AFFIRMATIVE ACTION

The New Discrimination

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The New Discrimination

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For Edith, Annelies and Caroline

Foreword

Affirmative action does not mean quotas based on ethnic origin or gender. It means strengthening, not weakening, the merit principle. We are not going to make the mistakes that were made in the early days in America. But if we are to measure the extent to which affirmative action policies are genuinely successful, we will need numerical goals for including more minority members and women, and timetables for achieving them. Moreover, the translation of a policy into a quantitatively specified target is a standard management tool when it comes to formulating other corporate policy objectives. The specification of an affirmative action policy for an organisation is no different.

There, in a nutshell, is a very familiar argument. It is also a very bad argument. Yet it is regularly trotted out in the United Kingdom and Australia, to reassure those who fear that affirmative action policies in practice mean introducing new forms of discrimination by ethnic origin or gender — often where none existed previously — and diluting the merit principle.

Why is it a bad argument? First, quotas were **never** lawful as such in the United States. Instead, the term 'quota' refers to the way **in fact** — as a matter of organisational practice — numerical goals operate in the hands of some managers, for good prudential reasons such as impressing their seniors and avoiding lengthy hearings before Equal Opportunity (or comparable) Commissions and explaining why, despite 'good faith efforts', the target was not reached.

So far as the merit principle is concerned, the matter is much more complex, as Dr Moens elegantly demonstrates in this book. Is the merit principle satisfied provided you appoint someone who demonstrates the capacity to perform the job? Or is it satisfied only if you select the applicant who, on the best evidence obtainable, possesses the relevant skills to the highest degree? Those who say affirmative action does not mean diluting the merit principle commonly take the former view. Provided the applicant is above the relevant floor of adequate competency, merit is satisfied, and one may then take into account other criteria such as the need to improve the representation of particular groups in the organisation. Such a view of merit may be appropriate in non-professional and semi-professional domains. As Everett Carll Ladd Jr and Seymour Martin Lipset have point out:

> ... A primary distinction between the professions and the semi-professions involves the so-called 'replaceability factor'. Doctors, lawyers, or scholars are not viewed as readily interchangeable. In

> contrast, a good nurse or public school teacher can more easily be replaced by another person with the same basic training and performance record. (*The Divided Academy,* Norton, 1976, p. 245.)

It may also be appropriate in the civil service. Indeed one of the great fears expressed in American and Australian universities is that they may be forced to lower their merit standards to those of the public service; i.e. to move from the second to the first conception of merit, with affirmative action and possibly in the future other externally mandated social policies distributing positions to those whose qualifications lift them above the floor.

The fear has been expressed clearly by Harvard University President Derek Bok. According to Bok:

> ... preferential treatment in faculty hiring cannot be justified on academic grounds. Worse yet, hiring professors on this basis would also be unjustified to white candidates of superior ability, for the latter could make a strong claim that they truly deserved the job 'on the merits' and that they had done nothing to warrant the loss of the appointment ... Nor are minority applicants for faculty posts particularly appealing candidates to receive compensatory benefits. Such persons are among the most privileged of their race, possessing talents and educational attainments that offer them excellent opportunities to compete for rewarding careers. Black professors already receive higher compensation that white professors of comparable age and experience — a condition that exists in almost no other occupational group in the United States. (*Beyond the Ivory Tower,* Harvard University Press, 1982, p. 114.)

Plainly, for Bok, the merit principle means the best person for the job, and the only point at which affirmative action criteria would be appropriate in the selection process, if ever, would be in those very rare circumstances when there was nothing to choose between the two best applicants.

Of course it is commonly said that one may justifiably by-pass the merit principle in this second sense (but not the first) in order to recruit more women and minority members into visible positions, in order to serve as 'role models' for others who may otherwise not contemplate pursuing 'non-traditional' careers. From the frequency with which this claim is made, you would think it must have been well established that ethnic or gender identification is at least a statistically significant factor in career choice and motivation. It is therefore worth noting what Jonathan Cole has observed, after a thorough review of the research on the subject:

> There simply is no strong evidence that gender matching or racial matching between young people and their elders has a significant

influence on career choice. We might like to think there is such an effect; it may have intuitive appeal; but the facts that are assumed to exist simply don't. (*Fair Science: Women in the Scientific Community*, Free Press, 1979, p. 269.)

Behind the insistence by affirmative action supporters on 'goals and timetables' (but **never** quotas!) are really two quite different social philosophies. One is an individualist philosophy that sees the abolition of discrimination on irrelevant criteria as an essential prerequisite for individual self-realisation and fulfilment. The other is a more radical and essentially anti-individualist view, which believes social goods should be distributed on the basis of group entitlements. According to this view, if society contains a population that is just over 50 per cent female, and if females do not receive half of the senior management positions or half of the total earned income, then there is a distributional injustice that needs to be remedied.

Goals and timetables **are** an appropriate management tool if one has this more radical view of social reconstruction in mind. Yet few would argue for such a view explicitly. And I doubt there would be much support for a new feudalism, according to which one's entitlements to social goods derived essentially from hereditary factors — in this case ethnicity or gender. If one's social philosophy is an individualist one that sees discrimination as an impairment to self-realisation and fulfilment that ought to be removed, then 'goals and timetables' are neither necessary nor sufficient for the removal of discrimation, nor does 'progress towards them' constitute the slightest evidence that discrimination has been reduced. Indeed it is perfectly consistent with exactly what many fear: the introduction of new forms of occupationally irrelevant discrimination.

Getting rid of affirmative action mechanisms once they have been put in place is extremely difficult. Management comes to like them, for it sees them as an effective counter to suits that might be brought by disgruntled unsuccessful applicants. New departments get entrenched, and then behave exactly like other elements of any bureaucracy, which cannot contemplate their own redundancy. American evidence on both these points is clear. The American National Association of Manufacturers issued a policy statement supporting affirmative action in May 1985. And as Anne B. Fisher has pointed out (in an article generally supportive of affirmative action, which is typical of the 'economic conservatism and social left liberalism' of the current American business press):

> ... By now, ... most large companies have an entrenched affirmative action bureaucracy in the personnel department. But companies also have practical reasons to support affirmative action and to preserve

their goals and timetables even if the government says they don't have to.

Once a company has an affirmative action program in operation, it cannot stop or even retreat noticeably without stirring grievances and impairing morale among women and minorities on the payroll ('Businessmen like to hire by the numbers', *Fortune* 16 September 1985, pp. 26, 28).

Dr Moens has produced the most comprehensive study of affirmative action ever undertaken in Australia, and one that is of international importance. It is one of the few studies that is not itself a product of the burgeoning affirmative action industry, and for that reason has an academic detachment and objectivity that should be immediately evident to every reader, whether antecedently sympathetic, unsympathetic, or just puzzled in relation to affirmative action.

Lauchlan Chipman
Harvard Law School

Preface

Since my student days in Europe and the United States in the late 1960s and 1970s I have been convinced that, in the main, the distribution of burdens and benefits on the basis of sex, race or ethnic background is discriminatory. This conviction stemmed from the fact that in the past members of disadvantaged groups were sometimes denied valued rewards and benefits on the basis of characteristics over which they had no control. In light of this conviction, it is not surprising that my intellectual curiosity is stimulated by the emergence and repeated demands for the introduction of affirmative action programs, including equal employment opportunity programs, which proceed on the basis that sex, race or ethnic background are relevant to the way people should be treated in society.

The affirmative action debate concerns the vexatious question of how racial and sexual discrimination can be remedied without betraying the very principles on the basis of which Australians consider discrimination an invidious practice. It could reasonably be expected that this debate would involve a detailed analysis of the manifold moral and philosophical issues pertaining to the introduction of affirmative action programs. However, the Australian affirmative action literature, rather than concentrating on these issues, is largely limited to the unimaginative assertion that affirmative action measures are perfectly legitimate ways to compensate for past societal discrimination or to create role models. With few exceptions, the relevant Australian literature uncritically embraces the proposition that affirmative action is desirable and appropriate in this country. As I am concerned about the absence of debate on the moral and philosophical issues arising from affirmative action, I decided to concentrate on these issues in this monograph. In doing so I hope that I have enhanced the quality of the affirmative action debate generally.

Many people have given me advice and assistance during the writing of this monograph. In particular, I would like to mention Professor L. Chipman, Dr M. Krygier, Mrs E. Moens, Dr P.R. de Lacey, Dr W Sadurski, and Professor A. E.-S. Tay, whose perceptive criticisms of and comments on earlier drafts have pressured me into a constant and continuing re-evaluation of the arguments developed in this monograph. While they undoubtedly saved me from some errors, I am alone responsible for any remaining defects. Also, I would like to thank Ms Rose McGee, the Executive Editor of the CIS, whose efforts in editing the original manuscript were largely responsible for the final draft of this monograph.

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Chapter 1

Understanding Affirmative Action: The Search for an Ideal of Equality

Introduction

The 'affirmative action' debate in Australia has been intensified recently by the enactment of certain legislative provisions. For example, subsection 9(2) of the *Human Rights Commission Act* 1981 states that the Commission shall not 'regard an enactment or proposed enactment as being inconsistent with or contrary to any human right ... by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons'. In 1980, the New South Wales Anti-Discrimination Act, 1977 was amended to incorporate equal opportunity employment provisions requiring the preparation of equal employment opportunity management plans. Such legislation has resulted in the commissioning of a number of affirmative action research reports as well as in the publication of relevant material in journals and newspapers.

The present debate has also been fueled by the decision of the Commonwealth Government to exclude specific affirmative action provisions from its *Sex Discrimination Act* 1984. This Act was followed by the publication of a policy discussion paper entitled *Affirmative Action for Women* (Ryan and Evans, 1984), and by a decision, taken in October 1985, to introduce affirmative action legislation for women in the private sector and tertiary education institutions.

Affirmative Action

Affirmative action is a recent addition to our national debates, and general familiarity with and awareness of its nature and variety is understandably limited. Even a perfunctory survey of the relevant literature reveals that the concept of affirmative action is obscure and that many meanings have been attributed to it.

In the main, affirmative action has been used as a general term to describe a number of measures aimed at improving the economic and social status as well as the employment prospects of its beneficiaries. For example, Ryan and Evans (1984:3) define affirmative action 'as a systematic means, determined by the employer in consultation with senior management, employees and unions, of achieving equal employment opportunity (EEO) for women'. Although this definition is vague and imprecise, it nevertheless conveys that affirmative action measures are instrumental in facilitating entry into and promotion within the workforce. As a commentator has pointed out recently, 'the designation "affirmative action" is more inspirational than informative; it tells us more about the intentions of its users than it describes the programs they support' (Roberts, 1982:150).

The many meanings of affirmative action share the underlying intention of its proponents to seek the establishment of a more egalitarian society. However, as 'equality' itself is an indeterminate category that must be filled in by policy makers, affirmative action measures could be used as convenient means to implement ideals of equality that are incompatible with one another or even mutually exclusive. There are many competing and conflicting ideals of equality. For the purpose of this monograph I will select two such ideals that are particularly relevant to the affirmative action debate: equality of opportunity, and equality of result.

In an employment context, equality of opportunity means (in part) that individuals are entitled to compete for jobs exclusively on the basis of characteristics needed for the satisfactory performance of those jobs. International treaties as well as domestic legislation stipulate that race, sex and ethnic background are irrelevant to the satisfactory performance of most jobs, and consequently interpret the ideal of equality of opportunity as meaning that people should be recruited and selected without regard to those characteristics.

If it is argued that talents and skills are **not** distributed uniformly to every person throughout the human race, then the implementation of the ideal of equality of opportunity may result in very different outcomes because individuals possess varying aptitudes, talents and skills. In this sense, the ideal of equality of opportunity is compatible with sharp hierarchical differences in society so long as there is social mobility, that is, the opportunity for people 'to move up and down the hierarchy' (Frankel, 1970-71:203) in accordance with their own talents and skills. In other words, the

system in which the ideal of equality of opportunity operates could be described as a social order in which individuals occupy places in a hierarchy of income, status, and power — places they have earned exclusively on the basis of their demonstrated individual talents and skills (Livingston, 1979:18).

But this interpretation of the ideal of equality of opportunity has come under attack in recent years because it is based on the assumption that talents and skills are **not** distributed uniformly throughout the human race. If it is argued that talents and skills **are** distributed uniformly throughout the human race, and that men and women, blacks and whites have on average the same talents and skills, then implementing the ideal of equality of opportunity would be expected to result in equal outcomes in the sense that men, women, blacks and whites would be represented in positions of influence and power in proportion to their total strength in the society. Proponents of this argument conclude that any large disparities in result (or outcome) must necessarily be due to the existence of a system or structure of discrimination, which in turn is the result of employment practices or procedures that disadvantage a substantially higher proportion of members of one group than another.

In emphasising the need to remedy the large disparities that result from implementing the ideal of equality of opportunity, these proponents rely on and seek to implement the second ideal of equality, namely, equality of result. This ideal is premised upon the idea that a 'nearly random distribution of women or other minorities in all jobs' (Roberts, 1982:157) would be expected to occur in the absence of discriminatory practices. Also, some proponents of affirmative action argue that, even if talents and skills are **not** distributed uniformly throughout the human race, it remains necessary to remove the large disparities that result from implementing the ideal of equality of opportunity. These proponents maintain that equal results (or outcomes) can be achieved by introducing affirmative action measures that require or inevitably lead to proportional representation of groups in the workforce. They recognise that such affirmative action measures may involve 'preferential hiring', namely the recruitment, selection or promotion of people precisely on the basis of their race, sex or ethnic background.

Affirmative action measures, then, employ a vision of social justice that favours the achievement of either of these two ideals of equality. I argue in this monograph that the relationship between affirmative action and ideals of equality is central, and is largely responsible for the ferocity and partiality with which affirmative action issues are debated in Australia as well as in the United States. The debate does not yield easy answers because it is difficult 'to see

what would constitute a decisive philosophical argument enabling one to choose between equality of opportunity and equality of outcome' (Tay, 1984:191).

Equality of Opportunity and the Anti-Discrimination Principle

As pointed out in the previous section, the implementation of the ideal of equality of opportunity has been associated closely with the proposition that racial and sexual characteristics are irrelevant to the way people should be treated. This proposition has been incorporated into the anti-discrimination principle in a number of international conventions and domestic Acts. The principle prohibits discrimination on the basis of race or sex.

