism then so much the better. However, I also think that at some point in the immediate future a further legislative intervention may be necessary to keep this system in line with Australia-wide developments of award simplification.

Third, the status of employee women needs to be increased. More work needs to be done on integrating equal opportunity and industrial relations mechanisms. In my view, the adoption of full pay equity, even after the completion of the current inquiry, will require acts of will coming not only from politicians and the industrial actors, but also from the public to deliver to New South Wales women their industrial birthright of pay equity.

Women are, as a general rule, still towards the bottom of the employee heap in New South Wales and in Australia. I think that the role of women will not improve until the State - and this can't be done by New South Wales alone - recognises the necessity of providing some form of paid parental leave.

Lastly, if the Commission is to survive in its current form into the early years of the new millennium, it must mirror itself against the society it industrially governs. Flexibility, innovation and user friendliness need to become hallmarks of our tribunal mechanism. Without a flourishing tribunal, the New South Wales system will whither. While the Commission must grow and adapt from within, it also needs the support and understanding of its client users. With both care and determination, the traditions of this Commission which are almost a century old, can be built on to ensure that this flexible and collectivist oriented system is well and truly still operating at the close of the first decade of the new millennium.

3. AGREEMENTS IN NSW: WHAT'S GOING ON?

Ron Callus

INTRODUCTION

As many of you know at ACIRRT we collect registered agreements much like some people collect stamps or phone cards. So an opportunity like this to take out our collection and have a look at what's happening in agreements in NSW is not to be missed.

Just a few introductory words about the ADAM database. To generate our data we take a representative sample of agreements registered under the different jurisdictions and then code each clause. In this way so we can capture what issues are dealt with in an agreement. Broadly we have about 500 items of information on our coding frame. From this we can compare agreements from different industries, different jurisdictions and different time periods. For the purpose of today's analysis I've also added single employer consent awards in NSW to registered agreements. I think this is justified because although they are the product of different legal instruments when we look in detail at the contents or profile of agreements and consent award they are very similar.

NSW COMPARED

If we compare a sample of around 350 current awards and consent agreements with those in other jurisdictions at a superficial level a picture emerges that suggests, when compared to federal collective agreements, workers under NSW agreements are not likely to be doing particularly well in terms of agreement outcomes. The single biggest issue in all jurisdictions has been changing working time arrangements. This incudes issues such as the increase in the span of ordinary hours, the introduction of 12 hour shifts, time off in lieu of overtime pay etc. But of all the jurisdictions we compared, hours clauses that change working time arrangements are most common in NSW agreements (89% of NSW agreements and consent awards). More specifically NSW has the highest proportion of agreements that allow for working more than 38 hours per week at ordinary time - 23% compared to 13% of federal agreements and 9% of WA agreements with similar provisions.

NSW agreements also stand out as being less likely to have provisions relating to the following:

- Training (44% vs 53%)
- Consultation (35% vs 54%)
- OHS (29% vs 43%)
- EEO matters (7% vs 18%)
- Redundancy provisions (27% vs 43%)
- Family friendly matters (9% vs 13%)

These differences may of course reflect the fact that matters such as OHS, EEO and redundancy are being effectively dealt with through other legislation or means in the NSW state jurisdiction.

In terms of wage outcomes workers under NSW agreements are just behind workers in most other jurisdictions except Queensland.

Average Annual Wage Increases of Current Agreements

NSW	4.3%
Federal	4.4%
Queensland	3.7%
WA	4.5%

Source: ADAM Database, 1998

These results may to a large degree reflect the industry distribution of agreements and consent awards analysed, which is as follows:

Table 1: Current NSW Agreements on ADAM

Industry	% of Agreements
Agriculture	2.0
Mining/Construction	8.7
Food Beverage & Tobacco Mfg	9.3
Metal Manufacturing	6.7
Other Manufacturing	12.5
Electricity Gas & Water	1.5
Wholesale/Retail Trade	10.2
Transport/Storage	10.8
Communications	0.3
Financial Services	8.1
Public Administration	3.2
Community Services	11.3
Recreation & Personal Services	15.4

INDUSTRY DIFFERENCES

In terms of NSW industry profiles agreements in recreational and personal services seem to have taken the brunt of changes. This industry covers such things as clubs, hotels, restaurants, hairdressers and even cemeteries. Almost all the agreements in this industry (94%) have hours provisions, and an amazing 47% of them provide for a working week of more than 38 hours per week at ordinary time. This industry is also more likely to have clauses that absorb leave loadings and it has the lowest average annual wage increase of just 3.0%. Not surprisingly, agreements in this industry are the least likely of any industry to have consultative provisions (21%) or training provisions (19%). It could be suggested that this is the disadvantaged industry in NSW at least with respect to agreement outcomes.

AGREEMENTS OVER -TIME

In NSW, as in other jurisdictions, agreement making has changed over time. Early generation agreement were long on vision and hope but short in detail. Over time, agreements have become more specific and, perhaps as a consequence, more realistic. When we compare agreements registered in NSW in 1992-95 with those registered in the past two year there has been very little change in the incidence of many issues that many predicted were going to become popular in agreements. The reality is that they were never were popular and they have remained non-issues in bargaining. Amongst these have been piece work arrangements, quality assurance clauses, gainsharing or profit sharing, team work provisions and annualising wages. All of these have been present in no more than 10% of NSW agreements ever since 1992.

A number of issues, however, have become more popular over time, including training (from 28% to 74%) consultative provisions (21% to 39%) family leave provisions (4% to 24%), OHS clauses (17% to 30%), redundancy clauses (8% to 26%) and the absorption of allowances (1% to 12%). Finally there are a number of issues that have become less popular over the period under study, including hours (97% to 84%), performance based pay systems (83%to 79%) and ordinary hours of 38+ per week (28% to 22%).

UNION EFFECT

By far the starkest finding of our research concerns the differences that emerge when we compare union and non-union registered agreements. Building on an analysis that was undertaken last year Australia wide of non-union and union agreements, I have confined the study to NSW registered agreements only. The findings are very similar to what we found economy wide. There is a clear union, non-union divide emerging in NSW when it comes to enterprise bargaining. In terms of wage outcomes the average annual wage increase for union agreements is 4.5% yet for non-union agreements it is only 3.6%. Even controlling for industry the effect is apparent. The differences also emerge in relation to hours provisions as can be seen from Table 2.

Table 2: Working time provisions in agreements in NSW union and non-union collective agreements

Provision	% of Non-union agreements	% of Union agreements
Any flexible hours provision	92	86
Hours >38hrs	37	11
Ord hours Mon -Sun	31	10
Aver of hours (wk/yr)	50	22
Overtime at single rate	30	1

Source: ADAM Database, 1998

The differences here are dramatic. Overall, nearly all (92%) of non-union agreements deal with some aspect of working time entitlements. Of greater significance is the incidence of particular types of working time clauses:

- Standard hours longer than 38 are more common in non-union (37%) as opposed to union agreements (11%).
- Averaging of hours over a week, month or year is more common in non-union (50%) compared to union agreements (22%)
- Overtime paid at a single rate present is in 30 % of non-union agreements and virtually absent (1%) in union agreements.

These findings suggest that where management can negotiate without unions in settling enterprise agreements it achieves major changes to working time entitlements.

Differences between union and non-union agreements are also apparent when we examine provisions dealing with procedural fairness and consultative approaches to workplace change. The findings are summarised in Table 3.

Table 3: Incidence of clauses dealing with procedural fairness and consultation in NSW union and non-union

Provision	% Non-Union Agreements	% Union Agreements
Redundancy provisions	9	45
OHS provision	17	40
Consultative provisions	19	51
Change provisions	5	24
Training provisions	25	62

Source: ADAM Database, 1998

This table indicates that unionised agreements are likely to include provisions concerning the fair treatment and entitlements of employees. This is particularly evident in the incidence of clauses dealing with change provisions, training, approaches to consultation, occupational health and safety and redundancy provisions.

The findings are good news for unions who can demonstrate that they make a difference in negotiations but bad news for those workers, that for whatever reason, negotiate their own agreements. The results highlight, however, that a system of collective bargaining where employees are unrepresented and where there is no active involvement of a third party may result in outcomes that have more to do with the relative bargaining powers of the parties and less to do with ensuring that there is some perceived fairness in the industrial relations outcomes of our system.

ISSUES IN ENTERPRISE BARGAINING IN NSW

It seems the differences that emerge between different jurisdictions have little to do with the legal framework in which the agreements are registered. At the end of the day there is not much substantive difference between the operation of the federal or various state governments collective bargaining streams. The differences in outcomes we observed have more to do with the industry profile of different jurisdictions but more importantly reflect the relative power of management and unions in bargaining and the economic environment in which collective bargaining is taking place.

What the data does show is that the bargaining agenda in NSW like elsewhere has been confined to a narrow range of issues - most importantly changes in working time arrangements It is an agenda that shows little of the promise of innovation and value added that was going to possible under a system of enterprise agreements.

The data does indicate a need to more carefully monitor the outcomes of enterprise bargaining at a macro level. The provision of safeguards in the Act rely almost solely on the 'no detriment' test which is applied to particular agreements when seeking registration. When examined in aggregate, it is clear that the bargaining process is producing differences that are inequitable. Specifically, it would seem there is a pattern of disadvantage emerging, especially in recreational and personal services and in non-union agreements. The policy challenge is how this can be remedied within a system that is based on micro considerations. This is a case where the whole is seemingly quite different to the parts. This simply reflects an inherent problem with enterprise bargaining - we are inclined to miss the big picture by concentrating on the specifics.

Better monitoring is important but perhaps there is a need to consider a role for community standards that transcend the minima that are deemed acceptable in any one industry or enterprise. Its not an idea that sits comfortably with the legal framework that informs and underpins our system, but perhaps the answers to these issues are not legal but economic and social.

4. UNFAIR DISMISSAL LAW IN NEW SOUTH WALES

Paul Ronfeldt*

INTRODUCTION

In the past few years, legislative protections against unfair dismissal have joined older contests such as those to do with the right to strike, decentralised bargaining, pay equity and discrimination as one of the battlegrounds of industrial relations policy in Australia. Despite this, the system of unfair dismissal law in operation under the *Industrial Relations Act 1996* (NSW) has remained above criticism from either side of politics. I would suggest that this is the result of two factors. Firstly, in enacting the *Industrial Relations Act 1996* (NSW) the Carr Government deliberately eschewed the controversy associated with the Federal Labor Government's unlawful termination laws by embracing, with little alteration, the regime of unfair dismissal laws that the Greiner Government created in 1991. Secondly, the Industrial Relations Commission of New South Wales has maintained its long tradition of dealing with disputes concerning dismissal in a manner that endeavours to promote widely-held expectations of the appropriate conduct of both employers and employees. Notwithstanding the lack of public criticism about New South Wales' unfair dismissal laws, I have endeavoured in this survey of their operation to identify the system's limitations and to propose certain reforms.

CHAPTER 2, PART 6, *INDUSTRIAL RELATIONS ACT* 1996 (NSW)

The Greiner Government introduced the first codified system of 'individual access' unfair dismissal applications in the *Industrial Arbitration (Unfair Dismissals) Amendment Act 1991* (NSW), which commenced operation on 5 July 1991. These provisions were subsequently incorporated into Part 8 of Chapter 3 of the *Industrial Relations Act 1991* (NSW).[1]

Prior to this, the Industrial Commission of New South Wales dealt with issues about fairness in termination only in the context of the general disputes settlement provisions of the *Industrial Arbitration Act 1940* (NSW). Importantly, this meant that claims for remedial orders in relation to termination could only be made by trade unions on behalf of their members.[2] Furthermore, the *Industrial Arbitration Act 1940* (NSW) did not prescribe any standard for fairness in termination; the conventions of unfair dismissal, as distilled by

---

* Adviser, Corrs Chambers Westgarth, Lawyers, Sydney. Paper presented to "Industrial Relations under the NSW System - emerging issues and challenges" conference, ACIRRT, University of Sydney, the Rex Hotel, Macleay St, Potts Point, 31 July 1998. The views expressed in this paper are those of the author alone and in no way should such views be taken to represent the views of any other person or persons

1 The *Industrial Relations Act* 1991 (NSW) commenced operation on 31 March 1992.

2 *Leaves v Mercedes Benz Pty Ltd* (1986) 16 IR 149.

Sheldon J in *Re Loty*[3] as a 'fair go all round', developed gradually over decades in the course of the Commission's work resolving collective disputes regarding termination.[4]

The 1991 provisions sought to codify the Commission's unfair dismissal jurisdiction and allow standing to individual applicants. The provisions applied only to the dismissal or threatened dismissal of an employee for whom any conditions of employment were fixed by an award or agreement, and to certain Crown employees.[5] The 1991 Act also established that the test for unfair dismissal was 'harsh, unreasonable or unjust' and made some attempt to specify matters that the Commission might take into account in determining applications. In *Busways v Johnson*[6] the Full Bench of the Industrial Relations Commission determined that this formulation supplanted the 'fair go all round' test and in *Woolstar Pty Ltd v The Federated Storemen and Packers Union of Australia (NSW Branch)*[7] the Full Industrial Court found that the unfair dismissal provisions of the 1991 Act constituted a code preventing the Commission from dealing with claims of unfair dismissal as part of the Commission's general dispute determination jurisdiction.[8]

COVERAGE

One of the few significant changes to the New South Wales unfair dismissal regime associated with the introduction of the 1996 Act was to extend the coverage of the remedies to non-award private sector employees. At present, the *Industrial Relations Act 1996* (NSW) provides protection against unfair dismissal to three classes of employees: 'public sector employees', employees whose conditions of employment are set by a State award or enterprise agreement, and employees whose annual remuneration is less than $68, 000.[9]

The inclusion of non (State) award employees whose remuneration is less than this statutory cap[10] has given rise to two areas of uncertainty. Firstly, it suggested that the State provisions applied to federal award employees whose remuneration is less than the statutory cap. The

---

3 *Re Loty v Holloway and Australian Workers' Union* (1971) AR(NSW) 95.

4 Commissioner Connor has recently identified the earliest New South Wales 'unfair dismissal' decision to be the determination in *Newcastle Wharf Labourers' Union v Newcastle and Hunter River Steamship Company Limited* (1902) AR 1. Connor P, 1997, 'Unfair Dismissal Claims in the State Jurisdiction', Address to the Employment and Industrial Relations Forum, 28 February 1998, Young Lawyers' Association of New South Wales.

5 *Industrial Relations Act* 1991 (NSW), section 245 expressly excluded trainees and apprentices (s 245(2)), Crown employees covered by Part 2A of the *Public Sector Management Act* 1988 (NSW) or Part 5 of the *Police Service Act* 1990 (NSW) (s 245(3)). The application of the provisions were also made subject to s 245(1)(c), which allowed other classes of employees to prescribed by the regulations as a class of persons to whom the Part applied. However, no such regulations were made.

6 (1994) 55 IR 255.

7 (1992) 45 IR 39.

8 cf *Industrial Relations Act* 1996 (NSW), s 137(1)(b).

9 *Industrial Relations Act* 1996 (NSW), s 83 & *Industrial Relations (General) Amendment (Unfair Dismissal)* 1997 (NSW), cl 5A.

10 The original limitation was $62, 200. In July 1997 this amount was increased in line with the increase in the equivalent federal cap to $66, 200. As observed in the previous footnote, the cap has recently been increased to $68, 000.

traditional rule has been that State laws, including statutory protections in relation to termination were excluded by virtue of section 109 of the Constitution,[11] which provides:

> 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.'

However, one of the changes to federal industrial law associated with the passage of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) – which changed the short title of the *Industrial Relations Act 1988* (Cth), to the *Workplace Relations Act* 1996 (Cth) – was the removal of the statutory basis for an inconsistency between a federal award and a State termination law.[12] Accordingly, there appeared no impediment to a federal award employee earning less than the remuneration cap for non (State) award (or agreement) employees making an application for relief under Chapter 2, Part 6 of the *Industrial Relations Act* 1996 (NSW). In spite of this, the Full Bench of the Commission in October 1997 determined in *Moore v Newcastle City Council*[13] that the intention of the New South Wales Parliament in extending coverage of unfair dismissal protection to non-award employees could not be taken to include an extension of these protections to federal award employees.[14]

The second area of uncertainty involved the question of whether the term 'remuneration' as it appears in section 83 of the Act should be read narrowly, to refer only to wages and salary, or whether the term encompassed employees' non-monetary benefits such as the value of motor vehicles, travel concessions and employer-provided child care. On 24 July 1998, a Full Bench of the Commission in *Shead v Summit Western Pty Ltd*[15] helped resolve this uncertainty by adopting the approach that has been applied for some time to the meaning of 'remuneration' in the context of the federal termination provisions,[16] that in relation to Part 6 of Chapter 2 of the 1996 Act, 'remuneration' includes 'an employee's total package as a reward for the work performed.'[17] This test will necessitate difficult questions of fact regarding the quantification of employee's benefits, particularly in cases where the remunerative element of items such as cars, mobile phones and travel benefits will need to be distinguished from their role as production related expenditures.

