

ANTI-DISCRIMINATION REMEDIES

1 INTRODUCTION: ROLE OF REMEDIES

To date, there has been little exploration of the question of remedies under anti-discrimination legislation in Australia.¹ To some extent, therefore, it is desirable to look to the overseas experience for guidance in considering ways of devising appropriate means of redress in this new area where rights have been statutorily created.

For the complainant, the remedy is undoubtedly the most important facet of any proceedings which might be initiated. The complainant seeks to cure a legal wrong. That wrong might be the anger, hurt and humiliation in being told that she/he is the wrong sex when applying for a particular job. In addition, being denied such a position may also involve specific economic loss. Both these harms are compensable in monetary terms under complaint-based anti-discrimination legislation.

While the goal of compensation is pre-eminent in any civil enforcement action, the payment of monetary damages also contains an inbuilt deterrent element. The theory is that since the respondent's conduct has been responsible for the harm occasioned to the complainant, she/he should be punished by having to pay out damages, which will act to deter any repetition of the conduct on her/his part. The payment of damages should also act to deter other potential discriminators in the community.

Concomitant with this notion of deterrence is the general educative effect resulting from the substantiation of a complaint. An appropriate remedy, together with the ensuing publicity,² will contribute to public awareness as to what constitutes unacceptable conduct in the area. Successful complaints are also likely to encourage prospective complainants to initiate actions in cases where they may have been formerly uncertain of their rights.

One might also add a further purpose justifying the availability of relief which is the assuagement of the anger not only of the complainant but of all members of the stigmatised class. For example, a racial slur, uttered in the context of a denial of accommodation to an individual, redounds against the racial group as a whole.

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1 The relevant sections dealing with remedies in the Australian legislation are as follows:—

Racial Discrimination Act 1975 (Cth) (RDA) s25;
Human Rights Commission Act 1981 (Cth) (HRCA) s16;
Anti-Discrimination Act 1977 (NSW) (ADA) s113;
Equal Opportunity Act 1977 (Vic) (EOA) s37;
Sex Discrimination Act 1975 (SA) (SDA) s38;
Racial Discrimination Act 1976 (SA) ss6-9;

Handicapped Persons Equal Opportunity Act 1981 (SA) (HPEOA) s50.

2 In *Mooney & Leo v Flannery* (Anti-Discrimination Board, 3 December 1979, unreported), a case in which a complaint alleging racial discrimination in respect of accommodation was substantiated, the Anti-Discrimination Board declined to take any further action under s113(b)(v) of the ADA because the respondent (a real estate agent) had already received "a deal of publicity by the showing of a television program in prime viewing time and may have suffered adversely by reason of this".

Finally, the availability of remedies, backed up by sanctions for non-compliance, indicates that the legislation, despite its novelty, is to be taken seriously. The Handicapped Persons Equal Opportunity Act 1981 (SA), for example, imposes a fine of \$2,000 for failure to comply with an order made under the Act.³

2 LEGISLATIVE MODELS

(a) Criminal Law Model

The South Australian Racial Discrimination Act 1976 is an aberration in Australia, so far as anti-discrimination legislative models are concerned, in that it utilises criminal procedures alone. No action can be initiated without the authority of the Attorney General and penal sanctions, in the form of fines, can be imposed upon a person found guilty of discrimination on the ground of race in the areas of employment, provision of goods and services, access to public places and accommodation.

While the criminal law model might represent a symbol of the society's disapprobation of discriminatory conduct, it guarantees no tangible redress to the individual. Furthermore, the number of prosecutions instituted has been miniscule⁴ because of inherent procedural difficulties. In particular, the requisite standard of proof is the criminal standard, that is, the court must be satisfied beyond all reasonable doubt that an act of discrimination occurred, while the civil standard must be met in establishing that the discriminatory act was predicated on the ground of race. In view of the exclusiveness in meaning of the concept of discrimination, the difficulty in isolating the relevant criteria and doubt as to the role of intent, the burden is unrealistic. This problem is compounded by the fact that a complainant would have to complain to the police, a body whose relations with the Aboriginal community, in particular, is not likely to be conducive to the lodging of complaints.

Overall, we see an unwillingness on the part of a predominantly white society to enforce legislation which it perceives to be unduly harsh in its treatment of questionable transgressions.

(b) Conciliation Model

For the most part, the accent of the Australian legislation is not on the adoption of punitive measures, but on conciliation and mediation. Anti-discrimination legislation is novel legislation encompassing egalitarian values which challenge and potentially threaten the traditional values of our society, values which have established that the acceptable standard for entry into and successful participation in any field of endeavour is that of the white, Anglo-Australian, physically normal male. Thus the female, the Aboriginal, the migrant and the physically impaired standards have been perceived as deviant in other than a range of crippling stereotypes, regardless of individual qualities and abilities. Indeed, those in positions of power who draft and legislate in respect of anti-discrimination are most likely to be white, Anglo-Australian, physically

3 Section 47; cf RDA s27 — \$500; HRCA s32 — \$500; ADA s116 — \$1,000; EOA s37 — \$1,000; SDA s38 — \$2,000.

4 Between 1966 and 1976, only four actions were instituted under the Prohibition of Discrimination Act 1966 (the predecessor of the 1976 Act); only one of which was successful. See *Port Augusta Hotel Limited v Samuels* [1971] SASR 139. See also *Samuels v Traeger* (1978) LSJS 1373 instituted under the current legislation.

normal males. As a result, the punitive elements tend to be played down and the accent is on education by the comparatively gentle means of conciliation and mediation.