The proposition that race and sex are irrelevant to the way people should be treated is presumably based on the belief that race and sex are immutable characteristics over which people have no control and that, therefore, distribution of benefits and burdens by governments on racial and sexual grounds is discriminatory. Nevertheless, some writers argue that a distinction should be made between 'invidious' and 'benign' discrimination (Ely, 1974; Redish, 1974), proceeding on the underlying assumption that the relevant international conventions and domestic Acts prohibit only 'invidious' discrimination. For example, if an enactment made it compulsory to levy a 15 per cent tax on taxpayers generally, with a proviso that a 20 per cent tax would be levied on Aboriginals, then the proviso would represent an example of invidious discrimination because race is extrinsic to the administration of the taxation enactment involved. The argument that a distinction should be made between invidious and benign discrimination further proceeds on the assumption that measures designed to favour preferred minorities (or women) or to enhance the economic and social status of members of these groups are permitted under the relevant international conventions and domestic Acts.

The distinction between invidious and benign discrimination prompted Posner (1974) to argue that **every** distribution of benefits and burdens on the basis of race (and by implication, sex) is impermissible. He argues that the distinction between invidious and benign racial discrimination creates judicial inconsistency. There are no decisive principles enabling us to determine whether a measure that distributes a government benefit or burden on the basis of race is benign or invidious. Thus, total agreement on the invidious or benign nature of race-conscious measures can never be reached. Hence Posner argues that policy makers and judges will have to decide the nature of a race- or sex-conscious measure on the basis of their own values. They may be tempted to make their own

assessment of what constitutes an invidious or benign discriminatory measure, thereby implicitly or deliberately choosing the values and interests worthy of protection. Posner concludes that the proper principle is not 'no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens' (1974:25).

Notwithstanding Posner's argument, there are a number of reasons not to prohibit **every** distribution on the basis of race or sex; at times, such distribution may even be required by the anti-discrimination principle itself.

First, as indicated above, race- and sex-conscious measures may be objectionable because race and sex are immutable characteristics over which people have no control. This argument suggests that, while benefits and burdens ought not be distributed on the basis of immutable, rigid characteristics, they may be distributed on the basis of flexible characteristics regarded as relevant to the way people should be treated. But this argument is not compelling because there is only a tenuous line between immutable, rigid characteristics and flexible ones. For example, it may be argued that intelligence, rather than being a flexible characteristic, is also largely beyond one's control. Thus, 'immutability' could be offered as an argument that applicants should not be preferred because they are 'intelligent'. The fact that there is only a tenuous line between immutable and flexible characteristics weakens any argument based on our ability to draw a line between these characteristics in the first place.

Second, the anti-discrimination principle, according to which 'the distribution of benefits and costs by government on racial or ethnic grounds is impossible' (Posner, 1974:22), sometimes implies and may even require race- and sex-conscious measures. The principle that one should not be discriminated against on the basis of race or sex presupposes that the violation of this principle be remedied, even if the remedy involves race- and sex-conscious measures. If violations of the principle went unremedied, then it would be reduced to the status of a mere moral principle.

Third, race and sex may be regarded as individual characteristics rather than group characteristics. In this sense, race and sex may be meritorious and may qualify a person for a valued reward, such as suitable employment. Thus, race may be a factor in a selection process if it is taken as an individual (as opposed to a group) characteristic likely to facilitate satisfactory performance of a particular job. For example, race may be considered as meritorious if the reward is a job requiring the successful applicant to work in black communities. The Department of Social Security employs Aboriginal staff whose job it is to improve communication between the Department and Aboriginal people who come into contact with it. Aboriginals are not appointed simply on the basis of their race; in

this case, 'Aboriginality' is treated as an individual characteristic deemed to facilitate the successful performance of the liaison duties.

Direct and Indirect Discrimination

The anti-discrimination principle has become a powerful moral precept in our society. It has become so entrenched that few Australians would be prepared to dissent from it in public. In fact, many contemporary Australians believe that public disagreement with this proposition is sufficient to justify a charge of racism or sexism.

Acceptance in our society of this principle is based on the assumption that no human being is of greater or lesser moral worth than another because of differences in sex, race or ethnic origin. Chipman points out that in a society that prohibits discrimination on the grounds of race and sex, it could be expected that an individual's desire to acquire or obtain things of value, including suitable employment, would not be frustrated because of sex or race. Nevertheless, this expectation can be rebutted easily. If we actually look at the distribution of things commonly perceived as valuable, such as suitable employment opportunities, educational achievements and income, we find significant differences between ethnic groups and between the sexes, particularly in respect of employment opportunities (Chipman, 1983:34).

This point may be elaborated further by distinguishing discrimination in the traditional sense from what is now often referred to as 'indirect' discrimination. In the main, proponents of affirmative action argue that a seemingly neutral rule or practice that does not deliberately discriminate against persons or groups may in fact disadvantage a particular group and thus result in indirect discrimination. For example, seniority rules, which determine eligibility for promotion, may seem neutral because they do not discriminate deliberately against women employees. However, some female employees may in fact be disadvantaged by these rules because they are more likely than men to interrupt their careers to raise children. If seniority rules are linked to the idea of permanent and continuous service, then a break in a female's career decreases her chances for promotion. Both direct and indirect discrimination may result in what is known in the relevant literature as 'systemic' or 'structural' discrimination. This happens when the interaction of discriminatory rules and practices affects groups of people in systematic ways (Ryan and Evans, 1984:12).

Advocates of affirmative action argue that indirect discrimination is exacerbated when a whole complex of seemingly neutral rules or practices combine, producing discriminatory results and leading to underrepresentation of races, ethnic groups and women in the

workforce. It is true that a statistical study of the number of women in certain jobs may indicate (but not yield conclusive evidence of) indirect discrimination and may identify some 'neutral' rules or practices as contributing to the underrepresentation of women or minorities in the workforce. But some advocates of affirmative action treat statistical underrepresentation as conclusive evidence of direct discrimination (Stewart and Andy, 1984), even though it may be only the inevitable consequence of indirect discrimination, which by its very nature does not involve a discriminatory intention. In other words, indirect discrimination is for all practical purposes equated with direct discrimination by these advocates.

This equation of direct and indirect discrimination has been accelerated by a gradual but, if international trends are an indication, irreversible extension of the concept of indirect discrimination. It now covers the situation where a social or natural fact results in underrepresentation of women or minorities in the workforce and measures are not introduced to remedy such social or natural facts. Thus, an employer's unwillingness or failure to consider the fact that, statistically, women's careers suffer more interference than men's through childbirth or home duties may lead to a charge of direct discrimination.

Careful observers of the anti-discrimination movement notice a shift in emphasis from discrimination as a **deliberate** act or policy to discrimination as an **objective** feature of situations or an outcome of rules or practices intended to be neutral. This shift has been reinforced by anti-discrimination legislation that obviates the need to distinguish between direct and indirect discrimination because the criminal law conception of the guilty mind (or intention) does not apply (Tay, 1984:194). For example, the *Sex Discrimination Act* 1984 proclaims the practice of both direct and indirect discrimination as unlawful but not as criminal offences.

This amalgamation of direct and indirect discrimination, coupled with a corresponding weakening of 'intent' as necessary to the concept of discrimination, is a significant development that I will discuss throughout this monograph. Tay emphasises the importance of this development:

> Not only philosophers but the major political parties of most democratic countries and the populations of most of those countries, united as they may be in believing in human rights, are deeply divided about the moral and legal propriety of discarding the concept of deliberate racial, ethnic or sex discrimination as intolerable and, instead, extending the concept of affirmative action over a wide range of social activities to protect large and reasonably secure sections of the population. This, they say, can be done only at the expense of the social ideal of individual equality of rights and of individual equality before the law. (Tay, 1984:195-6)

It will be argued in the next section that this conflict between individual rights and group rights is an important issue in the affirmative action debate. The philosophical literature on affirmative action displays strong feelings and extended arguments on this issue.

The Concept of Affirmative Action

As mentioned above, a review of the literature reveals that 'affirmative action' is often used simply as a general description of measures aimed at improving the economic and social status of its beneficiaries. This definition is not particularly helpful because it includes **any** measures taken to improve the quality of life of those favoured by them. Thus, affirmative action could refer to 'programs aimed at establishing and distributing to disadvantaged individuals the information and skills required to effectively compete for and acquire desired social positions' (Roberts, 1982:150), as well as to remedies for 'past discrimination, whether that discrimination is intentional or a result of improperly structured employment systems which have disproportionately excluded minorities and women' (Farmer, 1981:5). Hence, affirmative action provides remedies for direct (intentional) discrimination as well as for indirect discrimination that is a result of 'improperly structured employment systems'.

An example of affirmative action measures that provide a remedy for instances of indirect discrimination is offered by the United States Supreme Court in the case of *Griggs* v. *Duke Power Company* (1971) 401 U.S. 424. *Griggs* was a decision handed down by the United States Supreme Court following a complaint from a black man, Griggs. He alleged that he had been discriminated against because of his race when he was refused a janitorial job with Duke Power Company. The company, denying race discrimination, argued that he was refused employment because he did not have a Grade 12 education, which was a requirement for the position. Counsel for Griggs demonstrated successfully that the Grade 12 requirement had the effect of disqualifying a disproportionate number of black applicants because of their lower level of educational achievement, and that this requirement was not necessary to perform satisfactorily the particular job for which Griggs had applied.

The Supreme Court, ruling in favour of Griggs, stressed the necessity to remove 'artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification'. Duke Power Company, in failing to demonstrate the legitimacy of its rules used to distribute positions, established invalid selection criteria which resulted in unwarranted discrimination. Consequently, the

Court found that racial discrimination had occurred when a qualification required was not a genuine occupational qualification justified by business necessity, which resulted in the disproportionate underrepresentation of blacks in the workforce.

The Court used Title VII of the *Civil Rights Act* 1964, which deals with discrimination in employment and proscribes 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation', and claimed that if an 'employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited'.

Griggs is an important case because it alerts us to the possibility that employment practices that are 'fair in form' may be discriminatory in practice if qualifications required are not necessary for the successful performance of a particular task. These practices are discriminatory because qualified individuals may find it difficult to gain access to employment or may be discriminated against once they have become employed.

The *Griggs* proposition, that only genuine occupational qualifications justified by business necessity be required of applicants, is incorporated in the Australian Commonwealth Public Service's selection guidelines. For example, the Service's Equal Employment Opportunity Selection Guidelines for Ethnic People stipulate that 'fair treatment in the selection process means that selectors will take into account only the inherent requirements of each position in setting selection criteria'. The guidelines continue:

> Selection based on the inherent requirements of the position will ensure that if facility in written and spoken English is an important requirement, then the successful applicant must be able to demonstrate this facility. It also means that a candidate with appropriate skills and experience but a limited knowledge of English will not be at a disadvantage in applying for positions in the Service which require only basic English. These days an increasing number of positions in the Service require bilingual/bicultural staff. Occupants of these positions need language skills and a knowledge of ethnic issues, apart from the other requirements of the job. In all such positions selectors must give due weight to these factors. For some jobs they may be of prime importance.

The Commonwealth *Racial Discrimination Act* 1975 imposes obligations on the Public Service to ensure that its selection processes are not discriminatory. For example, it puts the onus on interviewing officers to concentrate their assessment on the inherent requirements of the job and makes it illegal for selectors to display bias during an interview or at any stage in the selection process. This legislation also ensures that applicants are not eliminated solely because of language usage, cultural affiliation, or any other reason

related to their ethnic origin and unrelated to the requirements of the job.

Measures taken by companies to remove arbitrary barriers to employment that invidiously discriminate on the basis of racial or other impermissible classifications could be described appropriately as 'affirmative action' programs. These programs may include, but are not limited to, the following measures:

- publication of statements that the employer is an equal opportunity employer;
- measures for improved recruiting;
- information campaigns aimed at locating suitable applicants where they may be found;
- introduction of new training programs open to all employees regardless of race or sex;
- installation of special seats for the handicapped on public and private transport;
- modification of buildings, providing for the installation of access ramps for the disabled in wheelchairs;
- public housing programs; and,
- any other specific remedies that enable applicants to compete effectively for scarce resources, including desirable employment.

It could be argued reasonably that such programs constitute acceptable and customary responses to discriminatory situations. But many such programs remain controversial because affirmative action measures as well as anti-discrimination legislation inevitably restrict freedom of action, in the sense that they prohibit people from acting on their prejudices or biases (Levin, 1982:85-95; 1981:110-25). Nevertheless, these programs are consistent with the anti-discrimination principle if they do not grant or deny any benefits on the basis of race, sex or ethnic origin, but concentrate on removing any artificial barriers to employment. This opening up of positions through the use of affirmative action measures conforms to the ideal of equality of opportunity identified above: the idea that justice is achieved when the entitlement of individuals to compete for valued rewards is determined exclusively by characteristics relevant to the reward. Such programs are sometimes referred to in the relevant literature as 'soft'. 'Soft' affirmative action programs are ideally suited for removing indirect discrimination against handicapped people. An example is the Handicapped Persons Welfare (HPW) Program, which assists eligible organisations to provide special services for physically and intellectually handicapped people. The services include training, activity therapy and sheltered employment, and residential services.

However, some advocates of affirmative action believe that it is not enough merely to replace discriminatory practices with

legitimate procedures. They claim that reparation must be made for past discrimination practised by the society as a whole, even though such reparation may involve discrimination in favour of individuals who belong to 'preferred' groups. They point out that soft affirmative action programs require a 'comparatively long time to produce a social order free of the marks signifying its discriminatory past' (Roberts, 1982:151). Therefore, they insist that more vigorous affirmative action is needed immediately to rectify inequities produced by past 'societal' discrimination.

These more vigorous brands of affirmative action programs usually involve the establishment of quotas in hiring to be filled exclusively by individuals from groups identified as victims of past societal discrimination. The forceful imposition of a quota is controversial because it may result in the displacement or rejection of those who, under traditional selection criteria, would have been appointed. These programs are often called 'hard' affirmative action programs. They may give their beneficiaries a percentage advantage within the scale of hiring requirements, or they may reserve a certain number of places in companies for members of a specific designated group.

