

9. EQUITY

9.1 DISCRIMINATION

ACCI POLICY PRINCIPLES:

Employers accept the general principle of equal opportunity which underpins discrimination law.

Discrimination law must however represent a balance of interests and must necessarily be qualified and targeted to specified conduct rather than impose far reaching or general unspecified duties.

POLICY AUDIT & ANALYSIS:

- Employers are subject to both federal and state anti-discrimination laws. Employers do not seek to conduct business operations or employment practices on a discriminatory basis. However, the regulation of employment practices by discrimination law raises multiple issues of public policy that can, if the law fails to properly take into account the interests of industry, unduly and inappropriately impede legitimate business decisions and employment practices.
- Multiple regulatory jurisdictions create multiple regulatory obligations. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the *Workplace Relations Act 1996* (eg the form of awards, unlawful dismissal etc). This proliferation of obligations can be confusing and challenging to employers.
- There have been reforms in this area since 1996. Reforms appear to have emphasised improving processes and the operation of various bodies administering law in this area. Changes to the foundations of policy (ie the existence of redress for discrimination, and the statutory prohibition of discrimination) have not been pursued and do not appear set to be pursued.
- The Human Rights and Equal Opportunity Commission (HREOC) was considerably reformed in 1999, including the transfer of certain powers from HREOC to the Federal Court and Federal Magistrates Service, and from individual Commissioners to the President.
- The Equal Opportunity for Women in the Workplace Agency replaced the Affirmative Action Agency in 1999. This included replacing the focus on affirmative action under the previous legislation.
- During this parliamentary term, the Federal Government plans to introduce a national age discrimination law. The potential for significant overlap with state laws, as well as the federal and state workplace relations systems, exists. Whilst the Federal Government has – appropriately – indicated that such a law will not compromise age based youth wages, other areas of employment practice and business activities are potentially adversely affected by such a proposal.
- Unlawful discrimination is not an acceptable human resource practice, does not constitute an appropriate basis for human resource decision-making, and is contrary to the interests of business.
- Direct discrimination based on the various prohibited grounds long recognised in state and federal discrimination law should be prohibited.

- Anti-discrimination law should have a clearly delineated scope of operation, and provide specifically identifiable obligations and avenues for redress. General anti-discrimination goals/objects should only be included in legislation where supported by detailed operational provisions that properly support compliance.
- Anti-discrimination law should generally be contained in dedicated anti-discrimination statute or an employment statute, unless there is a requirement to address it in other legislation affecting employment.
- In the context of employment, there is a sound basis to have employment tribunals continue to be solely responsible for the variation of the industrial instruments they make, including in regard to discrimination.
- Workplaces are not appropriate venues for experimentation in social policy. In framing law, it should be recognised that private sector workplaces are private businesses where work is performed under private contracts of employment.
- Change to employment arrangements, including moves into agreement making without union involvement, should not constitute any form of prohibited discrimination unless there was, or should reasonably have been, a proven intention to discriminate.
- The administration of anti-discrimination law should not be solely or even substantially based on regulation and prosecution. Effective education, problem solving and voluntary compliance can play an important role in the administration of this law.
- Redress based approaches must be complemented by appropriate resources to encourage and promote best practice, including through the production of guidelines and the active promotion of best practice.

RECOMMENDATIONS:

Objective 1: Discrimination law should be clearly expressed so that employers can readily identify their obligations, whether under one or multiple regulatory systems.

Objective 2: Employers should be protected from ‘double jeopardy’. Discrimination law should not permit multiple claims in different jurisdictions based on the same conduct. Discrimination law should not permit claims in discrimination tribunals which are within the lawful jurisdiction of industrial tribunals.

Objective 3: Discrimination law should not, other than in limited circumstances, apply the concept of ‘indirect discrimination’ to employment and workplace policy and practices. The concept of indirect discrimination does not provide the regulatory certainty required by employers, especially small business.