---

11 *Metal Trades Industry Association of Australia v The Amalgamated Metal Workers' and Shipwrights Union* (1983) 152 CLR 632.

12 *Workplace Relations Act* 1996 (Cth), s 152(1A) provides: 'If a State law or a State award makes provision in respect of the termination of an employee's employment, any provision in a Federal award that also makes provision in respect of the termination of employment of the employee is not to be taken to show an intention to cover the field to the exclusion of that State law or State award'.

13 (1997) 77 IR 210.

14 It is important to observe that Part 7 of Chapter 2, Injured Employees, does apply to persons covered by federal awards: *Fabros v Hotel Intercontinental Sydney* (1994) 53 IR 193.

15 Unreported, 24 July 1997, Hungerford J, Schmidt J and Connor C, IRC 3627 of 1997.

16 See particularly *May v Lilyvale Hotel Pty Ltd* (1995) 68 IR 112.

17 *Shead v Summit Western Pty Ltd*, op cit, at 29.

The 1996 Act also allowed for the introduction, by regulation, of exemptions for certain types of employment relationships, including persons engaged for a fixed term of less than 6 months,[18] employees engaged for a specific purpose,[19] employees serving a period of probation,[20] and employees engaged on a casual basis.[21] In the main, the exemptions reflect those that were established under the 1994 federal provisions and have continued, albeit in a broader form, in the *Workplace Relations Act* 1996 (Cth).[22]

An application for relief in relation to an unfair dismissal, or threatened dismissal, may be made by an employee or by a trade union on behalf of an employee.[23] It is significant to note that the concept of dismissal includes a failure to offer a casual employee continuing employment[24] and a forced resignation (that is, 'constructive dismissal').[25] It would however appear difficult to establish that a failure to renew a fixed term contract constitutes a 'dismissal'.[26]

Unlike the federal unfair dismissal provisions, no filing fee applies to applications made under section 84. Applications must be made not later than 21 days after the dismissal of the employee. However, the Commission is allowed to accept an application made out of time in certain circumstances. These are: if the Commission considers there is sufficient reason to do so, having regard to the reasons for and the length of the delay; if the Commission determines that the acceptance or rejection of the application may case hardship to the applicant; or if the Commission determines that the conduct of the employer relating to the dismissal warrants accepting the application out of time.[27]

PROCEDURE

The procedure applied in resolving applications for relief for unfair dismissal is loosely based on the traditional Australasian model for resolving industrial disputes: conciliation and arbitration. Section 86 demands that the Commission must endeavour, by all means it considers proper and necessary, to settle the applicants claim by conciliation. Where the

---

18 *Industrial Relations (General) Regulation* 1996 (NSW), reg 5B(1)(a): exempts 'employees engaged under a contract of employment for a specified period of time, if the specified period is less than 6 months.'

19 *Industrial Relations (General) Regulation* 1996 (NSW), reg 5B(1)(b).

20 *Industrial Relations (General) Regulation* 1996 (NSW), reg 5B(1)(c): exempts 'employees serving a period of probation or qualifying period, if the duration of the period, or the maximum duration of the period, is determined in advance and either (i) the period, or the maximum duration of the period, is 3 months or less, or (ii) if the period, or the maximum duration, is more than 3 months the period, or the maximum duration, is reasonable having regard to the nature and circumstances of the employment.'

21 *Industrial Relations (General) Regulation* 1996 (NSW), reg 5B(1)(d): exempts 'employees engaged on a casual basis for a short period except employees who (i) are engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months, and (ii) would, but for the dismissal, have had a reasonable expectation of continuing employment with the employer.'

22 *Workplace Relations Act* 1996 (Cth), s 170CC and *Workplace Relations Regulations* 1996 (Cth), reg 30B.

23 *Industrial Relations Act* 1996 (NSW), s 84.

24 *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385.

25 see *David Jones Ltd v AWU; Re Levette* (1978) AR 206; *Allison v Bega Valley Council*, unreported, NSW IRC, No IRC 1166/95, 1/9/95 digested at (1995) AILR para 5-064.

26 see *Stephens v Nowra Bomaderry Meals on Wheels*, unreported, NSW IRC, 2/1/94.

27 *Industrial Relations Act* 1996 (NSW), s 85(3)

Commission determines that all reasonable attempts to settle the claim by conciliation have been exhausted, the Act provides that the Commission is required to determine the claim by making a remedial order under section 89, by dismissing the claim, or by making any other order it is authorised to make under the Act.[28]

As an order by the Commission under Chapter 2, Part 6 involves the exercise of arbitral power, the well established convention that a party may object to the member of the Commission involved in conciliating the application also being involved in its adjudication applies. Section 173(1) provides that:

> 'The member of the Commission who attempts conciliation of an industrial dispute or other matter is not to exercise arbitration powers in relation to the dispute or matter if a party to the arbitration proceedings objects and requests that a different member of the Commission exercise arbitration.'[29]

The right of appeal from a determination by a single member of the Commission is limited by section 191 to matters of law and to clear errors of fact, and is not by way of a new hearing.

'HARSH, UNREASONABLE OR UNJUST'

The Act provides only limited guidance to the scope of the concept of unfairness. Section 88 provides that the Commission may, if appropriate, take account of the following factors:

> '(a) whether a *reason* for the dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to reinstate or re-employ, and
>
> (b) if such a *reason* was given – its nature, whether it had *a basis in fact*, and whether the applicant was given an *opportunity to make out a defence* or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and
>
> (c) whether a *warning of unsatisfactory performance* was given before the dismissal, and
>
> (d) the *nature of the duties* of the applicant immediately before the dismissal and, if the applicant sought but was refused reinstatement or re-employment, the likely nature of those duties if the applicant were to be reinstated or re-employed, and
>
> (e) whether or not the applicant requested reinstatement or re-employment with the employer, and
>
> (f) such other matters as the Commission considers relevant.'
>
> [emphasis added]

Significantly, the matters referred to in section 88 do not establish legal standards for conducting terminations. Rather, they are factors which, among others matters, the Commission *may* take into account in determining whether to exercise its discretion to grant an applicant a remedy. Ultimately, the "law" of unfair dismissal resides in the hearts and minds of the members of the Industrial Relations Commission of New South Wales as the interpreters of customary notions of fairness in dismissal.

---

[28] *Industrial Relations Act 1996* (NSW), s 87(2).

[29] See however s 173(2) which narrows the range of activities taken to involve conciliation.

Some of these customs are suggested by the language of section 88 itself, such as: the importance of giving an employee an opportunity to defend himself or herself in relation to allegations of misconduct and poor performance; the expectation that an employee should be warned of his or her poor performance and given an opportunity for improvement; the need to provide reasons for dismissal; and the idea that the employer's decision to dismiss be justifiable by reference to an objective assessment of the changing needs of the organisation or business, the employee's conduct, the employee's capacity or the employee's performance.

Other customs are equally notorious, even if the Act is silent regarding them, such as the application of fair criteria in selecting employees for redundancy and the provision of appropriate periods of warning and consultation to employees about technological and organisational change.[30]

It is normally easy to discern where a dismissal contravenes one of these conventions. The process of determining whether, in all the circumstances, the Commission will determine that the dismissal was harsh, unjust or unreasonable, can, however, be fraught with uncertainty. This uncertainty often arises in cases where considerations of the gravity of an employee's misconduct must be weighed against the conventions of what is often, somewhat misleadingly, referred to as procedural fairness. Such cases are particularly problematic because they involve the further difficulty arising from differences of opinion (between applicants and respondents, as well as between members of the Commission) regarding what sort of conduct constitutes grounds for dismissal.

The tension involved in such cases was recently illustrated in the decision of the Full Bench in the Hollingsworth case.[31] In this case Ms Hollingsworth was dismissed from her employment as a student police officer on the grounds that she had omitted to record on her job application that she had previously worked as a prostitute. She also failed to disclose on the application that she knew currently serving police officers, despite the fact that in her former profession she had become acquainted with a number of them as clients. The approach of the Police Department to her dismissal was clearly contrary to several accepted conventions regarding procedures for termination, and was criticised in the original determination by Connor C and by the Full Bench on appeal. In particular, the facts revealed that the decision to dismiss Ms Hollingsworth was made without giving any genuine opportunity to explain her failure to disclose her involvement in prostitution.

The major issue before both Connor C and the Full Bench was whether Ms Hollingsworth was under an obligation to disclose that she had previously worked as a prostitute. Connor C accepted Ms Hollingsworth's explanation that she did not disclose that she had worked as a prostitute on her application form because she did not consider that the form compelled her to do so. Furthermore, Connor C determined that as a general matter of law, an person is under no duty to reveal all aspects of his or her past when applying for employment. Connor C considered that Ms Hollingsworth should be judged according to the same criteria. Accordingly, the Commissioner determined that there was no element of dishonesty in Ms Hollingsworth's failure to disclose that she had worked as a prostitute. The Full Bench approached this question from a somewhat different perspective to Connor C. They emphasised that while an employee is not obliged to answer incriminatory questions, a job applicant should answer questions honestly and, in the case of an applicant to join the police

---

30 *Outboard World Pty Ltd v Muir* (1993) 51 IR 167.

31 *Commissioner of Police v Hollingsworth* (1997) 77 IR 339.

force, a particular requirement of frankness is warranted. Thus, the Full Bench concluded that the dismissal was justified and, in spite of the precipitous nature of the decision to terminate her employment, in no way 'harsh, unreasonable or unjust'.

The Hollingsworth case also illustrates the priority that the Commission gives to substantive issues (concerning the justice of dismissals) over procedural failures. Another example of this is the Full Bench's decision in *Rapp v Wauchope RSL Club Ltd.*[32] In this case, Mr Rapp was dismissed following allegations that he and another employee used offensive and demeaning language to female co-workers. At first instance, and on appeal, the Commission found that the allegations against Mr Rapp were supported by the evidence. Against this, there were obvious deficiencies in the procedures adopted by the Club leading up to Mr Rapp's dismissal when Mr Rapp was interviewed and told of a written allegation of sexual harassment against him his request to have union representation in the interview was refused. His request to see the letter or to be told of the circumstances of the allegations against him was also refused. Furthermore, it was apparent that in deciding to terminate the employee, the management committee of the Wauchope RSL Club also considered allegations by other women about which Mr Rapp was not informed. These omissions of procedure were in direct contravention of the disputes settlement provisions of the applicable award. Despite this, the Commission at first instance and on appeal refused to grant Mr Rapp any remedy. The Full Bench stated:

> *" The Commission concludes that the case that the employee Mr Rapp was denied procedural fairness has been made out...In many cases this would lead to an order for reinstatement or re-employment. In this case, reinstatement or re-employment, in view of the nature of the allegations, would be inappropriate ..."*
>
> ...
>
> *"The failure to provide procedural fairness has been substantial enough to visit injustice upon Mr Rapp... While there can be no doubt that Mr Rapp was denied procedural fairness there can in equal measure be no doubt at all that on the evidence he was guilty of serious misconduct in the nature of harassment of female members of the staff ..."*[33]

Accordingly, the Commission also refused to grant compensation.

REMEDIES

The Act indicates that the primary remedy where the Commission determines that the dismissal was harsh, unreasonable or unjust is reinstatement. Reinstatement involves an order that the employee is to be re-engaged in the same position that they held prior to the dismissal. In the case of applications relating to threats of dismissal, the Commission may order the employer not to dismiss the employee. [34]

If the Commission considers that an order for reinstatement is impracticable because, for instance, another person has been appointed to that position or the position has been

---

[32] *Paul Rapp and Wauchope RSL Club Ltd,* unreported, Matter No.IRC1893 of 1995, Fisher P, Tabbaa CC and McKenna CC, 19 December 1995.

[33] Ibid at p. 6. See also, *Electricity Commission of New South Wales (Trading as Pacific Power) v Nieass and Ors*, unreported, Industrial Commission of New South Wales, Full Commission, Fisher P, Bauer J, Patterson CC, 14 September 1995, Matter No. IRC 672 of 1995.

[34] *Industrial Relations Act 1996* (NSW), s 89(7).

abolished as part of a change in organisational structure, the Commission may order re-employment to another position that the employer has available and which, in the Commission's opinion, is suitable. A Full Bench, in *Effem Foods v Urban,*[35] has recently indicated that an order for re-employment should not compel an employer to create work for the applicant. That is, the applicant for such an order must identify the available alternative position in which he or she wishes to be re-engaged. In addition, the Commission indicated that while another position may be available, the applicant may be ill-suited to it and that such an order may be otherwise inappropriate because another employee might have occupied the position for some time. In this case, the Full Bench overturned an order of re-employment by Connor C on the basis that the applicant, Mr Urban, who had been dismissed after being on light duties for 23 months following a back injury, was unable to identify a position with the employer which was currently available and for which he was both fit and qualified.

Where an order of reinstatement or re-employment is made, the Commission may also order that the period of employment is deemed to be unbroken by the dismissal[36] and require the employer to pay an amount equivalent to the remuneration that the employee would, but for the dismissal, have received before being reinstated or re-employed.[37]

While reinstatement remains the primary remedy, there is no longer a requirement that an applicant must seek reinstatement as part of their claim.[38] If the Commission determines that it would be impracticable to make an order for reinstatement or re-employment, it may order the employer to pay the employee an amount of compensation not exceeding the employee's remuneration during the 6 month period immediately prior to dismissal.[39] Accordingly, in the case of employees with less than 6 month's service, the maximum amount that can be awarded is their total earnings up to dismissal, even if this is only a matter of a few weeks.

In determining the amount of compensation to be awarded, the Commission is required to take account of the efforts of the applicant to find alternative employment, and any remuneration that the employee would have received in alternative employment.[40] Otherwise, the Act is silent as to the approach that the Commission should take in assessing compensation. Also, contrary to the approach adopted by the Industrial Relations Court of Australia and, more recently, the Australian Industrial Relations Commission, the Commission does not attempt to expressly quantify an employee's loss according to the normal rules of damages for a statutory tort. My impression is, however, that the Commission's approach to compensation is not entirely dissimilar and follows the general remedial principle that, within the limitation of the compensation cap, the employee should be compensated for their losses. In spite of the formal primacy of reinstatement, the vast majority of applications appear to be settled or determined by the payment of a modest amount of compensation.

Where an unfair dismissal application is made by a trade union on behalf of an employee, the union may also apply for the Commission to make orders in relation to amounts of

---

35 *Effem Foods Pty Ltd t/as Uncle Ben's of Australia v Urban*, IRC of NSW, 8 July 1998, Hill J, Maidment J and Buckley C, IRC97/6880.

36 *Industrial Relations Act 1996* (NSW), s 89(4).

37 *Industrial Relations Act 1996* (NSW), s 89(3).

38 *Industrial Relations Act 1996* (NSW), s 84(4).

39 *Industrial Relations Act 1996* (NSW), s 89(5).

40 *Industrial Relations Act 1996* (NSW), s 89(6).

unpaid remuneration of up to $10,000, rather than taking such a claim to the Chief Industrial Magistrate or the Commission in Court Session.[41]

COSTS

As with most other aspects of the *Industrial Relations Act 1996* (NSW), orders for the payment of legal costs are generally unavailable in the NSW unfair dismissal jurisdiction. The Commission may only award costs against a party to unfair dismissal proceedings who, in the opinion of the Commission, unreasonably failed to agree to a settlement of the claim or whose application was frivolous or vexatious.[42] In any case, the quantification of costs is entirely within the discretion of the Commission.[43]

OVERCOMING UNCERTAINTY

It is trite to observe that the provisions of Chapter 2, Part 6, of the *Industrial Relations Act 1996* (NSW) are by no means the only laws impacting upon the termination of employment in New South Wales. Even for those employees covered by the Act's unfair dismissal provisions, alternative remedies lie in relation to termination of employment under the common law, anti-discrimination law,[44] the *Occupational Health and Safety Act 1983* (NSW),[45] the unlawful termination provisions of the *Workplace Relations Act 1996* (Cth),[46] the freedom of association provisions of the *Workplace Relations Act 1996* (Cth)[47] and the *Employment Protection Act 1982* (NSW).