Hard affirmative action programs do more than prohibit discrimination because they involve the selection and recruitment of minority workers and women precisely on the basis of their race or sex. In the United States these programs have led to charges of reverse discrimination against applicants who were better qualified than others who were selected on the basis of race, sex or ethnic origin. Hard affirmative action programs are developed mainly, but not exclusively, in the field of employment. They often proceed on the implicit assumption that our society is discriminatory and that 'the substantial under-representation of various groups in various educational and vocational sectors' is evidence of 'this deplorable heritage' (Roberts, 1982:157). Hard affirmative action programs are consistent with the second ideal of equality, identified above as the ideal of equality of result.

If the preceding analysis is correct, then different forms of affirmative action are consistent with different ideals of equality. Soft affirmative action programs are consistent with the ideal of equality of opportunity; hard affirmative action programs, through the imposition of quotas, conform to the ideal of equality of result.

While the connection between affirmative action and ideals of equality is clear in theory, a study of the relevant literature reveals that this connection is confused in practice. For example, the United States Commission on Civil Rights stated in 1973 that the purpose of affirmative action programs 'is to eliminate the institutional barriers that minorities and women now encounter in seeking employment **and thereby to redress the historic imbalance favoring**

white males in the job market (United States Commission on Civil Rights, 1973:5). As indicated above, institutional barriers may be removed or eliminated by the introduction of soft affirmative action programs consistent with the ideal of equality of opportunity. But this in turn may result in factual inequalities. Therefore, the second part of the Commission's statement, that the elimination of institutional barriers will 'redress the historic imbalance favoring white males in the job market', assumes that the 'historic imbalance' is due only to 'institutional barriers'; it also assumes that differences in result imply and are a consequence of unequal opportunities.

The choice between these two conflicting ideals of equality, and the question of whether justice should be done for individuals or for groups, are key issues often neglected in the affirmative action debate. Indeed, the choice of one ideal of equality also determines which affirmative action programs are desired or favoured and which vision of social justice society wants to implement. Glazer (1978:88) elaborates on this key issue:

> But if the whole concept of legal rights has been developed in individual terms, how do we provide justice for the group? And if we provide justice for the group — let us say, a quota which determines that so many jobs must go to members of the group — then do we not, by that token, deprive individuals of other groups, not included among the discriminated-against groups, of the right to be treated and considered as individuals, independently of any group characteristic.

Although Glazer was writing in the American context, his statement also identifies the dilemma of justice for groups that have been discriminated against in Australia in the past. A good argument could be made for the proposition that the relevant law in Australia uses the language of individual rights. How can the problems of a group be solved by using the language and the law of individual rights?

It can be argued reasonably that Article 1 section 1 of the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* (hereafter referred to as UN *Convention*), in describing racial discrimination as 'any distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition . . . of human rights', incorporates the principle that **individuals** have the right to be free from racial discrimination. However, section 1 is qualified by section 4, which states that 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure . . . equal enjoyment or exercise of human rights . . . shall not be deemed racial discrimination,

provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups'.

Section 1 states the general principle; section 4 provides the exception to this principle. However, it can hardly be argued that **any** special measures that benefit the members of certain favoured racial groups are allowed; otherwise, the principle that one should not be discriminated against on the basis of race would become empty and meaningless. Thus, a cogent argument could be made for the proposition that the only special measures allowed are those that are compatible with the general principle, expressed in section 1.

These measures, as indicated before, may include soft affirmative action programs aimed at removing arbitrary barriers to employment. If my interpretation of Article 1 of the UN *Convention* is correct, then hard affirmative action programs involving selection simply on the basis of race and discriminating against those who do not belong to the favoured group may not be permissible because they violate the principle according to which individuals have the right to be free from racial discrimination. Also, if **any** measures, including hard affirmative action programs, were allowed, then the result could well be 'the maintenance of separate rights for different racial groups' in the sense that the benefits and burdens of the members of those groups are determined on the basis of race. The UN *Convention* recognises the conflict between individual rights and group rights by requiring that special measures 'taken for the sole purpose of securing adequate advancement' of members of groups that have been discriminated against be conceived as temporary.

A Preview of this Monograph

Although debate regarding the desirability and propriety of certain forms of soft affirmative action is not unimportant, the major controversy in philosophical, legal and political literature is over hard affirmative action. The major controversy does not involve whether affirmative action should be embraced or rejected. Instead, it involves the sophisticated debate concerning the limits and forms of affirmative action needed in Australia to achieve nondiscriminatory employment opportunities. Therefore, this monograph concentrates on analysing arguments for and against quota-based hard affirmative action programs. In the following Chapters, the tension between the two ideals of equality and their relationship with affirmative action is examined.

In Chapter 2 comparable developments in the United States with regard to affirmative action are studied. Although the discussion concentrates on the United States, issues arising from affirmative

action exist in many other countries. But due to time constraints, the increasingly widespread legislation in some other common law democratic countries cannot be considered in detail. I will argue that a discernible trend in favour of soft affirmative action has been growing in recent years, and that the relevant literature displays as much criticism of as support for hard affirmative action programs. Chapter 3 analyses the Australian anti-discrimination law, followed in Chapter 4 by a critical analysis of affirmative action programs that have already been introduced in Australia. Finally, the philosophical and moral issues pertaining to hard affirmative action will be examined critically in Chapters 5 and 6.

Chapter 2

Affirmative Action: The American Experience

Introduction

This Chapter concentrates on affirmative action developments in the United States. This choice is not arbitrary because, as later analysis will indicate, Australian developments follow accurately the American example. We hear repeated statements that the American example is not followed in Australia, but a combined reading of Chapters 2 and 4 of this monograph reveals that these statements are based on ill-founded assumptions about the nature of affirmative action programs proposed for Australia.

Also, a study of the relevant American developments illustrates the central theme developed in this monograph, namely that the key issue involved in the affirmative action debate is the attempt by policy-makers and legislators to replace the ideal of equality of opportunity with the ideal of equality of result. As suggested in Chapter 1, this is a major if not the most important social development since the Second World War.

The conflict between the ideal of equality of opportunity and the ideal of equality of result dominates the affirmative action debate in the United States. This debate has spawned an enormous amount of literature, most of it concentrated on the legal, ethical and philosophical aspects of two forms of hard affirmative action: preferential admission programs and preferential hiring programs. Preferential admission programs aim at increasing the number of designated minorities in universities and colleges. Preferential hiring programs aim at increasing the proportion of minority and female representation in each job classification to approximately the

proportion of minorities or women in the wider community (or in the labor force).

The American affirmative action debate has been stimulated by two leading cases handed down by the Supreme Court of the United States. The first of these, *Regents of the University of California* v. *Bakke* (1978) 438 U.S. 265, involves preferential admission programs (for details of this case see Moens, 1982:165-222). The second, *United Steelworkers of America* v. *Weber* (1979) 47 The United States Law Week 4851, involves preferential hiring programs. *Bakke* concerns the question of whether, and if so to what extent, race may be used as a criterion in the admission procedures of universities and colleges. As this monograph concerns itself with affirmative action programs for Aboriginals, ethnic minorities and women in the field of employment, the analysis in the following sections will mainly concentrate on *Weber*.

The Nondiscrimination Principle

The law of the United States with regard to employment issues consists of federal laws, state laws, Executive Orders and regulations. The incalculable number of these laws, orders and regulations certainly provides a climate of respect for their complexity and intricacy. It also makes a systematic study of their application and consequences very difficult. Nevertheless, a brief review of the development of employment legislation and practices is essential in order to perceive the gradual shift from the ideal of equality of opportunity to the ideal of equality of result. I will concentrate on those laws, Executive Orders and regulations most often discused in the affirmative action literature.

In the United States, discrimination in the field of employment is the subject of Title VII of the *Civil Rights Act* 1964, as amended by the *Equal Employment Opportunity Act* 1972. Title VII, section 703(a) reads in part:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

This section prohibits employment discrimination in a wide range of activities, including hiring, advertising, payment, promotion, training, seniority, pension plans and fringe benefits. Where direct discrimination has occurred, the law requires that all discriminatory effects be remedied. In addition, as a consequence of the Supreme Court decision in *Griggs* v. *Duke Power Company* (1971) 401 U.S. 424, Title VII also proscribes practices that are fair in form but

discriminatory in practice. In particular, the employer must show that any employment rule or practice that results in the disproportionate underrepresentation of minority employees and women is job-related or justified by 'business necessity'.

The desirability of combating direct as well as indirect discrimination was also emphasised in 1973 by the United States Commission on Civil Rights. The Commission stated that 'racial and ethnic divisions in society have translated themselves into institutions which systematically deny equal employment opportunity to minority persons' (1973:4-5). It further stated that one of the most pervasive forms of employment discrimination is 'systemic discrimination', which is 'built into the systems and institutions which control access to employment opportunity' (1973:5). The Commission also observed that despite many efforts 'both intentional discrimination and systemic discrimination remain widespread' and that the '**consequences** of years of such discrimination in the past remain' (1973:6).

There are many examples of apparently neutral employment practices that were held to be discriminatory by the American courts. For example, the Courts held that relying on word-of-mouth dissemination of information about employment opportunities was unlawful because it tended to provide information only to the friends and relatives of present employees (*Parham* v. *Southwestern Bell Telephone Company* [1970] 433 F.2d 421, 8th Circ.). Also, height, weight and physical requirements that could adversely affect minority groups or women were declared unlawful unless these characteristics were justified by 'business necessity' (see, e.g., *Dothard* v. *Rawlinson* [1977] 433 U.S. 321). Thus, the doctrine of 'business necessity' may be used to justify an otherwise discriminatory employment practice.

Title VII of the *Civil Rights Act* 1964 also established the Equal Employment Opportunity Commission (EEOC). Apart from its educational and information function, the main role of EEOC is to investigate individual complaints of discrimination filed under its Title VII authority. It has been confronted by an ever-increasing number of complaints, due at least in part to the proliferation of anti-discrimination legislation.

Section 703(a) of Title VII of the *Civil Rights Act* 1964, according to which it is unlawful for an employer 'to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin', could easily be interpreted as prohibiting preferential hiring, which involves the selection of employees precisely on the basis of race or sex. This interpretation is reinforced by section 703(j) of Title VII, according to which 'nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to

any group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total or percentage of persons of such race . . . in any community'. Hence, a good argument could be made for the proposition that a combined reading of sections 703(a) and 703(j) categorically prohibits preferential hiring on the basis of race or sex, and that consequently 'a company that uses an explicit racial ratio in selecting employees is engaged in unlawful discrimination' (Fullinwider, 1980:125).

However, this interpretation is clouded by section 706(g) which uses the term 'affirmative action':

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, **and order such affirmative action as may be appropriate**, which may include reinstatement or hiring of employees with or without back pay. (emphasis added)

The court's sweeping power to 'order such affirmative action as may be appropriate' raises the question of whether section 706(g) permits preferential hiring on the basis of race or sex or whether these affirmative action measures are limited in scope by section 703(j).

An analysis of the relevant case law reveals that the courts have used their discretionary power to fashion a variety of remedies aimed at combating specific forms of racial or sexual discrimination. In particular, some judges have interpreted their discretionary, remedial power to order a balanced workforce, involving proportionate representation, whenever deliberate racial or sexual discrimination could be demonstrated. But even so, the court's power to authorise affirmative action measures that involve some form of proportionate representation can be activated only if it finds that the accused employer 'has intentionally engaged in or is intentionally engaging in an unlawful employment practice'.

If the discretionary power of the courts to order affirmative action relief is activated only in case of **intentional** discriminatory practices, then this power does not extend to instances of indirect discrimination. Even if it were possible to equate intentional and indirect discrimination through the use of some ingenious reasoning, the power of the courts to order affirmative action would still be limited to, using the term of section 706(g), 'appropriate' and equitable remedies.

After making findings of intentional discrimination, United States courts have sometimes ordered that a specified percentage of all new employees be members of a particular group until such time as the desired proportion of minority participation is reached. For

example, in *Rios* v. *Enterprise Ass'n Steamfitters Loc. 638 of U.A.* (1974) 501 F.2d 622, 2nd Circ., the Court said:

> The effects of ... past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential. Since the nature and extent of such action depends on the facts of each case, it must of necessity be left to the sound discretion of the trial judge, who may in one case find that broad equitable relief will suffice to restore the balance but in another conclude that use of a more specific remedy is required ... to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination. (pp.631-2)

As the trial judge is left with 'sound discretion' to 'find that broad equitable relief', a remedy involving proportionate representation of groups in the workforce may violate Title VII if it is not equitable. For example, a remedy may not be equitable if it greatly exceeds the violation of the employment rule prohibiting discrimination. The introduction of disproportionate remedies would almost necessarily lead to a conflict between the recruitment and selection of persons on the basis of their demonstrated individual qualities, and the proportional representation of groups in the workforce. This conflict, as indicated in Chapter 1, permeates the affirmative action debate.

The *Weber* Controversy

Nevertheless, a more expansive interpretation of Title VII was attempted by Kaiser Aluminum and Chemical Corporation in *Weber* v. *Kaiser Aluminum and Chemical Corporation* (1977) 563 F.2d 216, 5th Circ. The Company, Kaiser Aluminum, and the United States Steelworkers Union agreed in 1974 to hire one black for every white employee hired for a special training program. This affirmative action plan was instituted in order to eliminate conspicuous racial imbalance within the Company. The plan reserved 50 per cent of the openings in in-plant craft-training programs for black employees until the percentage of black craft workers was commensurate with the percentage of blacks in the respective local workforce. Although whites were chosen by seniority, the implementation of the program required the selection of blacks with less seniority than white employees.

Brian Weber, a white employee, sued the company under Title VII, section 703(d), arguing that he was discriminated against on the basis of his race. Section 703(d) makes it an 'unlawful employment practice for any employer ... to discriminate against any individual because of his race ... sex, or national origin in ... any program

established to provide apprenticeship or other training'. It is important to realise that the affirmative action plan involved was voluntary, and was not required or imposed by a Court as a remedy for specific forms or instances of racial discrimination.

Weber was significant because it presented the courts with the question of whether a company may voluntarily attempt to remedy past societal discrimination. The Court of Appeals observed that the company had not been found guilty of any past discrimination against blacks at the company and that no such charge had been made in court and no such evidence introduced. The Court of Appeals ruled that 'in the absence of prior discrimination a racial quota loses its character as an equitable remedy and must be banned as unlawful racial preference prohibited by Title VII, 703(a) and (d)' (p.224).