3 REMEDIES AT THE CONCILIATION LEVEL

While all legislation which has adopted the conciliation model⁵ authorises a statutory officer or body to inquire into and endeavour to conciliate complaints falling within its mandate, none of the legislation informs us as to the appropriate procedures to be adopted in the conciliation process. Furthermore, none of the legislation contains any clues as to how a complainant might be made whole at this stage for injuries suffered. It may seem somewhat anomalous that such potentially wide and undefined powers are vested in this statutory officer or body whereas, for the most part, the powers of the quasi-judicial tribunal⁶ or court⁷ are circumscribed in respect of the remedial action it may order. However, in accordance with collective bargaining principles, it would appear that the only constraint operating upon the conciliator is that there be agreement by both parties. Thus, if the complainant in an employment complaint seeks consideration for the job, or even the job itself, promotion, transfer, reinstatement, the implementation of non-discriminatory job selection criteria in the future, non-discriminatory conditions, or damages, there does not seem to be any legal impediment, provided that the respondent agrees.

But what if the complainant seeks a remedy which is expressly or impliedly precluded from the orders open to the tribunal? For example, could a complainant under the Anti-Discrimination Act 1977 (NSW) seek damages of \$200,000,⁸ even though there is a statutory upper limit of \$40,000 so far as the Equal Opportunity Tribunal is concerned? Similarly, would the President of the Anti-Discrimination Board be acting ultra vires if she/he devised an equal employment opportunity management plan for the private corporation of the kind at present being developed in public employment in New South Wales,⁹ when it is doubtful that the Tribunal itself could order such a course of action under the remedies provision of the Act?¹⁰

Judicial review of conciliation proceedings would appear to be very difficult. First of all, a requirement of confidentiality is imposed upon the conciliation process. Section 94(2) of the Anti-Discrimination Act specifies that "evidence of anything said or done in the course of conciliation proceedings . . . shall not be admissible in subsequent proceedings under this Part relating to the complaint".¹¹ However, this wording might be construed in such a way as to govern admissibility

5 The RDA, ADA, EOA, SDA and HPEOA. The HRCA has adopted a one-tier model which authorises the Human Rights Commission to endeavour to effect a settlement of a matter which has given rise to an inquiry.

6 The body which constitutes the second tier of the structure established under the legislation which is endowed with wide powers to conduct inquiries into matters which have failed to be conciliated, or which have been otherwise forwarded on it.

7 Under the RDA only.

8 The *First Report of the Counsellor for Equal Opportunity* (1982) 5 reported that several complainants were seeking such substantial settlements as compensation for forced retirement.

9 Part IXA of the ADA, added in 1980 which is designed to remedy historic discrimination against women and racial minorities in the public sector.

10 ADA s113.

11 Cf EOA s36(3); SDA s40(7); HPEOA s49(7).

under the Anti-Discrimination Act only, not in respect of the common law principles of judicial review of administrative action.

Secondly, nevertheless, there is still the question as to who would be the aggrieved party. It is unlikely that a third party would be granted standing to challenge any settlement between the parties. A respondent who had agreed to a certain course of action would probably be estopped from subsequently challenging the agreement. A complainant would be in a somewhat stronger position in challenging a particular settlement as she/he might be able to allege that she/he was forced to succumb because of undue pressure from the respondent. However, a settlement on favourable terms would almost certainly preclude substantiation of a victimisation complaint in respect of the conciliation process.¹²

It would seem, therefore, that the broad discretionary power vested in the statutory officer suggests that a liberal view should be adopted in regard to remedies arrived at during the conciliation process. Furthermore, the voluntary nature of the remedy devised at that level is distinguishable from that ordered by the tribunal, the enforcement of which is backed up by legal sanctions.

However, when we turn to the Racial Discrimination Act 1975 (Cth), it is notable that complainants appear to have been very modest in respect of remedies sought at the conciliation level. This is partly explained by the fact that Aborigines, who constitute the preponderance of complainants under the Act,¹³ have been so thoroughly conditioned to accept the law as a punitive and oppressive manifestation of white social control that they find it difficult to accept it also as a remedial instrument which can right wrongs. Indeed, it has been observed that Aborigines have barely used the Anglo-Australian civil law at all as a means of resolving disputes.¹⁴

The publication of the Commissioner for Community Relations entitled *Discrimination against Aborigines in Country Towns of New South Wales*¹⁵ indicates that the fundamental desire to have the complaint investigated and validated has been the most sought after remedy.¹⁶

In addition, the Commissioner notes that an apology, whether written, oral or public, was one of the main bases of settlement.¹⁷ While a mere apology would appear to be less than adequate compensation for a legal wrong in white terms, an apology by a white to an Aboriginal presently does have some compensatory effect, as the Commissioner notes:

“Six years ago it was a revolutionary act to get a white man of

12 Section 50 of the ADA declares victimisation to be unlawful, but the operation of the section is obscure. (See *First Report of the Counsellor* supra n 8 30-32). The victimisation provision forms a discrete section under Part V of the Act. Section 50 refers to “the person victimised” rather than “the complainant” and “the discriminator” rather than the “respondent”, terms which render it uncertain as to whether conciliation is the appropriate procedure in seeking a further remedy. Victimisation is dealt with more clearly under the SDA, where s39 establishes the same procedure for acts of victimisation as for acts of discrimination.

13 Human Rights Commission, *Annual Report 1981-1982* vol 2 (1982) 11.

14 Tatz, “Access to Civil Law” (1980) 5 Leg Serv Bull 91.

15 (Community Relations Paper No 11, 1981).

16 Ibid 6.

17 Commissioner for Community Relations, supra n 10 at 6.

power and affluence to say 'I'm sorry' to an Aboriginal even when he knew he had broken the law by discriminating against him".¹⁸

No such justification can be adduced, however, in respect of one discriminator's "conciliatory" offer of free service of squash in a hotel for one hour.¹⁹ Counter-offers of this kind indubitably carry with them the taint of discrimination no less than the original act, albeit in a more covert form.

