Anti-Discrimination Laws: The New Province for Labour Market Lawlessness

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18 March 2005

1. Introduction

Since the H R Nicholls Society was established 19 years ago, we have seen the re-emergence of freedom in the Australian labour market. The major cases which were fought during the 1980s—Dollar Sweets, the Wide Comb Dispute, Mudginberri, the Live Sheep dispute, all of which are documented on the HRN website—were milestones in the attack on trade union power and privilege and the concomitant growth of freedom for the ordinary working Australian. The battle against union power and privilege is not yet over, by any means, and the outcome of debates now taking place in the federal Cabinet room will decide how much further we have to travel before we can declare victory, pack up our tents and depart the battlefield, at least as far as trade union power and privilege are concerned.

But while we have been focused on trade union privilege, and the damage done to our economic life by the arbitral tribunals, a new threat to freedom, not from the trade union movement or the Industrial Relations Commission, has emerged. This threat arises from the anti-discrimination laws and the bodies established to administer them, notably HREOC, the Human Rights and Equal Opportunity Commission, and its various State counterparts.

The Commonwealth Acts which are relevant in this debate are the *Racial Discrimination Act* of 1975; the *Sex Discrimination Act* of 1984; the *Disability Discrimination Act* of 1992; and most recently the *Age Discrimination Act* of 2004. The consequence of these Acts and their State counterparts is that the law of contract between employer and employee has been seriously compromised by restricting the freedom of employers (but not employees) to contract with the party with whom they would prefer to engage in an employment relationship.

Unless we subject these laws and the agencies established to administer them to some effective critique, this process will continue and grow. As the roll-back of the system of compulsory conciliation and arbitration continues, the room for interference by the anti-discrimination tribunals will increase. Like nature, regulators abhor vacuums, or more accurately, they abhor freedom. We must now be vigilant to ensure that the freedom created by the retreat of the industrial tribunals, is not clawed back by the anti-discrimination tribunals.

2. **Collective Labour over the last 20 years**

The thrust of labour market regulation over the last 20 years has proceeded in two different directions. The laws governing collective labour relations, the Higgins model of compulsory conciliation and arbitration, and its essential components—legally privileged trade unions and employer organisations, centralised wage fixing, and the priest-like caste of industrial relations experts, headquartered in the Australian Industrial Relations Commission and its

State equivalents—are under attack and the Higgins apparatchiks are feeling insecure and unloved. The IR Society dinner held last December to celebrate the centenary of the passage of Higgins' 1904 C&A Act was more like a wake than a party.

Bit by bit, trade unions, with some important exceptions, have been gradually brought down from their place, as they thought, of being above the law. As a consequence of John Howard's Sections 45D&E of the TPA, Peter Reith's reforms designed to tackle unlawful industrial action, and the recognition (in legal and business circles) of the effectiveness of common law remedies as in Dollar Sweets, it is fair comment to say that unions are now much less willing to resort to strike action or to criminal violence than they were twenty years ago. A powerful reason for this most welcome reluctance is that the punishment for unlawful and criminal action is now greater and more certain than in the mid-eighties. These changes have at the same time emboldened the regulators. Two years ago, the ACCC imposed a $100,000 fine for the unlawful picketing of a gas station in the La Trobe Valley. And the Building Industry Taskforce is beginning to influence the culture of the building industry. With new powers in the wings, its influence will increase as the criminality which underpins the building industry unions' power is identified and brought before the courts. It can't happen soon enough.

The reason that unions are gradually accepting the rule of law is due primarily to the removal of the AIRC (and its state counterparts) from the field of law enforcement. Without this change, industrial action by unions would still be rewarded, by the arbitral tribunals, with arbitrated wage increases (under the guise of "allowances" or "improvements in conditions"). Such rewards were based on the time-honoured notion of "industrial reality": ie, whoever strikes hardest, for longest, in those industries most exposed to hostage taking, gets the most.

The reason that the reward for industrial action was not allowed to be called a wage increase, was that the system of centralized wage-fixing was supposed to reward all employees based on national economic considerations. But what really happened was that industrially strong unions forced wage increases which were then transmitted through the centralized system upon all employers.