In making a racial quota dependent on proof of prior discrimination, the Court effectively disagreed with the company's argument that its on-the-job hiring ratio should be approved 'not to correct past employment discrimination by Kaiser at this plant but to correct a lack of training blamed on past societal discrimination' (p.225). The company argued that past societal discrimination, rather than its own past discrimination, was sufficient to introduce 'such affirmative action as may be appropriate'. In addition, the company urged that it was permitted to introduce voluntarily affirmative action programs, involving preferential hiring, without the authorisation of the court.

The argument advanced by Kaiser was ultimately approved in a well publicised and often misinterpreted decision handed down by the United States Supreme Court on 27 June, 1979 *(United Steelworkers of America* v. *Weber* [1979] 47 The United States Law Week 4851). Justice Brennan, writing for the five-man majority, argued that sections 703(a) and (d) could not be interpreted as prohibiting quota-based hard affirmative action plans because such interpretation would conflict with the purpose of the *Civil Rights Act* 1964. He wrote that it is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers' (p.4853). In his opinion, if Congress had wanted to prohibit **all** hard affirmative action programs, including voluntary programs, it could have provided that nothing in Title VII shall be interpreted to permit (as opposed to require) these programs.

Despite Justice Brennan's arguments, there is sufficient evidence to support the proposition that Congress never intended Title VII to have this effect. In fact, amendments were proposed to make it unequivocally clear that federal officials and employers could not use Title VII to impose quotas voluntarily under any circumstances.

These amendments became section 703(j) (Fullinwider, 1980:148-51; *Weber*, pp.4858-67, Rehnquist J dissenting).

The *Weber* case clearly demonstrates that quota hiring programs are not limited to programs ordered by courts as equitable remedies for past intentional discrimination. In fact, popular affirmative action literature overlooks the fact that, as a consequence of *Weber*, courts often condone voluntary affirmative action plans that may well have more far-reaching effects than programs introduced following a finding of specific past racial discrimination.

The issue of compensating for past societal discrimination is important and will be discussed in detail in Chapter 5. At this stage, I will merely mention some of the problems involved.

The concept of 'compensation' involves the idea that persons who suffer disadvantages as a consequence of past discrimination be made 'whole'. The logic of the concept requires that a 'genuine' remedy fit the racial discrimination involved in order to make the victim 'whole'. A remedy that would also result in the compensation of nonvictims would not be 'genuine' because it would be over-inclusive. The argument is that, in the absence of a genuine relationship between preferential hiring and compensation for past societal discrimination, the number of unsuccessful innocent applicants for a desirable position may be increased unjustifiably. Thus, the genuineness of this relationship depends upon the number of **innocent** persons who are affected adversely by the introduction of the program involved.

Establishing the closest possible relationship between preferential hiring programs and compensation for societal discrimination minimises the possibility of innocent people being affected adversely. If it were possible to establish that there exists no genuine relationship between preferential hiring and past societal discrimination, then such hiring practice would involve the selection of some employees simply on the basis of their race (or sex) without themselves having been discriminated against, thereby justifying a claim of reverse discrimination.

An analysis of decisions after *Weber* reveals that courts upheld affirmative action plans against claims of reverse discrimination if the following requirements were met:

1. The plan is a response to a conspicuous racial imbalance in the employer's workforce;
2. the plan is reasonably related to the plan's remedial purpose;
3. the plan does not unnecessarily trammel the interests of white employees; and
4. the plan does not continue beyond a period reasonably required to eliminate the conspicuous imbalance or correct the discrimination.

Thus, in *Setser* v. *Novak Investment Co.* (1982) 657 F.2d 962, 8th

Circ., the court placed a heavy burden on the plaintiff complaining about racial discrimination by insisting that an employer who implemented an affirmative action plan was entitled to a judgment as a matter of law once he had produced evidence that his treatment of the plaintiff was a direct consequence of the implementation of an affirmative action plan which was a response to a conspicuous racial imbalance and reasonably related to the remedial purpose:

> The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. There is no fixed formula for the type or nature of the evidence sufficient to meet the employer's burden. A showing of a conspicuous racial imbalance by statistics is sufficient ... The employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden. (p.968)

This is a clear judicial statement. It demonstrates that proportional group representation aimed at overcoming any racial imbalance in the workforce is the major concern of affirmative action efforts in the United States. It also illustrates beautifully the shift in emphasis from anti-discrimination, which is compatible with the ideal of equality of opportunity, to group representation, which is compatible with the ideal of equality of result.

Nevertheless, there is judicial evidence that, at least in the fields of promotion and hiring, appellate courts and the Supreme Court are reluctant to order relief in the form of promotion and hiring quotas if these trammel the interests of innocent persons. Thus, courts have expressed concern over the rights of more experienced and more senior white employees whose opportunities for promotion were curtailed by affirmative action programs. *Firefighters Local Union No. 1784* v. *Carl W. Stotts* (1984) 52 The United States Law Week 4767 particularly well illustrates this trend. On 12 June 1984 the Supreme Court overturned several lower court decisions when it ruled that a court-ordered affirmative action program had trammelled the interests of minority white employees:

> If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster ... mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him ... Even when an individual shows that the discriminatory practice has had an impact

> on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job. (pp.4771-2)

Executive Order 11246

Notwithstanding the preoccupation of the American courts with employment discrimination issues the legal requirement for affirmative action derives mainly from Presidential Executive Orders. According to the United States Commission on Civil Rights, 'the number of cases which can be tried by Federal courts or administrative tribunals is small compared to the pervasive nature of employment discrimination' (1973:7). Therefore, as a response to this 'pervasive nature', successive administrations have promulgated a number of Executive Orders requiring affirmative action to be taken by employers.

The most influential of these orders is undoubtedly Executive Order 11246, issued by President Lyndon B. Johnson in September 1965. Executive Order 11246 requires affirmative action programs by all federal contractors and subcontractors. It provides that all federal contracts include clauses to the effect that contractors agree not to 'discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin' (Carnegie Council in Policy Studies in Higher Education, 1975:98). The contractor will take 'affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin' (Fleming, Gill and Swinton, 1978:334) and will comply with 'all the rules, regulations, and relevant orders of the Secretary of Labor' (Fullinwider, 1980:160).

Thus, the Executive Order, in which the term 'affirmative action' is used, prohibits discrimination by federal contractors who work on federally-funded or assisted projects. The term 'affirmative action' is not defined in the Executive Order.

The term was interpreted by employers as meaning that an employer should do more than just ensure employment neutrality and should subscribe to some notion of active, as opposed to passive, nondiscrimination. Thus, the Order was interpreted to mean that a policy of active nondiscrimination involves additional good faith efforts to recruit and promote members of groups formerly excluded.

The United States Department of Labor, through its Office of Federal Contract Compliance (OFCC), is responsible for issuing

rules and regulations to implement Executive Order 11246 and issued revised Order No. 4 on 4 December 1971. Revised Order 4 stipulated that affirmative action be taken in establishing 'goals' and 'timetables', and thus mentioned for the first time the form affirmative action was to take. Revised Order No. 4 further described an acceptable affirmative action plan as one that includes 'an analysis of areas within which the contractor is deficient in the utilization of minority groups and women' (41 Code of Federal Regulations 60-2.10). 'Underutilisation' is defined as 'having fewer minorities or women in a particular job classification than would reasonably be expected by their availability' (41 Code 60-2.11; Fleming, Gill and Swinton, 1978:345-6); companies not in compliance with Order No. 4 may have their contracts terminated or be barred from further contracts.

The Labor Department delegated to the Office of Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) the task of implementing affirmative action plans in universities, colleges, museums and some other public and private nonprofit organisations. In October 1972, HEW issued its Higher Education Guidelines, which required additional 'efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer' (Carnegie Council, 1975:116). Colleges and universities were thus compelled to commit themselves to equal employment opportunity and to design specific methods to improve the career opportunities of minorities and women.

The guidelines also emphasised that goals were to be distinguished from quotas; goals were required, but quotas were never permitted. However, in many cases, 'goals' for increasing minority representation had been interpreted as requiring racial quotas, despite the explicit language of the guidelines to the contrary and despite the issuing by OCR of a 'Memorandum to College and University Presidents' stressing that preferential hiring was illegal under the Executive Order (Carnegie Council, 1975:125).

Most of the controversy in the United States surrounding affirmative action derives from attempts to distinguish hiring 'goals' and 'quotas'. Hiring 'goals' have given rise to the widespread opinion that affirmative action plans require or result ultimately in applicants being selected simply on the basis of race or sex, and in discrimination against those who otherwise would have been selected. Thus, goals are frequently condemned as nothing more than racial or sexual quotas (Fullinwider, 1980:162-70).

This issue has also dominated the affirmative action debate in Australia. It is important because it largely determines which ideal of equality is favoured or implemented in a society. For these reasons, the issue is further examined in the next section.

Goals or Quotas: A Distinction Without a Difference

The basic steps to develop an affirmative action program as provided by the EEOC are the following:

1. Issue a written equal employment policy and affirm the commitment of the company to the equal employment opportunity philosophy.
2. Appoint a top official with responsibility and authority to direct and implement the affirmative action program.
3. Publicise policy and affirmative action commitment.
4. Survey present minority and female employment by department and job classification.
5. Develop goals and timetables to improve utilisation of minorities, males and females in each area where underutilisation has been identified.
6. Develop and implement specific programs to achieve goals.
7. Develop supportive in-house and community programs.
8. Develop a system for handling discrimination complaints.
9. Establish internal audit and reporting systems to monitor and evaluate progress in each aspect of the program. (Radford, 1979:7-8)

In an explanation, the EEOC states that the written policy statement companies are required to issue must include a statement to the effect that this is a 'results oriented program with the end product being measurable yearly improvement in the hiring, training and promotion of women and minorities in all parts of the organisation' (Radford, 1979:8). The 'result' is described by the Equal Employment Opportunity Bureau of the Australian Commonwealth Public Service Board:

> The survey of minority and female employment and analysis of under-utilisation and concentration by job category ... provides the basic data for formulating goals and timetables. The long range goal should be representation of each group identified as under-utilised in each job classification in reasonable relation to the overall labor force participation of the group. This goal may be modified if the employer can show that valid job-related selection standards reduce the numbers of a group qualified for a particular job classification. Next, short range goals and timetables with annual targets should be developed for all personnel activities to enable the long range goals to be reached within an indicated time frame. (Radford, 1979:10-11)

Is it possible to describe the measurable yearly improvement of a results oriented program aimed at the 'representation of each group ... in reasonable relation to the overall labor force participation of the group' as a goal? Or is a 'goal' a euphemistic description for a 'quota'?

Any differences between goals and quotas are important because proponents of hard affirmative action programs continue to claim that goals are compatible with (and even required by) the ideal of equality of opportunity. As demonstrated before, quotas that involve selection and recruitment simply on the basis of race or sex are compatible with the ideal of equality of result. If it were possible to demonstrate that goals are disguised quotas, then the claim by these proponents would be based on an intellectual confusion of the two ideals.

An examination of this issue starts with Revised Order No. 4, which requires that an acceptable affirmative action program 'must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and . . . goals and timetables'. It also states that the plan's purpose is the correction of these deficiencies and the 'utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist' (41 Code 60-2.10). Major difficulties arise from the further statement in Revised Order No. 4 that the 'purpose of a contractor's establishment and use of goals . . . is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin' (41 Code 60-2.30).

These statements are, on their face, incompatible with one another because full 'utilization' can only be interpreted as requiring 'representation of each group . . . in reasonable relation to the overall labor force participation of the group'. Indeed, participation of a minority group or women in the labor force that does not result in proportional representation would not amount to full utilisation.

In view of these implications of Revised Order No. 4, which involve a dramatic change in business practices, it is not accidental that valiant attempts have been made by proponents of hard affirmative action to distinguish clearly between a goal and a quota. These proponents emphasise a difference mentioned in the Revised Order No. 4 itself according to which goals are 'flexible' and quotas are 'rigid':

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. (41 Code 60-2.12(e))

This statement was approved by the Civil Service Commission, the EEOC and the OFCC. In a widely publicised and often cited statement, these bodies stated that a 'quota system . . . would impose a **fixed** number or percentage which must be attained' whereas a goal 'is a numerical **objective**' (Radford, 1979:11; emphasis added).

As is not totally unexpected in policy documents of this nature,

this perceived distinction between a goal and a quota is insubstantial. Is a flexible goal really different from a rigid quota? A quota involves reserving a predetermined fixed number of vacancies for minority applicants and women without regard to the individual qualifications of the applicants, and may therefore necessitate the selection of unqualified applicants. A flexible goal does not involve reserving a predetermined, fixed number of vacancies and does not require the selection of unqualified applicants. Indeed, even if a 'goal' of 50 per cent is set for the selection and appointment of minorities and women, employers are not expected to hire persons who do not have qualifications necessary to perform advertised positions. Thus, the establishment of a goal is compatible with a comparative examination of applicants because it does not involve the attainment of a predetermined number of minority applicants and women. If there were not enough minority applicants and women and an employer were able to fill only 25 per cent of vacancies with these applicants, he or she would not be threatened with legal action. Proponents of this line of argument further stress that since a system of goals recognises that persons are to be compared with others on the basis of individual ability, such a system is therefore consistent with the principle of merit hiring.

This distinction between a goal and a quota is valid, but it is also largely irrelevant to the affirmative action debate because it hides the fact that both a goal **and** a quota require the selection and the appointment of applicants less qualified than others who, under traditional meritocratic selection criteria, would have been appointed. It can reasonably be argued that a goal involves (and indeed requires) the appointment of **less** qualified applicants, even though more suitably qualified persons are available (Chipman, 1985:47). Indeed, if a goal were only to result in the appointment of the best candidates, then the concept of a goal would be redundant because the appointment of the best candidate could be achieved through the traditional meritocratic selection criteria, which are based on the anti-discrimination principle.

If this argument is valid, then the only real difference between a goal and a quota is that a goal is flexible with regard to the **number** of less qualified applicants who would be appointed, whereas a quota is rigid because it requires selection of a predetermined number of less qualified (and even unqualified) applicants for a position. Both may require preferential hiring on the basis of race or sex (Moens and de Lacey, 1985:38-40).