In addition, the *Industrial Relations Act 1996* (NSW) includes several special-purpose protections against dismissal: a prohibition against dismissals associated with the taking of parental leave;[48] a prohibition against victimisation (including dismissal) on a range of grounds relating to union membership and making employment complaints;[49] and a prohibition against dismissing injured employees within the first six months of their

---

41 *Industrial Relations Act* 1996 (NSW), s 380. This procedure only applies where the 'amount payable' relates to remuneration fixed by an award, over award payments or amounts payable under the *Annual Holidays Act* 1940 (NSW), the *Long Service Leave Act* 1955 (NSW) and the *Long Service Leave (Metalliferous Mining Industry) Act* 1963 (NSW).

42 *Industrial Relations Act* 1996 (NSW), s 181(2)(c).

43 *Industrial Relations Act* 1996 (NSW), s 181(1).

44 That is the *Anti-Discrimination Act* 1977 (NSW), *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth) and *Disability Discrimination Act* 1992 (Cth).

45 See *Occupational Health and Safety Act* 1983 (NSW), s 26.

46 See *Workplace Relations Act* 1996 (Cth) Subdivision C, Division 3, Part VIA (ss 170CK-170CT). See also prohibitions against prohibited terminations in s 298K of Part XA (freedom of association provisions).

47 See *Workplace Relations Act* 1996 (Cth), Part XA.

48 *Industrial Relations Act* 1996 (NSW), s 68.

49 *Industrial Relations Act* 1996 (NSW), ss 210 & 213. The scope of these provisions has recently been discussed by a Full Bench of the Commission in *Davis v Amalgamated Television Services Pty Ltd*, unreported, Cahill Hill Maidment JJ and Redman C, IRC 97/7028, 22 June 1998.

incapacity for a compensable injury[50] – the later two involving wholly separate individual remedies.

Furthermore, the scope of remedies in relation to 'unfair dismissal' has been substantially increased via the use of the 'Unfair Contracts' provisions within Chapter 2, Part 9 of the Act.[51]

Accordingly, New South Wales' employees face a bewildering choice of remedies, while employers face a stultifying array of obstacles to reasoned decisions regarding termination.

This regulatory complexity is contrary to the interest of both employees and employers. It flies in the face of the efforts of the industrial relations community to simplify the system of regulation and, by necessitating an over-reliance on external advisers, negates efforts to devolve decision making regarding employment. As John Niland stated in his 1989 Green Paper on industrial relations in New South Wales:

> "Work arrangements within industries, enterprises and establishments need to be clearly set out. The interests of good industrial relations are seldom served by ambiguity and the inability of workers and managers to know what each expect of the other. Such clarification can be provided in various ways: through legislation; through regulations made pursuant to particular pieces of legislation; through awards of industrial tribunals; or through the negotiation of agreements between the industrial parties. In addition to these formal arrangements, further clarification will emerge on a day-to-day basis through consultation and discussion in the workplace. However, even in the latter case it is important that formal rules and regulations lay out clearly the types of procedures to apply in the various circumstances."[52]

Moreover, the complexity of these laws encourage unwarranted criticism of employment regulation. While the legal form of termination laws in New South Wales is unnecessarily complex, the protections afforded by these laws are quite modest. However, the proliferation of dismissal remedies fosters the impression that the law is imposing excessive restraints on employers. For instance, I would submit that the disenchantment of small business operators with our labour laws, as manifest in recent proposals for the exemption of small business from unfair dismissal laws, arises in the main from the difficulty that such employers (and their advisers) have in fully comprehending their obligations under the law. Faced with so many laws, many employers – even those who subscribe to the values that such laws promote – approach a state of regulatory apoplexy, in which badly-reasoned dissent becomes a more natural response than simple compliance.

The failure to address this complexity is, I would submit, one of the major flaws of the 1996 Act. One relatively obvious reform would be to consolidate the current provisions regarding unfair dismissal with all other current statutory prohibitions on termination (including those in the *Anti-Discrimination Act 1997* (NSW) and the *Occupational Health and Safety Act 1983* (NSW)), and all other remedies available to employees on termination of employment,

---

50 *Industrial Relations Act 1996* (NSW), Chapter 2, Part 7 (ss 91- 100).

51 See paper by Kylie Nomchong in these proceedings. See also Ronfeldt P, 1998, "Developments in Unfair Contracts Law", *Legal Developments Affecting Human Resource Management in Australia,* 6th Annual Labour Law Conference Proceedings, ACIRRT Working Paper 52, University of Sydney.

52 Niland J, 1989, *Transforming Industrial Relations in New South Wales,* Green Paper, Vol. 1, pp. 28-29.

into a single Chapter of the Act. In part, this approach has been adopted in the *Workplace Relations Act 1996* (Cth) and the *Workplace Relations Act* 1997 (Qld).

The primary advantage of this proposal is that employers and employees could rely on the provisions of the New South Wales Act as a genuine code regarding termination of employment. Associated with any such consolidation should be an attempt to more clearly detail the conventions regarding 'fair' dismissals and to include matters such as the requirements for undertaking redundancies. It should also include the specification of minimum entitlements regarding severance payments which currently appear in the regulations to the *Employment Protection Act 1982* (NSW) and, like the *Workplace Relations Act 1996* (Cth), the Act should also prescribe minimum entitlements to notice for non-award and award employees.

The type of consolidation that I am suggesting would of course greatly extend the jurisdiction and function of the Commission. In particular, it would allow commissioners to determine claims of unlawful (including discriminatory) dismissal and claims relating to the payment of termination benefits under awards, contracts of employment, the *Annual Holidays Act 1944* (NSW) and the *Long Service Leave Act 1955* (NSW) as part of applications for orders against unfair dismissal. A dismissed employee would then be able to make a single application relating to any of the concepts of unfair or unlawful termination, or for any termination related benefits, under New South Wales law.

There are of course some predictable criticisms to a consolidation of this kind. One would be that it would involve an inappropriate extension of the role of the Commission into areas of law to which it was ill suited. In particular, some may feel that it was inappropriate for the Commission to undertake the same functions as the specialist roles of the Anti-Discrimination Board and the Equal Opportunity Tribunal. Previous proposals of this kind have been raised and criticised on this basis. I would, however, submit that the view that the Industrial Relations Commission of New South Wales is insensitive to the demands of anti-discrimination principles[53] is no longer tenable in 1998. Moreover, there is no reason why such a consolidation would need to involve any formal reduction in the protections available under the *Anti-Discrimination Act 1997* (NSW). Arrangements could be established to advise applicants alleging discrimination as to their options to proceed via a complaint to the Anti-Discrimination Board.

Another concern may be that this putative consolidation would make termination related complaints easier for employees, and further encourage vexatious, frivolous and unwarranted claims. Quite obviously, such a concern cannot be sustained on social justice

---

[53] As suggested by Professor Niland in his Green Paper, ibid. pp 128-133.

grounds. It also ignores the benefits for employers of facilitating access to justice and the efficient determination of termination related disputes. Furthermore, this concern ignores the genuine benefits for employers in being able to refer to a code in undertaking dismissals.

CONCLUSION

For labour lawyers and specialist industrial relations and human resource practitioners in New South Wales, the operation of the *Industrial Relations Act 1996* (NSW), particularly the conventions applied by the Commission in determining claims of unfair dismissal, are familiar and, in the main, predictable. It is important, however, for those of us in the industrial relations 'club' to ensure that our systems are easy to understand and accessible to the community at large. Neither the current arrangements for termination law in general, nor the provisions regarding unfair dismissal more particularly, satisfy these criteria. There is a need for the law to provide clearer instructions to employers, managers and employees concerning the requirements for dismissals, to streamline the administration of justice and, where it is possible to do so without undermining the inherently flexible character of unfair dismissal conventions, to create greater certainty regarding outcomes.

Reformers should also consider other matters, particularly the relationship between unfair dismissal laws and the unfair contracts provisions of Chapter 2, Part 8 of the Act, and the quite arbitrary nature of the current remuneration cap on applications and compensation. I will leave those matters to Ms Nomchong to explore in greater depth except for two final points. Firstly, as my preference is for increased certainty and a simpler scheme for dismissal law in New South Wales, I consider that the continuance of section 106 in its current form is untenable. Secondly, the ability of executive employees to use section 106 to circumvent the remuneration cap on 'unfair dismissal' applications established under section 83 has added to the shamelessly chaotic aspect of New South Wales termination law. As opposed to the Carr Government's proposal in this area[54], I would propose that the proper balance between equity and efficiency would be, as part of the more general codification suggested above, to remove the remuneration cap on unfair dismissal applications altogether. That way, moves to exclude employees from using section 106 to challenge termination benefits or the conduct of employers upon termination, would be less unobjectionable.

[54] For a discussion of these proposals, see paper by Kylie Nomchong in this volume.

5. THE NSW PAY EQUITY INQUIRY: WHAT MIGHT IT ALL MEAN?

Kathryn Heiler

INTRODUCTION

Discussing pay equity publicly is a risky business. It seems prudent to stress from the outset of this discussion that the issue of pay equity is one that evokes quite a dramatic range of responses - both emotional and cognitive - from observers and participants alike. There is only one thing guaranteed for anyone brazen enough to tackle these issues publicly, and that is that regardless of what you say, you can be absolutely sure of offending at least a sizeable part of your audience. This is further complicated by the seemingly equivocal status of the evidence on the magnitude and causes of the pay equity problem.

In terms of the NSW Pay Equity Inquiry, this discussion is further complicated by the fact that the final determinations are yet to be handed down. What will be presented today will be based partly on evidence given by the key parties involved in the inquiry and partly on speculation about the final recommendations.

This presentation will cover the following:

- Definitions of pay equity and comparable worth
- Locating the NSW Pay Equity Inquiry in an international context
- The key terms of the reference of the inquiry
- Key points of contention between the parties
- Crown Party's recommendations
- Strengths and weaknesses of the pay equity inquiry approach

What is 'pay equity' and comparable worth?

Pay equity is a term sometimes used interchangeably with 'comparable worth' to explain the principle of equal pay for work of equal or comparable value. The widely accepted definition of pay equity is:

'Equal remuneration for men and women doing work of equal or comparable value (NSW Pay Equity Taskforce, 1997:2)'

The pay equity or comparable worth approach was spurred on by the perceived failure of the Affirmative Action programmes in the US and informed by French feminist philosophy around the 'celebration of difference'. In the employment area this approach seeks not to devalue the work women have traditionally performed by encouraging them to leave (occupational desegregation) but to value women's work properly and pay it accordingly. Comparable worth projects try to determine the amount of undervaluation by comparing the

complexity and responsibility of male and female dominated jobs and then institute pay increases to eliminate the differences.

The pay equity approach represents a departure from other approaches (such as Affirmative Action or anti-discrimination legislation) because it seeks to redress discrimination against *entire job categories* rather than just individual workers. This collective, rather than individual approach to pay equity was strongly argued in the NSW Pay Equity Taskforce Report (1997). The process by which jobs are compared may involve a comparison of the same or similar jobs within an occupation, workplace or industry (eg machine operators within the confectionery industry), or may compare dissimilar jobs in the same or different industry (eg motor mechanics and hairdressers).

As you can imagine, this approach generates much debate between the protagonists which often throws more heat than light on the subject (as we shall see). Before examining the key points of contention, let us first locate the NSW Pay Equity approach within some kind of international context.

The background and aims of the NSW Pay Equity Inquiry in an international context

The ILO[1] recognises that while most countries, including Australia, have accepted the ILO Convention 100 on equal remuneration for work of equal value, that the effective application of these conventions are far from satisfactory (ie words are cheap). The ILO further recognises that significant levels of pay inequity persist, arguably due to differences in over award-payments, labour market segmentation, and in the persistent undervaluation of comparable skills[2].

In terms of the promotion of pay equity, there are three recognised stages that can be identified in the evolution of regulations on equal pay at a national level:

- **Stage 1: Removal of blatant discrimination:** The first stage is the inclusion in national constitutions and laws of general principles aimed at eliminating blatant inequalities and discrimination. In particular, it means abolishing different wage scales for men and women doing the same work; it also involves removing the more blatant examples of what were 'protective' legislation (such as lifting restrictions etc); this has been undertaken formally, but still exists in practice.

  In Australia unequal pay was of course enshrined in early industrial law, for example in the Harvester judgement of 1907 which enshrined the principle of a family wage. Male and female differentials were reinforced in 1919 with the Fruit-picker's case.

  In 1958, NSW became the first Australian jurisdiction to legislate for equal pay in the *Female Rates Amendment Act 1958*. However, this only applied to about 20% of women because of the high level of sex segregation in the workforce. In 1969 the equal pay case introduced the principle of equal pay for equal work, but since it did not apply in female dominated industries its application was severely restricted.

---

1 ILO (1997)

2 An excellent overview to the international context can be found in Rosemary Hunter's evidence to the NSW Pay Equity Inquiry.

Stage 2: An enlargement of the principle of equal pay, broadening the basis of comparison to equal value (ie the notion of comparable value)

The *Equal Pay Case 1972* introduced federally the principle of equal pay for equal work or work for equal value. While the application of this principle has helped to address blatant wage disparities, a significant gap persists, especially with regard to work of a dissimilar nature. The traditional refusal of the Federal IRC to consider over award payments has further limited the effectiveness of the 1972 Act.

Other measures have helped to formalise the principle of comparable wirth. For example, the adoption of ILO Conventions federally in 1974, ILO Convention 11 under Whitlam, and range of anti-discrimination acts at federal and state levels such as the *NSW Anti-Discrimination Act 1977*. In 1993 the *Industrial Relations Reform Act* enshrined the ILO Conventions and introduced a set of provisions to enable claims to be brought before the IRC with respect to equal remuneration for work of equal value. This has not meant with much success, as the recent HPM case attests.

Stage 3: 'Unorthodox measures and regulations', currently in progress (and where we might locate the NSW Pay Equity Inquiry) which aims at finding means to overcome structural and labour market inequalities resulting from women's location within the labour market and workplace, women's child care responsibilities and direct and indirect discrimination. The ILO (1997) notes that: ***'This new complexity will lead to unorthodox measures and regulations in order to achieve complete equal pay'. (ILO 1997).***

The NSW Pay Equity Inquiry

Section 3(f) of the *NSW Industrial Relations Act 1996* provides that it is an object of the Act to: ***"prevent and eliminate discrimination, and in particular, to ensure equal remuneration for men and women doing work of equal or comparable value".*** This expands the previous legislation to encompass *both* remuneration and broader notion of comparable value. It implies an embracing of over-award payment and a much broader consideration of work value, as well as a commitment to a collective approach in addition to existing individual approaches to addressing pay inequity.

The NSW Pay Equity Inquiry itself aimed to facilitate the development of pay equity solutions within the NSW industrial jurisdiction and ensure that pay equity was incorporated into the mainstream industrial relations agenda.

The terms of reference of the NSW Pay Equity Inquiry are:

(i) Whether work in female dominated industries and occupations is undervalued in terms of remuneration paid relative to work in comparable male dominated industries. The inquiry, true to its word, chose to look at a range of controversial comparisons including: child care workers; public sector librarians with senior geologists; hairdressers with motor mechanics, seafood processors with butchers and trimmers; final year enrolled nurses with first year coal miners; outworkers in the clothing industry.

(ii) The adequacy of tests and mechanisms for ascertaining value of work and the extent to which they are inequitable on the basis of gender;

(iii) Consideration would be given to the appropriateness of current work value tests, MRA and other industrial mechanisms, job evaluation techniques, matters of discrimination, and international conventions;

(iv) Mechanisms and processes by which pay equity matters can be brought before the Commission;

(v) The Inquiry must take into account: public interest, object of the IRA 1996, impact on the NSW economy, need to protect the employment base and any adverse impact on employment opportunities for women; inter-state comparative rates.

Key Points of contention between the parties

As the NSW Pay Equity Inquiry was run as a formal quasi-judicial inquiry, the parties (adversaries?) to the inquiry seemed to - at times - retreat to their corners, take their positions, rally their supporters and respond to the bell. To appreciate the distance which sometimes divided the parties on various aspects of the inquiry we might examine just some of the main points of contention. Needless to say, this list should in no way be considered exhaustive.

What is presented below is a summary of the two poles of the debate. These are drawn from both my own recent work on the debates around pay equity, and also from the summary generated by the NSW Women's Equity Bureau. By examining some of the common points of contention in the argument about pay equity we may be better able to assess the likely impact and effectiveness of the remedies put forward by the Crown under the NSW Pay Equity Inquiry.