For example, in the 1973 National Wage Case, the Whitlam Government, along with the unions (the most prominent being the Metalworkers Union), pushed for an across-the-board minimum wage increase of $14 (about 27.5 per cent). The result was a wages blowout of 28.91 per cent in 1974, double-digit inflation and the end of full employment. Clyde Cameron, then Minister for Labour and Immigration, stated, belatedly, that "one man's pay increase could mean another man's job". These developments became a major factor in the fall of the Whitlam Government.

The same pattern was repeated under Fraser in the early 1980s. Again the Metalworkers Union was involved. In 1981, during the recession, the Metalworkers Union won wage increases of 24 per cent for the 400,000 metalworkers who then comprised 9 per cent of the workforce. Wages rose across the workforce by 16 per cent in 1982. The fallout was massive dis-employment and liquidation of businesses, memorably summed up by Paul Keating at the 1984 ALP Conference. He accused the Metalworkers Union's Doug Cameron of having "100,000 dead men around his neck". The dramatic decline in Australia's manufacturing sector since 1974, when 1,338,444 people were employed in manufacturing and fell by over 300,000 to 1,018,100 by 1984, was not entirely due to the mandated wage increases I've just recounted. But they were significant. Paul Kelly underlined the Metalworkers Union's culpability, stating in *The End of Certainty*, that it was an “employment holocaust the unions visited upon their own members by excessive wage claims”.

Centralised wage fixing is being replaced with enterprise and, increasingly, individual bargaining. Almost 600,000 AWAs had been entered by the end of last year, with the take-up rate increasing each month. Productivity rather than industrial lawlessness has become the determinant for wage increases. And the results have been very good. The economics editor of the *AFR* attributed Australia’s “golden age of productivity growth” to, among other factors, an increase in labour productivity. But the capacity for flexibility in employment contracts can have huge implications for overall productivity in capital-intensive industries such as mining, where capital per employee is often measured in many millions of dollars.

Increasing freedom to set wages and conditions on an enterprise and individual level, and the restraints on unlawful union action and tribunal interference has been the continuing trend of the last 20 years. In the lead-up to the federal election of October 2004, Mark Latham came out with an Industrial Relations policy which was a traditional Labor policy: repeal of Sections 45 D&E, increasing the powers of the tribunals, and restoring trade union privileges. What was surprising to me was the ferocity and the unanimity of the counter-attack from business organisations, and the media. Even the AIG joined in. After that experience, I do not believe that the ALP will ever again seek to repeat that exercise. So one is reminded at this point of Churchill’s use of Arthur Hugh Clough:

> For while the tired waves, vainly breaking,
> Seem here no painful inch to gain
> Far back, through creeks and inlets making,
> Comes silent, flooding in the main.
> And not by eastern windows only,
> When daylight comes, comes in the light;
> In front the sun climbs slow, how slowly!
> But westward, look, the land is bright! [1]

3. **Individual Labour**

The freedom of individual employees and employers to do what suits them best is a different story. Looking westward over the last 20 years, individual labour law has become cast in shadow. Freedom has been gradually reduced. This has occurred in three main ways. First, the rise of statutory and common law restrictions upon so-called “unfair dismissal”; second, the erection of a huge “safety” regulatory framework in which the common law has been replaced with workers’ compensation and health and safety laws, inspectors and tribunals; and third, the impact of discrimination legislation.

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1 Poet Arthur Hugh Clough as quoted by Churchill in a speech of Apr. 27, 1941, see Kimball, *Churchill & Roosevelt*, I, p. 178. In An Introduction to the works of Rudyard Kipling, George Orwell labelled both Clough and Kipling as “Good bad poets”. He said “Good bad poetry, however, can get across to the most unpromising audiences if the right atmosphere has been worked up before hand. Some months back Churchill produced a great effect by quoting Clough’s ‘Endeavour’ in one of his broadcast speeches. I listened to this speech among people who could certainly not be accused of caring for poetry, and I am convinced that the lapse into verse impressed them and did not embarrass them. But not even Churchill could have got away with it if he had quoted anything much better than this.”