This argument is supported by a number of commentators. For example, Fullinwider suggests that numerical requirements 'which are flexible are no less numerical requirements because they are not rigid'. He continues:

> If affirmative action hiring goals require an employer to extend racial preferences, then requiring him to give preferences at a reasonable rate instead of an unreasonable rate does not alter the fact that he is being required to give preferences. Flexibility versus rigidity may be a useful and interesting contrast to draw for some purposes, but the contrast is irrelevant in deciding whether a hiring goal requires an employer to hire on a racially preferential basis. (Fullinwider, 1980:164)

Having disposed of this argument, Fullinwider presents an interesting theory aimed at clarifying the differences between a goal and a quota. He argues that discriminatory quotas are **intentions** to hire a specific number of minorities or women, whereas nondiscriminatory goals are mere **predictions** of the number of minorities and women who will be hired:

> Here we have the basis for distinguishing affirmative action 'goals' from 'quotas'. The so-called goals are **predictions** of the number of blacks that will be hired under assumed nondiscrimination. The so-called quotas represent **intentions** or **aims** to hire a certain number of blacks. In the first instance, the employer aims at true neutrality and uses the predicted outcome as a standard against which to measure his achievement of his aim. In the second instance, the employer aims directly at achieving the desired number. (Fullinwider, 1980:173-4)

If the predicted goal is not achieved, an employer will be prompted to investigate whether the recruitment procedures used are truly nondiscriminatory. Following a detailed study of these procedures, if they are found to be nondiscriminatory their modification is not required.

This argument is appealing because the traditional merit principle, which is compatible with the ideal of equality of opportunity, is not compromised: a goal only prompts employers to check whether their procedures unduly disadvantage a person or group of persons. Quotas, on the other hand, require a change in recruitment procedures if the quota is not met.

Despite its superficial appeal, Fullinwider's attempt to distinguish goals and quotas presents some major theoretical and practical difficulties. For example, Fullinwider does not say what the goals or predictions will be based on. However, if Revised Order No. 4 is an indication, a goal or a prediction will be based on the extent to which minorities or women are underutilised or underrepresented in 'each job classification in reasonable relation to the overall labor force participation of the group'. But is it possible to predict that proportional representation (or full utilisation) will result from a policy of nondiscrimination?

I submit that this proposition is very weak because it is based on the implicit assumption that skills are distributed uniformly

throughout the human race. Philosophers who hold this view are known in the relevant literature as empirical egalitarians. Levin summarises their viewpoint well:

> Egalitarians assume that talents are fairly uniformly distributed throughout the human race. Having assumed this, the egalitarian can . . . conclude that any inequality in result or competitive position must be due to chicanery of some sort. He concedes that you can in principle have 'equality of opportunity' and inequality of outcome, but he believes that in fact this can never happen. Similarly, the 'empirical egalitarian' . . . believes that as a matter of empirical fact, force or fraud is the only explanation there can be for the vast differences in wealth found in free market economies. (Levin, 1981:122)

The argument of the empirical egalitarians assumes that women, if they were given the chance, would be as interested as men in any line of work, implying that 'sex discrimination' and 'sex segregation' prove that women are not being given that chance.

The proposition that skills are distributed uniformly throughout the human race rests in turn on another proposition, namely that men and women, on average, and blacks and whites, on average, have the same skills and interests. These claims have never been demonstrated satisfactorily. Moreover, a good argument could be made for the proposition that acting upon these claims would be discriminatory because it would involve imputing characteristics to people who do not possess them or claim to possess them.

Another problem with the goals-quota distinction is more practical. Although there is theoretically no need to change recruitment procedures, even if the predicted goal is not achieved, provided the procedures are found to be nondiscriminatory, it is clear that there would be constant pressure on employers to achieve the goal. Thus, hiring goals could result in reverse discrimination because they do not serve a policy of racial and sexual neutrality.

The goals-quota controversy is a key issue in the present affirmative action debate and will be discussed at length in the following chapters. The above description and examination of the relevant United States dispute explains, at least in part, why opponents of hard affirmative action claim that a goal is nothing else than a more sophisticated quota. In fact, this claim is sometimes also made by proponents of hard affirmative action. One of the clearest admissions that a goal is a disguised form of quota comes from Byrne, whose writings reflect an enthusiastic yet at times uncritical defense of affirmative action programs:

> The concept of positive discrimination implies a form of 'interim quota' under which firms, having analysed in detail their staffing structures by sex, qualification, grade etc., fix their own 'targets' for recruitment

> and promotion of women by Affirmative Action programmes (which are backed by substantial Federal or State or employer funding). (Byrne, 1980:60)

The Conflict Between the Two Ideals of Equality

The internal quota policy of the Federal Government of the United States beautifully illustrates the conflict between the two ideals of equality. This policy is articulated in the *Civil Service Reform Act* 1978, which was intended to put the Civil Service securely on a merit basis. The policy states that 'recruitment ... should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition, which assures that all receive equal opportunity'. It also makes the usual genuflection to race and sex blindness: 'any employee who has authority to take ... any personnel action, shall not ... discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex or national origin, as prohibited under ... the Civil Rights Act'.

However, while the legislation puts its authority behind the principle of nondiscrimination, which is compatible with the ideal of equality of opportunity, it also declares that its **purpose** is to produce 'a work force reflective of the Nation's diversity'. This statement, of course, is not necessarily inconsistent with the ideal of equality of opportunity because it could reasonably be expected that a policy of nondiscrimination will result in a diverse workforce. However, a further reading of the Act reveals that the legislation seeks to promote not 'diversity' but 'proportional group representation'. Indeed, the Act requires that 'each Executive agency conduct a continuing program for the recruitment of minorities ... to eliminate underrepresentation under EEOC guidelines'. Women are identified as a minority, and an employment category is said to be underrepresented if there is 'a lower percentage of the total number of employees within the employment category than the percentage that the minority constitutes within the labor force of the United States'.

This increased emphasis on proportional representation is opposed by those who advocate the ideal of equality of opportunity. It has also led to a general reassessment of which forms of affirmative action are desirable in the United States. The United States Commission on Civil Rights, in an attempt to stop further erosion of the nondiscrimination principle, affirmed in a powerful statement that only soft affirmative action programs compatible with the ideal of equality of opportunity are allowed. The Commission statement, in view of its authoritative value, deserves extensive quotation:

> In the Commission's view, enforcement of nondiscrimination law in employment must provide that all of an employer's discriminatory practices cease and that any identifiable individual who has been the direct victim of discrimination be returned to the place he or she would have had in the workforce in the absence of the employer's discrimination. Thus, each identifiable victim of the employer's discriminatory employment practices should be made whole, including the provision of back pay and restoration to his or her rightful place in the employer's workforce at the next available opening. . . . 'Simple justice' is not served, however, by preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens. (U.S. Commission on Civil Rights, 1984:2-4)

The statement is clear: the Commission puts its weight behind the principle of nondiscrimination by forbidding preferential treatment based on race, colour, gender, or national origin in favour of nonvictims of discrimination at the expense of innocent individuals.

Chapter 3

Anti-Discrimination Legislation in Australia

Introduction

Australia has been extremely active in the development of 'human rights' since the Second World War (Tay, 1984:19). For example, Australia participated in the creation of the United Nations and took part in its early activities. Dr H.V. Evatt was President of the General Assembly of the United Nations when the *Universal Declaration of Human Rights* was adopted on 10 December 1948. The proposed Convention on Human Rights then being considered by the United Nations was influenced by the work of the Australian delegation, particularly in the field of social and economic rights. Australia proposed articles dealing with the right to work, the right to social security, the right to education, and the supervision by the state of wages and working conditions.

The adoption of the *Universal Declaration of Human Rights* also inspired the formulation of a number of international conventions which were ratified by Australia. For example, Australia ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1949, the *Convention Relating to the Status of Refugees* in 1954, and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* in 1956. However, the force with which this ratification program began was not continued, and the primary reason appears to have been a constitutional barrier.

A Commonwealth enactment is valid only if its provisions are capable of being linked to one or more heads of federal legislative power enumerated in the Constitution. If they cannot be so anchored, then the enactment is unconstitutional because it is

beyond the Commonwealth's power, and the subject matter of the enactment remains within the spheres of State jurisdiction. Subsection 51(29) of the Constitution, for example, gives the Commmonwealth power to legislate 'with respect to ... external affairs'. While signing and ratifying international conventions and treaties certainly comes within the power of the Commonwealth, the precise scope of the 'external affairs' provision of the Constitution has been unclear until recently (Tay, 1984:47).

The Commonwealth Government is properly restricted in its lawmaking powers to specific provisions in the Constitution. The question is whether signing and ratifying conventions and treaties gives it the power to enact Commonwealth legislation in areas that would otherwise be entirely within the jurisdiction of the States. Some constitutional lawyers have argued that conventions and treaties become law only when they have been incorporated into domestic law and that this incorporation requires the concurrence of the States when the subject matter of these conventions and treaties is not, by its own nature, an external affair, for example, discrimination within Australia and human rights in Australia (Tay, 1984:46). Thus, on this argument at least, if the external affairs provision of the Constitution were not interpreted as giving power to the Commonwealth to legislate on matters that are the subjects of these international documents, then Australia would be able to fulfil its international obligations only if it were able to secure the voluntary cooperation of the States.

The problem is, however, that according to customary international law, a country that is party to an international convention or treaty cannot excuse itself from the obligations of that convention or treaty simply because it does not have the power to enforce these obligations due to the federal nature of its Commonwealth. Therefore, Australia attempted in 1950 to instigate the insertion of what has been called a 'federal clause' in international conventions. A 'federal clause' in a treaty takes note of the constitutional difficulties that may arise in the performance of the treaty obligations in federal states. It permits such a state to become a party to the treaty insofar as the authority responsible for the conduct of external relations has constitutional authority to implement the obligations. However, Australia's attempt was rejected in 1954 by the United Nations.

Thus, the inability of the Commonwealth to obtain the necessary cooperation of the States in matters that fall traditionally within the jurisdiction of the States has been a major reason for Australia's failure to implement conventions and treaties on human rights. Castles (1969:8) summarised these difficulties when he stated that 'the parochialism of only one state can hinder the conduct of our international relations', and that this parochialism 'can bring

criticism to bear on this country for its refusal to join in multinational efforts to consolidate and extend the rule of law'.

Despite the constitutional barriers described above, some important human rights legislation has been enacted recently in Australia, including anti-discrimination legislation. In fact, Australia has used its international obligations under conventions and treaties as the basis and justification for enacting municipal legislation, and the 'overwhelming trend has been ... to follow declarations, covenants and other agreements proclaimed or reached in the United Nations, its subsidiary organisations or other international associations' (Tay, 1984:32). This Commonwealth legislation and its relationship to affirmative action is the subject of this Chapter. Although I will concentrate on the Commonwealth legislation, comparable developments in Australian States will also be discussed briefly when such discussion facilitates a better understanding of Commonwealth legislation and affirmative action issues.

The Commonwealth legislation involves two separate Acts, one to cover race discrimination and the other sex discrimination. The following three sections cover racial discrimination in general, Aboriginal land rights, and special measures for Aboriginals. The final section of this chapter covers sex discrimination.

The Prohibition of Racial Discrimination in Australia*

The first Australian anti-discrimination legislation was South Australia's Prohibition of Discrimination Act, 1966 (amended in 1970 and 1975). It was designed to prohibit racial discrimination in the provision of services in hotels, accommodation and employment. The Act made it a criminal offence punishable by a fine to refuse entry to any licensed premises, place of entertainment, shop or public place; to refuse to supply food, drink or accommodation; to dismiss employees; to restrict land or housing sales; or to refuse to let dwellings to a person 'by reason only of that person's race or country of origin, or the colour of his skin' (s.5).

Although this legislation represented a historic step, and, according to Rowley (1972:313-14), created 'clear rights in practice' and public standards that bound the police to take action, the Act was unsuccessful in combating racism or improving the position of Aboriginals for whom it was designed. During its operation from December 1966 to 1976 only four cases were brought, all of them involving the refusal of hotel service to Aboriginals, and only one

*This section closely follows the discussion on anti-discrimination legislation provided in Tay, 1984:76-96. Other sources include Nettheim, 1981; Pettman, 1984; Ronalds, 1979; Thornton, 1983.

was successful. At least one writer attributed this failure to the nature of the Act as a piece of criminal legislation, and to the fact that it was designed to remedy direct discrimination without tackling the problems of indirect and systemic discrimination (Prideaux, 1975:315).

The 1966 Act was replaced in 1976 by the Racial Discrimination Act, which attempted to cover some of the problems encountered in proving racial discrimination beyond reasonable doubt. This Act made it a criminal offence in South Australia to discriminate on the grounds of race in the areas of employment (except in private households or where the employer employed no more than three persons), provision of goods and services, access to public places (defined as including hotels, shops or places in which public entertainment is held), and offers of, applications for, and terms of accommodation.

The test for discrimination on the ground of race is whether a person treats another 'less favourably than in identical or similar circumstances he treats or would treat a person of another race' either on the ground of race or 'on the ground of an actual or imputed characteristic appertaining or attributed to that person' (s.5). 'Race' is defined as including nationality, country of origin, colour of skin or ancestry of a person or that of any person with whom the person resides or associates. The test for unlawful discrimination requires the courts to undertake a real or hypothetical comparison to determine if there has been a difference in treatment (and therefore discrimination) on the ground of race. According to section 11, the court must find on balance of probabilities that the discrimination is on the ground of the race of the person discriminated against in order to deem the offence proved.

Neither the repealed 1966 Act nor the 1976 Act, which is still in force, contains any provisions for conciliation. In this respect, therefore, the 1966 Act is little improved upon by the 1976 Act, since neither establishes an administrative tribunal for the conciliation of complaints, which is a feature of most overseas and recent Australian legislation in this area.

In the Commonwealth sphere, the *Racial Discrimination Act* 1975 was based on the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* (UN *Convention*) and purported to rely on the Commonwealth's constitutional powers with respect to external affairs, which allowed the Commonwealth to make laws with regard to people of any race for whom it is deemed necessary to make special laws. The Act, after a rather turbulent career in the Parliament, passed both Houses of Parliament on 3 June 1975 (Ronalds, 1979:4).

Affirmative Action

The Act is different from the South Australian Acts already discussed because it contains a general prohibition that indirectly imports public international law:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social or cultural or any other field of public life. (*Racial Discrimination Act* 1975, subsection 9(1))

The terms used in this subsection are not defined, but the reference to a 'human right' or 'fundamental freedom' in the specified fields is expressed to include the kind of right referred to in Article 5 of the UN *Convention,* which is attached as a Schedule to the Act. Another general section attempts to prevent inequality of rights enjoyed by persons of a race, colour or national or ethnic origin (including rights referred to in Article 5 of the UN *Convention*) and specifically refers to laws concerning management of property owned by Aboriginals and Torres Strait Islanders.

