7. INTERNATIONAL STANDARDS

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Introduction

[7.1] In its outline of Core Contentions, the ACTU has referred to four international Conventions which it argues support its claims at paragraph 1.3:

a) ILO Convention (No. 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities;

b) ILO Convention (No. 111) Concerning Discrimination in respect of Employment and Occupation;

c) UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);

d) UN Convention on the Rights of the Child (CRC).

[7.2] Consideration of Australia's international obligations does not assist the ACTU's specific claims in this matter as claimed in the ACTU's outline of core contentions. International Conventions quoted are either of little direct relevance or have been misinterpreted to the extent that they fail to support the specific claims of the ACTU. Whatever use on ascribes to them in this proceeding, or however one characterises them, they fall far short of providing any basis in fact or in law that would constitute a basis for granting the regulatory claims sought.

[7.3] The ACTU has failed to demonstrate both where Australia is currently in breach of its obligations under these Conventions or where concession of the ACTU claims will assist in meeting international obligations. Consequently the ACTU has under prosecuted its case in respect of International obligations.

[7.4] In Australia, ratification of International Treaties and ILO Conventions does not give force of national law to the terms of the individual Convention until the terms of the Convention in question has been expressly incorporated into domestic law by Parliament. The extent of such ratification and the express terms of such, where set down in the *Workplace Relations Act, 1996* determine the extent of the legal status of international instruments in Australian law as it applies to the award safety net provisions. Thus for the purposes of an award test case, it is the provisions of the *Workplace Relations Act, 1996* that have legal effect in this respect.

[7.5] The incorporation of such obligations into the *Workplace Relations Act* must be considered in the context of such express terms and in conjunction with the overall objects of the legislation and the scheme of the Act as a whole.

Relevance generally

[7.6] In considering the relevance of International Conventions on this matter, the Commission needs to take account of the following issues:

a) Whether or not the individual Convention has been ratified by Australia in order for the State to incur international obligations in that respect. This does not mean that the provisions are implemented into domestic law.

b) Whether or not the individual Convention or individual articles in the Convention have been given the force of federal law through express implementation by the Federal Parliament and the extent to which such express implementation has taken place.

c) Whether or not the *Workplace Relations Act, 1996* makes specific provision for such Convention and the express terms of the provision contained in the Act.

[7.7] As each of the above Conventions has been ratified by Australia, the first question does not amount for consideration in their respect. However it should be noted that in the ACTU's expert witness report[1], reference is made to a number of other international conventions which have not been ratified by Australia and are thus not relevant in the present context.

Section 3 of the Workplace Relations Act 1996

[7.8] Section 3 of the Workplace Relations Act 1996 set outs the principal objects of the Act. The ACTU has argued at 1.2(i) and 1.7 that granting its applications will meet the objects of the Act at sections 3(i), (j) and (k). However it must be pointed out that the object in section 3 are the objects in total and the Commission is required to take each of the subsections in section 3 into account in order to meet the overall object of "a framework for a co-operative workplace relation which promotes the economic prosperity and welfare of the people of Australia." Therefore it is not possible nor permissible to consider the section 3(i),(j), (k) objectives in isolation without consideration of the additional objects set out at (a) to (h). The total effect of the applications must be considered in light of all the section 3 objects.

[7.9] In addition, s15AA of the Acts Interpretation Act (Cth) 1901 sets out a purposive approach to the interpretation of legislation. Pearce and Geddes point out that objects clauses are the modern version of the preamble. They also point out that an objects clause will not be alone in representing the objects or purposes of legislation[2]. Accordingly ACCI would contend that the objects clause provides direction for the overall interpretation and application of legislation, rather than substantive obligations in their own right.

[7.10] Consideration must be given to the overall purposes of the Act as considered in both the objects clauses in total and the statutory framework as laid down by the Act. The *Workplace Relations Act, 1996* and its predecessor, *Industrial Relations Act, 1993* where s93A was first incorporated, set down major changes in the award making scheme in Australia and was designed to promote a move to enterprise bargaining, away from the paid award system. Consideration of

[1] Murray (2004) ACTU III, p 371-449 at 3.3 p388 and 3.6.2 at 392. Convention No. 183 has to date been ratified by 9 countries. Convention No. 175 has been ratified by 10 countries.
[2] Statutory Interpretation in Australia, 5th Edition, Pearce and Geddes at page 122.

international obligations as incorporated into that legislative framework must also bear in mind the overall purposes and scheme of such legislation as well as the express terms of the objects clause.