Monetary compensation ranged from \$25 to \$1,000. \$25 seems to be an overly modest sum for a discriminatory act which can rebound against the whole race, particularly when we compare it with the often substantial awards made in the analogous area of defamation, where damages are presently available on an individual basis only.²⁰

4 REMEDIES AT THE JUDICIAL LEVEL

Failing conciliation, complaints may be referred on to a specialised tribunal constituted under the state legislation for the purpose of a formal inquiry. The Anti-Discrimination Act provides for an adjournment of the inquiry at any time in order than an amicable settlement of the complaint might still be effected.²¹ However, the role of the tribunal in the process of conciliation is somewhat ambiguous, for it could well compromise its objectivity in negotiating a remedy which went beyond the remedies enumerated in the legislation which it is empowered to order in its judicial capacity.

Although a number of cases have been referred on to the tribunal level, comparatively few have been successful, and the scope of the remedies sections of the legislation has not yet been adequately tested. Although it is understandable that a quasi-judicial body might be hesitant about arousing fears in the minds of a public nervous as to the implications of legislation it does not fully comprehend, to say nothing of the ever-present spectre of judicial review, it is important that appropriate remedies be available when dealing with intransigent discriminators. An overly cautious approach, after all, is likely to frustrate the express intention of the legislation, that is, "to promote equality of opportunity between all persons".²²

A complainant under the Racial Discrimination Act (Cth) has no direct access to a legal remedy and the Act does not provide for the establishment of a specialised tribunal to hear cases which have failed to be conciliated. Instead, the Human Rights Commission must first issue a certificate to permit civil proceedings to be instituted by the aggrieved person through the normal court structure.²³ While the Commissioner for Community Relations issued his certificate on a handful of occasions,²⁴ only one case has gone to court.²⁵ At a hearing, the onus is on the

18 Ibid 7.

19 Provision for minimum damages could avoid demeaning offers. See eg s52 of the California Civil Code which provides for a minimum liability in damages of \$100 for the victim of discrimination denied access to accommodation or facilities on the basis of race or colour.

20 Fleming, *The Law of Torts* (6th edn 1983) 506-507.

21 ADA s106; cf HPEOA s20.

22 Statement included in the long title of the ADA.

23 RDA s24. This was formerly a function of the Commissioner for Community Relations.

24 Human Rights Commission, *Annual Report 1981-1982* vol 2 (1982) 46.

25 *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417. The constitutional doubts surrounding the validity of the Act, clarified by this case, may have formerly operated to inhibit

plaintiff to prove on the balance of probabilities that the defendant committed the discriminatory act. In the case of an Aboriginal in a country town, for example, this involves placing a substantial legal, psychological and economic burden on one person, when that person is one member of a class subjected to multifarious indignities in regard to employment, education, accommodation and the provision of goods and services.

(a) Damages

While there is an inbuilt punitive element in the payment of monetary damages in that it impels employers to evaluate their employment practices and voluntarily endeavour to correct them, the primary aim is an equitable one, for it is intended to restore the recipients to their rightful economic status in which they would have been but for the unlawful discrimination.

A general legislative statement allowing damages for any loss or damage suffered²⁶ could cover specific economic loss as well as emotional anguish. Back pay resulting from being underpaid according to seniority would be an example of economic loss. Retroactive wage adjustments should be based on the amount the complainant would have earned but for the discrimination but may also include interest, overtime, shift differentials, and fringe benefits.²⁷

Such wording is undoubtedly also sufficiently broad to encompass front pay, a concept not heretofore encountered in Australia. The concept of front pay is an equitable remedy developed in discrimination suits in the United States.²⁸ Front pay means that a person who has successfully proved that she/he would have been hired for a job, absent the unlawful discrimination, can be paid a future wage until she/he can be hired, or it can include the payment of money losses resulting from a denial of promotion until such time as upgrading occurs. Such awards can also be made for a specific period of time. In one American case, for example, a woman was awarded five years' back pay and five years' front pay.²⁹ Clearly, the upper limit of \$40,000, imposed by the Anti-Discrimination Act, for example, would not permit a comparable payment. However, the wording of s113(b)(i) ("compensation for any loss or damage suffered. . .") does not preclude the notion of front pay altogether, since it is predicated on proof of the discriminatory conduct of the respondent which has given rise to the disadvantaged position of the complainant.

In the United States, front pay may be regarded as the appropriate remedy, rather than reinstatement, in cases where the discriminatory conduct has resulted in hostility and the respondent has threatened retaliatory action, such as would impede a normal working relationship. For example, a woman employee who has alleged that she has been the victim of sexual harassment in a small office is particularly vulnerable and, if the heroic complainant in that situation is brave enough to

25 *Cont.*

the issuance of Certificates. See Lane, "The Federal Parliament's External Affairs Power : *Koowarta's Case*" (1982) 56 ALJ 519 for discussion of the constitutional issues.

26 RDA s25(d)(i); ADA s113(b)(i); HPEOA s50(2)(a).

27 Cf US Fed Ref 13,313 (1975).

28 *Eg Patterson v American Tobacco Co* 535 F 2d 257 (1976).

29 *Fitzgerald v Sirloin Stockade Inc* 22, EPD 30,724 (1980).

pursue her complaint against an intransigent employer to the public level, a front pay award might be the most appropriate remedy.

It is particularly difficult for an individual complainant to prove discrimination at the point of recruitment because of the necessarily subjective evaluation of the multifarious factors which constitute "merit". A minor variation in qualifications, work experience or ability may tip the balance in favour of one applicant or another, which may well be justified vis-à-vis a particular job. Thus, a complainant may be confronted by a virtually insuperable burden if she/he must prove that she/he would have been appointed but for the discrimination.