Part II of the Act, Prohibition of Racial Discrimination, contains sections making it unlawful to discriminate in a number of fields, including access to or use of any place or vehicle (s.11); disposition, acquisition, occupation or termination of an interest or estate in land, or residential or business accommodation (s.12); provision or terms of supply of goods or services (s.13); the offer or terms of, or dismissal from, employment (s.15); and membership in a trade union (s.14(2)). Any provision or rule of a trade union that prevents or hinders a person from joining it by reason of race is invalid (s.14(1)). Advertising that indicates an intention to do any of the above acts is unlawful (s.16). Finally, incitement to, assistance of, or promotion of any of these acts is also unlawful (s.17).

None of these unlawful acts, however, constitutes a criminal offence (s.26). Instead, the *Racial Discrimination Act* 1975 relies to a large degree on conciliation and attempted settlement of complaints. Originally, these functions were exercised by the Commissioner for Community Relations and by Conciliation Committees established under the original Act. A Community Relations Council was also established to advise the Attorney-General or the Commissioner on the observance and implementation of the Act, education, promotion and research, publications, promotion of understanding and other matters related to the UN *Convention.* Thus, the main function of the Commissioner for Community Relations is to inquire into alleged infringements of the substantive provisions of the Act and to try to effect a settlement, and to promote an understanding and

acceptance of the Act. The legislation as it now stands requires that, to be unlawful, a discriminatory act must be done primarily for reasons of race, colour or ethnic origin of a person (s.18).

The Commonwealth legislation was based, as indicated above, on the Commonwealth's external affairs power. It had always been a question of some considerable importance whether the Commonwealth, in order to fulfil its international obligations, had the power to legislate in this field, which traditionally had been the province of States only. On 11 May 1982, the High Court of Australia upheld the validity of the *Racial Discrimination Act* 1975 in the leading case of *Koowarta* v. *Bjelke-Petersen* 39 Australian Law Reports 417.

The case arose out of a complaint made by Mr John Koowarta to the (Commonwealth) Commissioner for Community Relations in 1976. Mr Koowarta claimed that the Queensland Minister for Lands had refused to consent to the transfer of a Crown pastoral lease bought by the Aboriginal Land Fund Commission in the expectation that it would be used by Mr Koowarta and other members of the Winychanam Group of Aboriginal people. Mr Koowarta complained that the Minister's ground for refusing, namely that it was his Government's policy to view unfavourably 'proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation' (p.627), contravened sections 9 and 12 of the *Racial Discrimination Act* 1975.

Following the issuance of a certificate by the Commissioner for Community Relations to enable the complainant to go to Court, Mr Koowarta sued members of the Queensland Government in the Supreme Court of Queensland. The defendants challenged the validity of the Act and the standing of the plaintiff. These matters were then removed into the High Court of Australia and heard in conjunction with an action by the State of Queensland against the Commonwealth, challenging the validity of the Act. It was accepted by both parties that sections 9 and 12 of that Act were enacted in implementation of the UN *Convention*.

Justices Stephen, Mason, Murphy and Brennan held that sections 9 and 12 of the *Racial Discrimination Act* 1975 were valid laws made under the external affairs powers of the Constitution. Justice Brennan said that the implementation of the UN *Convention* is 'of the first importance to the conduct of Australia's relations with its neighbours, if not indeed to Australia's credibility as a member of the community of nations' (p.488). Justice Murphy commented on the external affairs powers of the Commonwealth Government:

> The Parliament, in exercising the external affairs power . . . is entitled to make laws for the peace order and good government of the

> Commonwealth, that is, of the people as a whole, notwithstanding the opposition of any State Government or Parliament. The exercise of that power is not an intrusion upon the people of the States. The people of the States are entitled as well as obliged to have the legislative and executive conduct of those affairs which are part of Australia's external affairs carried out by the Parliament and Executive Government of Australia. (p.473)

While Justice Murphy linked the external affairs power of the Commonwealth Government with its obligation to implement the *Convention,* Justice Stephen went further in arguing that even if Australia were not a party to the *Convention,* 'this would not necessarily exclude the topic as a part of its external affairs'. He continued:

> It was contended on behalf of the Commonwealth that, quite apart from the Convention, Australia has an international obligation to suppress all forms of racial discrimination because respect for human dignity and fundamental rights, and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practice and as expounded by jurists and eminent publicists. There is, in my view, much to be said for this submission and for the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs, so that legislation much in the present form of the Racial Discrimination Act would be supported by power conferred by s.51(29). As with slavery and genocide, the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community. (p.456)

The minority, consisting of Chief Justice Gibbs and Justices Aickin and Wilson, held that the *Racial Discrimination Act* 1975 was an improper exercise of Commonwealth powers under section 51(29) of the Constitution. Chief Justice Gibbs argued that the majority had ignored the 'federal nature' of the Constitution:

> To understand the power as becoming available merely because Australia enters into an international agreement, or merely because a subject matter excites international concern, would be to ignore the federal nature of the Constitution. It would be to allow the Commonwealth, under a power expressed to be with respect to external affairs, to enact a bill of rights entirely domestic in its effect — a bill of rights to which State legislation and administrative actions would be subject, but which would of course not necessarily have the same effect on Commonwealth legislation or administrative action. (p.445)

Koowarta, in justifying the Commonwealth's power to legislate in the field of anti-discrimination, is a landmark decision because it validates the *Racial Discrimination Act* 1975.*

In fact, the decision effectively transfers traditional areas of the State's power to the Commonwealth. Sawer (1982:6-7) stresses the importance of the decision:

> The decision was important because of its basis. In the Australian federal system (which in this matter closely resembles that of the U.S.A.) land dealings within a State are in general within the exclusive competence of the State parliament and government, and can be affected by Commonwealth law only as incidental to some other power. In the Australian case, the federal authority also lacks any general power to deal with basic human rights matters, such as racial discrimination; in this respect, the U.S. position is different, because they have a constitutional Bill of Rights guaranteeing, among other things, equal protection of the laws, and the federal Congress can legislate to enforce this provision and has done so.

As indicated above, section 15 of the *Racial Discrimination Act* 1975 makes it unlawful for an employer to discriminate on the basis of race. Equality of opportunity or treatment in employment regardless of race, colour or sex is also guaranteed by Convention No. 111 *Concerning Discrimination in Respect of Employment and Occupation*, adopted by the International Labour Organisation. This Convention was ratified by Australia in June 1973. The Australian Government implements Convention 111 through a National Committee on Discrimination in Employment and Occupation and through a number of state committees established on a tripartite basis with representatives drawn from State and Federal Governments, employers and trade unions. The process of conciliation and arbitration is entirely voluntary and the committees have no recourse to legal sanctions or mandatory compliance procedures. The final avenue open to the National Committee to bring a matter to its conclusion without resolution is to have the Minister for Employment and Industrial Relations table its report in Federal Parliament. The committees also undertake extensive programs of community education intended to influence opinion and attitudes to the point where discrimination will not be tolerated.

In analysing the effectiveness of the work of these committees it is important to remember that the system is entirely voluntary and

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*In the Dams case (1983) 46 Australian Law Reports 625, the High court of Australia, also by a majority of four to three, reached a similar conclusion on the basis that the Franklin Valley had been declared a part of the World Heritage which Australia was pledged internationally to protect.

that no legal requirements or sanctions can be applied to offending companies or individuals. Indeed there are no guidelines for companies to refer to in attempting voluntary anti-discrimination procedures. The Australian system relies on goodwill between parties and the persuasive powers of the committees. At least one commentator has argued that the committees have not been successful:

> The National Committee's annual reports present a glowing picture of a successful operation, but the real situation seems far removed from this. The only power is the threat of naming a recalcitrant employer in their annual report, thus exposing the employer to publicity. A measure of their ineffectiveness is that ... despite numerous other reports of discrimination in the Australian workforce, this has never occurred. (Ronalds, 1979:3)

Aboriginal Land Rights

The *Koowarta* case, in addition to defining the Commonwealth Government's power to legislate in the anti-discrimination field on the basis of its external affairs power, also highlights the importance of 'land rights' for Aboriginals. The adoption of land rights legislation is, at present, an emotional issue in Australia. On the one hand its proponents argue that granting land rights to Aboriginals does not affect the interests of the majority; they also point out that land rights legislation can do a good deal for the morale and self-sufficiency of the Aboriginal communities who live on these lands. On the other hand, opponents of land rights invariably describe such legislation as involving an ostentatious preference simply on the basis of race.

In the 1970s there were repeated calls in the Commmonwealth Parliament to acquire land for Aboriginals. The claim to land rights was advanced in terms of Common Law doctrine in *Milirrpum* v. *Nabalco Pty Ltd and Commonwealth* (1971) 17 Federal Law Reports 141. In this case, the plaintiff Aboriginals claimed rights to traditional lands on the Gove Peninsula, which were being leased by the Commonwealth Government to a mining company for the purpose of mining bauxite deposits. The court held that there were no bases on which it could concede the claims under established legal doctrines relating to European settlement of Australia.

This decision revealed the need for legislation if Aboriginal land claims were to be recognised legally. The *Aboriginal Land Rights (Northern Territory) Act* 1976 was the first recognition in Australia of the traditional ownership of land by Aboriginals. This Act, which was proclaimed on 26 January 1976, provided for Aboriginal communities to be granted title to existing reserve land and

established a Land Rights Commission with whom Aboriginals could lodge claims to unalienated Crown lands on the basis of 'traditional association' with these lands.

It is interesting to note that claims to land rights are often associated with claims for the protection of sacred sites with religious importance for Aboriginals. In such cases, land rights activists support their claims with a reference to Article 18 of the *International Covenant on Civil and Political Rights*, according to which 'everyone shall have the rights to freedom of ... religion'. Article 27 of the *Covenant* guarantees the rights of ethnic minorities 'to enjoy their own culture' and 'to profess and practice their own religion'.

The *Aboriginal Land Fund Act* 1974 should also be mentioned. This Fund is used to purchase land anywhere in Australia for Aboriginal groups. But Queensland has refused on some occasions to permit the transfer of land to Aboriginal groups, as discussed above with regard to the *Koowarta* case.

The land rights movement has resulted in a wider attempt to work out a comprehensive treaty with regard to Aboriginal claims on Australian territory. This treaty is known in the relevant literature as the *Makaratta*. Produced by the National Aboriginal Conference (NAC), the *Makaratta* recognises that the 'Aboriginal people were the prior owners of the Australian continent' (Nettheim, 1983:259) and seeks compensation for the losses of their land. In particular, the *Makaratta* seeks the return of Aboriginal sacred sites and land occupied by tribal people to Aboriginal groups; it also envisages freehold title of all the land upon which Aboriginals presently live, including inviolate rights to the fishing and hunting associated with such lands.

State parliaments have also given some recognition to Aboriginal claims for land rights. In South Australia, the Pitjantjatjara Land Rights Act was proclaimed in 1981; in New South Wales, the Government released a Green Paper on *Aboriginal Land Rights* (Walker, 1982) and invited the public to comment upon the proposed land rights legislation. After describing the unequivocal support for the introduction of land rights by the churches, the trade union movement and even the business community, the paper lists the benefits New South Wales will reap from land rights for Aboriginals. In particular, it mentions studies that have demonstrated a close link 'between Land Rights and significant improvements in welfare, health and housing, and a downturn in alcoholism' (Walker, 1982:6). The paper also highlights the historical importance of land for Aboriginals as recognised by leading anthropologists.

Following public discussions, the NSW Government introduced the Land Rights Act 1983. While it is impossible within the confines

of this monograph to review all the major features of this legislation, its two most salient features will be mentioned. First, the New South Wales Government will allocate about $13m per year to buy land for Aboriginals. This amount is equal to 7.5 per cent of the Government's land tax revenue. These monies will be set aside each year for 15 years to provide a fund to enable Aboriginal communities to acquire and develop land. Second, there will be no right to claim private lands. Aboriginal Land Councils, which will be given all title to land previously held by the New South Wales Aboriginal Lands Trust, will have the right to purchase private lands on the open market, using funds provided by the Act. These councils will also receive freehold title to all lands transferred to them.

The only relevant international convention pertaining to land rights is the International Labour Organisation's Convention No. 107 of 1957, *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.* This Convention has not yet been ratified by Australia. Article 11 states that 'the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized'.

Nettheim (1983) expressed recently the view that land rights are examples of affirmative action. If affirmative action is defined as special measures taken for the purpose of securing adequate advancement of racial groups, then the granting of land rights could indeed be described appropriately as an example of affirmative action. However, it is a form of affirmative action that does not necessarily result in reverse discrimination.

If the claim to land rights is limited to lands formerly occupied by Aboriginal tribes, then the granting of land rights does not amount to, using the language of the UN *Convention*, 'racial discrimination . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights'. Indeed, the granting of land rights could well be described as an application of the anti-discrimination principle contained in Article 1 of that *Convention*. The principle that no one should be discriminated against on the basis of race presupposes that the violation of this principle be remedied, even though this may require a race-conscious remedy. If violations of the principle are not remedied, then the principle is reduced to the status of a mere 'moral principle'.

It can be argued persuasively that the dispossession of Aboriginals of their traditional lands by white settlers was a violation of the 'property rights' of Aboriginals (for want of a term that more precisely describes the relation of Aboriginals to their land). The dispossession proceeded on the basis that Australia was a

'conquered' country and that therefore the land belonged to the conquerors. Of course, these claims are neither relevant nor legally compelling today. Therefore, land rights claims, provided they are limited to lands traditionally 'owned' by Aboriginal tribes, may be regarded as a proper form of compensation for specific, identifiable acts of discrimination.

It could, of course, be argued that the granting of land rights is in conflict with or incompatible with the mining of mineral resources. Also, opponents of land rights may argue that Aboriginals are not entitled to the economic benefits that go with ownership. These opponents may emphasise that Aboriginals should not enjoy the economic and/or financial benefits of mining because they have never contemplated the exploitation of these benefits when they 'owned' these lands in the past. It is difficult to see how these arguments could succeed because one of the traditional attributes of ownership is an owner's right to refrain from exploitation. In the main, lack of knowledge of the existence and the value of minerals on the land is not a sufficient reason to deny an owner the advantage of these benefits once they are known. Nevertheless, both the proposed Commonwealth legislation and the New South Wales legislation develop mechanisms for reconciling land rights with proposals for the development of mineral resources.