Express Ratification of International Obligations

[7.11] The use of the External Affairs power in section 51(xxix) of the Constitution has been sometimes controversial and the subject of a series of High Court decisions in the 1980s. In *Victoria v. Commonwealth*[3] the High Court affirmed its view of the legislative power being a broad one but also gave important clarifications as to the nature and extent of the power. In particular, it upheld the view that a treaty obligation may validly be given effect in any one of a number of different ways, the law in questions need only be "reasonably capable of being considered appropriate and adapted to implementing the treaty"[4]

[7.12] Furthermore, the Commonwealth Government may also, to some extent, pick and choose how much of a treaty it wishes to implement, since "deficiency in implementation of a supporting Convention" will only be fatal to the validity of a law where "the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or its is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention"[5].

[7.13] Accordingly it is important to note that it is for the Parliament to adopt a Convention and expressly ratify it into Australian law as it sees fit. It is up to Parliament to decide how it gives effect to our international obligations, it is not an open ended consideration as the ACTU would have us believe.

[7.14] As a result of this, distinctions must be drawn between Conventions which are expressly named in the *Workplace Relations Act, 1996* and those which simply fall within the overall objectives of section 3.

[7.15] Furthermore, in considering the express provisions of Conventions, regard must be had for the express terms of the provisions such as section 93 and section 93A and the nature of the obligation on the Commission. Where Conventions have been specifically provided for in the substantive provisions of the Act such

[3] (1996) 187 CLR 416
[4] at 487

as section 93A, the object clauses as set out down in section 3 and section 88B are guides to the purposes of the legislation, rather than operative provisions in their own right.

How Australia meets its obligations

[7.16] Notwithstanding the above, examination of the most recent reports[6] of Australia to the ILO in respect of Convention 111 and 156 reveal that Australia is in compliance with these Conventions in respect of the areas the subject matter of these applications. In fact, whilst Australia has been the subject of individual observations from the ILO in respect of Convention 111, none of those observations relate to issues which are the subject of the ACTU applications nor have there been any individual ILO observations in respect of Convention 156.

[7.17] It should be noted that the *Workplace Relations Act, 1996* and its provisions are only one of a variety of means used to implement obligations under international instruments. Consideration of Australia's reports to the monitoring bodies under each Convention demonstrates the breadth of international obligations and the various mechanisms used to implement obligations under the Convention. However, for the purposes of an award safety net test case, it is only the provisions of the *Workplace Relations Act, 1996* which are relevant.

[7.18] However, given that nothing which is the subject matter of the ACTU applications have been the subject of relevant comments or notes by the international bodies responsible for the monitoring of international obligations, it can fairly be assumed that Australia is already in compliance with its international obligations as far as the international community is concerned. If Australia is already meeting its international obligations, how can concession of the ACTU claims assist that process?

ACTU doesn't show how its claims will advance compliance with international obligations

[7.19] The ACTU has not attempted to show where Australia is not in compliance with international obligations. Furthermore, ACTU has not attempted to show how acceptance of its applications will further advance compliance with

[5] at 489
[6] as required by Article 22 of the ILO Constitution

international obligations, if they are not already being met. ACTU simply makes broad general statements in respect of international obligations but fails to tie them specifically to the claims which it has made.

[7.20] The ACTU contend at 1.9 of its core contentions that granting its applications will:

> a) assist workers with family responsibilities to enter and participate in economic activity (Article 1);
>
> b) promote effective equality of opportunity between men and women workers and potential workers, by reducing the conflict between their employment and family responsibilities (Article 3); and
>
> c) promote effective equality of opportunity between men and women workers and potential workers by taking account their needs in setting terms and conditions of employment (Article 4).