Objective 4: Any proposed extensions of discrimination law to include new grounds, or to extend/vary the application of existing law, should be examined under the principles of the proposed Employment Regulation Standard (ERS).

Objective 5: Discrimination law should not impede necessary business decisions, such as decisions to employ, to not employ, to advertise for employment, to discipline or terminate employment on lawful grounds, to undertake redundancies and restructuring, and to measure or reward employee productivity or performance.

Objective 6: There should be a greater emphasis on education, promotion, and problem solving, and less on sanctions in the implementation of discrimination law in employment.

9.2 SUPPORTED WAGES

ACCI POLICY PRINCIPLES:

The supported wage provisions in federal awards were endorsed by ACCI in 1994, and ongoing variations have generally proceeded by consent since 1994.

ACCI and members have also been closely involved in a variety of employment programs and measures to support the employment and employability of persons with disabilities.

POLICY AUDIT & ANALYSIS:

- The existing system has successfully facilitated the creation of wages to support the employment of persons with disabilities, and their inclusion in federal and state awards. It has operated largely by consent between ACCI and the ACTU.
- The standard supported wage clause is prescriptive. However, it is arguable that employment of persons with disabilities can be distinguished from the wider imperatives for awards, and that this is one of the rare areas where appropriate prescription is warranted.
- It may be appropriate for employers to apply for the inclusion of supported wage provisions in awards in which they do not currently appear. The existing operation of the supported wage system should be reviewed, and consideration given to a single Supported Wage Award, or spreading the existing provisions into more awards in substantively similar terms.
- Ongoing variation of the supported wage clause should generally be supported consistent with established practice.
- Employment for persons with disabilities raises unique issues. In many cases, agreement making may not be feasible.
- Research on the scope for agreement making with persons with a disability may be appropriate in the future, including an identification of unique issues raised.
- It may be appropriate for the Commonwealth to undertake research, and to provide resources to assist employers in making agreements for persons with disabilities.
- Impediments to the making of agreements with persons with a disability should be re-examined, including provisions that whilst ostensibly protective, serve to make agreement entry difficult (eg a requirement for the appointment of legal decision makers for persons with disabilities seeking to enter agreements).

RECOMMENDATIONS:

Objective 1: Employers should have the maximum possible support in the employment of persons with disabilities. Regulatory impediments to such employment should be eliminated wherever possible.

Objective 2: Minimum wages for the employment of persons with a disability should, where appropriate, continue to reflect the unique circumstances that often attach to this employment, including through special wages structures.

Objective 3: Workplace bargaining for persons with a disability should be examined and if appropriate allowed for, taking into account the special circumstances of the relevant employer and employees.

9.3 GENDER PAY DISPARITY

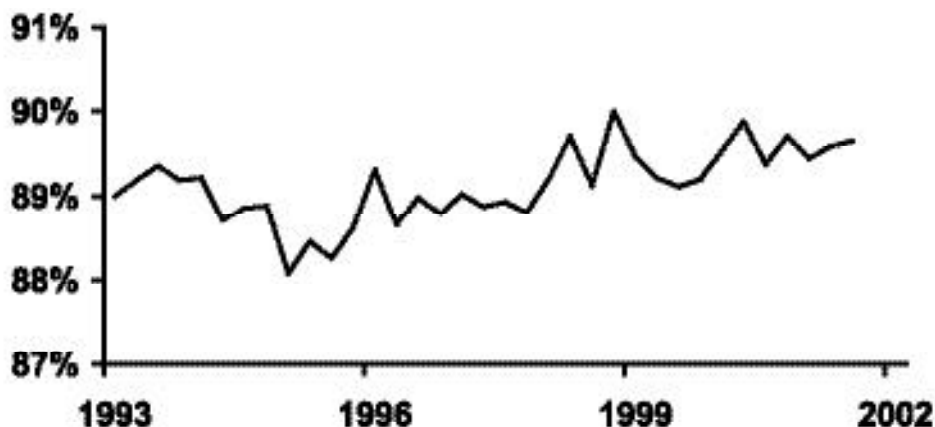
ACCI POLICY PRINCIPLES:

