

2. FRAMEWORK FOR CONSIDERATION

Introduction

[2.1] The ACTU contends that:

- a. The ACTU Applications are consistent with the Commission's objects, within its powers, and appropriate, taking into account the Commission's obligations.¹
- b. The ACTU applications are consistent with the objects of the *Workplace Relations Act 1996*.²
- c. The ACTU applications are consistent with Section 90 of the *Workplace Relations Act 1996* and with the public interest as defined therein.³
- d. The ACTU applications are advanced by a consideration of the proper interaction between the *Workplace Relations Act 1996* and the *Sex Discrimination Act 1984*.⁴
- e. The ACTU applications are advanced by a consideration of the proper interaction between the *Workplace Relations Act 1996* and Australia's responsibilities (in particular s.93A of the *Workplace Relations Act 1996*).⁵

[2.2] As is developed throughout this outline in relation to specific issues, ACCI directly contests each of the preceding ACTU contentions. When properly considered the statutory matters addressed in Section 1 of the ACTU outline do not assist the ACTU claims as purported, and in many cases mitigate strongly in favour them not being considered or not being granted.

Presumption in favour of bargaining / against additional award regulation

[2.3] The emphasis on / primacy of bargaining (and workplace determination) under the *Workplace Relations Act 1996* creates a positive presumption against

¹ ACTU Outline of Contentions, 30 April 2004, p.3

² ACTU Outline of Contentions, 30 April 2004, [1.2]. p.4

³ ACTU Outline of Contentions, 30 April 2004, [1.5]. p.5

⁴ ACTU Outline of Contentions, 30 April 2004, [1.7]. p.6

⁵ ACTU Outline of Contentions, 30 April 2004, [1.9]. pp.6-7.

additional award regulation, and in particular against the inclusion in awards of new and novel areas of award prescription.

[2.4] The statutory schema clearly places primacy on the regulation of employment being determined by agreement at the workplace level. This is only to be displaced to an extent clearly made out and necessary to establish a safety net of minimum conditions, in a response to demonstrable need or to some demonstrated failure to secure outcomes through bargaining – again, particularly for claims to extend the matters regulated by the award safety net.

[2.5] Various sections of this outline show that the ACTU has failed to demonstrate to the Commission that either:

- a. A need for inclusion of the relief sought in an award safety net operating across the economy and all industries.
- b. That there is some failure of bargaining or a widespread rejection of claims relating to the matters sought (various of its witnesses show the opposite).
- c. (In fact) that these matters are being sought to be pursued through bargaining at all.

[2.6] There is a presumption in the *Workplace Relations Act 1996* in favour of the matters raised by the ACTU being settled by agreement – the ACTU has not engaged this fundamental systemic consideration, and has certainly not provided the Commission to displace this presumption on any merit basis.

Awards as a safety net

[2.7] Directly related to the preceding, the ACTU claims seek to regulate actual outcomes in workplaces with either a level of prescription, or at a level of entitlement, which is fundamentally inimical to the concept of awards operating as a safety net.

Ambit, allowability and capacity for award regulation

[2.8] The ACTU makes a very specific contention as to the allowability of its claims and their fundamental capacity to be included in awards:

- 1.4 The ACTU Applications relate to industrial matters pertaining to the relationship between an employer and a group of employees. The elements of the application are allowable matters or are incidental and necessary for the effective operation of the awards.

[2.9] This contention, and the allowability and capacity for award regulation of each of the ACTU claims have been very closely tightly examined.

[2.10] When submitted to proper scrutiny, this ACTU contention is not made out in regard to significant parts of its case. Specifically:

- a. Various of the ACTU claims exceed the ambit of the industrial disputes upon which awards of this Commission (and the vehicle awards in this matter in particular) must rest. There is no ambit for major parts of this case wither for all awards or for many of the vehicle awards (Section 5 of this outline addresses this in more detail, and outlines the consequences for this case of the ambit failures in regard to the ACTU claims).
- b. A variety of the ACTU claims additionally do not relate to industrial matters (in whole or in part). As a matter of fundamental Constitutional power, and consistent with 100 years of precedent upon which this jurisdiction rests, they may not be included in awards of this Commission.
- c. A variety of the ACTU claims are additionally not allowable award matters in whole or in part. A proper consideration of the claims against the *Workplace Relations Act 1996* and precedent regarding the allowable award matters in particular, dictates that various claims cannot be regulated through the award system.

Proposals inimical with contemporary award quality

[2.11] Distinct from legal or threshold issues, it is appropriate that each of the ACTU claims is also subjected to an analysis of its likely practical impact and the quality of award regulation it would lead to.

[2.12] In substantial part, the ACTU claims fundamentally fail these tests. In particular when subjected to a proper analysis against the standards for award making in s.143 of the *Workplace Relations Act 1996* – the claims fail in this regard.

[2.13] This is not an abstract consideration, nor one the ACTU can simply ignore. The *Workplace Relations Act 1996* demands that awards have a certain character, and meet certain qualitative standards to perform their role as a safety net in the contemporary system. In particular, this constitutes a strong presumption against the regulation of procedures and processes to address day to day workplace relations issues in workplaces, which weighs against the ACTU claims.