[7.21] However the ACTU has failed to show **where** granting its claims will assist these aims. ACTU has failed to demonstrate **where** workers with family responsibilities are currently prevented from entering and participating in economic activity and how concession of its claims will meet this obligation, if that is still necessary. The ACTU has selectively quoted from aspects of the articles out of context, and in fact has misattributed its contention at paragraph a) above to Article 1(when in fact the issue in dealt with under Article 3).

[7.22] The ACTU has also failed to demonstrate in any clearly defined fashion, how concession of its claims will promote equality of opportunity. In relation to its part time work claim, international comparisons already show Australia's extremely high level of voluntary part time work amongst women. In view of this, it is difficult to see, how concession of an absolute statutory entitlement to part time work, even if it were workable, would operate to assist in meeting international obligations in respect of equality of opportunity.

[7.23] The ACTU has completely ignored the specific terms of those instruments; in particular the clauses which allow obligations to be meet by mechanisms which are **appropriate to national conditions and practice.** Without the necessary particularisation, the international instruments cited do nothing to assist the ACTU claims. There is no automatic linkage simply because of the subject matter of each Convention.

[7.24] ACCI will now consider the obligations under each of the Conventions individually.

ILO Family Responsibilities Convention (C156)

[7.25] The ILO Convention (No. 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities ("the Family Responsibilities Convention") was ratified by Australia on 30 March 1990 and entered into force for Australia on 30 March 1991.

[7.26] The relevant articles provides as follows:-

Article 3

1. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

2. For the purposes of paragraph 1 of this Article, the term discrimination means discrimination in employment and occupation as defined by Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958.

Article 4

With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken--

(a) to enable workers with family responsibilities to exercise their right to free choice of employment; and

(b) to take account of their needs in terms and conditions of employment and in social security.

[7.27] One of measures, parliament has used to meet its obligations under this Convention is Section 93A of the *Workplace Relations Act. 1996.* For the purposes of considering award safety net standards, section 93A is the relevant provision, taken in context with the provisions of the Act as a whole. However it should be noted that the *Workplace Relations Act, 1996* is only one of a variety of measures used to meet the obligations under the Convention[7] and section 93A must be interpreted in the context of the schema of the legislation as a whole as already discussed above.

[7.28] Section 93A requires the Commission to take into account the principles embodied in the Convention, in particular those relating to:

a) Preventing discrimination against workers who have family responsibilities; or

b) Helping workers to reconcile their employment and family responsibilities.

[7.29] Article 3 of the Convention requires countries to make it **an aim of national policy** to enable person with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, **to the extent possible,** without conflict between their employment and family responsibilities. (Emphasis added). Article 4 of the Convention requires all measures **compatible with national conditions and possibilities** to be taken

a) To enable workers with family responsibilities to exercise their right to free choice of employment ; and

b) To take account of their needs in terms and conditions of employment and in social security.

[7.30] Article 4 therefore has been selectively quoted by the ACTU to consider employment aspects only. Article 3 has been misquoted. Examination of International comparisons in the area of work and family as **set out by the ACTU** and considered by ACCI in the section on international comparisons show a wide range of mechanisms used to deal with work and family matters. There is no one correct way for the Convention to be implemented and the Convention should be implemented in a manner **compatible with national conditions and practice**.

[7.31] One only needs to examine the international evidence put forward by the ACTU to see the wide variety of mechanisms and means used to implement international obligations.

[7.32] There is nothing in the ACCI application which undermines the implementation of the Convention, if further implementation is necessary. In fact the ACCI applications are a more balanced and sustainable mechanism of implementing measures in favour of balancing work and family.

[7] See Attachment ,

[7.33] It is further submitted by ACCI that the ACTU applications go further than the obligations as set out under the Workers with Family Responsibilities Conventions as implemented by s93A. In particular, the emphasis of the ACTU on a rights based approach, ***without consideration of the needs of the individual enterprise*** is not supported by the terms of the Conventions as implemented by s93A. This has already been held to be the case by Commissioner Smith in *National Union of Workers and Wooldumpers Australia Pty Ltd* [8]where he stated:

> "I take the view that section 93A of the Act, together with a proper consideration of the Convention, should not lead to a situation where the position of the employee is absolute to the exclusion of the reasonable requirements of the employer. To adopt such an approach, would, in my view, be to eschew reconciliation in favour of seeking to exercise total control over the operation of the employer's business. The reasonableness or otherwise of the employer's position will invariably turn upon the depth of consideration given to a requirement, and an objective analysis of the operational requirements of the business."