Indeed, the successful complainant in *Reddrop v Boehringer Ingelheim Pty Ltd*³⁰ conceded that she was unable to prove that she would have been given the position had there been no element of unlawful discrimination. Nevertheless, the complainant's allegation of discrimination on the ground of marital status³¹ was found to have been made out in that she was denied the opportunity of having her application for employment properly considered. Thus, the harm was conceptualised as the loss of chance rather than as the loss of the job per se.

The Tribunal was then confronted with the vexed task of quantifying this somewhat nebulous loss. It found that the claim for damages actually fell under three discrete heads:—

- (i) Loss of opportunity to earn remuneration;
- (ii) Loss of opportunity for enjoyment of occupation;
- (iii) Injury to feelings.

In view of the complainant's outstanding qualifications, together with remarks made about her suitability for the position, her chances of being the successful applicant were rated highly. A finding to this effect permitted the Tribunal to compute damages under the first head based on the difference between the wages she would have earned and what she subsequently earned in alternative, less attractive employment. For all practical purposes, this approach probably did not differ significantly from that which the Tribunal would have adopted had it found that the complainant would have been appointed to the job itself but for the discrimination.

Although personal injury claims may include a quantum of damages for intangible harms such as "loss of enjoyment of life", a residual distrust of claims for non-material loss is still discernible amongst the judiciary. In view of this resistance, the computation of damages under two separate heads of intangible loss in the *Reddrop Case* is of particular interest. The loss of opportunity for enjoyment of occupation was distinguished from the injury to feelings.³² The former encompassed the loss of career satisfaction, a concomitant of the failure to be appointed to the position, while the latter was based on the complainant's shock and disappointment in not getting the job, in

30 Equal Opportunity Tribunal, 29 October 1982, unreported.

31 The complainant's husband was employed by a rival pharmaceutical firm. The complaint was also based on discrimination on the ground of sex but the Tribunal found that a case in this regard had not been made out.

32 Damages awards have been made for injury to feelings alone. Eg *Longworth & Mostert v Parcel Freight Cabs* (Equal Opportunity Board, July 1981, unreported).

addition to the shock involved in learning the real reason for not being appointed.

Finally, there is the question as to whether exemplary damages may be separately awarded under a general discretion vested in a tribunal to award damages "by way of compensation for any loss or damage suffered". Both the Equal Opportunity Tribunal³³ and the Equal Opportunity Board³⁴ have reserved their decision as to whether such damages may be levied in addition to those assessed under the restitutio in integrum principle. However, the Sex Discrimination Board has held that exemplary damages are not allowable under the Sex Discrimination Act 1975 (SA).³⁵ In the opinion of the Board, aggravated damages³⁶ relate only to actions in tort or contract, while exemplary damages apply only to actions in tort. Such damages do not apply to a statutory wrong.

Although punitive damages are regarded as "an uncommon and extraordinary remedy" in the United States,³⁷ they have been awarded in cases where malice has been established. For example, in *Stamps v Detroit Edison*,³⁸ both the employer and the union respondents were ordered to pay substantial punitive damages as they had been "extremely obdurate and intransigent in their determination to implement and perpetuate racial discrimination in employment".³⁹

While the imposition of substantial exemplary damages is inconceivable in Australia at present, a modest award within that rubric may have an important symbolic significance. This would be appropriate in such cases as the refusal of service to Aborigines, particularly where the complainant seeks no more than an apology from the respondent.

On the other hand, it is submitted that aggravated damages would not be appropriate as it is clear that damages for intangible losses, such as injury to feelings, can be included within substantive awards.

(b) Injunctive power

The legislation generally allows for an order to be made enjoining the respondent from continuing or repeating the discriminatory conduct in the future.⁴⁰ It may be averred that there is an unsatisfying element of chance about the injunctive power since it requires predictions about the future. As Fiss points out, however, this argument lacks cogency because the nature of the future wrong is analytically derived from a past wrong.⁴¹

The injunctive power can be invoked in the case of both individual and representative complaints. Discriminatory employment practices, such as testing of English which is not job-related (race), height and weight

33 *Reddrop v Boehringer Ingelheim Pty Ltd* supra n 30.

34 *Gross v Thomas Nelson (Australia) Pty Ltd* (November 1980, unreported).

35 *Gameau v The Minister of Education* (Sex Discrimination Board, 3 April 1980, unreported).

36 Aggravated damages allow compensation for distress to the plaintiff, while exemplary damages aim to punish the wrongdoer, whatever the effect on the former. Kercher & Noone, *Remedies* (1983) 232.

37 Babcock, Freedman, Norton & Ross, *Sex Discrimination and the Law* (1975) 431.

38 365 F Supp 87 (1973).

39 *Ibid* 124. The defendant company was ordered to pay US\$4,000,000 under this head, while one of the defendant unions was ordered to pay US\$250,000.

40 RDA s25(a); ADA s113(b)(ii); EOA s37(1)(a); SDA s38(3)(a); HPEOA s50(2)(b).

41 Fiss, *The Civil Rights Injunction* (1978) 11.

requirements based on the male standard (sex), and firing women on marriage (marital status) are examples of discriminatory practices which may be restrained. While the injunction might be tailored to suit the needs of a particular complainant, such as restraining an employer's acts of sexual harassment, such restraint may have the effect of transcending the individual's need for a remedy if the respondent's discriminatory behaviour can be generally modified.