“The minimum standards should comprise:... equal pay for men and women workers for work of equal value.”⁷⁶

POLICY AUDIT & ANALYSIS:

- Female AWOTE (full-time) is currently 89.6% of equivalent earnings for all employees.⁷⁷
- This is broadly equivalent to the average since January 1997 (89.3%), and during the life of the previous federal government (88.1%). There has been no decline in measured gender pay outcomes following workplace relations reforms after 1996.
- The *Workplace Relations Act 1996* removed scope to make additional minimum wages orders, and amended the making of equal remuneration orders.
- Equal remuneration orders have not been effective, but have cost employers considerable time, money and negative publicity (eg the HPM case⁷⁹).
- The *Workplace Relations Act 1996* continues to exceed ACCI policy in this respect. Division 2, Part VIA may not be an appropriate for inclusion in the *Workplace Relations Act 1996* in the longer term.
- Ongoing changes to minimum wages affecting women must be properly balanced against any negative consequences for individuals, workplaces and industries.
- Amendments since 1996 provide improved scope for agreement making to address gender pay issues (AWAs and s170LK agreements).
- State pay equity inquiries (NSW and Queensland) have led to some prescriptive outcomes at odds with the safety net role of awards, and the importance of bargaining.

Ratio of Female to All Persons Earnings 1993-2002⁷⁸



- Using awards as the vehicle to drive increased wages in female industries alone is likely to have a negative impact on employment and productivity. Work value and gender pay outcomes should not be pre-eminent considerations in increasing centralised wage outcomes above the existing safety net.
- Improving the skills, employability, productivity and bargaining capacity of female employees will continue to be the best way to improve relative gender pay outcomes into the future.
- Industry wide, comparable worth comparisons between occupations and competency-based wages are inherently prescriptive, subjective and at odds with the single minimum safety net role of awards.
- Categories of male and female employees at statistical extremes should not unduly distort discussion of gender pay outcomes. Changes to minimum award rates affecting comparatively lower income earners cannot be justified by averages distorted by higher earning and non-award employees (both male and female).
- Continued prohibition of direct discrimination is also relevant (see 9.1).

NOTES

⁷⁶ ACCI Labour Relations Policy

⁷⁷ ABS Cat 6202, Table 2 – Average Weekly Ordinary Time Earnings

⁷⁸ ABS Cat 6202, Table 2 – Average Weekly Ordinary Time Earnings

⁷⁹ [Print P9210] and others

RECOMMENDATIONS:

Objective 1: Equal minimum conditions for men and women should continue to be the primary regulatory measure to further gender pay parity.

Objective 2: Workplace bargaining has the scope to improve earnings in female dominated enterprises. An increased emphasis on bargaining and greater options for employees and employers particularly in female dominated industries, are necessary to deliver the flexibility required to address gender pay issues.

9.4 WORK AND FAMILY

ACCI POLICY PRINCIPLES:

ACCI supports a flexible workplace relations system that provides increased scope to address work and family issues.

ACCI Best Practice Paper No.7 (September 2000) on work and family, sets out a number of key points including:

- The importance of employers not adopting dismissive attitudes to work and family considerations, and the importance of life outside the workplace.
- Not all employers can accommodate the costs and complication inherent in changing work conditions. Realism is important in this area.
- There is scope for simple common sense approaches to the accommodation of work and family, emphasising flexibility and informality.