[7.34] The above principle was more recently cited with approval by Deputy President Ives in *CPSU v. CSL Limited*[9.]

ILO Discrimination Convention (C111) and s.93 of the Workplace Relations Act

[7.35] The ILO Discrimination (Employment and Occupation) Convention (No. 111) was ratified by Australia on 15 June 1973. The Convention has been incorporated into Australian law through a variety of legislative provisions, however is not specifically referred to in the *Workplace Relations Act, 1996.* In compliance with the Convention, the Act contains a number of provisions designed to help prevent and eliminate discrimination at work on a range of grounds.

[7.36] The obligations under Convention are predominantly contained in Articles 2 and 3. The Articles envisages the use of "methods appropriate to national conditions and practice". For example Article 2 provides: -

> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

[8] [R6032]18 June 1999 at paragraph 35
9PR921278 at paragraph 61

[7.37] Although Australia has been the subject of a number of individual observations by the Committee of Experts in respect of this Convention, none of the observations relate to matters the subject of ACTU applications.

[7.38] The Workplace Relations Act, 1996 does not specifically incorporate this Convention, however section 93 requires the Commission to take account **of the principles** embodied in the *Racial Discrimination Act, 1975, the Sex Discrimination Act, 1984 and the Disability Discrimination Act, 1992.* It does not mention Convention's obligations specifically.

[7.39] The requirement in section 88B(3)(e) is not a positive obligation to prevent and eliminate discrimination but rather that the Commission must have regard to "the need to prevent and eliminate discrimination". ACCI has already pointed out how section 3 and section 88B(3)(e) are objects clauses which provide direction as a guide to statutory interpretation rather than operative provisions in their own right.

[7.40] The substantive provisions of the Act, namely section 93, require the Commission to have regard to principles of anti-discrimination law. In adjusting a safety net/minimum standards provision, the Commission should only have regard to established legal principles, not areas of case law which are unsettled or determined on the individual facts of the individual case. It must also have regard to the objects as set down in 88B(2) including:-

a) The need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

[7.41] It should also be noted that the principles set down in s88B(3) will of themselves have competing rights and obligations within such principle and accordingly there is a need for rights and obligations to be balanced. Of course, a balance does not mean that new rights and obligations must be created. A proper balance, in certain circumstances, can mean that new safety net rights and obligations are inappropriate.

[7.42] Even within the principles enunciated in s88B(3)(e) there will be a need for balance where the needs of employees with family responsibilities conflict for example, with the needs of employees with a physical or mental disability. An example of this was the decision of Commissioner Lewin the Award Simplification decision in relation to the Vehicle Industry Award 1983 where an argument by the SDA in respect of age discrimination was rejected in the context of the junior rates provisions under 88B(3)(c).[10] Accordingly there is a requirement for the Commission to adopt a conservative approach in "having regard to the need to prevent and eliminate discrimination..".

[7.43] Thus in arguing as it has done at 1.8 that anti- discrimination legislation sets a floor and not a ceiling on the Commission's role, the ACTU is seriously overstating the position. The requirement to consider anti discrimination law is set down in section 93. Section 93 must be interpreted in light of the overall objects of the Act and the objects of the section as set down in 88B(2) and 88B(3). But even those objects clauses must be read in light of the purposive of the legislation and the statutory scheme as a whole as already discussed above.

[7.44] Objects clauses are guides to assist in determining the purposes of legislation and provide useful assistance in statutory interpretation. Section 93 is pretty clear however, and if assistance is required in interpreting the provision, the objects clauses contained in sections 3, 88B(2) and 88B(3) can be used. But even those objects clauses are not the exclusive sources of the purposes of legislation and the statutory scheme as a whole must be considered as already discussed above.

[7.45] The ACTU has failed to show which aspects of this Convention support its applications. It has overstated the obligations under this Convention to the extent that it does not support their obligations. By contrast, the nature of the ACCI applications is such that the obligations set down in this Convention, as incorporated into the *Workplace Relations Act, 1996* can be further advanced using "methods appropriate to national conditions and practice".