The problems with so-called unfair dismissal legislation were identified almost as soon as national legislation was promulgated in March 1994. By July 1994, there had been major amendments—reducing the available remedies to 6 months' pay or reinstatement. Three years after that, the life of the Industrial Relations Court of Australia established by the Brereton Act was terminated: unfair dismissal jurisdiction was removed almost entirely from the Courts and placed in the AIRC and, during the last 5 years, there has been a further tightening. The latest step will be the removal of employers with fewer than 20 employees from the scope of the laws. And now with the threatened nationalisation of the unfair dismissal system, the remaining state-based problems, especially the disgraceful New South Wales unfair contracts system, appear headed for the dustbin of history.

The safety system comprises two aspects: the compensation aspect and the punishment aspect. Traditionally, both have been State-based. The compensation part known as Workcover or Workcare is in similar form throughout Australia. The problems with this system are well known. So well known that they are almost a cliché: too expensive, too bureaucratic, too soft on employees and too willing to deem any injury as work related. Individual effort, responsibility and choice have all been reduced. But it is the punishment aspect of the safety regulatory apparatus that is more problematic. By gradually increasing monetary penalties, criminalising what are in truth complex operational decisions (including the recent change allowing the jailing of directors), and stacking the inspectorate with ex-union officials recently spun out of the industrial relations system, the occupational health and safety system is becoming the vehicle of choice for those unions unhappy with the industrial relations position of an employer. The Cole Commission Report into the Building Industry was replete with examples of unions using safety issues as a cover to press industrial demands. Now that it is accepted that the State knows best (and the State is represented by inspectors who are by and large ex-trade union officials), it is no longer possible for employers and employees (even or indeed especially experienced employees) to agree on the methods by which they will perform work.

The leading on-line workplace relations reporter recently carried this report[2]:

> **Patrick fined $115,000 over straddle crane risks**
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> The NSW IRC has fined Patrick Stevedores $115,000 and could face more than $500,000 in costs, after the MUA prosecuted it for failing to address musculoskeletal risks associated with driving straddle cranes.
> In its prosecution of the employer, the union relied heavily on the existence of workers' musculoskeletal disorders (MSDs) as proof that Patrick's use of straddle cranes at its Port Botany site risked its workers' health and safety.
> In particular, it argued that the enterprise agreement Patrick introduced (after the bitter 1998 waterfront dispute)—which required workers to work more hours on the straddles with fewer breaks—led to a "surge" of MSDs.
> **Coombs v Patrick Stevedores Holdings Pty Ltd [2005] NSWIRComm 56 (3 March 2005)**

It is hard to see Patrick's OHS case as anything other than industrial payback. Having lost the industrial, political and legal fight, the unions are turning to OHS to re-fight old battles. In 1998, MUA official Mick O'Leary said, "Reith's benchmark of 25 lifts an hour is just rubbish". Productivity on the waterfront has improved from 15.9 containers per hour in the 1995 December quarter to nearly 30 now (40 on some occasions). And Patrick now has achieved a real per capita productivity increase of 30% with half its pre-1998 workforce.

2 *Workplace Express*, Friday 4th March 2005 4:48 pm EST

The conventional view is that this is due largely to four factors. First, in its third term, the Hawke government got rid of pooled labour on the waterfront. Companies employed their staff directly and weakened the "gangs" underpinned by family and union allegiance. Second, both the Hawke and Howard governments funded redundancies. Hawke used $145 million of taxpayers' money to fund redundancies and Howard provided $150 million in loans. Third, Reith toughened the law on industrial action. And fourth, the 1998 waterfront dispute.

Another viewpoint is, in my view, more credible. The real reason for the improvements has been better workplace agreements, better management and fresh blood amongst the employees. But now, thanks to a NSW OHS decision, we can finally learn the true reason. Hidden for so long, Patrick has only been able to match world levels of productivity by putting workers' safety at risk.