Indeed, one may go further and ask whether the mandatory injunctive power can deal with only the particular discriminatory practice with which the complainant was aggrieved, or whether an across-the-board approach can be taken, that is, whether the respondent can be enjoined from continuing *all* its discriminatory policies. The across-the-board approach is most appropriate in representative complaints in employment in order to reach other departments and possibly also other branches of a respondent company.⁴²

While the class action is well-developed in the United States in discrimination suits as a procedure for effecting class-wide remedies, there has long been resistance to the procedure in the Anglo-Australian legal tradition.⁴³ The Equal Opportunity Act (Vic) does allow for two or more persons to join in the lodging of a complaint,⁴⁴ but the Anti-Discrimination Act alone makes specific procedural and remedial provision for representative complaints. However, the only express remedy permitted in a representative complaint under the Anti-Discrimination Act is an injunction. The limitation in respect of damages and other reasonable acts of redress would appear to be out of step with the make-whole approach adopted in respect of individual complainants. It would also appear to be in conflict with the well established legal principle that a court will always refuse an injunction to restrain the commission of a wrong if it is satisfied that damages are a sufficient remedy.⁴⁵

For example, if a restaurant denied access to a busload of handicapped persons on the ground of their physical impairment,⁴⁶ one or two of the group might initiate a representative complaint on behalf of the group in order to compel the restaurant to desist from continuance of the discriminatory conduct in the future. While the securing of a broadly worded injunction might be of benefit to handicapped persons subsequently visiting that particular restaurant, it would be limited as a personal remedy to the complainants themselves as it is unlikely that they would wish to return to the scene of humiliation. Nevertheless, the legislation expressly denies them any recompense for the injury to feelings. This exclusion most clearly encapsulates the fear of the legislature that offenders might be subjected to the payment of onerous damages.

Nevertheless, s105 of the Anti-Discrimination Act does appear to permit an individual complaint to be lodged, despite the fact that it may already have been the subject of a representative complaint. Therefore,

42 Shawe, "Processing the Explosion in Title VII Class Action Suits" (1978) 19 Wm & Mary L Rev 469.

43 Australian Law Reform Commission, *Access to the Courts - II Class Actions* (Discussion Paper 1979).

44 Section 38(2). Cf SDA s38(4).

45 Lawson, *Remedies of English Law* (2nd edn 1980) 184.

46 ADA s49K.

once the complainants have yet again gone through the whole process of attempts at conciliation and probable referral to the Equal Opportunity Tribunal,⁴⁷ the complainants may be able to obtain damages individually. This hardly seems to be the most efficient method of dealing with representative complaints, the ostensible intention of which is to deal expeditiously with a number of cases which contain common questions of law and fact. Indeed, one feels bound to draw the inference that such structural obstacles may have been deliberately designed to deter group actions.

In the United States, damages claims, such as back pay, have been assimilated into class actions under Title VII of the Civil Rights Act as a result of the adoption of a bifurcated trial structure developed through case law. The first step focuses on the establishment of liability for the unlawful injury to and injunctive relief for the class as a whole, and the second constitutes a recovery stage dealing with the personal pecuniary claims of class members on an individual basis. Once liability has been established at Stage I, settlement may be possible and the evidentiary problems posed by the necessity of proving the individual claim are then unnecessary.⁴⁸

It may be possible for the Equal Opportunity Tribunal to adapt the American model and still comply with its legislative mandate. The Tribunal, however, has not yet determined that a complaint should be dealt with as a representative complaint.⁴⁹

(c) Variation of contracts

Both the Racial Discrimination Act (Cth) and the Anti-Discrimination Act empower the court or tribunal to declare void the whole or part of a discriminatory contract.⁵⁰ This remedy could be utilized in respect of instances such as discriminatory contracts of employment which undertake to pay Aborigines less than white workers, lease agreements which include a "whites only" clause and loan agreements which require a female borrower to provide a male guarantor.

Despite substantial evidence of discrimination in the sphere of employment in respect of awards and rates of pay,⁵¹ this remedy is significantly undermined so far as the Anti-Discrimination Act is concerned. Section 54 of the Act expressly excepts discriminatory provisions in decisions of wage-fixing tribunals⁵² as well as in collective bargaining agreements.⁵³ While it might be averred that such discriminatory provisions should be challenged in the arbitral arena itself, no such rationale which can be adduced in respect of s54(2) which excepts discrimination in above-award payments.

47 It is assumed that a respondent who had not been amenable to conciliation in the first stage would also resist the payment of multiple awards of damages.

48 See Schlei & Grossman, *Employment Discrimination Law* (1976) 1260 and see *International Brotherhood of Teamsters v United States* 431 US 324 (1977).

49 ADA s102.

50 RDA s25(c); ADA s113(b)(iv).

51 Eg Report of the Anti-Discrimination Board, *Discrimination in Legislation* vols 1 and 2 (1978); Thornton, "(Un)equal Pay for Work of Equal Value" (1981) 23 JIR 466.

52 Section 54(1)(d). Cf SDA s31. See also *Cope v Dalgety Australia Limited* (Sex Discrimination Board, 6 July 1979, unreported); Graycar "Federal awards get in the way" (1979) 4 LSB 186.

53 Section 54(1)(e).

(d) Other reasonable acts

This provision⁵⁴ empowers the tribunal to order whatever course of conduct it perceives to be appropriate in the circumstances. Clearly, “any reasonable act. . . to redress any loss” or similar wording, connotes a very wide discretion indeed. The following are examples of measures developed in the United States which are likely to prove contentious if implemented in Australia.

(i) Retroactive seniority

Retroactive seniority is well developed as a remedy in respect of anti-discrimination legislation violations in employment in the United States.⁵⁵ In *Franks v Bowman Transportation Co.*,⁵⁶ for example, the Supreme Court upheld an order for retroactive seniority for black employees who had been denied the opportunity to transfer to a different seniority line, which allowed them better chances of advancement. The Supreme Court adopted the view that the overriding legislative policy was in favour of making whole the minority members who were victims of discrimination, even though this had the effect of placing them ahead of some longer-employed white employees.