Some key points of contention between the various parties

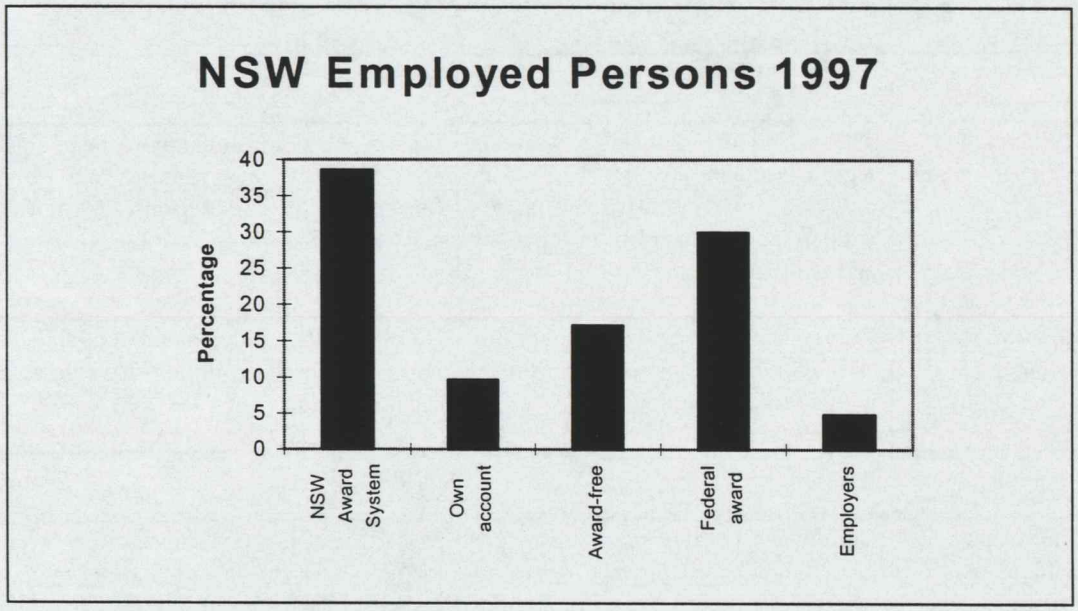
Issue	Proponents of pay equity say...	Opponents of pay equity...
'Remuneration'	Broadly defined to mean ordinary basic wage **PLUS** over-award, overtime, bonuses etc (ILO 100).	Narrowly defined and should NOT include over-award payments since this interferes with market relativities (employers must have the right to set over-awards without interference)
The 'wages gap'	Strong evidence of a wages gap based on direct and indirect gender discrimination in the labour market and at the workplace	There is a gap but there is no evidence of undervaluing or sex discrimination.
Reasons for the gap	Direct and indirect discrimination, undervaluing of skills, less access to overtime payments, job and labour market segmentation, access to child care, high levels of PT work	Justifiable 'market loadings', scarcity of skills, differences in human capital, PT status, productivity, labour force commitment, value to the employer - no direct or indirect discrimination (of if there is this is a market imperfection)
'Comparable worth' approach	The notion of comparable worth is legitimate and should be broad, allowing for comparisons across similar and dissimilar occupations and industries.	*Cannot* be done and any comparisons should be between more similar jobs (dissimilar job comparisons illegitimate and too difficult).
Valuation/under valuing of women skill	Comprehensive understanding of skill and value as a 'social construct' with a broad definition.	No evidence of undervaluation of skill so no need to broaden notion of value as a social construct.
Work value mechanisms	Current work value mechanisms are inequitable/inappropriate because women's skills are not fully recognised mechanisms are gender-biased.	No failure of the mechanisms so no need for new ones (no discrimination or bias demonstrated).
Solutions	Collective rather than individual measures more appropriate, strong role for industrial instruments; ADA, EEO not adequate alone.	No need for alternative solutions; ADA is adequate; focus on individual remedies; targeted education, reduction of occupational segmentation.
Benefits of solutions	Addressing 'market failure' will allow for full utilisation of skills, break down segmentation.	Inappropriate interference in the market and removal of employer discretion to set relativities.

We can see from the above - somewhat overstated - characterisation that considerable distance separates the parties across a number of very fundamental points. For example, there is considerable debate about the magnitude of the pay equity gap and the legitimacy or otherwise of using particular measurements instruments (see for example (Wooden, 1998). In addition, there is the not inconsiderable problem of relying on aggregate wages data to try to capture the intricacies and idiosyncratic nature of the wages gap at a workplace level. Certainly, the debate has not been helped by dramatic conclusions being drawn on the basis of often methodologically weak data.

A brief overview of the NSW workforce covered by the NSW jurisdiction; some estimates of wage inequity by gender

- First we can consider the percentage of NSW employed persons likely to be covered by NSW awards. This is presented in Graph 1 below and shows that around 38% of employees are covered by NSW awards. Of these, 43% are females, which constitutes 46% of all women workers in NSW (Watson, 1998).

Graph 1: NSW employed persons 1997

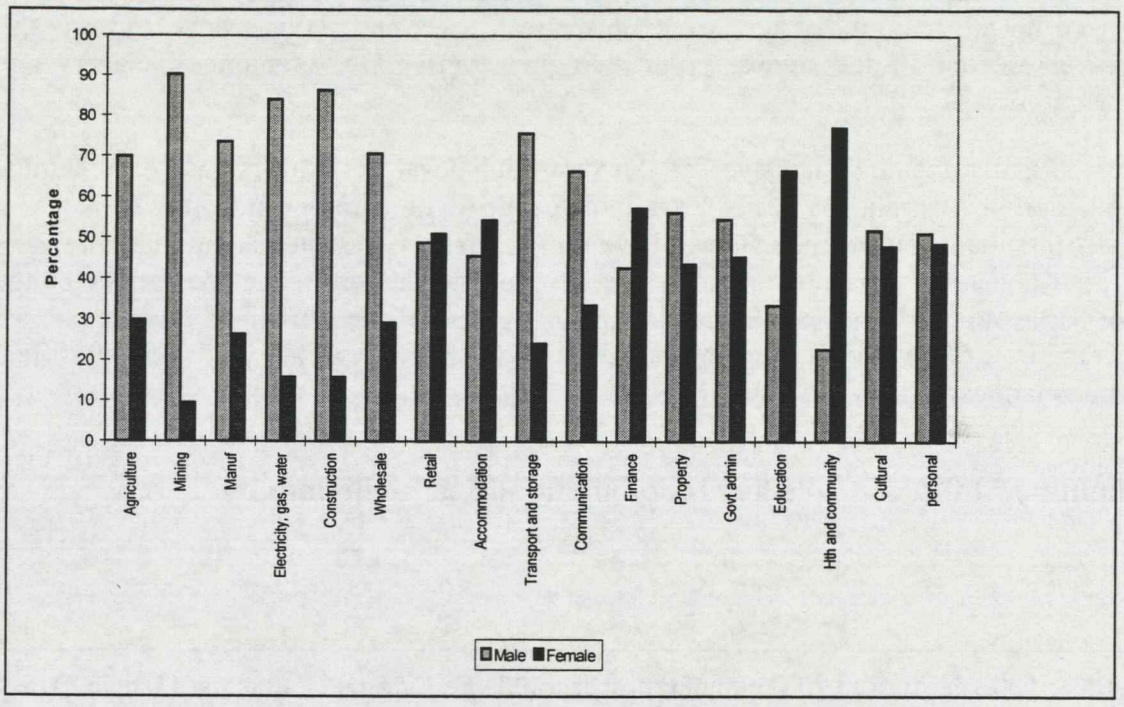


Source: DIR (1997) Estimates by NSW DIR based on ABS *Labour Force*, cat. no. 6201.1 1990 (approximate numbers only)

Industry and occupational background of women and NESB women

Recent analysis of industry and occupational trends of women in Australia shows that strong industry and occupational segmentation continues in Australia (see Heiler, 1998). For example, Graph 2 below shows the industry background of men and women in Australia 1998.

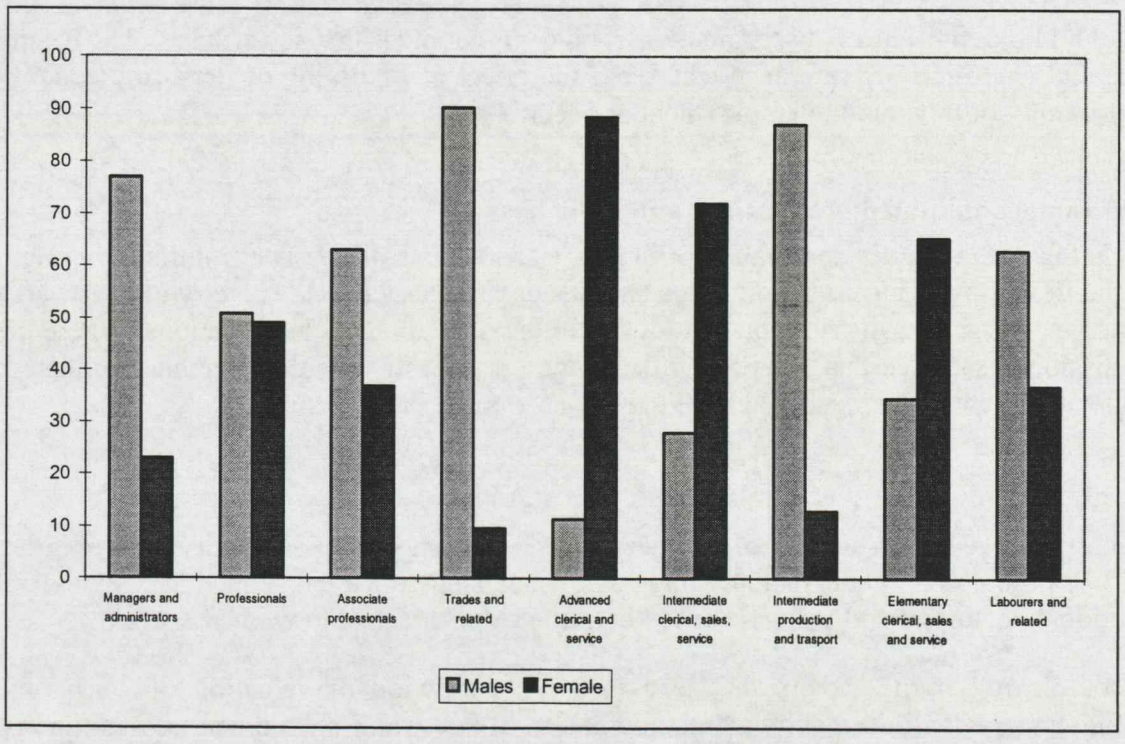
Graph 2: Industry background of men and women, Australia



Source: ABS *Labour Force Australia*, cat. no. 6203.0, 1998.

Graph 2 above shows that there is continuing strong industry segmentation by gender in Australia, with the majority of women being concentrated across a small band of industries.

Graph 3: Employment by occupation, May 1998



Source: ABS *Labour Force Australia,* cat. no. 6203.0

Graph 3 above shows that in terms of the sex background of the various occupations, women still make up the majority of employees in clerical, sales and service work and are still poorly represented in the trades, production and transport and among managers and administrators.

It is important to remind ourselves of the very high level of industry and occupational segmentation in Australia, as this is strongly associated with earnings outcomes. It is also a reminder that industrial instruments will have limited effectiveness in a labour market where these high levels of segmentation exist. We now turn to the key recommendations of the Crown parties to the NSW Pay Equity Inquiry. A review of these findings gives a feel for the direction of the Inquiry, even though we do not know as yet what the final recommendations will be.

A summary of the Crown's key recommendations to the inquiry

Definitions

Remuneration

The ILO 100 definition of remuneration should be adopted, that is [article 1(a)]: Remuneration means the ordinary basic or minimum wage or salary and any additional emoluments whatever payable directly or indirectly, whether in cash or kind, by the employer to the worker and arising out of the worker's employment. This includes over award payments, bonuses, overtime, penalty rates, superannuation and other payments as well as non-monetary remuneration.

Discrimination

The ILO 111 definition of discrimination should be adopted, that is [article 1(1)(a)]: any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Female/male dominated occupations and industries

These terms mean gender domination of industries and occupations. The Commission ought have the flexibility to have regard to broader considerations such as the history of the awards in question, the gender distribution historically in the industry and classifications. Where the Commission is satisfied that a particular occupation or industry is either 'female dominated' or 'male dominated' then it should have the power to make such a ruling.

Value/undervaluation

A comprehensive understanding of the meaning of value should be adopted. This definition should be based on an understanding that value is a social construct, reflecting a number of institutional, historical and cultural views about the value attached to women's work.

The complexity of the factors that lead to the construction of valuation of work (and therefore undervaluation) require a broad definition of how value should be assessed. Such a definition would allow the Commission to identify and analyse the operation and

interactions of the numerous factors that determine value and ensure a gender neutral understanding of undervaluation.

Comparable

Means comparable value irrespective of the occupations and industries and the nature of the work. The choice of comparators does not constitute a threshold test for the purposes of any pay equity claim.

Range of measures needed

A range of measures, with the following components, is necessary to fulfil the NSW Government's pay equity objectives and meet the requirements of the Industrial Relations Act 1996:

- a comprehensive legislative base for the implementation of ILO 100;
- a pay equity principle incorporating a new equitable work value test which the Commission is to consider in regard to specific pay equity claims; and whenever the Commission considers matters affecting remuneration, including applications by consent, the approval of enterprise agreements/awards, making or varying awards or agreements, and reviewing awards;
- guidelines for the use of the Commission and industrial parties to provide practical assistance in considering issues which arise in the context of pay equity;
- a system of award review and monitoring as established by s19 of the IRA.

A new equitable work value test

A new equitable work value test should be developed and incorporated in the proposed Pay Equity Principle. The aim is to ensure that the value of work should be defined, assessed and applied in an objective, transparent and non discriminatory manner.

A new Pay Equity Principle

A new Pay Equity Principle be adopted which will facilitate the bringing of an equal remuneration claim to the Commission. The Principle will provide the mechanism for determining whether a gender based pay disparity exists, whether the disparity reflects discrimination based on sex and will provide for pay equity decisions.

The Commission is to have regard to the proposed Pay Equity Principle whenever it considers matters effecting remuneration, including applications by consent, the approval of enterprise agreements/awards, making or varying awards or agreements, and reviewing awards under s19 of the IRA.

Award reviews

The Crown submits that s19 of the IRA be used by the Commission to examine whether there is undervaluation and/or under-remuneration in female dominated industries and occupations. The Commission could then consider whether an adjustment is required to provide for pay equity.

For example:

(i) whether the work has historically been undervalued and the rates affected by sex discrimination;

(ii) whether the minimum rates adjustment process has been properly applied (including in relation to training and qualifications) to address pay equity issues;

(iii) whether lack of bargaining power has resulted in an inability to claim remuneration (through over awards, enterprise agreements and consent awards) for productivity contributions, work value changes, or other unrecognised factors of value of work, and has therefore resulted in under-valuing and/or under-remuneration of women's work;

(iv) whether any differences between the going rates and the award rates reflect aspects of the value of work which should be recognised in award classifications and/or rates;

(v) whether the award classifications adequately reflect the range of skills, training and experience. As to whether work value has been assessed relatively recently in the occupation- consideration should be given to including additional classification levels;

(vi) whether the remunerated value of the work takes full account of conditions including work environment and work rate requirements, work stress (see, for example, the seafood processing evidence);

(vii) whether the award includes conditions provided by Test Case decisions and has been appropriately adjusted for Commission decisions in State Wage Cases..

Guidance for the industrial parties

Appropriate guidelines should be developed for the use of the Commission and industrial parties to provide practical assistance when considering issues which commonly arise in the context of pay equity.

Pay equity panel

The Crown submits that the Commission should consider establishing a panel specifically to hear pay equity matters. Commissioner panels would be constituted by members dealing with particular awards or industries/occupations and s19 reviews.

Minimum rates adjustment process and other industrial mechanisms including productivity

MRA is still available and may be used in appropriate cases.

Enterprise agreements, productivity and over award payments

The new Pay Equity Principle should allow for the scrutiny of productivity increases and provisions and the overall operation of enterprise agreements and over award and discretionary payments, to ensure that they are consistent with pay equity requirements.

Other industrial mechanisms

Special Case and Anomalies and Inequities Principles are not adequate to address pay equity matters specifically. These principles may have continuing application in remedying some deficiencies in industrial instruments which continue to obstruct pay equity.

Job evaluation techniques

Gender bias free job evaluation techniques should continue to be used, where appropriate, as a tool to assist in the valuing of jobs and related pay setting. These techniques, where relevant, should continue to be used as a reference point for the Commission in remuneration setting in relation to awards and agreements.