But despite the potential that OHS regulators and the misuse of OHS laws have to undo reforms of the past 20 years, it is the use of anti-discrimination laws which arguably has the potential to do the most damage to the freedoms won in our labour market since the mid-1980s.

4. The Anti-Discrimination Laws

There are four Commonwealth anti-discrimination laws. The Whitlam *Racial Discrimination Act* of 1975; the Hawke *Sex Discrimination Act* of 1984; the Keating *Disability Discrimination Act* of 1992; and most recently the Howard *Age Discrimination Act* of 2004. On top of these federal initiatives, State governments of both persuasions have taken the opportunity over the past 20 years to gradually increase the scope of discrimination laws. With the addition of age discrimination, the coverage of these laws is now very large. For example, the Victorian *Equal Opportunity Act* 1995 is representative of most State laws. It prohibits discrimination on the basis of the following "attributes":

*** Age**
*** Breastfeeding**
*** Gender identity**
*** Impairment**
*** Industrial Activity**
*** Lawful sexual activity**
*** Marital Status**
*** Parental status or status as a carer**
*** Physical features**
*** Political belief or activity**
*** Pregnancy**
*** Race**
*** Religious belief or activity**
*** Sex**
*** Sexual orientation**

I should say at the outset that, having for the first time spent some hours looking at the Commonwealth statutes, and trying to work out the ramifications built into them, one can only wonder at the mindset of the legislators who passed these laws. During the Queensland election campaign of 1998 it suddenly became clear that One Nation was building up a real head of steam, and was getting about 13–14 per cent in the polls. At that time, Prime Minister

John Howard made one of his rare lapses of judgement and when asked about this phenomenon he used the word “deranged” with reference to One Nation supporters. This comment helped to lift the One Nation vote to something like 24 per cent on election day. Ever since then, I have had a particular fondness for the word “deranged”, and I think it is particularly apt in this case. These anti-discrimination statutes, if followed through to a logical conclusion, have the capacity to destroy economic life and social life in Australia, and there is no doubt that they now are as serious a threat to labour market freedom as the old Higgins mindset was.

To justify this statement let me very quickly try to explain the foundation of our economic life, namely the common law of property, contract and tort. Under this regime, unique to the English-speaking world, the rights of the individual to own property, particularly the property we now describe as human capital; and to trade that property as she thinks best for herself, particularly to enter into an employment contract for mutual gain with another party of her choice; and to sue others for tortious conduct which has damaged her; are upheld by the courts and the Crown. The essential point under this regime is that contracts entered into by two parties are voluntary, and will only take place if both parties expect to benefit from the contract. As trade takes place, and more and more contracts are entered into, we have a positive feedback coming into play, in that society benefits from the gains which follow from the successful carriage of the contract. Adam Smith wrote about it in *The Wealth of Nations* where he called it the division of labour, something which is only possible in a world where contracts are honoured, property is secure, and redress can be secured against tortious conduct by others.

A central pillar of the common law of contract has been the doctrine that those parties C thru Z which failed to enter into a contract with party A, cannot seek damages from party A for the prospective loss they will suffer because party A has chosen party B to contract with. Just as disappointed suitors for the hand of the beautiful girl must lick their wounds and try somewhere else in the marriage market, so it is in the worlds of commerce and the labour market. The essential point is that although the disappointed suitors and the would-be employees have not realised their hopes, they are no worse off than before, and they are free to try again, their human capital intact, even though their pride is hurt.

All this is changed by the various anti-discrimination Acts which I cited above. A girl who has discriminated against all her suitors but one, does not have to justify to the world why she has made her choice the way she has. But in the Commonwealth *Sex Discrimination Act* of 1984 we find, amongst other things, that

> (1) It is unlawful for an employer to discriminate against a person on the ground of the person’s sex, marital status, pregnancy or potential pregnancy:
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> (a) in the arrangements made for the purpose of determining who should be offered employment;
> (b) in determining who should be offered employment; or
> (c) in the terms or conditions on which employment is offered.

Even more astonishing is Section 7 (c):

> **Burden of proof**: In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

Reversal of the burden of proof is a sure and certain sign that the draftsman believed that a conviction could never be obtained without the presumption of guilt being laid firmly upon the accused. It is an unqualified attack on the Rule of Law.