POLICY AUDIT & ANALYSIS:

- Work and family initiatives are receiving considerable attention by Australian governments and in industrial, public and academic debate.
- As with many issues in the interaction of gender and employment, there are ongoing attempts to portray this as an area in which a regulatory approach and the creation of new duties on employers are 'overdue'. Yet, in the context of a decentralised bargaining system, regulatory options are generally not the appropriate public policy response to changes in the labour market or to broader community attitudes about work and family.
- Reforms to the workplace relations system, including additional agreement options, award simplification and an emphasis on facilitation have contributed to employers' and employees' capacity to pursue agreed approaches to this issue. Some employers have introduced a

variety of interesting, and effective work and family measures:

“Over the last two decades, measures to assist workers with family responsibilities have become a more pronounced feature of the Australian workplace relations system...The economic costs to women of having children have diminished significantly through the 1990s partly because women are returning to work more often and more quickly...The range of government activities to promote family friendly workplaces is contributing to the creation of a positive climate, with workplaces becoming more flexible and family responsive than analysis of the formal regulatory system might suggest.”⁸⁰

- Awards were varied during the 1990s to include various options for family and carer's leave. Some of these matters proceeded with employer consent, and ACCI successfully influenced the form of standard award clauses on these issues.

- However:
 - A wide variety of industrial developments, including regressive claims for additional ‘one size fits all’ award standards, continue to be advanced with reference to ‘work and family’.
 - There are persistent calls for prescriptive anti-employer duties based on a claimed necessary balance between ‘work and family’.
- Unduly positive generalisations about the business benefits of work and family measures should be avoided.
- Benefits from any given work and family initiative will not be universal, and what works for one workplace will not work for another. There are considerable differences in the benefits work and family geared initiatives can offer different employers. Each employer must have the right to undertake a cost benefit analysis of any work and family initiative based on their business.
- A primary consideration must be to not impose new standards or benefits which would lead to disincentives to the employment of women.
- Part time, casual, flexible, contract and other non-standard work arrangements often play an important to individuals’ efforts to personally organise their personal work and family arrangements. The legitimacy of such employment options must be stressed, and impediments to accessing them should be minimised.
- The imposition of prescriptive ‘work and family’ initiatives through awards is not appropriate and should be opposed. One size cannot fit all in this area.
 - Award approaches will inherently lack the balance and workplace focus of agreed approaches.
 - Award approaches to such issues often involve undesirable levels of prescription and detail. Such issues should best be addressed at an enterprise level.
- Whilst literature often refers to ‘balancing work and family’, work and families are not inherently oppositional. The contribution of work to family and community life should be actively emphasised into the future. Whilst there may be some changes in the workforce, it is not accepted that these inherently negatively impact on family life, nor reduce family engagement.
- It is also important to balance the debate about ‘work and family’ with the parallel debate about ‘working hours and incomes’. The reality is that some employees trade off shorter hours for longer hours and higher incomes, whilst other employees trade off potential higher earnings (from longer hours and overtime) for increased family and leisure time. These elements of the debate highlight the importance of choice and flexibility in policy responses to ‘work and family issues – and an avoidance of unnecessary prescription and set policy agendas.

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⁸⁰ Department of Family and Community Services & Department of Employment and Workplace Relations (2002) Australian Background Report to the OECD Review of Family Friendly Policies, August 2002

RECOMMENDATIONS:

Objective 1: Agreements (both registered and unregistered) are the appropriate avenues for employers and employees to pursue work and family balance initiatives. Encouraging and supporting options for effective and accessible workplace and individual agreement making are the primary supports the system can offer employees in balancing work and family.

Objective 2: Industry and governments should continue to promote consensual, non-prescriptive approaches to work and family. Best practice and information sharing should continue to be emphasised. Policy makers and arbitrators should not adopt 'one-size-fits-all' approaches.

Objective 3: Recognition should continue to be given to best practice work and family initiatives through annual Work and Family Awards.

9.5 MATERNITY BENEFITS

ACCI POLICY PRINCIPLES:

“The minimum standards should comprise... twelve months’ unpaid parental leave after twelve months’ continuous service.”⁸¹

“ACCI Council notes the ongoing debate concerning maternity leave, and the extent to which enterprise agreements have supported the general award entitlement to 12 months’ unpaid maternity leave.