Matters of discrimination and the *Anti Discrimination Act 1977* (NSW), as provided in the Industrial Relation Act 1996 (NSW)

In the context of developing and applying the new pay equity principle, a broad definition of discrimination is adopted. The definition to be adopted is that contained in ILO 111, that is [article 1(1)(a)]: any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The Industrial Relations Commission of NSW is the best forum to consider and address issues relating to pay equity. The *Anti-Discrimination Act 1977* will continue to provide access to individual and representative claims for past damage.

Relevant international labour and other conventions

The Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO 100) be used to define both the terms 'equal remuneration for work of equal or comparable value' and 'remuneration', and that the Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111) be used to define the term 'discrimination'.

International Conventions to which Australia is a signatory provide a framework for the development of domestic mechanisms which address pay equity. The Convention provisions not only provide guidance to signatories, but establish legal obligations as well as principles and benchmarks for their practical application.

The key recommendations seem likely to include the following:

- **A new Pay Equity Principle: facilitate the bringing of an equal remuneration claim to the Commission**
- **Award reviews**
- **Guidance for industrial parties**
- **Scrutinising enterprise agreements, productivity and over-award payments**
- **Objective job evaluation techniques**

An assessment of the significance of the NSW Pay Equity Inquiry

While it is very premature to assess what the likely implications of the pay equity inquiry might be, some general comments may be made.

- **Forcing the parties to confront the divergence of views on the issue**

  Given the distance that separates the parties, the Inquiry was an opportunity to force the parties to the table at least to listen to the evidence and views about the issue. Whether or not this has been an effective process (or has just entrenched pre-existing positions) is yet to be determined.

- **Drawing together of state of the art understandings of the issue**

  The bringing together of expertise in Australia around the issue of pay equity has also provided an important intellectual resource for others interested in the area and has developed a resource of data and information to be drawn on.

- **Undertaking controversial comparative case studies**

  The act of trying out comparable worth principle by undertaking innovative and novel case studies has been an important characteristic of the inquiry. More work is required in the area, but there has been a start.

- **Range of definitional propositions and measures proposed; focus on industrial instruments and wages policy as a key vehicle for addressing collective pay equity issues**

Again, the act of considering the likely effectiveness of measures to address pay equity has been useful. All too often we focus on the extent of the problem without also trying to come up with strategies and solutions that have some chance of being implemented. At this early stage, however, I do believe that not enough account has been taken of the current pressures and realities within the labour market which will reduce the effectiveness of these interventions.

Opportunities and problems

Some broader issues to consider when assessing the potential impact and effectiveness of the inquiry are outlined below. In some ways these are more general principles associated with the consideration of pay equity.

- **Symbolic impact of the inquiry important should not be confused with outcomes**

  While it has been important symbolically to hold an inquiry into the issue of pay equity, there is the danger that the process of the inquiry will be confused with outcomes. The end of the inquiry should not herald a signing off of the issue. Adequate resources and actions will need to accompany any final recommendations. There is also the danger that the highly politicised nature of the inquiry will be seen as associated with one government over another, rather than being viewed as a bi-partisan approach. This makes the whole process extremely vulnerable to political winds that inevitably blow at a state level.

- **Pay equity strategy gives primacy to wages policy and industrial instruments as effective in addressing pay inequity; this should be seen as a *complementary* rather than principle strategy**

  The increasing realities of decentralised bargaining and major changes in the effectiveness of the nation-state will diminish the effectiveness of industrial instruments to address pay equity issues. The structural changes to the labour market (high levels of casualisation, marginalisation of workers, high levels of unemployment and under-employment) are all important components of pay equity outcomes. Thus, tinkering with industrial instrument should be see as complementary to other strategies rather than the whole answer.

Labour market and other measures needed to address pay inequity

Finally, it is useful to consider some of the other strategies which should accompany changes to industrial instruments.

(a) Better award compliance: We need to ensure that **existing** award conditions and pay are enforced and entitlements are taken out. Lack of award compliance has been an often neglected but persistent problem, more prevalent where unions are weak or inactive, and among smaller workplaces - often the workplaces where women are to be found. In addition, increased insecurity and vulnerability among employees can make them reluctant to take out existing entitlements. Recent discussions with the FSU and ALHMWU, for example, and other evidence suggests that the failure to apply for paid over time is a growing problems associated with increased job insecurity.

(b) Equitable working conditions AND wages: we need to be sure that working conditions are not being eroded at the expense of wages. This is particularly the case with regard to working hours, where increased unpredictability, under-employment, stress, unpaid overtime can erode the value of wages. Improvements in wages could be masking increased divergence in working conditions.

(c) Child care: Preservation and protection of gains made in the area of child care is vital to pay equity outcomes. The current attacks on and increased costs of child care and the implications this will have for women's participation and total income cannot be overstated; the state government could intervene to ensure that child care costs and availability in NSW are not compromised; an action that would benefits both workers with child care responsibilities and businesses in genera;. No one benefits from the diminution of affordable, quality child care

(d) Marginalised workers: Protection of the growing number of marginalised workers, many of whom are women: The 1997 DIR report identifies a growing number of employees who fall outside the formal award system. We need to tackle the increasing number of workers who fall outside the institutional award framework and are thus out of reach of many of the recommendations of the Crown parties.

(e) The role of trade unions: AWIRS 1995 demonstrated clearly that workers covered by trade unions where the union was active and had active delegates were also more likely to be those workers with better pay and conditions; the low levels of trade union membership and activity among women workers is cause for real concern.

(f) Labour market and occupational segmentation: so long as we have women concentrated in low-paying, poorly unionised, highly casualised industries and occupations, the application of pay equity will be compromised. We do not have to discard notions of comparable worth to also recognise that women will remain marginalised if they do not become better represented across industries and occupations

(g) The impact of decentralised bargaining and growing wages dispersion: increased wages: The impact of decentralised bargaining on wages dispersion is still being monitored, but the outcomes are not looking promising. Another problem thrown up by decentralised bargaining is the issue of monitoring of wages. As workplace level arrangements increase, it will be harder to track overall labour market trends for women. In addition, the growing variation on wages arrangements places great resource challenges on unions who may attempt to establish what wages patterns are across workplaces and industries. We cannot address pay equity if we are not sure or confident about what is actually occurring at a workplace level.

Finally, it seems apparent that there is a growing contradiction between the increased deregulation of the economy, financial markets and labour markets and the capacity of the state to intervene over issues such as pay inequity. As deregulation within the economy and labour market increases, the corresponding ability of the state to intervene in these matters may be significantly reduced.

To conclude, the danger may be that we end up with a fabulous set of industrial instruments but that it is 'business as usual' back in the labour market!

References

Heiler, K. (1998) *We Are All Sisters Here...Pay Equity and NESB Women in NSW*, Report prepared for the Women's Equity Bureau, NSW Department of Industrial Relations, (unpublished)

Hunter, R.C (1998) *Statement to the NSW Pay Equity Inquiry,* Matter No. IRC/6320 of 1997

ILO, (1997), *Gender Issues in Labour Legislation: Labour Management Relations and Remuneration,* [Online], Available from: URL http://www.ilo.org.public/english/140 femine/guides/labourle.htm, [Accessed 23 July 1998]

Pay Equity Inquiry (1998) Matter No. IRC. 6320 of 1997, *Submission of Crown Parties*

Watson, I (1998) *NESB women in the Australian labour market*, unpublished data prepared for an investigation into pay equity prepared for the Women's Pay equity Bureau (to be released later this year)

Wooden, M. (1998) *Gender Pay Equity and Comparable Worth in Australia: A Reassessment*, Working Paper No. 148, National Institute of Labour Studies, Adelaide

Acknowledgments

Thanks to Mary Grace and Julie Mahoney, Women's Equity Bureau; Ian Watson, ACIRRT and an employer organisation for their generous assistance in making available some of the information used in the preparation of this paper.

6. In Defence of the Right To Fairness In Work: Rights for Employees and Non-Employees – The role of Section 106 of the Industrial Relations Act, 1996 (NSW).

Kylie Nomchong[1]

THE LEGISLATIVE FRAMEWORK OF SECTION 106

Section 106 of the *Industrial Relations Act, 1996* (NSW) ('the Act') is the newest version of a provision conferring jurisdiction on the Industrial Relations Commission of New South Wales ('the Commission') in relation to unfair contracts. The original provision was contained in section 88F of the *Industrial Arbitration Act*, 1940 and was enacted in 1959[2]. In the following legislation, the *Industrial Relations Act*, 1991, the provision appeared in section 275. This latest provision (section 106) includes some changes to the wording of the section. However, despite these changes the practical operation of the power has not changed since its original enactment.[3]

In order to understand both the scope of the jurisdiction conferred upon the Commission in Court Session and the nature of remedies available under Section 106 it is necessary to understand the legislative regime under which the provision operates. The section is as follows:

> **106 Power of the Commission to declare contracts void or varied**
>
> (1) The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.
>
> (2) The Commission may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.
>
> (3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.
>
> (4) In considering whether a contract is unfair because it is against the public interest, the matters to which the Commission is to have regard must include the effect that the contract, or a series of such contracts, has had, or may have, on any system of apprenticeship and other methods of providing a sufficient and trained labour force.

---

1 Barrister, Denman Chambers, Sydney. This paper was prepared for the ACIRRT Conference *Industrial Relations under the NSW System* 31 July, 1998.

2 Interestingly, the provision was only rarely used in the first 10 years of existence and even then it was only adopted in relation to contracts in the transport industry between independent contractors and transport companies. The provision did not become widely used at all until the 1970's

3 cf. *Walker v Hussman Aust Pty Ltd* (1991) 40 IR 180, (1992) 44 IR 404 and (1993)48 IR 396 and related decisions

(5) In making an order under this section, the Commission may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Commission considers just in the circumstances of the case.

The term 'contract' is defined in section 105 as 'any contract or arrangement, or any related condition or collateral arrangement, but does not include an industrial instrument'. This definition allows the Commission to determine applications not only in relation to legally binding contracts but also collateral arrangements or conditions related to contracts or even arrangements generally. This latter concept of an arrangement was discussed in *Legal and General Assurance v Stock*[4] where it was stated '... the authorities make it clear that the term 'arrangement' where used in the section is a wide one and encompasses transactions and plans which are not legally enforceable agreements.'[5] The Commission then went on to distil the principles in relation to the scope of the term 'arrangement' and this emphasises the very extensive nature of the jurisdiction.

All that is necessary to invoke the jurisdiction is that there be such a contract or arrangement and that the contract or arrangement be one in which 'a person performs work in an industry'[6]. That phraseology has meant that section 106 proceedings have been utilised in relation to a variety of contracts and arrangements. The most obvious, of course, have been employment contracts - although this has been the case only in recent times with the review of employment contracts achieving greater prominence in section 275, and then section 106 proceedings since the late 1980's. There have also been numerous claims from independent contractors which have provided those workers with some protection in circumstances where they have been excluded from the protection of awards and many statutory entitlements that applied to employees.[7]

The High Court in *Stevenson v Barham & Anor*[8] held '..the power conferred upon the Commission by section 88F of the Act is in the widest terms and is not limited to matters which are industrial in character. The Commission's powers are not confined in point of jurisdiction to contracts or arrangements designed to avoid the industrial awards or agreements of the rates of remuneration fixed for the performance of work by employees.'

In addition, section 106 has been invoked in many other areas and is now regularly used in relation to franchise agreements, partnerships, commercial leases, share-farming agreements and copyright agreements.[9] It has also been used in relation to superannuation arrangements[10] and, in the jurisdiction, was held to apply to a representation made by a bank to a person who worked as an abalone diver. The representation was held to be a 'collateral arrangement' to the work of an abalone diver, being work performed in an industry.[11] It is

---

4 [1993] 49 IR 465 at pp. 480-1

5 supra at p. 480

6 *Walker v Hussman Aust Pty Ltd* (1991) 40 IR 180

7 see B. Creighton & A. Stewart *Labour Law: An Introduction*, 1994, Federation Press, Sydney pp. 128-135

8 12 ALR 175 at p. 179, 184; see also *FMWU v Wilson* [1980] AR(NSW) 352

9 see M. Holmes, (1995) 'An Historical Analysis of the Jurisdiction Conferred on the Industrial Court by s275 of the Industrial Relations Act, 1991', *Australian Law Journal*, vol.69, no.1,pp.49-61

10 see G. Warburton, 'Dealing with Superannuation Surpluses in NSW and Elsewhere', (1989) 2 *Australian Journal of Labour Law*, vol.2, no.1,pp.40-61.

11 (1996) 64 IR 451

clear that the types of contracts and arrangements which may be scrutinised pursuant section 106 proceedings are not readily limited.

The very wide scope of the jurisdiction can also be seen from the parties against whom orders may be made. The Commission may make orders binding not only the parties to the contract/ arrangement but also to 'any other person who is (in any way considered relevant by the Commission) associated with any such party' in relation to future conduct. Therefore, whilst proceedings may be brought against a company operating a franchise arrangement by the franchisee, the Commission may (if it thinks fit) also make orders against say, the directors of the franchise company or say, an agent who induced the franchisee into the arrangement on false representations. The jurisdictional basis for such orders arise from cases such as *Malthais v Industrial Commission*[12] and *Minister for Youth and Community Services v Health and Research Employees Association of Australia*[13]. The test to establish liability against person or entity not a party to the contract is culpability or some other relevant connection with the contract or receipt of proceeds from the contract.

Whilst the type of orders and remedies which may be imposed by the Commission are set out in section 106 itself, section 107 provides that in addition to those orders specified in section 106, the Commission may also make injunctive orders prohibiting (either absolutely or in accordance with specified conditions) any party to the contract or other person associated with a party from entering into specified kinds of contract in the future or doing any act (whether by way of advertising or otherwise) which may reasonably be construed as being intended to induce other persons to enter into any such contract.

As to what will constitute unfairness, section 105 defines an unfair contract as being one:

(a) that is unfair[14], harsh or unconscionable, or

(b) that is against the public interest, or

(c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or

(d) that is designed to, or does, avoid the provisions of an industrial instrument.

The way in which these concepts have developed, particularly the concept of what is 'unfair, harsh or unconscionable', is discussed below.

The Concept of Unfairness

Section 106 of the Act allows the Commission to declare a contract of employment or other contract and/or arrangement and/or collateral arrangement (I refer to these collectively as 'contracts' in the remainder of this paper) unfair, harsh or unconscionable (I refer to this phrase as 'unfair' in the remainder of this paper). The Commission may then make orders

---

12 (1986)14 IR 367

13 (1987) 10 NSWLR 543 at 558G – 559B. This reasoning evolved through cases such as *In re Herrick and Star Carrying Co, Pty Ltd* [1968] AR 445 at 446;

14 Defining an unfair contract as one that is, amongst other things, unfair seems somewhat circuitous but the wide nature of the jurisdiction and the discretion vested in the Commission has meant that each case will be determined on its own facts. The notion of unfairness comes into operation in each particular set of circumstances.

voiding or varying those contracts etc., and to make orders for the payment of money to rectify such unfairness etc.

A claim under section 106 of the Act may be based on 'inherent unfairness'. That is a contract which, having regard to the terms of the contract itself are, on their face, unfair, harsh or unconscionable. For example, a franchise agreement which contains a term that the franchisee should pay to the franchisor 99% of all profits from the business would, in most circumstances, be held to inherently unfair.

A contract may also be unfair, harsh or unconscionable on the basis that the force and effect and/or operation of the terms of a contract produces a result which is relevantly unfair. It is this concept which has been utilised in cases where the termination provision of contracts which may be fair in one set of circumstances are declared unfair in another.

A notable recent case in this area is *Cukeric v David Jones*[15]. In that matter, Mr. Cukeric had been employed by David Jones for some 35 years. He had been promoted on many occasions, starting as a dockhand and at the time of dismissal, he was National Merchandising Manager and aged 60 years. There was a purported re-organisation of the company at the senior level and it was decided that Mr. Cukeric's position was to be made redundant. David Jones provided Mr. Cukeric with a severance package including 12 months notice, outstanding leave entitlements and superannuation to the value of $600,000. It was held that the termination package was a term of his contract with David Jones and was therefore reviewable. In many circumstances such a package would be considered fair. However, in this case the Commission held that the term of the contract between Mr. Cukeric and David Jones which allowed David Jones to act in the way it did in terminating Mr. Cukeric's employment was unfair. Mr. Cukeric had not been considered for other positions within the organisation despite his long career with David Jones, there had not been any objective criteria applied to the redundancy process itself in that there seemed to be a number of personal factors which influenced the decision-maker and finally, it was found that Mr. Cukeric was not consulted about his termination or the proposed organisation change. He was dismissed 'on the spot' and was not allowed to work out his notice.

The Commission ordered David Jones to pay to Mr. Cukeric a further amount equivalent to 6 months total remuneration as compensation for the lack of procedural fairness.