What these anti-discrimination statutes forbid (except when qualified), as far as the labour market is concerned, is the exercise of the right of choice in deciding who to employ, who to promote, who to fire. Given that the whole point of entering into an employment contract is to maximise the economic benefits which will flow from the contract; benefits which will be shared between the contracting parties; the rigorous application of this statue to the labour market will potentially reduce the economic benefits from an employment contract to zero.

The areas in which discrimination on these grounds is not allowed are, typically, employment, education, accommodation, the provision of goods and services and disposal of land, sport, and local government. We can be grateful that it is not unlawful, yet, to discriminate in the marriage market where discrimination—particularly on the basis of "physical features, "race", "sex", religion, and "sexual orientation" are the drivers of choice in that market.

Although there are many areas of life in which discrimination is, under these statutes, unlawful, almost all the actions based on these anti-discrimination statutes occur in the employment area. It would be interesting to do the statistics, but probably 80–90 percent of the cases arising under these statutes arise because of discrimination (or more correctly, perceived discrimination or perhaps more correctly still, opportunistically perceived discrimination) in employment.

5. Practical Problems

But there are practical problems as well. There are too many tribunals covering the field of employment law. AIRC President Guidice referred to this problem in a speech in 2000.[3]

> The growth in regulation can be illustrated by taking the familiar case of the dismissal of an employee. Dismissal may lead to litigation based on discrimination of one kind or another in a specialist anti-discrimination tribunal either Federal or State, in the Federal Court because the reason for dismissal is an unlawful or a prohibited one, under the unfair dismissal provisions of the *Workplace Relations Act 1996* or State unfair dismissal legislation, or under the more general dispute resolution provisions to be found in industrial relations legislation and awards and agreements. There is also the possibility of an action at common law for breach of contract, perhaps with a trade practices overlay. In some jurisdictions there may be an action available based on unfair contracts legislation.
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> **[9]** In some very important respects the existence of this thicket of regulation threatens the quality of our democracy. This is not simply a question of the amount of regulation. Most of the legislation, if not all of it, is directed towards useful and important social purposes, such as the prevention and settlement of industrial disputes, the protection of freedom of association, the elimination of discrimination in all of its forms and so the list goes on. Various statutory provisions establish the machinery and processes which the several Parliaments of the States and the Commonwealth have adopted to carry those purposes forward. So my concern is not about the need for regulation in whatever areas sovereign governments think appropriate. But as all practitioners in the field know, for any one set of facts there is a variety of potential causes of action, in a number of different courts and tribunals, with a range of possible outcomes. This is confusing to say the least for the parties directly concerned but it also means that the outcome of

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3 Bar Association Of Queensland Industrial And Employment Law Conference, 20 April 2001, Keynote Address, Justice Giudice, President, Australian Industrial Relations Commission

> particular cases is of very little predictive value in similar cases. Our regulatory framework should be designed in a way which accords a high priority to consistency of treatment.
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> “It is unfortunately true that there are many instances where the parties to employment relationships are unable to say with confidence that particular conduct will have definite legal consequences or will result in a particular form of relief. This kind of problem is of course not confined to labour law. Demands for consistency in sentencing evidence concern of a similar kind in the criminal jurisdiction. But I suggest that the problem in industrial law is far bigger and more complex and can have grave social consequences.”
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> **[12]** “I do not want to be misunderstood. I am not directly addressing the basis or the continuing need for the various laws. Issues of that kind may be debated by others who are concerned with policy formulation and the political process. The uncertainty generated by the mixture of laws which impact on employment relationships in this country constitutes an erosion of our freedoms and impacts on the quality of our society. Laws at State and federal level which ostensibly have the same purpose are often quite different in their effect. One only has to consider again the laws dealing with termination of employment. The conditions for access differ, the remedies differ both between states and federally and there are other differences of significance. Treatment of costs is one example. The same general subject matter in some legislative schemes may be dealt with by a Court, in others by an industrial commission and in others again by a specialist tribunal. The potential for different outcomes in similar factual situations is widespread. To the extent that the potential for inconsistent treatment is avoidable the situation is quite simply unfair.”