Council affirms that neither the various enterprise agreements nor the general international position provide support for claims to introduce across the board paid maternity or parental leave.

Council also notes the extensive maternity benefits already provided by the social security system. If the current arrangements for maternity leave and benefits are to be varied, this should be done through a review of the social security safety net rather than through imposing new costs on employers.”⁸²

POLICY AUDIT & ANALYSIS:

- The existing system has allowed for the creation and application of a universal unpaid entitlement of up to 12 months parental leave, both through awards and in legislation at the federal and state level.
- Employers have expressed extreme concern at a foreshadowed ACTU test case in the AIRC to seek to extend, on an economy wide basis, current unpaid maternity leave entitlements from 12 months to up to 3 or 5 years, and other claims. The compulsory extension of the unpaid parental leave standard in this way would have obvious severe cost and organisational implications for employers and would act as a disincentive to the employment of women.
- There is considerable current debate on the creation of some form of paid maternity entitlement. To date, this has been framed by HREOC in terms of a government rather than employer funded entitlement, which employers may choose to augment through bargaining.
- The ACCI position in the ‘paid maternity leave’ debate reflects the following key considerations:
 1. ACCI supports sensible and affordable measures agreed in the workplace, and by governments which contribute to an improved balance between work and family.
 2. The most important of those measures is a flexible workplace relations system that does not impose ‘one size fits all’ rules.
 3. The primary contributor to women balancing employment and maternity is the provision of leave. It is the leave that provides the choice for women to resume a career post maternity.
 4. Australian employers already provide 52 weeks unpaid leave for maternity. This is well in excess of international standards.
 5. ACCI supports the longstanding Australian practice of the Commonwealth providing affordable benefits for maternity,

parenting and families through the social welfare system.

6. ACCI does not support compulsory employer funded paid maternity leave for businesses of any size. It is not an employer's responsibility to fund parenthood or population policy. No credible international standard imposes that burden directly on employers. Such an approach may be counterproductive to the employment of women.
7. A better alternative is to review existing Commonwealth social welfare funding for maternity, parenting and families with a view to examining whether such payments should be restructured to include a national government funded maternity benefits scheme. Childcare and re-training needs should also be examined by governments.
8. If a review of existing government payments leads to a government funded maternity benefits scheme, the scheme must be affordable to the budget, and must be accompanied by changes to industrial laws that would prevent the industrial

system doubling-up with compulsory paid maternity leave obligations on employers above any general standard.

9. ACCI supports the rights of employers and employees in individual workplaces to negotiate work and family measures through mutually beneficial workplace agreements, so long as any agreement is confined to that business and its staff.
10. Through existing personal and business taxation obligations, employers contribute to funding maternity, parenting and family benefits paid by the Commonwealth via the social welfare system.
11. The foreshadowed ACTU test case claim on 'work and family' highlights and validates warnings by ACCI of the potential for union initiated 'top-up' claims against employers for paid maternity leave in industrial tribunals.

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⁸¹ ACCI Labour Relations Policy

⁸² ACCI Council October 2001

RECOMMENDATIONS:

Objective 1: The debate on a paid maternity benefit should not lead to any compulsory change in the period for unpaid leave or the conditions that attach to it.

Objective 2: There is an ongoing debate regarding paid maternity leave in Australia. Under no circumstances should employers have imposed upon them any mandatory burden to fund paid maternity leave.

Objective 3: Any government response to the issue of paid maternity leave must recognise that under Australia's unique workplace relations system employers remain at risk of funding compulsory paid maternity leave via compulsory arbitration of union top-up claims in industrial tribunals. Government policy must, at a minimum, quarantine employers from the risk of compulsory paid maternity leave – whether directly imposed by governments or indirectly imposed by union claims in industrial tribunals.