Another feature of the *Cukeric* case was that, upon termination, David Jones required Mr. Cukeric to enter into a Deed of Release whereby in consideration for the severance package, Mr. Cukeric agreed to waive all rights and entitlements including the right to bring any proceedings in relation to his termination of employment. Indeed, David Jones withheld the payment of the severance package until Mr. Cukeric signed the Deed of Release.

The Commission found that the arrangement whereby Mr. Cukeric entered into the Deed of Release and in particular, the circumstances of the parties entering into that Deed was part of the arrangement whereby Mr. Cukeric performed work in an industry (or, in the alternative, a collateral arrangement). The Commission then went on to find that that arrangement was unconscionable and declared it void. Following from that finding, there was then no impediment to Mr. Cukeric pursuing the primary proceedings.

---

[15] (1996)70 IR 26

The decision ought not, however, be taken as authority for the proposition that Deeds of Release can be easily overturned or are useless. The Commission analysed most carefully both the Deed itself and the circumstances which prevailed at the time Mr. Cukeric was asked to sign that document. For example, Mr. Cukeric was dismissed 'on the spot' and was then informed that the significant severance package being offered was conditional upon signing the Deed. The case is really one which emphasises the way in which the Commission can and does look at all the circumstances of the case in determining whether or not a contract is unfair.

The Cukeric case is also indicative of those cases where the Commission In the Cukeric case, the contract failed to contain a provision which entitled Mr. Cukeric to procedural fairness in relation to his termination. Under section 106, the Commission may also have regard to the terms of the contracts, that should have (in fairness) been contained in the contract under review and may make declarations on the basis of what a contract failed to contain. (see for example, *Australian Entre Business Centres Pty. Ltd v. Smith*[16]; *Bank of New York v. James*[17]).

In *GIO Australia v O'Donnell*[18], a former employee of GIO Australia sought orders pursuant to section 106 in relation to a share option scheme. Whilst an employee, Mr. O'Donnell had purchased options to buy shares in GIO Australia. The share option scheme was separate and distinct from the contract of employment but the option could only be exercised by an employee. The date from which the option could be exercised (ie. to purchase the shares at a reduced price) occurred after the date of Mr. O'Donnell's dismissal and the contract itself made no provision for an ex-employee such as Mr. O'Donnell. The Commission varied the share option scheme between Mr. O'Donnell and the GIO to allow Mr. O'Donnell a period of 12 months to exercise his options to buy the shares.

In deciding whether a contract of employment is unfair either in its terms or in its operation, the Commission is entitled to have regard to all of the circumstances surrounding the contract including the circumstances that prevailed at the time it was entered into, the circumstances in which it operated and the circumstances of its termination as well as the conduct of the employer in those circumstances (see *Bank of New York v. James* (supra); *Incitec v. Industrial Court of N.S.W.*[19]; *Baker v. National Distribution Services Limited*[20]; *Westfield Ltd & Anor v. Sidney Helprin*[21].

The decision in *Baker v. National Distribution Services Limited* is really the modern starting point in the current authorities dealing with the concept of 'unfairness'. The decision discussed the previous case law and drew its conclusion that the Commission is entitled to (and, indeed, should) take into account all of the circumstances relevant to the operation and effect of the contract under review[22]. The Commission looked at a range of issues and considered that in their entirety '...the litany of conduct by the respondent, in our view, demonstrates in a comprehensive way the quality of unfairness which we find occurred in

---

16 (1989) 29 IR 172 at 182-184
17 (1992) 40 IR 1 at 25
18 (1996) IR
19 (1992) 45 IR 155
20 (1993) 50 IR 254
21 (1996) 68 IR 25
22 (1993) 50 IR 254 at 272-273

this matter as to the way in which the appellant's contract and arrangements worked out in practice.'[23]

Mr. Baker had been employed for approximately 26 years. At the time of his dismissal he was employed as a manager (or a staff employee). A large section of the workforce was retrenched and the union was able to negotiate a redundancy arrangement for the award employees which was greater than that prescribed by the award. No such negotiation was entered into with those staff employees (including Mr. Baker) who were made redundant and the redundancy package provided to Mr. Baker (and other management staff) was significantly less than that provided to the award employees.

However, the company had paid Mr. Baker six months' redundancy pay of $18,250 and one months' notice on termination. This was well above community standards prevailing at the time. However, the Commission found that the contract/ arrangement was unfair in that it was significantly less than the package provided to award employees in the same workplace and in the same circumstances. The Commission ordered that the contract be varied so as to provide that Mr. Baker be paid the same redundancy package as the award employees. This amounted to a further payment of $93,865.00.

The definition of unfairness which applies to contracts the subject of proceedings under section 106 also provides that a contract will be unfair if it provides the contractor with total remuneration less than he/she would receive if he/she were an employee. In this way, many independent contractors are able to seek remedies from the Commission, particularly in relation to those contracts where the obligations under the contract require the contractor to work lengthy hours for a relatively low contract price.

Whilst section 127 of the Act provides that where a principal enters into an agreement with an independent contractor and that independent contractor in turn employs staff, then the principal becomes liable for the payment of any remuneration to employees of that independent contractor if they are either underpaid (in comparison to the prevailing award or agreement) or not paid at all. However, section 127 does not provide any protection for the independent contractor him/herself.

It is clear that the Commission has a broad discretion in relation to finding unfairness etc., The Commission adopts 'the common sense approach characteristic of the ordinary juryman' (see *Davies v General Transport Development Pty Limited*[24]) And the discretion of the Commission is to be exercised to protect victims of wrong-doing and not to prescribe anodynes. In exercising the discretion the Commission must apply standards which appear to 'provide a proper balance or division of advantage and disadvantage between the parties who have made the contract or arrangement.'[25]

Regard may be had to the conduct of the parties, their capability to appreciate the bargain entered into, the comparative bargaining strength of each of the parties in terms of the advantage and disadvantage and the surrounding circumstances of each particular case on a case by case basis (see generally *Davies v. General Transport Development Pty. Ltd* (supra); *Baker v. National Distribution Services*[26]. The exercise of the discretion involves

---

23 (supra) at p. 273
24 (1967) AR (NSW) 37
25 (1967) AR (NSW) 37
26 (supra) at p. 272

considerations of fairness, harshness and/or unconscionability. The lawfulness of the contract/ arrangement, or any conduct is not strictly of itself determinative. Simply because the contract/ arrangement may be lawful and may have been carried out lawfully, does not mean that it operated fairly or worked out in practice[27]. Similarly, questions of breach of contract are not strictly relevant. This section has been described as involving the application of plain standards of '*morals not law.*'[28]

SOME RECENT CASES

In *Newton v Goodman Fielder Mills Limited*[29] the employer had dismissed Mr. Newton by asking him to come to a meeting at a time when Mr. Newton was on annual holidays and informing him that his job had been made redundant as of the following Monday. At the time, Mr. Newton had been an employee of Goodman Fielder for some 36 years. On termination, Mr. Newton was given a cheque for approximately $50,000 which included outstanding leave entitlements and a severance payment equivalent to 15 months pay. The severance payment had been calculated in accordance with a staff redundancy scheme which provided for a maximum of 12 months severance pay but gave the company a discretion to increase that sum in appropriate circumstances. The employer gave Mr. Newton an extra 3 months pay on this basis. This amount was well in excess of the applicable award entitlement.

However, Goodman Fielder then summarily deducted an amount of $30,000 which was the balance outstanding of a loan provided to Mr. Newton by the company. The deduction was made without any consultation or agreement by Mr. Newton. The loan had been provided by Goodman Fielder to assist Mr. Newton to move to Narrabri, a relocation made at the request of his employer. There was no consultation or advice that this deduction would be made or that it was consequent on Mr. Newton being made redundant.

His Honour Justice Hill found that even though the severance payment was in excess of the award entitlement, the question was not whether the award was fair but whether the contract of employment was unfair. Awards prescribe fair and reasonable conditions based on general community standards. However, section 106 was 'designed to deal with fairness or unfairness of a particular contract or arrangement of employment having regard to all the circumstances and consideration relevant to that particular contract.'[30] The fact that an employer had paid the correct amount pursuant to the award (or in this case, above the award) was not a barrier to assessing fairness. One must look to the circumstances of the case. In this matter, Mr. Newton had been employed for 36 years and was 53 years of age at the date of his dismissal. There had been no consultation, discussion or advance notice given to Mr. Newton of his impending dismissal on the grounds of redundancy.

His Honour held that the contract of employment which allowed Mr. Newton to be given only 15 months severance pay was unfair in all the circumstances. In particular it was unfair to purport to give Mr. Newton a severance payment in order to provide an economic cushion in the face of his termination but then to unilaterally deduct one third of that sum to re-pay a

---

27 see *Bank of New York v. James* (supra) at 25 and generally *Davies v. General Transport Development Pty. Ltd* (supra)

28 see Davies (supra) at p. 374

29 (unreported decision of Hill J, 12 September, 1997)

30 supra, page 13

loan which, but for the untimely dismissal, Mr. Newton would have paid off in instalments over the coming years. In addition, the Commission held that Mr. Newton was entitled to have been given a reasonable period of actual notice and some consideration of his age, employment prospects, retraining and counselling. In addition, the calling up and deduction from the severance payment of the balance of the loan was harsh, unjustified and unreasonable.

His Honour order that Goodman Fielder pay to Mr. Newton an amount equivalent to 8 months pay in lieu of notice. In addition, a further amount equivalent to 4 months salary was awarded in respect of the unfairness of the contract relating to the loan.

The importance of the case is that the existence of an applicable award and compliance with that award, will not render a contract fair or immune from review under section 106.

In *Payne v Foxboro L&N Pty Limited and Anor*[31] His Honour Justice Hill made a decision on two important issues. His Honour confirmed (but only by necessary implication) that payments made in relation to notice and payments for severance are to be treated separately. Secondly, His Honour found that the doctrine of mitigation did not apply to reduce the orders for compensation made in these section 106 proceedings.

In that case Mr. Payne had been employed by the respondent companies for a total of 26 years. On 8 January, 1996, Mr. Payne received a letter advising him that his employment was to be terminated on 27 February, 1996 as the company's business had been sold. Pursuant to a termination policy of the company, Mr. Payne was to receive 4 weeks actual notice and 4 weeks pay in lieu of notice and 26 weeks pay in relation to redundancy. There was a disagreement in the evidence as to whether Mr. Payne had been made aware of his impending redundancy but in any event, his Honour found that the company had not made any attempts to find suitable alternative employment for Mr. Payne within the new company structure.

His Honour separately considered the issues of redundancy and held that even though the level of benefit under the company's termination policy had not altered since 1983 and that they were, in comparison to community standards, somewhat low, this did not render the severance payment unfair as they were higher than those payable if the provisions of the *Termination Change and Redundancy Case* (1994) applied.

The matters taken into account by His Honour Justice Hill in ordering the respondent to pay to Mr. Payne a further 12 months pay in lieu of notice were wide ranging. His Honour noted that the termination policy provided for a one month's notice plus one month' pay in lieu of notice. The Commission took into account the length of service, the status of his position at the time of termination, the level of responsibility in his job. However, consideration was also given to the fact that Mr. Payne had some 250 accrued sick days although whether or not this affected the exercise of the court's discretion in relation to notice was unclear.

This decision confirmed the approach in *Cukeric* and *O'Donnell* that the applicable rate of pay for the calculation of the money order in relation to the notice was on the full remuneration package not just the base salary.

---

[31] (unreported decision Hill J, 16 July, 1998)

Mr. Payne in fact found alternative employment prior to his termination and commenced his new job about two weeks after his dismissal. The evidence was that he earned about $11,000 to $15,000 less in the first year of his new job. The issue arose in the proceedings as to whether any monies awarded should be discounted to take into account the fact that this mitigation of his economic loss had occurred. His Honour Justice Hill referred to the decision in *Harcourt Brace & Co (Aust) Pty Ltd v Gos Cory*[32] In that case, the principle of mitigation was found to apply to money awards under section 106 proceedings, save in exceptional circumstances.

In *Payne*, Hill J decided that no deduction based on mitigation should be made and, in so doing, took into account the fact that Mr. Payne found his new job himself without any assistance from the company, and that his new job provided him with a lower level of total remuneration. Interestingly, matters such as the high number of accrued sick days, the loss of opportunity to accumulate long service leave, the loss of continuity of employment were also were also considered to be factors against the imposition of the principle of mitigation.

The time for an appeal in relation to this decision has not yet expired.

On an issue related to the characterisation of section 106 proceedings, the decision of the Full Bench in *Davis v Amalgamated Television Services Pty Limited* (Cahill, Hill and Maidment JJ & Redman C) (unreported, 22 June, 1998) is interesting in that the victimisation provisions of the *Industrial Relations Act, 1996* (NSW) were held to apply to section 106 proceedings.

In that matter, Mr. Davis was a reporter on the Witness television program on Channel 7. On 31 January, 1997, whilst still employed by Amalgamated Television Services, Mr. Davis, along with Jana Wendt, the presenter and other members of the staff of that program commenced proceedings pursuant to section 106 claiming that the terms of engagement were unfair. The unfairness related to the degree of editorial control of Amalgamated Television Services as compared to that of the production team itself. A claim was also made in relation to damage to reputation as a result of the unfair operation of the contract.

Subsequent to making the claim pursuant to section 106, Amalgamated Television Services embarked upon a campaign of conduct against Mr. Davis. Work assignments were reduced. When he was working Mr. Davis claimed that unreasonable workloads and deadlines were imposed. Mr. Davis claimed that he was asked to operate outside his area of expertise and then criticised for his failure to perform subsequently. Mr. Davis claimed that Amalgamated Television Services made regular and unwarranted threats of disciplinary action against him. Finally, Amalgamated Television Services summarily dismissed Mr. Davis on 28 April, 1997.

Mr. Davis commenced proceedings pursuant to sections 210(e) and (g) of the Act which stipulates that an employer must not victimise an employee because:

.....

---

[32] (unreported decision, Full Bench (Jill, Hungerford and Schmidt JJ) 22 September, 1997)

(e) the person claims a benefit to which the person is entitled under the industrial relations legislation or an industrial instrument;

.....

(g) the person participates or proposes to participate in proceedings relating to an industrial matter.

The Full Bench found that the acts of Amalgamated Television Services were capable of constituting victimisation within the meaning of the Act. The Full Bench then determined that the commencement of the section 106 proceedings amounted to participation in '*proceedings relating to an industrial matter*' (section 210(g)).

Having found that a breach of section 210(g) was possible, the Commission analysed the merits of the case including the conduct of Amalgamated Television Services and in particular the proximity of certain events to the initiation of the section 106 proceedings. Having found that the conduct of Amalgamated Television was capable of being found to be victimisation within the meaning of section 210(g) and, as the appeal was from an interlocutory order, the Full Bench referred the determination of whether there was actual victimisation back to a single judge of the Commission. That hearing has not yet taken place.

The decision broadens the protection afforded to section 106 applicants by allowing the umbrella of anti-victimisation provisions in the Act to restrain any improper conduct by the employer.

PROPOSED CHANGES TO SECTION 106

It is clear from the preceding discussion that section 106 has been utilised by former employees to seek remedies in relation to their dismissal. In particular, managerial employees have taken advantage of the wide scope of section 106 to seek compensation for insufficient payments on termination.

The legislative regime under the Act allows for two avenues of remedy in the event that a person is unfairly dismissed and allows for different remedies for each.

Under Chapter 2, Part 6 of the Act, a person whose employment has been terminated in circumstances which are harsh, unjust or unreasonable may apply for relief and obtain either reinstatement or compensation (up to a maximum of 6 months pay).

These provisions are however restricted to public sector employees, employees covered by an award or industrial agreement or employees not covered by an award or agreement earning less than $66,200 (as indexed) per annum.

For employees who fall outside those criteria, the provisions of section 106 allow the Commission in Court Session to set aside or vary an unfair contract. Accordingly, non-award employees earning more than $66,200 who have no recourse to the unfair dismissal provisions of the Act, may seek relief from the Commission in the event that they are treated unfairly under the terms of the contract – and this may include unfair treatment at the time of termination. There is no limit as to the compensation which may be awarded.

On 8 April, 1998 *the Industrial Relations Amendment (Unfair Contracts) Bill 1998* was introduced.

At face value, the proposed changes state that they are attempting to stop the provisions of section 106 being utilized in circumstances which amount to proceedings for unfair dismissal. However, it should be noted that the proposed changes are attempting to stop section 106 of the Act from having any operation in circumstances where a person has no other effective remedy at law.[33] For example, if a person were forced to resort to the common law in relation to a contract of employment, then usually the only remedy would be for enforcement (or damages for breach) of the existing contract. If that contract allowed for payment of 4 weeks notice on termination, then that is all that could be obtained. Putting aside reliance on implied terms of reasonable notice or implied terms to act fairly (which are notoriously difficult to prove and which, as a general rule, have not been accepted by the Australian courts), there is little to comfort the prospective plaintiff in common law proceedings in relation to employment contracts.