There is also the problem that specialist tribunals concerned with the administration of, in this case anti-discrimination laws, do not understand that the law should be coherent and consistent across the whole range of human activity. Justice Guidice has commented upon this aspect also:

> “What is of real concern, however, is the potential, some may say the fact, for discretionary decisions to be made by individual judges or arbitrators which have no consistent theoretical basis either because they are made in different statutory contexts or because the discretion afforded by the law is too wide. To illustrate how different statutory contexts might lead to different results in the same factual context, it is useful to contrast the approach required when a matter falls to be decided in the course of an industrial dispute with the situation when the same matter is dealt with under a provision primarily concerned with individual rights. In industrial disputes the position of an individual or individuals might give way to the public interest or the good of the greater number involved in the dispute and an industrial tribunal, acting properly, might give greater priority to the well-being of the workforce at the expense of one or two individuals. In a statutory regime which gives primacy to individual rights the broader public interest merges with the right of the individual and the interests of the group are of less significance. This contrast in approaches is paralleled by the tension within the *Workplace Relations Act 1996* between parts which focus on collective rights and other parts which deal with individual rights. And the more one looks at the scope for the exercise of discretion in the various jurisdictions and the statutory context in each case, the clearer it becomes that there is the potential for a number of different outcomes in any particular case depending upon the court or tribunal and the relevant law. While the problem is capable of amelioration through appeal systems, appeals cannot provide a complete answer while there is a multiplicity of laws, courts and tribunals”

The inevitable problem which arises in every specialist tribunal, unstated by Justice Guidice, is the composition of these tribunals. The type of people who seek appointment to anti-discrimination tribunals, and often succeed in getting appointed, are often women, homosexual, and sometimes disabled (the former head of the Victorian tribunal was a blind woman). They tend to be steeped in student revolutionary culture of the 1970s and are living specimens of an undergraduate time warp. For them, employers, large and small, are the drivers of capitalist oppression. In this time warp, white, middle-aged males harass, intimidate, fail to promote, fail to hire and terminate employees as part of a conspiracy against non-Anglo-Saxons and women. Profoundly ignorant of how markets work in a free economy, and guided by chattering-class perceptions of how and why hiring and firing occurs, they are determined to bring light to the unenlightened and to expose the evils of the market economy. These tribunes are not judges at all—but social engineers sitting on the bench—inspired by the example of Sir William Deane, Sir Anthony Mason and Sir Gerard Brennan. Now that age and disability have been added to the anti-discrimination list, their capacity for re-engineering society has been increased in scope.

Sometimes the combination of 1970s undergraduate Marxist suspicion of employers and a profound ignorance of the world of industry and commerce is manifest in judicial pronouncements. A typical example is found in the recent *Age* case: *Keenan* v *The Age Company Limited* .[4] This case, and the judge's decision, affords considerable amusement to those observers of *The Age* who have noted how some of its columnists have been mugged by reality, and sought to adjust to it, and how others are still cocooned in the world of benevolent socialist theory, where governments are omnicompetent and should seek only to bring happiness and equality to everybody. In this case, a female property editor sued *The Age* for failing to give her the same benefits that *The Age* afforded her male predecessor.

The role of *The Age* property editor is similar to that of a society page writer. She or he has to find the gossip: who has got the biggest spreads, who is selling to whom and why. The previous editor got one of the biggest scoops in property: the sale by John Elliot of his Toorak mansion. He found out prior to Elliot's wife finding out. Which made for good TV when the breakfast programmes trapped the wife on her morning constitutional. She quickly scuttled back into what had become, tragically for her, the home that was no longer hers.