Special Measures for Aboriginals

The Commonwealth Government administers a number of special programs, the benefits of which are available only to persons who are deemed to be 'Aboriginal'. These special programs were introduced by successive Commonwealth Governments from 1968 as a response to public pressure for action to remedy the obvious disadvantages of Aboriginals. A number of reports have concluded that Aboriginals are and remain poorer, less educated, less adequately housed, and more likely to be unemployed than other identifiable groups of Australians. The high rate of unemployment among Aboriginals prompted the Australian Council of Trade Unions in 1980 to urge the Commonwealth Government to introduce 'more positive measures to correct this inequitable and tragic plight of Aboriginal people' (Australian Council of Trade Unions, 1982:6).

Governments have generally been responsive to demands that, in addition to those measures available to all Australians, special measures be introduced aimed at improving the economic conditions of Aboriginals. The need for special measures is recognised by Article 1.4 of the UN *Convention*, which states that 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups ... shall not be

deemed racial discrimination', as long as such measures do not lead to the maintenance of separate rights for different racial groups and are not continued after their aims have been achieved.

The provision of suitable and adequate **housing** is of special importance to the Commonwealth Government because lack of adequate housing contributes to overcrowding, which in turn affects the health, education and employment prospects of Aboriginals. The government housing programs aim at providing accommodation of a type and location that allows Aboriginals to choose their own lifestyles and to enjoy accepted standards of health and social well being. Special programs in the housing field, such as low interest housing loans to Aboriginal home buyers and builders, are controversial because they assign a financial benefit simply on the basis of race.

The Commonwealth Government's policy in Aboriginal **education** seeks full educational opportunities for all Aboriginal people. The Government is committed to ensuring that Aboriginals receive an education harmonious with their cultural values and chosen lifestyle, enabling them to acquire the skills they desire and to improve their socio-economic positions in society. The Government is also guided by the desire to promote education in the whole Australian community regarding the cultures and lifestyles of the Aboriginal people. There are, however, a number of special programs ranging from pre-school to tertiary education that are available only to Aboriginals.

The special program that seems to arouse most resentment is the *Aboriginal Secondary Grants Scheme* (Abseg). This scheme is administered by the Commonwealth Department of Education and commenced in 1970. It was introduced specifically and deliberately to encourage Aboriginal and Torres Strait Islander students to remain at school, thereby enabling them to take greater advantage of educational opportunities at the secondary level. It was known that Aboriginal children generally dropped out of school at younger ages than the rest of the school population and that only a tiny proportion completed secondary schooling. The scheme has had the intended effect of increasing the 'retention rate' of Aboriginals in the school system, even though this remains far below the general rate.

Aboriginal Secondary Grants are available to Aboriginals and Torres Strait Islanders who are full-time students at an approved secondary school or who are 14 years old or more and are full-time students at an approved primary school. The benefits paid in 1985 are not means-tested. They include a living allowance for students living at home, paid to the student's parent or guardian, a books and clothing allowance, and a personal allowance paid directly to students to help cover personal incidental expenses. A boarding

allowance is payable in lieu of the living allowance when a student is approved, on sound educational ground, to live away from home to attend school. Boarding students are also assisted with fares between home and school. Full school fees are paid for students at government schools and for approved boarders. The scheme can also arrange extra tuition for students who are experiencing difficulties with particular school subjects, or for students who have a special interest or talent they wish to develop, such as art or music. Some assistance is also available to help with the cost of school excursions.

In addition to Abseg, the Department of Education also administers the *Aboriginal Study Grants Scheme* (Abstudy), which commenced in 1969. This scheme aims at encouraging and assisting Aboriginals and Torres Strait Islanders to take advantage of opportunities for further study after leaving school. Aboriginal Study Grants are available on a full-time or part-time basis to any Aboriginal or Torres Strait Islander who has left school and wishes to undertake any acceptable course for which he or she is suited. There are a wide range of acceptable courses including those at tertiary institutions and technical and agricultural colleges, vocational and personal development courses, and secondary studies for mature-age students. Where a course is not available in an established educational institution, the scheme may be able to set up courses specially designed the meet the needs of a group or even an individual. The benefits are not means-tested.

Students undertaking full-time courses in 1985 receive a living allowance and an allowance for dependants. The scheme meets the costs of essential textbooks and equipment and pays all compulsory fees. Benefits also include clothing and establishment allowances, assistance with travel costs, and tutorial assistance for students having difficulties with their courses. A weekly part-time allowance is also payable.

Abseg and Abstudy have been supported by successive Governments as measures of 'positive' discrimination in recognition of the special difficulties faced by Aboriginals and Torres Strait Islanders in reaching improved standards of education. The programs are controversial because their benefits are made available simply on the basis of race, and consequently they discriminate against equally poor non-Aboriginal people. These benefits add considerably to division within the community and help to propagate and develop racial prejudice.

Opponents of these special measures can point to the *Declaration of the Rights of the Child*, proclaimed by the General Assembly of the United Nations on 20 November 1959, which is attached to the *Human Rights Commission Act* 1980. Principle 7 of that Declaration states that 'the child is entitled to receive education,

which shall be free and compulsory ... **on a basis of equal opportunity**' (emphasis added). In other words, government aid should be made available to all Australians who are in need of assistance regardless of their race or sex.

Very few Australians would disagree with this principle, at least in public. Its importance is reinforced by the fact that the greater part of Government expenditure for Aboriginals is already available to everyone on the basis of need, regardless of the applicant's race or sex. For example, government expenditure is available for everyone through the payment of social security benefits and through the education, health, welfare and housing programs administered by the States. Also, the Commonwealth Government has responded to complaints that Abseg and Abstudy have discriminated against equally poor Australians of non-Aboriginal descent by introducing the *Assistance for Isolated Children Scheme* (AIC), which might be seen as a step in the direction of non-discriminatory treatment of all needy students. This scheme provides assistance for primary and secondary students who, because of their geographic isolation, do not have reasonable daily access to government school facilities. However, as benefits payable under this scheme are not comparable to those payable to Aboriginal students, resentment may continue. Such resentment raises the question of whether racially exclusive programs can ever effectively promote racial equality.

I can only speculate about why the Commonwealth Government distributes benefits to some Australians simply on the basis of race. It is, however, not unreasonable to believe that these benefits are not made available to all Australians who are in need because of the added financial burden that would be involved. Also, in the main, 'race' is an administratively convenient proxy for poverty. Indeed, the possibility of imposing a means test to exclude relatively well-off Aboriginals from the schemes has been examined from time to time but so far rejected on the basis that the cost of administering such a test would not be justified by the savings. Successive Governments have been very conscious that the scheme has some counter-productive effects on community relations, and no doubt the option of applying a means test will be examined again.

There are also a number of special measures in the field of **employment**, introduced as a response to the continuing underrepresentation of Aboriginals in the workforce in proportion to their total numbers in society. During consultations with Aboriginal leaders, direct as well as indirect racial discrimination was identified as the major reason for the present underrepresentation in the workforce. Aboriginal leaders stressed the negative effects of indirect discrimination and suggested that policies, procedures and practices that result in such discrimination could be neutralised only by improving the education of Aboriginal

children in conjunction with educational projects aimed at creating an atmosphere of respect for difference.

A number of Aboriginals also emphasised that employers as well as schools did not pay enough attention to the fact that the values of Aboriginals were different from those of the majority white society. This is important because it alerts us to the fact that some measures, including developmental training, taken to improve the chances of Aboriginals to gain suitable positions, may not actually result in a noticeable improvement because they may be incompatible with the value systems of Aboriginal communities. Suggestions were made that Australian governments should allocate more money to Aboriginals for the setting up of Aboriginal enterprises. Some Aboriginals indicated that such programs could be opposed by some sections of the white majority because they involved the distribution of an important benefit simply on the basis of race.

The Department of Employment and Industrial Relations and the Aboriginal Affairs Department, assisted by the National Aboriginal Employment Development Committee, administer a number of schemes aimed at facilitating the entry of Aboriginals in the workforce. The authority for the Commonwealth Employment Service (CES) to make special arrangements and to provide special facilities where necessary for Aboriginal people seeking employment or training is contained in the Commonwealth *Employment Service Act* 1978. Such assistance may be arranged through CES officers or through specialist Vocational Officers attached to CES.

Vocational Officers are located throughout Australia in areas where there are significant numbers of Aboriginal people. Their role is to stimulate employment and training opportunities for Aboriginals and to promote an acceptance by employers and the community at large of Aboriginals as employable members of the community. This responsibility involves supervising Aboriginal people undergoing training, canvassing employers for specific vacancies, arranging employment placements, conducting career visits for school leavers, and counselling people with employment or training problems. In remote areas, duties include visits to settlements and communities to assist in local employment and training initiatives.

Most training measures for Aboriginals are provided under the Training for Aboriginals Programme (TAP), which is administered by the Department of Employment and Industrial Relations and encompasses a broad spectrum of training and employment schemes. These measures include on-the-job training, formal training, the arrangement of specially targeted courses, visits by Vocational Officers, and other measures to provide work experience.

The TAP also involves Public Sector Training (PST), one element of the National Employment Strategy for Aboriginals. This assistance is provided by CES Officers in consultation with the Public Service Board, statutory authorities and State and Commonwealth Government Departments, and Aboriginal Organisations that are more than 50 per cent government-funded. It takes the form of on-the-job training to enable Aboriginal people to gain basic marketable skills or to upgrade existing skills in a variety of occupations. PST is conducted for a negotiable period (normally not more than 12 months) and attracts a subsidy of the full wage of the trainee plus associated training costs.

The Prohibition of Sex Discrimination in Australia

Three States as well as the Commonwealth have introduced anti-discrimination legislation prohibiting discrimination on the ground of sex. South Australia, in addition to its Racial Discrimination Act, 1976, already discussed above, enacted the Sex Discrimination Act, 1975. This Act makes it unlawful in that State to discriminate on the grounds of sex or marital status in the areas of employment, education, provision of goods and services, and accommodation. The objective of the Act, which relies on administrative action for conciliation of complaints, is described in its title as involving 'effective remedies against discrimination on the ground of sex and marital status and to promote **equality of opportunity** between men and women generally' (emphasis added). In providing that it is not a criminal offence to do an act which is made unlawful (except in the case of causing to be advertised an intention to do an act which is unlawful under the Act), the South Australian Act largely operates outside the criminal jurisdiction and thus expresses the belief that 'criminal law is a blunt tool for instituting social reform' (Tay, 1984:82).

Like the South Australian Act, the New South Wales Anti-Discrimination Act, 1977 emphasises that it is the objective of the Act 'to promote **equality of opportunity** between all persons' (emphasis added). The Act, which was amended on several occasions, now prohibits discrimination on the grounds of race, sex, marital status, physical or intellectual impairment, and homosexuality in the areas of employment and education, provision of goods and services, accommodation and registered clubs. As already mentioned in Chapter 1, it also provides for the preparation and implementation of equal employment opportunity management plans in all New South Wales Government departments and statutory authorities. This affirmative action legislation was used as a model for the Western Australian *Equal Opportunity Act*, 1984, which was proclaimed to commence on 8 July 1985.

Victoria has passed the *Equal Opportunity Act* 1984, which repealed the *Equal Opportunity Act* 1977 as well as the *Equal Opportunity (Discrimination Against Disabled Persons) Act* 1982 and replaced the various grounds of discrimination with the widely defined discrimination on the grounds of status and private life. 'Status' is defined as meaning sex, marital status, race, physical or intellectual impairment. 'Private life' is defined as covering the grounds of political and religious beliefs.

The Commonwealth *Sex Discrimination Act* 1984 makes it unlawful to discriminate against another person on the grounds of sex, marital status or pregnancy in the areas of employment (s.14), education (s.21), provision of goods, services and facilities (s.22), accommodation (s.23), disposal of land (s.24), activities of clubs (s.25), and the administration of Commonwealth laws and programs (s.26), application forms and advertisements (s.27). The Act also outlaws sexual harassment of employees, fellow employees, job applicants, commission agents and contract workers (s.28), and sexual harassment of students or prospective students by staff members of educational institutions (s.29).

According to section 8 of the Act, the doing of an act for two or more reasons, one of which manifests a discriminatory attitude towards women, amounts to sexual discrimination, even though the having of that attitude is not, using the language of the section, 'the dominant or substantial reason for the doing of the act'. Thus, if an employer were to have a good, valid and sufficient reason (other than those explicitly mentioned in the Act) for not offering a job to a female applicant, the employer would still be a 'discriminator' even though the discriminatory attitude was not the dominant or substantial reason for not hiring the female. It is for this reason that it is possible to argue, as was done in the government paper on *Affirmative Action for Women*, that 'direct discrimination does not have to be verbally expressed' and it 'does not have to be intentional or a deliberate decision to discriminate' (Ryan and Evans, 1984:63) on the basis of sex (see also Chipman, 1984a).

Much of the debate in Parliament concentrated on the exemptions provided in the Act. The Act includes an exemption for positions in which it is a genuine occupational qualification to be a person of the opposite sex of the person alleged to be discriminating (s.30). The exemptions also cover situations where the job can be performed only by a person having particular physical attributes, other than strength or stamina, which are not possessed by persons of the opposite sex. The Act also exempts dramatic roles in which authenticity, aesthetics or tradition require performance by a person of a particular sex, and covers the situation where decency or privacy require the limitation to one sex only. The Act provides examples: fitting of clothes, clothing or body searches, duties in

lavatories, living on premises without separate sleeping accommodation, or entering premises ordinarily used by people in a state of undress. Further exemptions apply to sporting activities by persons over the age of 12 where strength, stamina or physique is relevant (s.42), and combat duties (s.43).

A reading of section 5 reveals that the Act prohibits both direct and indirect discrimination. Direct discrimination is prohibited by subsection 5(1):

> For the purposes of this Act, a person . . . discriminates against another person . . . on the ground of the sex of the aggrieved person if, by reason of —
> (a) the sex of the aggrieved person;
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

Subsection 5(2) prohibits indirect discrimination:

> For the purposes of this Act, a person . . . discriminates against another person . . . on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
> (b) which is not reasonable having regard to the circumstances of the case; and
> (c) with which the aggrieved person does not or is not able to comply.