At common law, an employee is limited to either the notice provision contained in the contract (most often a period between 1 week and 1 month) or, if the contract is silent, reasonable notice which, on the authorities, is limited in its scope. In addition, the exercise of the common law rights would further be affected by involvement in the already crowded lists of the District and Supreme Courts.

It should be remembered that, jurisdictionally, the provision does not operate unless the contract or conduct pursuant to the contract is *unfair*. The essence of proceedings under section 106 is that the contract or arrangement between the employee and the employer is unfair in its operation because it allows for unfair dismissal. It is not an unfair dismissal provision at all.[34] It is a provision that has come to reflect the societal values we place on not only fairness but also fairness in the important and vital field of work. It is, in my view, fundamental to the system of industrial jurisprudence in New South Wales.

Section 106 should be applauded and enforced not watered down. In *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, the Court of Appeal considered the scope and purpose of legislative provisions such as section 106. In his judgement, Priestley JA held (at 263ff):

> 'There are many instances of Acts of parliament imposing terms upon particular classes of contracts and forbidding or limited the variation of those terms by the parties. These have much the same effect as the attaching of implied conditions to contract by courts as an incident of law. In these instances, the Acts have been passed not because it was necessary for those contracts to include such terms so the contracts could be effective **but because it was thought the terms were needed to make the contract work more fairly between the parties**.' (emphasis added)

Later at 268, His Honour held:

---

[33] As noted above, the provisions of section 106 are utilised in a much broader area of matters, such as unfair franchise agreements and unfair contracts for independent contractors generally. These will not be affected by the proposed changes.

[34] For a discussion of unfair contracts and an analysis of the proposed amendments see P. Ronfeldt 'Developments in Unfair Contracts Law' esp. p. 27.

> 'This development is a very strong one in this country if the New South Wales experience is typical of all the States as, broadly speaking, I believe it is. In New South Wales since 1900 there has been an ever growing number of statutes permitting Courts to remould particular kinds of contract **in the interests of fairness**. The principal ones have been the *Moneylenders and Infants Loan Act, 1905*, the *Hire Purchase Agreement Acts* of 1941 and 1960 , **s 88F of the *Industrial Arbitration Act, 1940*** (the predecessor to section 106)...'

Most importantly, the effect of the proposed changes would allow employers of non-award employees earning more than $66,200 to treat those employees as unfairly as they want, particularly in relation to the termination of their employment and that employee would have no effective remedy as against his/her employer. Indeed it would be a positive incentive for any employer to give an employee a raise (to more than the arbitrarily set statutory cap of $66,200) shortly before they terminate his/her employment thereby precluding the employee from seeking a remedy.

Contractors on the other hand, placed in similar circumstances would still be able to avail themselves of the provisions of section 106 and seek a remedy.

In response to these arguments, the Government has not proceeded with the amendments pending further consideration of the constructions of the draft bill. As to the policy decision to attempt to exclude high paid employees from unfair contracts , this still remains a matter of debate.

7. WORKPLACE REFORM IN THE NSW PUBLIC SECTOR: INTRODUCING TOTAL QUALITY MANAGEMENT TEAMS

Michael O'Donnell

While the New Public Management model emphasises rationalisation, measuring performance and achieving cost-effective results (Hood, 1991), it also attempts to present a more humane face to public sector reform. This involves the promotion of management strategies that seek to change the culture of the public sector to one that focuses on improving the quality of services provided to customers (Pollitt, 1993). Experiments with cultural change were enthusiastically promoted by the Liberal/National Government, in particular by Premiers Greiner and Fahey (Greiner, 1992; Fahey, 1994b; Fahey, 1994c). The Coalition Government aimed to change the culture from one perceived as preoccupied with building bureaucratic empires, to one which strived to improve the quality of service provided to customers (Greiner, 1992: 43).

This focus on cultural change mirrors international trends and similar experiments have been undertaken by both British and North American governments in an attempt to alter the culture of their public sectors from supposedly unproductive bureaucracies to efficient and responsive customer driven organisations (Osborne and Gaebler, 1993; Pollitt, 1993). At a workplace level, this cultural change strategy is intended to empower those workers closest to the customer through the introduction of total quality management (TQM) teams.

This paper critically assesses the introduction of a culture of quality customer service and TQM teams within the former NSW Department of Industrial Relations, Employment, Training and Further Education (NSW DIRETFE). The effectiveness of the quality culture and TQM teams is examined through a case study of one agency with NSW DIRETFE - the Long Service Payments Corporation (the Corporation). The Corporation's function within NSW DIRETFE was to provide a portable scheme of long service payments to workers in the building and construction industry in NSW.

The Corporation was at the forefront of the Department's attempts to introduce TQM process improvement teams. Process teams comprised of staff at the 'coalface' within each agency and focused on eliminating waste and improving customer service. There were a maximum of six workers in each cross-functional team, drawn from a range of areas across an agency. Each team elected its own team leader (Customer Service Project Officers, 27 July 1994). Two of the four teams that had presented their recommendations by July 1994 to the NSW DIRETFE Quality Council, (comprised of senior management who monitored the progress of TQM teams throughout the Department), originated from the Corporation (Customer Service Project Officers, 27 July 1994). As such, the Corporation represents a particularly useful organisation within which to assess the success of cultural change and TQM teams within the NSW public sector.

The data presented in the paper was obtained from semi-structured interviews with senior management, workplace managers, workers involved in TQM teams and other workers within the Corporation affected by the outcomes of TQM team deliberations. Interviews were also conducted with an industrial officer and workplace delegates of the NSW PSA. The interviews were conducted between July 1994 and June 1995. The data gathering

process also included an analysis of documentation prepared by these groups as part of, or in response to, NSW DIRETFE's 'True North' and TQM teams strategy.

CULTURAL CHANGE VERSUS WORKPLACE LABOUR MANAGEMENT PRACTICE

TQM emphasises the importance of creating a quality culture throughout the organisation (Linkow, 1989: 69; Wilcox, 1991: 18). Since the publication of the 'excellence' literature in the early 1980s, managers have been encouraged to transform the culture of their organisations (Peters and Waterman, 1982). Culture can be defined as the 'habitual and traditional ways of thinking, feeling and reacting that are characteristic to a particular organization' (Ogbonna and Wilkinson, 1990: 9). This quality culture emphasises the commonality of interests between capital and labour. For Deming (1986: 148):

> 'Once the superficial, adversarial relationship between managers and workers is eliminated, they are more likely to pull together during difficult times and to defend their common interests in the firm's health'.

But the focus on creating a corporate culture overlooks the potential for conflict to exist both within the management hierarchy and between management and labour (Dawson and Palmer, 1993: 128). Further, the values held by public service workers may not be amenable to change in response to a short term cultural change program. Attempts to change the culture of the British and American public services 'have been either crude or contradictory or largely ineffective or some combination of all three' (Pollitt, 1993: 25). The effectiveness of TQM's quality culture may also be constrained where it conflicts with existing workplace labour management practice. Kramar argues that 'unless those implementing the policies change their values and behaviours, the revised policies will not be implemented' (1992: 11-13).

The impact of the Department's quality culture and promotion of workforce involvement in decision-making through TQM teams was constrained because it clashed with existing labour management practices which focused on increasing efficiency. Throughout the time of the case study the Corporation was experiencing external environmental pressure in the form of public and private sector reviews of its operation, creating a fear of privatisation amongst workplace management.

Workplace management responded to the threat of privatisation by maximising efficiency and minimising costs. Cost minimisation involved rationalising administrative costs whilst making work processes more efficient. For example, within the claims section of the industry services branch (which dealt directly with building workers), management claimed it had 're-engineered' the processing of building workers' claims. Whereas in 1987-88 it took between thirty and sixty days to process a claim, by 1994 this has been reduced to one to two days, while the number of staff involved in claims had been reduced from six to one (Corporation management, 15-26 September 1994). Overall administration costs had also been reduced from in excess of $6 million in 1989 to $4.3 million for the 1994-95 financial year.

Rationalisation had been most evident in the area of salaries - the organisation's largest cost - resulting in a substantial reduction of the Corporation's workforce. The Corporation employed approximately 143 workers in 1986, when it was established, and this was steadily

reduced to forty-two (or by approximately 70 per cent) over nine years by a combination of natural attrition, redundancies and redeployment.

In contrast to TQM's advocacy of workforce 'empowerment', which aimed to increase employee commitment to the organisation, labour management practices such as workforce reduction increased stress levels amongst the workforce. It was commonplace for workers to perceive themselves as 'moving targets' as all positions appeared to be under constant threat (Corporation workforce, 14-5 September 1994; Corporation, 1993d: 1-5).

The reduction in the number of workers employed by the Corporation as a consequence of the 'downsizing' exercises also resulted in a greater intensity and pace of work for remaining staff. For instance, the Corporation's workforce observed that they worked in a perpetual state of 'crisis management' with the added work pressure particularly acute during the Corporation's peak work period, from July to the end of each year.

TQM TEAMS AND WORKFORCE PARTICIPATION IN DECISION-MAKING

As part of the process of attempting to instil a quality culture, management may introduce TQM teams and seek to involve workers more in decision-making (Palmer and Saunders, 1992: 69). The teams are meant to empower public service workers nearest to the customer and invert the traditional hierarchy of organisational power and control (Morgan and Murgatroyd, 1993:16-7). When introducing TQM teams, management may also allocate considerable financial and time resources training team members in statistical analysis, pareto charts, cause and effect diagrams, communication skills and so on (Brown, 1992: 11). At the prospect of greater participation in workplace decision-making, Hill (1991a: 565) argues, workers respond enthusiastically to TQM. Initial enthusiasm for quality initiatives, however, may diminish where workers are expected to participate in process improvement team activities on top of their regular work tasks (Allan, 1991: 54).

The actual extent of decision-making accorded to workers under TQM programs appears questionable. The involvement of workers in TQM teams may be limited to determining problems at the point of production. Wilkinson et al (1991: 28) found that decision-making by TQM teams in Britain was restricted solely to resolving problems of work organisation; in Australia Lever-Tracy (1990) found that employee involvement initiatives by management at Ford Broadmeadows car plant did not provide workers with any greater participation in workplace decision-making than had existed previously. Therefore, TQM teams may not present a challenge to management's prerogatives or control over decision-making. Management continue to retain control over how resources are utilised, what goods or services are produced and how profits are dispersed (Dawson and Palmer, 1993: 126; Dawson and Webb, 1989: 236; Kelly, 1995: 130; Sewell and Wilkinson, 1992b: 111). Thus, the degree of autonomy in decision-making ceded to workers in TQM teams may prove limited.

An experiment with devolving decision-making authority to workers was undertaken in the Corporation and two process teams commenced on October 28 1993: Cheque Mates and Just Asc. The Cheque Mates team decided to investigate the processes being used to pay claims by building workers for long service payment. Both process teams conducted extensive research prior to submitting their recommendations. The Cheque Mates team examined the branches of the organisation involved in handling claims and highlighted time delays in the existing system for paying claims by building workers for long service. The Cheque Mates'

preferred recommendation was to provide an electronic funds transfer service for building workers, which was estimated to cost $0.05 per claim above the current process. The major advantage of electronic funds transfer was its ability to expedite the payment of claims.

The Just Asc process team recommended improvements to the process of paying additional medical service credits. The Just Asc team found that delays occurred with the receipt of documents under the current system, with little publicity made available by the Corporation regarding a worker's eligibility for additional service credits, and even less about the documentation required.

Workers in the Cheque Mates and Just Asc teams claimed that they gained considerable satisfaction from participating in these teams. One process team leader commented that they found the experience 'extremely rewarding... It has provided invaluable skills in the coordination of a multi-discipline team, time management and enhanced communication and presentation skills'. Many process team members enjoyed having some input into making recommendations, learning a range of project work and flow chart design skills (Corporation workforce, 14-15 September 1994).

Team members, however, experienced mounting work pressure because process team research was undertaken on top of their existing duties. The process of developing flow charts and undertaking research took up a substantial amount of time, resulting in several teams members retiring because of excessive work pressures. Team members also experienced growing resentment from individual branch managers and from other workers regarding their frequent and often lengthy absences.

WORKPLACE MANAGEMENT RESISTANCE AND SENIOR MANAGEMENT INTERVENTION

Advocates of TQM stress the central role that senior management must play to promote a corporate quality culture (Jones, 1991: 48; Purdie-Smith, 1991: 18). Hill argues that senior management 'determines quality priorities, establishes the systems of quality management and the procedures to be followed, provides resources, and leads by example' (1991a: 554). Such intervention by senior management may be emphasised because of the failure of previous quality initiatives to maintain the support of senior levels of the managerial hierarchy (Bradley and Hill, 1983: 302; Hill, 1991a: 550). The role of senior management has also been emphasised to overcome the potential recalcitrance of middle management in adopting TQM (Allan, 1991: 41). The resistance of middle managers was a major factor contributing to the failure of quality circles (Brennan, 1991: 23; Hill, 1991b: 404; McGraw and Dunford, 1987: 153).

Senior management may attempt to secure middle management commitment to TQM by devolving responsibility to them for the implementation of this quality management initiative (Hill, 1991a:560; Wilkinson et al, 1991: 30). But such increased involvement may be insufficient to overcome the potential for middle managers to resist total quality initiatives. They may resent the challenge that TQM teams pose to their prerogatives and resist the increased workforce participation in decision-making that TQM proposes (Wilkinson et al, 1991: 28). TQM may not represent a panacea for overcoming potential middle management resistance, and may result in increased tensions within the management hierarchy, as eventuated within the Corporation.

Workplace management responded negatively to the Cheque Mates team's recommendation favouring electronic funds transfer. The finance branch manager argued that this idea had been recommended previously by staff within finance and that the Cheque Mates team were seeking to take the credit for the finance branch's original idea. Workplace management also considered that Cheque Mates had provided insufficient detail on the financial controls required to minimise the potential for fraud and to comply with Treasury guidelines. Electronic funds transfer was also viewed as a waste of scarce resources given the lack of demand from building workers for this service.

Furthermore, management criticised the TQM process team for failing to solicit the views of the guidance team as they developed their proposals. This meant that workplace management were unable to control or predict the recommendations of the Cheque Mates team (Corporation management, 15-26 September 1994). Management considered that process team recommendations did not necessarily represent appropriate courses of action, and that responsibility for accepting or rejecting process team recommendations should rest with workplace management, who were ultimately accountable for the decisions taken by the Corporation (Corporation management, 15-26 September 1994).

In response to these criticisms, the process team decided to undertake more extensive research. The team gained the approval of the manager of the internal audit unit within the Department and the Australian Taxation Office for the implementation of electronic funds transfer. The team also reviewed the research they had undertaken regarding financial controls to ensure that adequate safeguards were in place to avoid the possibility of fraud (Corporation workforce, 27 April 1995). Cheque Mates team members claim that senior management on the NSW DIRETFE Board of Management responded enthusiastically to the electronic funds transfer recommendation and the team's efforts to shorten the time taken to process claims for long-service pay by building workers (Corporation workforce, 27 April 1995).

But the implementation of the electronic funds transfer recommendation did not follow from senior management's approval without problems, and a one year delay occurred between recommendation and implementation. Workplace management blamed the delay in the introduction of the electronic funds transfer recommendation on the Corporation's inadequate computer hardware and software (Corporation management, 1994). The process team members maintained, however, that they were unable to tie management down to a specific deadline for the implementation, being told that it could take anything between twelve to eighteen months. The process team was concerned that workplace management was stalling because they were unwilling to accept recommendations from the workforce (Corporation workforce, 14-5 September 1994).

Concerted pressure from head office senior management sought to overcome the inertia in implementing the electronic funds transfer recommendation. Workforce frustration with the delays in implementing electronic funds transfer filtered back to head office management through the Department's customer service project officers. Senior management stated that electronic funds transfer was not optional, and had to be placed in the Corporation's business plans for the 1994/5 financial year. The Director of the Corporation came under sustained pressure from the Assistant Director of the Department, and other members of the Quality Council, to implement the process team's recommendations. The Director was required to provide status reports and develop a timetable for implementation.

Workplace management were more enthusiastic about the recommendations from the Just Asc team. The Just Asc team's recommendations were placed in the Corporation's business plan, but implementation was delayed, with management again blaming a lack of up-to-date technology. Conversely, the Corporation's workforce blamed the delays on management procrastination and insistence on making alterations to the team's recommendations.