Seniority for unskilled workers should be distinguished from promotional positions, such as at the executive level.⁵⁷ The American courts have been conscious of interfering with settled expectations of other employees, particularly as it is, after all, the respondent employer, not other white male employees, who is alleged to have discriminated against women and minorities in the past.

In *Franks's Case*, the members of the plaintiff class were unnamed. They were not seeking to modify the existing seniority system, but sought to be placed at the relevant seniority level they would have held but for the initial illegal discriminatory hiring practices which led to the refusal to hire them. The Court held that merely hiring the victims would be an inadequate remedy and would fall short of the make whole provisions of the legislation.

Therefore, in respect of retroactive seniority, the tribunal must weigh the competing interests of those affected. It is the matter of balancing the settled expectations of employees, on the one hand, and the principles underlying anti-discrimination legislation, namely, equality of opportunity in employment, on the other. The mere discontent of majority group members is not enough to displace the statutory duty imposed by the legislation.⁵⁸

(ii) Legally-sanctioned collective bargaining

The problems posed by discrimination against women and minorities in promotional positions, such as in academia, make it difficult to devise appropriate remedies. However, if complainants are able to meet the onerous proof requirements in this context (given the disparate factors involved in the valuation of “merit” which constitutes the basis of

54 RDA s25(b); ADA s113(b)(iii); EOA s37(1)(b); SDA s38(3)(b); HPEOA s50(2)(c).

55 Where it is also known as “fictional” or “constructive” seniority.

56 424 US 747 (1976).

57 Eg *Kirkland v New York State Department of Correctional Services* 520 F 2d 420 (1975); cf *EEOC v American Telephone & Telegraph Co* 556 F 2d 167 (1977).

58 Cf *United States v Bethlehem Steel Corp* 446 F 2d 652 (1971).

selection and promotion), they should not be denied remedies merely because of difficulties in design and implementation.

In cases of discrimination in upper-level jobs, it has been suggested that the courts, with their broad equitable powers might sanction collective bargaining on behalf of aggrieved plaintiffs on a finding of class-wide violations of the legislation.⁵⁹ The plaintiffs are then given some degree of participation in the design and implementation of an appropriate remedy. Good faith efforts on the part of the parties is secured with the assistance of a court appointed mediator. Measures might include securing the advice of the plaintiffs in respect of all contemplated personnel changes. This concept of peer review means that the employer, whose personnel practices have been held to be deficient, is no longer solely responsible for all decision making pertaining to personnel.

Thus, a group of women in a tertiary institution, or in a corporation, might seek such a remedy under s38(3)(b) of the Sex Discrimination Act. This section empowers the Sex Discrimination Board to "make an order . . . with a view to eliminating future contravention of this Act", the wording of which is sufficiently broad to encompass legally-sanctioned collective bargaining. The remedy itself, in fact, resembles the injunctive enforcement mechanism, but permits flexibility in devising a dynamic remedy over a period of time.

(iii) *Affirmative action*

A broadly worded section, such as the above-mentioned section in the Sex Discrimination Act, or "such other relief as the court thinks fit" to be found in s25(e) of the Racial Discrimination Act (Cth), may permit the tribunal to fashion appropriate affirmative action⁶⁰ as a means of relief.

Because the conciliation model of legislation is predicated on the complainant initiating action, the success of the method is dependent upon the ability of the complainant to recognize and identify the discriminatory act, and then to have the knowledge and the tenacity to pursue a complaint through the appropriate channels. The United States has long recognised the limited impact of individual complaint-based remedies in dealing with endemic discrimination, that is, deep-seated prejudice against disfavoured groups, particularly Blacks, Hispanics and women, which has resulted in their being placed in a permanently disadvantaged position in society in terms of education, access to jobs and the distribution of resources. Of course, the successful public resolution of an individual complaint may have a ripple effect in a particular organisation and in the community generally. However, it is unrealistic to expect discriminatory patterns of behaviour to change as a result of isolated actions when the rationale for the preponderance of discriminatory acts lies deep within the societal consciousness.

59 Newman, "Remedies for Discrimination in Supervisorial and Managerial Jobs" (1978) 13 Harv Civil Rights — Civil Liberties L Rev 633.

60 The phrase does not have a precise denotation and can embrace multifarious measures at the institutional level designed to overcome historical disadvantage suffered by a particular group. Such measures might conceivably range from the inclusion of the statement "Women are welcome to apply" in job advertisements to the setting of quotas in recruitment. The phrase is not synonymous with "reverse discrimination" which involves an identifiable victim of the dominant (white male) group suffering specific disadvantages.

In recognition of the fact that it is illusory to expect the injunctive power alone to restrain future discriminatory conduct, American courts can order affirmative action programs following a finding of past discrimination which is egregious, that is, evidence has to have been adduced of either virtual or total exclusion of the disadvantaged group. Such evidence needs to be supported by a statistical comparison of white males vis-à-vis blacks, Hispanics and/or women in the respondent's employ, compared with the relevant labour force.⁶¹

Quotas, goals, or preferential treatment, however, are contentious in a society committed to the meritocratic ideal. Nevertheless, in *Rios v Enterprise Association Steamfitters Local 638*,⁶² the Court of Appeal took the view that affirmative action, consisting of the setting of "remedial goals" was essential in the light of the "long continued and egregious discrimination" by the union against non-whites in failing to admit them to journeyman status. The court-ordered plan set a minimum goal of 30% non-white membership to be achieved in stages. This figure was based on census data regarding the number of non-white male workers over 18 (women never having sought to become steamfitters) of New York City and two adjoining counties. The fact that the violation of rights was directly caused by the past discriminatory practices of the defendants justified the court's dramatic remedy.