[10] Print S2974 at paragraph 22.

Non-ILO UN Conventions

[7.46] The CRC and CEDAW are not specifically Conventions on the area of labour standards. They are general United Nations Conventions to which Australia is a party. The ACTU has failed to identify the specific articles of these Conventions which it argues supports its Contentions.

UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

[7.47] CEDAW is an anti discrimination Convention. Thus the arguments in respect of Convention 111 and section 93 apply equally in respect of CEDAW. It differs from Convention 111 in that it is specifically aimed at women. The ACTU has failed to identify any specific articles of this Convention which it contends supports its claims and has failed to show where concession of its claims will advance compliance with CEDAW's obligations.

[7.48] CEDAW has been expressly ratified into Australian law through inter alia the Sex Discrimination Act 1984 ("SDA"). The Commission is required to have regard to the principles embodied in that legislation under section 93. However it is the principles of SDA that the Commission must have regard to under section 93, not the wider provisions of CEDAW. This legislation is complaint focussed remedial legislation.

[7.49] Again the ACTU have failed to identify in which respects its applications advance the provisions of this Convention or the provisions of the Sex Discrimination Act 1994. Nor has it demonstrated how existing award provisions fail to comply with obligations under the SDA. Is the ACTU arguing that awards have been made in contravention of section 93 between 1993 and 2004?

[7.50] The Objects of the SDA are set out in section 3 of the Act as follows:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

[7.51] The objects and statutory framework of the SDA is clearly remedial and therefore do not support the ACTU's contention of a more activist role in the setting of minimum award safety net standards by the Commission.

[7.52] The SDA sets out a statutory scheme for the processing of complaints of discrimination by individuals who have suffered detriment. Given that the SDA is remedial and complaint based with respect to the rights and obligations set down in that ACT, it is wrong for the ACTU or any party to view the Act as a basis for contending that the award system should impose new rights and obligations on employers which go beyond what is provided for in the SDA or capable of being a remedy under that Act.

[7.53] Similar arguments also apply here as were made in paragraphs 38 to 45 above. The contention that anti-discrimination legislation sets a floor and not a ceiling on the Commission's role is a vast overstatement of the case.

UN Convention on the Rights of the Child (CRC)

[7.54] Similarly, the ACTU have failed to show where exactly its claims are supported by and advance the compliance with the obligations under the CRC convention. In fact article 18 of CRC makes it clear that the responsibility for upbringing of children is the responsibility of both parents. By emphasising women as the primary caregiver and by seeking to pigeon-hole women in part time work and supporting the CFMEU's application to be exempted from this case in a male dominated sectors such as the building industry, the ACTU's applications are actually in conflict with the Convention.

[7.55] In relation to the CRC, following Australia's first report to the Monitoring Committee in 1997, none of the monitoring committee's observations relate to matters, the subject matter of the ACTU applications.

Conclusion – How the Commission should proceed

[7.56] The requirement to take into account international obligations is one of twelve factors which must all be taken into account in meeting the principal object of the *Workplace Relations Act, 1996.* The objects clause is as already discussed, a series of directions in the purposes of the legislation to assist in statutory interpretation and application of the law. The purposes of the Act are ultimately determined from the overall scheme and purpose of the Act when read as a whole.

[7.57] The Commission has specific obligations under s93 and 93A to take into account the SDA and the Family Responsibilities Convention. However, the SDA is a remedial and complaint focussed piece of legislation. The Family Responsibilities Convention has already been interpreted by the Commission as conferring both rights and responsibilities on employers and employees. Relevant Australian law is in compliance. There is no regulatory vacuum created by these Conventions to be filled with regulation of the proscriptive "rights based" character proposed by the ACTU. Accordingly, the international obligations as they apply in Australian law do not support the ACTU's applications.

[7.58] In fact, the proposals as set forward by ACCI operate both to meet the remedial principles of the SDA as set down in section 93 and the needs to appropriately balance workers work and family responsibilities as required by section 93A as already interpreted by the Commission. Accordingly, international instruments as enacted in the *Workplace Relations Act, 1996* operate to support ACCI's applications rather than the claims of the ACTU.