Like many employees who are expected to show initiative, it is hard to describe a go-getter, but easy to know when you have found one. The judge, had evidently no knowledge of or experience in making decisions of this type. This was her thinly veiled criticism of *The Age* editor, Michael Gawenda

> "The decision as to what grade to allocate to a new appointee carries no pre-set criteria. The types of matters Mr Gawenda set out as relevant to such a decision[2] can be summarised as including an assessment of the person's skills at writing, news breaking ability, feature writing, editing and sub-editing; experience in the industry; number of contacts, work history, what general skills they bring to the job and whether they are vulnerable to being poached by other media organisations. Another matter referred to in evidence was whether the person has a wider media profile such as on radio or TV. Despite some time being spent on evidence of this because the respondent's witnesses held it out as an attribute warranting higher grade or rate of pay, it emerged that there are at present only very few print journalists who have such exposure. I am not satisfied on the evidence that many senior male journalists have it or are required to have it to achieve a high grade. Many excellent writers lack the spontaneity of oral expression needed for radio or TV, and that does not mean that they cannot be very senior graded print journalists. The criteria for allocating a grade to a new appointee are therefore wholly subjectively applied."

One might well presume that Mr Gawenda, a hostile critic of Mr Kennett during his time as Editor of the *Sunday Age*, knows something about how to run a newspaper. Presumably his opinion as to why someone should be graded higher than someone else should be given some weight. He has, after all, spent his life in newspapers. Given that he was appointed as Editor of *The Age*—he is hardly likely to be the racist, sexist, pig-headed caricature of feminist demonology. Even leaving this aside, how can the judge seriously suggest that she knows better, and dismissively refer to grading decisions as "wholly subjectively applied".

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4 *Keenan* v *The Age Company Limited* [2004] VCAT 2535 (22 December 2004)

This led to an extraordinary finding:

> "While I have not found the initial decision to appoint Ms Keenan to grade 8 unlawfully discriminatory, as the evidence progressed in this case I could not help but think of the respondent as Hamlet's mother—"*The lady doth protest too much, methinks*". While Ms Keenan was granted a merit review increase at the end of 2003, the respondent seems firmly determined not to promote her to grade 9. The evidence is that she has performed her role as property section editor competently for more than three years and while I was not prepared to draw the inferences sought about appropriate comparators from her predecessors in the role at The Age, or from NSW Fairfax property editors' histories, I note that those who stayed as long as she has in the role received advancement, whether to grade 9 or beyond it. The longer Ms Keenan is kept at grade 8 as property editor, the more available will become the inference that she is not being advanced because she is female (or because she has brought this complaint)."

Although Judge Judith Cohen did not require *The Age* to promote Ms Keenan to Grade 9, Her Honour did mandate a company-provided car for her.

The Age now has a property editor whom we may reasonably infer that it does not want, it does not regard as having performed as well as her predecessors, who it must eventually promote—at the risk of being further prosecuted by the employee. The property editor is now a protected species. And the precedents set in this case carry enormous implications.

Another problem with litigation inspired by the anti-discrimination legislation is the gradual increase in damages awards. The imposition of the discrimination legislation follows a time-honoured ritual. First, it is said to be educative. Then there is a tentative move towards compensation. Then the idea of penalising conduct develops. (Without large penalties, we can't get at the "hard core" offenders.) This pushes the compensation awards along. And as the judges and tribunal appointees act without juries, and as they are largely ignorant of the workings of a competitive economy, and as they want their own role to be taken more seriously, they have pushed up damages awards slowly and surely over the last 20 years.

In contract, an employee is usually limited to notice specified in the contract; under unfair dismissal legislation to 6 months notice (or reinstatement), but discrimination tribunals can give open-ended damages awards. Here are the summaries of five hearings, in just one month, September 2004, from *Workplace Express*:

> **"Overweight coal miner's battle with Anglo Coal pays off in ADT**
>
> **Friday 17th September 2004 3:13 pm EST**
>
> An overweight coal miner sacked three times by Anglo Coal's Capcoal operations for being unfit for work has won a discrimination claim against the company after it then refused to let him on site at a different mine [Compensation almost $20,000].
>
> **Queensland company liable for pregnancy discrimination**
>
> **Tuesday 14th September 2004 5:49 pm EST**
>
> A Cairns adventure tourism operator has been ordered to pay a former manager $26,750 in damages, lost earnings and interest after being found to have discriminated against her on the basis of her pregnancy and parental status.
>
> **NSW police ordered to compensate man with vision defect**

Monday 13th September 2004 6:28 pm EST

The NSW Police Service has been ordered to pay $15,000 in damages to a man refused employment as a policeman because of a visual disability.