In Australia, it might be argued that far-reaching affirmative measures in favour of a particular group are contrary to the spirit of equal treatment which is mandated by anti-discrimination legislation. However, as s 8 of the Racial Discrimination Act (Cth), read with art 1(4) of the appended Convention on the Elimination of all Forms of Racial Discrimination expressly exempts special measures from the prohibition of racial discrimination⁶³ in order to secure equal human rights for disadvantaged racial and ethnic groups, it is submitted that allegations of reverse discrimination are likely to be misplaced.⁶⁴ Nevertheless, paragraph 4 does make it clear that special measures may be impugned if continued beyond the point when no longer justified. Special affirmative measures, then, must be closely correlated with the past injustice and must be of a temporary nature only.

The public interest component of any case in the race relations area calls for bold and adventurous remedies from courts, as opposed to the timid requests for apologies seen at the conciliation level. Therefore, in view of the fact that almost the entire Aboriginal population of some country towns is unemployed,⁶⁵ it may be possible for a creative court to fashion a remedy of an appropriate nature, such as ordering an

61 There are, however problems in identifying the relevant labour force. See eg *Hazelwood School District v United States* 433 US 299 (1977); Rosenblum, "The External Measures of Labor Supply: Recent Issues and Trends" (1978) 10 Conn L Rev 892; Lustgarten, "Problems of Proof in Employment Discrimination Cases" (1977) 6 Industrial LJ 212.

62 501 F 2d 622 (2nd Cir 1974).

63 Cf ADA s21.

64 Reverse discrimination (also known as benign or positive discrimination) has been particularly contentious in the United States because of the constitutional guarantee of equal protection. See *Regents of the University of California v Bakke* 438 US 265 (1978), and contra *United Steelworkers v Weber* 443 US 193 (1979) and *Fullilove v Klutznik* 448 US 448 (1980).

65 Report of the NSW Anti-Discrimination Board, *Study of Street Offences by Aborigines* (1982) 218-225.

intransigent respondent, who may be a major employer in the town, to hire and train Aborigines until the percentage of Aboriginal employees is roughly commensurate with the percentage of Aborigines in the regional labour market.⁶⁶

(e) Interim orders

The availability of an interim order may also constitute an important remedy in itself, in addition to improving the complainant's chances of securing a substantive remedy. Section 40(3) of the Equal Opportunity Act permits the Equal Opportunity Board to make an interim order in the course of proceedings before it "to prevent a party to the proceedings from acting in a manner prejudicial to any decision or order that the Board might subsequently make".⁶⁷ This remedy is particularly important in the sphere of employment as it may prevent the actual dismissal of the complainant and/or the appointment or promotion of another person.

However, the wording of the section suggests that this remedy is not available until the matter is actually the subject of an inquiry, that is, until it has been referred to the Tribunal, following an unsuccessful attempt to resolve the complaint by conciliation. Indeed, there may well be a case for securing interim orders as soon as a complaint has been lodged, without prejudice to the conciliation procedure, since the lodging of a complaint itself may be sufficient to precipitate the dismissal. Indeed, the Anti-Discrimination Act has been amended to allow a complaint to be referred to the Tribunal at any time after lodgment so that an application for interim orders can be made.⁶⁸ It is submitted that a similar amendment would be desirable in other federal and State legislation.

(f) Costs

The recovery of costs may also be perceived as an integral part of the complainant's remedy, since considerable financial expense, time and emotional trauma may be involved in the pursuit of the overall remedy.

At the conciliation level, no costs are involved, apart from the incidental expenses of the individual complainant.

While a complainant may represent herself/himself before the tribunal,⁶⁹ the majority of complainants are likely to feel intimidated by the formal judicial nature of the proceedings: an adversarial system which can involve aggressive cross-examination, the technicalities of statutory interpretation and legal language, and the fact that the judicial member may be a judge.⁷⁰

The complainant may face substantial legal costs if confronted by a large public or private corporation which can afford to engage expensive counsel, and she/he will feel disadvantaged if a barrister of comparable stature is not engaged. A complainant's union will sometimes support

66 It is recognised that the concept of proportionality is not an easy one to implement. See eg Goldman, *Justice and Reverse Discrimination* (1979) 191 *passim*.

67 Cf ADA s112; SDA s41(3); HPEOA s50(3).

68 Section 89A and see *Whitehair v Broken Hill Town Dental Clinic and the Broken Hill and District Hospital* (Anti-Discrimination Board, 10 July 1981, unreported).

69 ADA s101; EOA s46.

70 As is presently the case in New South Wales.

her/him in an employment case,⁷¹ but this may not be possible if the alleged discrimination has arisen at the point of recruitment, or if the union is supporting the competing interests of other employees, as in a promotion case, for example.

Section 114 of the Anti-Discrimination Act expressly states that each party shall pay her/his own costs unless circumstances justify an order in a particular case. A submission was made in *Harrison v Watson*⁷² that this section should be interpreted so as to permit recovery of costs by a successful complainant with limited means against a well-to-do respondent.⁷³ However, this argument was rejected by Cripps J. It is uncertain, therefore, just what is the meaning of this section, particularly as s11(2) provides for the Tribunal to make an order as to costs when dismissing a complaint that is "frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained . . ."