International Instruments

[2.14] The relevance to this case of Australia's obligations under International instruments including ILO Conventions ratified by Australia (both those expressly named in provisions of the *Workplace Relations Act 1996* and others), and other UN Conventions cited by the ACTU, is addressed in Section 7 of this submission.

[2.15] This shows that a proper consideration of each of the international instruments / standards cited by the ACTU does not advance the ACTU claim. In particular, as with so much of the ACTU contentions, a consideration of this material does not in fact assist the Commission in arbitrating between the ACTU's rights and obligation approach and the ACCI/NFF alternative based on continued evolution of agreed / consensual approaches.

[2.16] It is a specific contention of ACCI/NFF that nothing in the Australia's international obligations, nor the areas where they are addressed in domestic law (including the *Workplace Relations Act 1996*) compels or advances the ACTU claim over that proposed by ACCI/NFF. Further contentions on this (including in particular the proper meaning and context of provisions such as s.93A of the *Workplace Relations Act 1996* will be further developed during the course of these proceedings.

Discrimination law

[2.17] The ACTU makes detailed reliance on anti discrimination law, both in Section 7 of its contentions, and as a statutory consideration⁶.

[2.18] The relevance of this material to this case is addressed in detail in Section 8 of this submission.

[2.19] This material shows that:

- a. Australia fulfils its international obligations in regard to anti-discrimination without any need for additional action through the workplace relations/ award system.
- b. Anti-discrimination law is inherently by its nature, and with reference to Australian experience, a matter for legislation. How Australia implements

⁶ ACTU Outline of Contentions, 30 April 2004, [1.6]. p.5

its obligations through the creation of remedial jurisdictions is not properly a matter for these proceedings.

- c. The ACTU's contentions on the importance of importing discrimination law concepts into workplace relations regulation are flawed. Such a case is not, and could not be, made out.

A short note on the objects

[2.20] The ACTU seeks to ground its claims in the objects provisions of the *Workplace Relations Act 1996* (s.3), apparently ignoring:

- a. The detailed and directly provisions of the Act under which awards are made and varied, and under which the system as a whole operates.
- b. The wider statutory schema embodied in the Act.

[2.21] The ACTU seeks to ground its claims in the objects provisions of the *Workplace Relations Act 1996* (s.3), apparently ignoring the proper role of objects provisions in statutory interpretation.

[2.22] The observations of Mason J in *L & S Lake City Freighters Pty Ltd v. Gordon and Gtoch Ltd*⁷ are relevant:

"... to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context.....Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

[2.23] The Commission has also stated that in addition to the objects in s.3 of the *Workplace Relations Act 1996*, it must also consider the objects of the part which is in dispute⁸. This is relevantly the objects set down in section 88B(2) of the Act.

[2.24] This is relevant in particular to the ACTU's reliance on anti-discrimination and international law.

⁷ (1985) 60ALR 509 at 514 Mason J

⁸ SENIOR DEPUTY PRESIDENT WILLIAMS National Tertiary Education Industry Union S0688 Similar approach adopted by Commission Laing in PR2803

A proper understanding of Sections 93 and 93A of the Act

[2.25] Principles of statutory interpretation only fall to be considered when a provision or section is ambiguous. Section 93 and section 93A are not ambiguous. They clearly set out that the Commission is to have regard to principles embodied in the [various Acts] relating to discrimination in employment. Nor is section 93A particularly ambiguous: regard must be had to the principles in the convention, in particular -

- a. Preventing discrimination against workers who have family responsibilities.
- b. Helping workers reconcile their employment and family responsibilities.

[2.26] There is both a preventative and positive role in achieving balance. The Commission is required to have regard to legislative provisions (not academic or unsettled areas of anti discrimination law) as set out in the Acts cited.

[2.27] The positive requirement is to assist workers in achieving balance. It is not to place one element above the other and the obligation is to assist workers, not to ensure positive outcomes. That is more properly the role of government.

[2.28] In considering the objects of the legislation and Part VI, regard must be had to the fact that it is section 93 and 93A that are the operative provisions. The objects of the Act and the part are only guides to assist in interpretation and do not in themselves impose an additional positive requirement on the Commission.

[2.29] ACCI/NFF would contend that there is no ambiguity in these provisions. In the event that there is, then the objects of the Act are directional guides to interpretation and application.

[2.30] Thus, to contend that anti discrimination legislation sets a floor, not a ceiling, on the Commission's role, severely overstates the position.

[2.31] Sections 93 and 93A must also be considered:

- a. in light of the overall scheme of the Act, and
- b. The objects of the Act as a whole as set out in their entirety in Section 3.

- c. In light of the objectives of the *Workplace Relations Act 1996* in relation to awards - to set out minimum standards and consequently, a system where awards functioned as a safety net.

[2.32] It is not open to the ACTU to elevate one of the sub-objects of the Act over the others. Regard must be had to all of the objects of the Act as set out in Section 3.

[2.33] Regard must also be had to the provisions of section 88B(2) which sets out the objectives of that part of the Act.

[2.34] The Commission must ensure the need to provide both fair standards and the enunciated economic outcomes. Section 88B(3) articulates the factors the Commission must have regard to in ensuring the results under section 88B(2).