Employer pays for indifference to sex harassment complaint

Thursday 9th September 2004 7:17 am EST

A company and its male director found liable for the sexual harassment of a female worker have been ordered to pay her $25,000 compensation, including $5,000 in aggravated damages for the "indifference" it showed in failing to respond to HREOC correspondence and appear in the case.

Employer needed hard evidence before rejecting colour blind emergency worker

Monday 6th September 2004 4:14 pm EST

Employers need definitive evidence before refusing employment on the basis of a medical condition—even for emergency services personnel, a tribunal has found in a case involving a colour blind man."

The going rate is roughly $10,000 to $30,000. Damages used to be small: an apology, or payments in the hundreds of dollars. We are now in the tens of thousands. Eventually they will increase to the hundreds of thousands, and then millions of dollars. Unlike unfair dismissal and contractual damages, they are uncapped. As this area borrows so heavily from American experience, it will not be long before the damages awards in Australia increase to American proportions.

In the middle of 2004, JP Morgan agreed to pay $75million to settle a class discrimination claim. Reported by Workplace Express[5] as follows:

$75m payout for JP Morgan

US Equal Employment Opportunity Commission has withdrawn a sex discrimination case it launched in 2001 against investment bank Morgan Stanley after the company agreed to a $75m settlement.

As part of the deal (see the EEOC/Morgan Stanley joint statement), the company will set up a $55m fund to compensate 350 female employees who were denied promotions and pay rises.

The company will also spend $3m on internal diversity programs. It has also agreed to an extensive list of measures to counter discrimination and allow monitoring of its performance.

The "lead plaintiff", bond trader Alison Schiefelin, is understood to have been awarded $16.6m in compensation."

Finally, I have not touched on indirect discrimination or equal pay for work of equal value to any large extent. These are largely sleeping areas of discrimination law that have the capacity to completely roll back the freedoms won over the last 20 years. Through the mechanism of class action type indirect discrimination claims and equal pay for work of equal value cases, it will be possible to re-create a system of centralized wage fixing. The inherent hostility of the members of discrimination tribunals to the market and to "wholly subjectively applied"

5 Wednesday 14th July 2004 3:14 pm EST

criteria, will lead to attempts to re-fashion an “objective” framework. The objective framework will be a framework constructed by comparing a carpenter (say) to (say) a nurse, and the conclusion will be self-evident. The nurse has been underpaid, because her skills, experience, efforts and expertise have been undervalued. She is actually just as valuable, “objectively” speaking as the carpenter, it is just that the market, in its patriarchal, subjective way has refused to recognise it. To an extent this is occurring already. There has not been a JP Morgan case yet in Australia, but the equal pay for work of equal value arguments are being put forward throughout Australia, and we can expect to see some fireworks in this field over the next three years.

6. Conclusion

The threats posed by the use of anti-discrimination laws in the mid-2000s are similar to the experience with the unfair dismissal laws of the mid-1990s. The combination of tribunals staffed by true believers, with little or no experience of the real world and with the potential to award large uncapped damages, and the opportunities which ambulance-chasing law firms will seize, is an explosive one.

It took Laurie Brereton only 3 months to realise what a mistake he made in March 1994 with his unfair dismissal clauses. By July 1994, he had capped damages. The true believers were shut down three years later, as the Industrial Relations Court was disbanded and the jurisdiction removed to the Industrial Relations Commission.

The dangers posed by the discrimination laws are even greater (given the capacity for class action style indirect discrimination claims and equal pay for work of equal value cases). Yet these dangers are as yet unrecognised. As they are unrecognised, nothing has been done to bring the anti-discrimination tribunes to heel. The only effective remedy is repeal of the offending legislation or ring-fencing it so that it cannot intrude into labour market contracts. If this is not done, all of the work of the last 20 years will be at risk.