In other State legislation, the question of costs is not dealt with expressly, apart from cases involving vexatious litigants.⁷⁴ Therefore, in a bona fide case, the tribunal is empowered to make an order as it thinks fit under the general proviso regarding the redress of any loss or damage suffered.⁷⁵ A court has an inherent discretionary power to make an order as to costs, and this principle would apply in respect of the Racial Discrimination Act (Cth). Incidentally only the last-mentioned legislation makes specific provision for legal aid.⁷⁶

(g) Appeals

A complainant who has successfully obtained a remedy at the tribunal level may, nevertheless, find that decision is the subject of appeal to the Supreme Court, and possibly also to the High Court.⁷⁷ Section 118(1) of the Anti-Discrimination Act now restricts appeals to questions of law, while s43(2)(b) of the Equal Opportunity Act provides that an appeal shall be by way of rehearing⁷⁸ which could be an unnecessarily time-consuming and expensive exercise. The Supreme Court is then empowered to remit its decision to the tribunal, or to make such order as it sees fit.⁷⁹ Other legislation limits the ambit of discretion to "any order that could have been made in the first instance".⁸⁰ However, this may not involve any limitation on the court's discretion if a wide power is expressly vested in the tribunal.

71 Eg *Harrison v Watson* (Anti-Discrimination Board, 19 June 1979, unreported).

72 *Ibid.*

73 See Thornton, "Board's first decision" (1979) 4 LSB 180, and the Board's reply, "Thornton on the NSW Anti-Discrimination Board: A Reply" (1980) 5 LSB 29.

74 EOA s41(1); SDA s41(6); HPEOA s50(2)(c).

75 EOA s40(2)(c); SDA s41(2)(c); HPEOA s50(6).

76 RDA s45.

77 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1979) 54 ALJR 210. See also Hann, "Wardley's Long Battle" (1979) 4 LSB 184; Riches, "Note on Inconsistency" (1980) 54 ALJ 606; Ronalds, "Federal Industrial Awards and State Anti-Discrimination Legislation" (1980) 5 LSB 71; Note, "*Ansett Transport Industries (Operations) Pty Ltd v Wardley*" (1980) 3 UNSWLJ 426; Goldsworthy, "Legal Rights, Subject Matters and Inconsistency: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1981) 7 Adel LR 487.

78 Section 52(4) of the HPEOA expressly provides that an appeal shall not be conducted as a re-hearing of the matter before the Tribunal.

79 ADA s118(3).

80 EOA s43(3)(a); SDA s43(3)(a); HPEOA s52(5)(a).

On the other hand, a complainant who has been consistently unsuccessful at both the conciliation and the tribunal levels is unlikely to be successful before a non-specialist court at the appellate level if she/he persists in pursuing a remedy. Indeed, the complainant's inability to make out a case against the respondent by that stage may well redound against her/him with an award of costs in favour of the respondent.⁸¹ However, the automatic application of the principle of "loser pays" may be inapposite if the appeal turns on one of the many uncertain facets of incipient anti-discrimination jurisprudence. As a matter of public policy, one must ask whether discriminatory practices in the public domain should be shielded from judicial scrutiny because of the spectre of high costs confronting the individual complainant. The Victorian and South Australian legislation does make express reference to the appellate court's power to make an order as to costs "that the justice of the case requires".⁸² It is submitted that this discretionary power would permit a court to take into consideration the relative resources of the parties as well as the general public interest of the litigation, apart from the strictly legal merits of the case.

5 CONCLUSION : THE ELUSIVENESS OF A DISCRIMINATION REMEDY

Although the Australian judicial system is still wrestling with the substance of the non-discrimination principle, it has been shown that tribunals are generally vested with power to grant wide equitable remedies by way of relief once a finding of discrimination has been made.

The Human Rights Commission, however, is anomalous in a number of respects. While the Commission can conduct inquiries and endeavour to effect settlements in respect of human rights violations, it lacks enforcement powers.⁸³ The Commission can report to the Minister (the Attorney-General) and make broad recommendations as to appropriate remedial action.⁸⁴ Like the non-legislative National and State Committees on Employment and Discrimination, the ultimate sanction available is for the Minister to name the discriminator in Parliament. However, in the case of the Committees, this course of action has not been invoked in ten years of operation,⁸⁵ attesting yet again to the official timidity in taking what is perceived to be punitive action in respect of discriminatory conduct.

Nevertheless, the major impediments confronting complainants endeavouring to seek a remedy under existing legislation tend to be of a substantive or procedural nature which manifest themselves prior to the judicial or quasi-judicial stage. For example, the limited ambit of

81 *Eg Trau v The University of Sydney* (Supreme Court of NSW, Woodward J, 7 August 1980, unreported); *Langley v University of New South Wales* (Supreme Court of NSW, Lee J, 25 June 1981, unreported).

82 EOA s43(3)(c); SDA s43(3)(c); HPEOA s52(5)(c).

83 Procedural sanctions only may be imposed for offences such as the giving of false information (s15), victimisation (s32) or breaches of confidentiality (s34).

84 HRCA s9(b).

85 For a critique of the Committees, see Ronalds, "Employment Discrimination Committees Don't Work" (1981) 6 LSB 17.

operation of most legislation is further accentuated by numerous exceptions and qualifying clauses.⁸⁶

Furthermore, Queensland, Western Australia and Tasmania presently lack State legislation on any ground, although the jurisdiction of the Racial Discrimination Act (Cth) extends to all States and Territories of the Commonwealth. However, even those States which have ostensibly adopted a somewhat more enlightened stance in respect of either race, sex, marital status or physical impairment provide no remedies in the case of either intellectual impairment and/or homosexuality, or in the case of other identifiable grounds which also generate stigmatic harms, such as age, religious or political belief.

86 Eg Creighton, "The Equal Opportunity Act -- Tokenism or Prescription for Change?" (1978) 11 Melb ULR 503; Crawford, "The Human Rights Commission Bill, 1979 and the International Covenant on Civil and Political Rights" in *Legislating for Human Rights* (University of NSW, Faculty of Law Seminar Papers, 1982); Thornton, "Perspectives on Sex Discrimination Legislation in Australia" (1982) 54 AQ 393.