TRADE UNION AVOIDANCE

Trade unions may interpret TQM as a union avoidance strategy, where management seeks to use TQM programs to communicate directly with employees. Management attempts to use TQM to communicate directly to workers has antecedents in earlier experiments with quality circles. In North America, Grenier (1988: 58-60) found that quality circles were used by management to disseminate anti-trade union values and attitudes amongst team members. McGraw and Dunford (1987: 157) found that trade unions were not involved in quality circles introduced into the pharmaceutical division of Reckitt and Coleman's Australian operations and that these quality circles enabled senior management to communicate directly with workers outside of traditional management-trade union channels. Conversely, trade unions in Britain maintained a watchful eye upon the introduction of quality circles and little evidence was found that quality circles reduced workers support for their trade union or the level of their animosity towards management (Bradley and Hill, 1983: 302-7). However, Wilkinson et al found no trade union involvement in British TQM programs they examined, and proposed that:

> 'TQM could marginalise the union as a communication channel, at the same time increase employees' commitment to what are management objectives' (1991: 30-1).

In short, management may seek to use cultural change and TQM team activities to communicate directly to employees and avoid trade union involvement.

TQM process teams were introduced into the Corporation without trade union involvement. The NSW PSA did not have a say in the issues that the teams researched or in the recommendations they developed. As the Department was under tight budget constraints, 'customer service' initiatives had to be either cost neutral or involve cost reductions. As salaries represented the largest item in the Department's cost structure, the NSW PSA feared that the Department's customer service corporate priority represented a down-sizing exercise by stealth. The Union also believed that process team recommendations which raised occupational health and safety, technological change and training issues were also likely to be ignored because of their budgetary implications (NSW PSA DIRETFE Departmental Committee Delegates, 22 March 1995).

CULTURAL CHANGE, TQM TEAMS AND MANAGEMENT FADS

The promotion by management of cultural change via TQM teams may ultimately prove to be short-lived. Gill and Whittle (1993: 282) argue that TQM, in a manner similar to earlier management fads, such as management by objectives, is coming to the end of its 'honeymoon period' and may be fast approaching 'maturity and decline' (Gill and Whittle, 1993: 286).

Not long after the NSW PSA began pressing management for more details regarding TQM teams and 'True North', senior management closed the Customer Service Unit on 30 June 1995, effectively ending the Department's TQM teams strategy. The reasons for its demise

included growing senior and middle management disenchantment with the process teams and the political realities that emerged in the aftermath of the 25 March poll in NSW and the election of a Labor government. By June of 1995 the enthusiasm of senior management for process teams had declined considerably. A recurring criticism was that the teams produced no quantifiable data to demonstrate the improvements in work processes that were resulting from their activities.

The demise of the Customer Service Unit predated the 25 March NSW poll, reflecting the growing hostility of middle-level managers. Since the January 1995 conference to discuss NSW DIRETFE's 'vision', mission and values, which involved middle level management, there had been growing criticism of the customer service initiative and process teams by regional directors. They argued that process teams were cumbersome, lacked flexibility and took too long to develop recommendations. These views ultimately prevailed, and resulted in a downgrading of the emphasis on process teams throughout the Department (Customer Service Project Officers, 16 June 1995).

Customer service was also overtaken by the election of the Labor Government. In the aftermath of the March poll, the Department was restructured into two new departments; the NSW Department of Training and Education Co-ordination (NSW DTEC) and the NSW Department of Industrial Relations. Senior management had sought to ensure that much of the former Department was not carved up and transferred to other departments. Organisational restructuring following the election included the transfer of Public Employer Services, Industrial Relations Consultancy and Workforce Management Centre to the Public Employment Office of the Premier's Department, and the NSW Superannuation Office to Treasury (NSW DTEC, 1995b).

NSW DTEC was also amalgamated with the NSW system of Technical and Further Education, and senior management sought to ensure it was not subsumed within that system. As a result, senior management became more focused on the survival of the organisation than on the promotion of TQM process teams. Senior management established a 'transition team' to respond to these changes and the Customer Service Unit found itself excluded from its deliberations. Senior management changed the emphasis of cultural change away from TQM teams, towards an increased focus on 'process improvement' monitored by the Planning and Review Section of the Department (Customer Service Project Officers, 16 June 1995).

The Carr Labor Government has maintained the former Greiner/Fahey Governments' focus on TQM. Details of the Carr Government's approach were outlined in a memorandum to all ministers (Carr, 1995) and a circular to all Chief Executive Officers (NSW Premier's Department, 1995). Interestingly, neither document mentions implementing TQM through staff involvement in workplace teams.

CONCLUSION

The Liberal/National Government aimed to introduce quality customer service into the NSW public sector through the introduction of Guarantee-of-Service statements, Customer Councils and staff participation in TQM teams. Within DIRETFE this resulted in the dissemination of a new 'vision', mission and set of core values under the guiding principle of 'True North', a metaphor for the Department's search for its 'true direction' on its 'quality journey'. The new 'vision' attempted to generate the commitment of public service workers

nearest to the customer by providing them with increased participation in workplace decision-making through the introduction of TQM teams.

Participation by public service workers in TQM team activities resulted in contradictory outcomes. On the one hand, workers clearly appreciated the opportunity the teams provided to develop recommendations to improve work processes. On the other hand, attendance at team activities was time consuming and gave rise to additional work pressure for team members. Thus, initial workforce enthusiasm for TQM teams waned where team activities were expected to be undertaken on top of regular work tasks.

The paper highlighted conflict within the management hierarchy between a senior management and politically driven strategy of quality customer service and a workplace management strategy of cost-cutting and rationalisation. At a workplace level, quality customer service conflicted with workplace management practices that emphasised reducing the Corporation's workforce and rationalising work processes. Such workplace management practices resulted in considerable job insecurity, stress and increased workloads for the Corporation's declining workforce. This contrasted starkly with the intentions of the quality customer service culture to improve the morale of public service workers.

Intra-managerial conflict intensified within DIRETFE when workplace managers within the Corporation were slow to implement TQM team recommendations they objected to. Workplace managers insisted that it should be up to them to decide whether TQM teams recommendations were appropriate for the Corporation. Workplace management resistance resulted in senior Departmental management intervention. Senior managers on the Quality Council put considerable pressure on the Corporation's Director to expedite the implementation of the electronic funds transfer recommendation.

Although they initially championed the new 'vision' of quality customer service, the support of senior management for TQM teams declined significantly when the teams were unable to demonstrate measurable improvements in productivity, a central managerialist requirement. Senior Departmental managers were also more concerned with ensuring the survival of as much of the organisation as possible in the aftermath of the election of the Carr Labor Government in 1995 than with being a catalyst for promoting TQM teams.

The paper further suggests that cultural change and TQM teams in the public service may be introduced with little trade union consultation. Department management did not involve the NSW PSA in the development TQM teams. The Union was not consulted prior to or during the deliberations of either the Cheque Mates or Just Asc teams, and had no input into the issues that either team investigated.

REFERENCES

Allan, C. (1991), 'The Role of Diffusion Agents in the Transfer of Quality Management in Australia', BComm Honours Thesis, Division of Commerce and Administration, Griffith University.

Barker, J.R. (1993), 'Tightening the Iron Cage: Concertive Control in Self-Managing Teams', *Administrative Science Quarterly*, 38 (3): 408-37.

Blakemore, J. (1989), *The Quality Solution: Adaption of Quality Management to the Australian Culture*, Parramatta NSW, Masc Publishing.

Blyton, P. and Turnbull, P. (1992), 'HRM: Debates, Dilemmas and Contradictions', in P. Blyton and P. Turnbull, (eds.) *Reassessing Human Resource Management*. London, Sage.

Boje, D.M. and Winsor, R.D. (1993), 'The Resurrection of Taylorism: Total Quality Management's Hidden Agenda', *Journal of Organizational Change Management*, 6 (4): 57-70.

Bradley, K. and Hill, S. (1983), ' 'After Japan': the quality circle transplant and productive efficiency', *British Journal of Industrial Relations*, 21: 291-311.

Brennan, M. (1991), 'Mismanagement and Quality Circles: How Middle Managers Influence Direct Participation', *Employee Relations*, 13 (5): 22-32.

Brown, A. (1992), 'Total quality management: selected Western Australian cases', Australian Centre in Strategic Management, Working Paper series no. 21, Faculty of Business, Queensland University of Technology.

Dawson, P. and Palmer, G. (1993), 'Total Quality Management In Australian And New Zealand Companies: Some Emerging Themes and Issues', *International Journal of Employment Relations*, 1 (1): 115-136.

Dawson, P. and Webb, J. (1989), 'New production Arrangements: The Totally Flexible Cage?', *Work, Employment & Society*, 3 (2): 221-238.

Delbridge, R. and Turnbull, P. (1992), 'Human Resource Maximization: The Management of Labour under Just-in-Time Manufacturing Systems', in P. Blyton and P. Turnbull, (eds.) *Reassessing Human Resource Management,* London, Sage. pp. 56-73.

Deal, T. and Kennedy, A. (1982), *Corporate Cultures,* Reading, Addison-Wesley.

Deming, W. E. (1986), Out of Crisis: Quality, Productivity and Competitive position, Cambridge, Cambridge University Press.

Du Gay, P. and Salaman, G. (1992), 'The cult[ure] of the customer', *Journal of Management Studies*, 29 (5): 615-33.

Fisher, T.J. (1990), 'Quality Management and Productivity - A Preliminary Study', *Australian Journal of Management*, 15 (1): 107-28.

Fox, A. (1974), *Beyond Contract: Work Power and Trust Relations*, London, Faber & Faber.

Gill, J. and Whittle, S. (1993), 'Management by Panacea: Accounting for Transience', *Journal of Management Studies*, 30 (2): 281-95. March.

Grenier, G. (1988), *Inhuman Relations*, Temple University Press, Philadephia.

Hill, S. (1991a), 'Why Quality Circles Failed but TQM Might Succeed', *British Journal of Industrial Relations*, 29 (4): 541-68. December.

Hill, S. (1991b), 'How Do You Manage A Flexible Firm? The Total Quality Model', *Work, Employment & Society*, 5 (3): 397-415. September.

Hood, C. (1991), 'A Public Management for all Seasons', *Public Administration*, 69 (1): 3-19. Spring.

Jones, M. (1991), 'The role of the CEO in quality', *Quality Australia*, 8 (3): 48-51. September.

Juran, J.M. (1992), *Juran on Quality by Design: The New Steps for Planning Quality into Goods and Services*. New York, The Free Press.

Kramar, R. (1992), 'Strategic Human Resource Management: Are the Promises Fulfilled?', *Asia Pacific Journal of Human Resources*, 30 (1): 1-15. Autumn.

Mathews, J. (1991), *Colonial Mutual Life Australia: Service Quality Through Self-Managing Teamwork*, UNSW Studies in Organisational Analysis and Innovation, No. 5, Industrial Relations Research Centre, University of New South Wales.

Morgan, C. and Murgatroyd, (1994), *Total Quality Management in the Public Sector*. Buckingham, Open University Press.

Lever-Tracey, C. (1990), 'Fordism Transformed?', *Journal of Industrial Relations*, 32 (2): 179-196. June.

Linkow, P. (1989), 'Is Your Culture Ready for Total Quality?', *Quality Progress*, pp. 69-71. November.

McGraw, P. and Dunford, R. (1987), 'The Strategic Use of Quality Circles in Australian Industrial Relations', *Journal of Industrial Relations*, 29 (2): 150-168.

O'Grady, P. (1992), 'Delighting the Customer: Development of a Strategy for Customer Service Improvement in Sydney Electricity', *Quality Australia*, 9 (1): 20-2.

Ogbonna, E. and Wilkinson, B. (1990), 'Corporate Strategy and Corporate Culture: The View from the Checkout', *Personnel Review*, 19 (4): 9-15.

Ogbonna, E. (1992), 'Organization Culture and Human Resource Management: Dilemmas and Contradictions, in P. Blyton and P. Turnbull, (eds.) *Reassessing Human Resource Management*. London, Sage. pp. 74-96

Oliver, N. and Davies, A. (1990), 'Adopting Japanese-Style Manufacturing Methods: A Tale Of Two (UK) Factories, *Journal of Management Studies*, 27 (5): 555-570.

Osborne, D. and Gaebler, T. (1992), *Reinventing Government: How The Entrepreneurial Spirit Is Transforming The Public Sector,* New York, Plume.

Ouchi, W. G. (1981), *Theory Z: How American Business Can Meet the Japanese Challenge,.* New York, Addison-Westley.

Palmer, G. and Saunders, I. (1992), 'Total Quality Management and Human Resource Management: Comparison and Contrasts', *Asia Pacific Journal of Human Resources*, 30 (2): 67-78. Winter.

Pascale, R. (1985), 'The paradox of 'corporate culture': Reconciling ourselves to socialization', *California Management Review*, 27 (2): 26-41.

Peters, T.J. and Waterman, R.H. (1982), *In Search of Excellence; Lessons From America's Best-Run Companies,* New York, Harper & Row.

Pollitt, C. (1993), *Managerialism and the Public Services: Cuts or Cultural Change in the 1990s*?, Oxford, Blackwell. Second edition.

Sayer, A. (1986), 'New Developments in Manufacturing: The Just-In-Time System', *Capital and Class*, 30: 43-72. Winter

Sewell, G and Wilkinson, B. (1992a), 'Someone to watch over me: surveillance, discipline, and the just-in-time labour process', *Sociology*, 26 (2): 271-89.

Sewell, G. and Wilkinson, B. (1992b), 'Empowerment or Emasculation? Shopfloor Surveillance in a Total Quality Organisation', in P. Blyton, and P. Turnbull. (eds.) *Reassessing Human Resource Management,*. London, Sage. pp. 97-115.

Silver, J. (1987), 'The Ideology of Excellence: Management and Neo-Conservatism', *Studies in Political Economy*, 24: 105-129. Autumn.

Slaughter, J. (1990), 'Management By Stress', *Multinational Monitor*, January/February. pp. 9-12.

Sohal, A.S., Ramsay, L. and Samson, D. (1992), 'Quality Management Practices in Australian Industry', *Total Quality Management*, 3 (3): 283-300.

Swiss, J.E. (1992), 'Adapting Total Quality Management (TQM) to government', *Public Administration Review*, 52 (4): 356-62.

Wilcox, T. (1991), 'Making Quality Stick - Quality and the Change Process', *Quality Australia*, 7 (4): 18-21. January.

Wilkinson, A., Allen, P. and Snape, E. (1991), 'TQM and the Management of labour', *Employee Relations*, 13 (1): 24-31.

Wood, S. (1989), 'The Japanese Management Model: Tacit Skills in Shopfloor Participation', *Work and Occupation*, 16 (4).

NSW Government

Carr, B. (1995), 'Total Quality in the NSW Public Sector', Memorandum No. 95-49 (Memorandum to all Ministers), 19 December.

Fahey, J. (1994a), 'Development of Guarantee of Service By Agencies for 1994', Memorandum No. 94-3, 14 February 1994.

Fahey, J. (1994b), 'Quality Customer Service', Memorandum N. 94 - 45 (Memorandum to all Ministers), 22 December 1994.

Fahey, J. (1994c), 'New South Wales Quality Customer Service Statement: Building Quality into the New South Wales Public Sector', A Statement by John Fahey, Premier of New South Wales, December 1994.

Greiner, N. (1992), 'New South Wales Facing The World', Premier New South Wales Government.

Office of Public Management (n.d.), *Towards Best Practice: Successful Customer Service Strategies in the NSW Public Sector*, NSW Premier's Department.

Premier's Department NSW (1995), 'Implementation of Total Quality', Circular No. 95-25 (Circular to all Chief Executive Officers), 19 December.

NSW Department of Training and Education Coordination (DTEC)

NSW DTEC (1995a), DTEC Strategic Plan 1995 - 1998. 7 June.

NSW DTEC (1995b), E-Mail from Director-General to Staff, 7 April.

Interviews

1 Senior DIRETFE Manager, 27 July 1994.

2 DIRETFE Customer Service Project Officers, 27 July 1994, 9 January 1995 and 16 June 1995.

3 Workplace Managers, 15 September 1994.

6 Process Team members and 3 other Buildcorp workers, 14-15 September 1994 and 27 April 1995.

PSA Industrial Officer, 2 November 1994.

2 PSA DIRETFE Departmental Committee Delegates, 22 March 1995.

For example, within Australia, the introduction of TQM teams at Colonial Mutual is credited with producing an 'avalanche of new ideas' or 'self initiated TQM' (Mathews, 1991: 19).