As direct discrimination ordinarily involves and requires an intention to discriminate, any legislation involving direct discrimination presents unavoidable if not insurmountable problems because such discrimination can be established only by probing the mind of an alleged discriminator. Therefore, more and more anti-discrimination practitioners rely on subsection 5(2) and claim that statistical underrepresentation of women demonstrates an 'intention' to discriminate. The presence of the two subsections, one covering direct and the other indirect discrimination, shows that intent as an essential requirement in proving discrimination is not replaced by a 'result' concept of discrimination. If only the results of policies, rules and practices on the representation of women in the workforce were taken into consideration, then some acts of direct discrimination would go unremedied, namely isolated events that do not substantially affect the representation of women in the workforce.

One of the objectives of the Act is 'to promote recognition and acceptance within the community of the **principle of the equality** of men and women' (s.3(d); emphasis added). Unlike the State acts, which all describe the achievement of the ideal of equality of opportunity as one of the objectives of the legislation, the *Sex Discrimination Act* 1984 does not define the principle of equality by referring to an ideal of equality. The absence of a definition of equality is not trivial. By failing to define the principle of equality, the Act facilitates (but does not require) the achievement or promotion of the second ideal of equality identified in Chapter 1, namely the ideal of equality of result.

Indeed, if the ideal of equality of opportunity were mentioned as the most important objective of the legislation, then hard affirmative action programs involving preference on the basis of sex would be inconsistent with the objective of the legislation — unless, of course, the mere absence of an appropriate percentage of women from certain occupations, professions and levels of management was interpreted as a denial of equal opportunity. In fact the absence of women in leading positions is taken increasingly as '*ipso facto* proof that there must have been systemic, if not intentional discrimination, and therefore that the "under-represented" groups do not or have not enjoyed equality of **opportunity**' (Chipman, 1984a:1).

This approach is unsatisfactory because equating practices, rules and policies that have the effect of **disadvantaging** women, with acts that **discriminate** against women, is conceptually confusing. But, as Chipman has pointed out, the 'principal error lies in expecting policies which achieve **equality of opportunity** to bring outcomes closer together' (Chipman, 1984a:1). Removing artificial and arbitrary barriers to employment in order to provide equal opportunity, so that all are able to compete for scarce employment opportunities, does not necessarily result in proportionate representation of groups in the workforce. Removing these barriers to employment widens the field to allow classes of people previously excluded to compete for jobs, but there is no guarantee or likelihood that the competition will result in proportionate participation. Indeed, the outcome of the competition becomes less predictable.

If, however, policy makers were to aim at proportional representation, then it would be necessary to introduce hard affirmative action programs giving preference to women. A careful reading of the *Sex Discrimination Act* 1984 reveals that such programs are not inconsistent with the express language of the Act even though they are not required by the Act. According to section 33 it is not 'unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status ... have equal opportunities with other persons in circumstances in relation to

which provision is made' in the Act. Of course, this clause would be consistent with the introduction of soft affirmative action measures involving only the removal of arbitrary and artificial barriers to employment. But if that were the correct interpretation of section 33, then this section would be redundant because a violation of subsection 5(2), which prohibits indirect discrimination, already necessitates such remedies, including acts 'the purpose of which is to ensure that persons of a particular sex . . . have equal opportunities'. Section 33 thus ensures that discrimination by way of affirmative action (including soft and hard versions) should not be regarded as a violation of the anti-discrimination provisions of the Act.

Also, section 33 refers to acts a '**purpose** of which is to ensure that persons . . . have equal opportunities' (emphasis added). This would make otherwise discriminatory acts designed or intended to ensure that persons of a particular sex have equal opportunities (however judged) lawful, even if they would not have that effect. In this context, it is worth noting that the Human Rights Commission is explicitly excluded in subsection 48(2) from condemning or criticising any enactment or proposed enactment 'as being inconsistent with or contrary to the objects' of the Act if it is included for the purposes of securing equal opportunities (however judged). Furthermore, section 33 has no 'sunset' clause built into it, which would put a time limit on affirmative action measures.

Due to the absence of a sunset clause, section 33 is considerably wider than Article 4 section 1 of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women.* Article 4 section 1 allows 'temporary special measures aimed at accelerating *de facto* equality between men and women'; these measures are to be discontinued 'when the objectives of equality of opportunity and treatment have been achieved'. Also, according to the language of Article 4, special measures may not lead to or entail 'as a consequence the maintenance of unequal or separate standards', thus suggesting that hard affirmative action programs that involve treatment simply on the basis of sex are not permitted.

In the next Chapter, which deals with affirmative action measures that have already been introduced or are being considered in Australia, I will examine the extent to which special measures involve preferential treatment on the basis of sex.

Chapter 4

The Affirmative Action Debate in Australia

Introduction

The issues discussed in the preceding Chapters demonstrate that affirmative action as a concept and as a policy raises a number of important ethical and social questions, a better understanding of which necessitates in-depth analysis and research. Notwithstanding its complex nature, the debate in Australia on this issue has undoubtedly been one-sided. Indeed, the New South Wales and Commonwealth Governments, which are both firmly committed to the introduction of special measures for women, Aboriginals and immigrants, have thus far largely succeeded in reducing the intricate moral and philosophical issues associated with the introduction of affirmative action programs to a number of so-called uncontroversial principles that do not require or admit of informed discussion.

A reading of the Australian affirmative action literature reveals the existence of the following two principles:

1. affirmative action measures aim at and are directed towards the fulfilment of the merit principle in hiring (defined as the selection of the most competent person for the job without regard to race or sex) and they are not to be interpreted as inconsistent with the merit principle;
2. 'goals and 'targets', which are invariably described in the literature as 'essential' in the preparation of an affirmative action plan, are not to be confused with 'quotas'.

The persons responsible for the implementation of affirmative action programs have effectively sold these principles to the community at large despite the fact that, as seen in Chapter 2, the distinction

between targets (or goals) and quotas has been in practice a distinction without a difference.

I will argue in this Chapter that affirmative action programs that have been or are being introduced in Australia wittingly or unwittingly implement the ideal of equality of result, even though their proponents claim to implement the ideal of equality of opportunity. The repeated claims that these programs implement the ideal of equality of opportunity effectively translate a questionable proposition into an unquestionable truth, thereby pre-empting debate about either ideal of equality. Such debate is necessary because otherwise the real direction in which our society is heading is covered by a veil of ignorance. This failure to discuss the question of which ideal of equality is appropriate for Australia is largely responsible for the present confusion surrounding the concept of affirmative action, and it clouds our understanding of what kinds of affirmative action are desirable for Australia.

The Requirements of the New South Wales Legislation: Targets or Quotas?

The New South Wales Government has incorporated affirmative action provisions in its Anti-Discrimination Act, 1977. These provisions establish the office of the Director of Equal Opportunity in Public Employment and require departments and authorities of the New South Wales public service to develop equal employment opportunity management plans. An *Affirmative Action Handbook* (Ziller, 1980), originally prepared for the Review of New South Wales Government Administration, guides equal opportunity co-ordinators in this work. The *Affirmative Action Handbook* (hereafter referred to as *Handbook*) suggests four stages in the preparation and implementation of equal employment opportunity plans:

1. Preparation and communication. Staff members are appointed who are committed to the equal employment opportunity philosophy of the New South Wales Government. These staff members prepare a policy statement on affirmative action.
2. Review of employee utilisation and personnel practices. A statistical analysis is made of the department's or authority's workforce by race/ethnicity, sex and marital status, and a general review of the organisation's personnel practices is carried out. This statistical information forms the basis for the creation of affirmative action programs and is used as 'a benchmark against which programs may be evaluated for their effectiveness'.
3. Preparation of equal employment opportunity management plans. The plans include goals or targets, as well as timetables

for their achievement and methods by which their effectiveness can be evaluated.

4. Implementation and continuous evaluation of the program begins after the equal opportunity management plan is submitted to the Director of Equal Opportunity in Public Employment. (Ziller, 1980:34-63)

The *Handbook* also outlines various types of discrimination and provides educational information in an attempt to reduce or eliminate discrimination.

The thrust of the *Handbook* is that a system that requires complaints by individuals is unsatisfactory because dealing with specific instances of discrimination helps only a small number of well-informed or self-motivated individuals. The *Handbook* is based on the implicit assumption that larger numbers of persons should benefit from anti-discrimination measures and that structural changes are needed to bring about an equitable distribution of jobs. The following principles listed in the *Handbook* underlie affirmative action programs that have been introduced in New South Wales:

1. Equality of employment opportunity is a matter of basic social justice.
2. There are two kinds of discrimination, namely, direct and indirect; both of these must be addressed if equal employment opportunity is to be achieved.
3. Past discrimination and its enduring legacy require redress in the form of (a) positive and active steps to eradicate discrimination and (b) remedial programs for members of groups who have suffered discrimination.
4. Improvements in equality of employment opportunity should be visible both in the outcome of selection and promotion procedures and in the redistribution of minority groups and women in personnel statistics.
5. Affirmative action programs should have specific goals and, where possible, numerical qualitative targets together with a timetable for their achievement. Programs should be evaluated in terms of their redistributive effects and their success in regard to the nominated targets. This does not constitute proportionate hiring or quotas. (p. 23)

Subsection 122J(2) of the Anti-Discrimination Act, 1977 lists certain provisions that must be included in the equal employment opportunity management plan:

1. provision for the review of personnel practices, including recruitment techniques, selection criteria, promotion and transfer policies and conditions of service 'with a view to the identification of any discriminatory practices';
2. provision for the collection and recording of appropriate information;
3. provision for policies, methods and programs needed for achieving the objects of the affirmative action legislation;

4. provision for the appointment of persons responsible for the implementation of the management plan; and
5. provisions for 'the setting of goals or targets, where these may reasonably be determined, against which the success of the management plan in achieving' the objects of the legislation may be assessed.

A review of the legislation reveals that 'the setting of goals or targets, where these may reasonably be determined' is a critical feature of the management plan. In the *Handbook* an attempt is made to distinguish clearly between targets and quotas:

> Targets are the prime motivators and guides to the success of an affirmative action plan. They are not mandatory quotas. In equal employment opportunity programs, quotas imply proportional hiring, i.e. bypassing remedial programs and hiring employees without regard to merit, in order to meet numerical requirements. **Targets, on the other hand, express the expectation that desired numerical outcomes will be achieved by means of positive remedial programs** . . . The people responsible for setting and achieving targets should always distinguish clearly between targets and quotas, and ensure that **targets are not treated as quotas.** The difference between targets and quotas should be clearly explained at all EEO awareness and other training sessions. (p. 25; emphasis added)

The above statement clearly says that targets are not to be treated as quotas, but it is spectacularly vague because it fails to tell us how targets should be treated. However, a possible clarification is offered later in the *Handbook:*

> Implementation of the program should be subject to regular statistical evaluation, and objectives and strategies should be revised as necessary. **In the end, the success or failure of affirmative action depends on statistical results. An affirmative action plan is successful only if it results in a more equitable distribution of women and migrants in personnel statistics.** Statistical profiles and summaries of estimated versus actual performance should be updated at least annually. (p. 63; emphasis added in part)

How is it possible to reconcile the clear statement that 'the success or failure of affirmative action depends on statistical results' with the equally clear statement that targets 'are not mandatory quotas'? Targets, using the language of the *Handbook*, 'express the expectation that desired numerical outcomes will be achieved by means of positive remedial programs' (p. 25). This statement suggests that the crucial point is the idea that targets are to be met only by a process of reforming discriminatory personnel practices **through remedial programs**, for example, introducing measures to

remove artificial and arbitrary barriers to employment. If equal employment opportunity is to be achieved by introducing 'remedial' programs, why then is there this concern with set percentages and targets and the urgency to achieve these targets? Although affirmative action programs purport to improve the employment and career prospects of minorities and women through remedial programs, the present philosophy of affirmative action emphasises the attainment of set percentages and the employment of women and minorities in proportion to their total strength in the community: this practice goes beyond the 'remedial' programs envisaged by the *Handbook*.

Of course, it may still be argued that the achievement of targets does not amount to the attainment of mandatory quotas. The argument, briefly summarised, is that a target is only an expectation that some measurable change will occur, thereby allowing flexible statistical results. The effect of setting a target is to put the onus on the employer to prove that the target was not met for a good reason, rather than to require the employer to achieve a very specific numerical result. This argument is not compelling because it does not succeed in demonstrating the non-discriminatory character of targets and goals. Although a predetermined quota need not be achieved, the required 'measurable change' may still involve the selection and appointment of some people who are less qualified than those who otherwise would have been hired. In other words, a 'flexible' numerical requirement remains a numerical requirement, even though it does not necessarily achieve a pre-ordained quota (Fullinwider, 1980:164). It is also worth mentioning that requiring the employer to demonstrate that the numerical requirement is not met for a good reason reverses the onus of proof, violating the basic civil liberties principle that the complainant must prove the discrimination of which he or she complains.

These arguments are independent of and in addition to the further argument that, if the American experience is an indication and if I do not completely misrepresent human nature, targets pressure employers into adopting quotas in order to avoid lengthy and costly litigation that may result in the loss of government contracts. Hence, it is justified to argue that there is an ambivalence in the idea of targets and the role they are to play in an equal employment opportunity management plan.

On the one hand, as seen above, the *Handbook* argues that equal employment opportunity management plans should not infringe on the individual's right to be selected on the basis of merit without regard to race or sex. On the other hand, it insists that an equal employment opportunity management plan is a result-oriented technique to achieve some desired proportional group representation. While the *Handbook* uses the language of and

pretends to implement individual rights, it assesses the success or failure of a plan by reference to the employer's ability to achieve self-imposed goals, which are expected to result in the equitable representation of preferred groups. In insisting that 'the success or failure of affirmative action depends on statistical results', the *Handbook* implies that further action may be required if the goal is not met.

The ambivalance in the idea of targets or goals is also discussed by Goldman in his book, *Justice and Reverse Discrimination* (1979). Goldman's detailed and sustained argument attempts to show how individuals acquire rights to dispose of benefits, and he discusses the circumstances under which these rights may sometimes be suspended in order to correct errors in the distributive system. Writing in the context of American affirmative action programs, he questions whether there is or is not 'an internal inconsistency in a policy which required "goals" but prohibited quotas' (p. 210). He answers his question affirmatively, arguing that goals encourage and pressure employers into adopting quotas that produce statistical results. This practice may result in reverse discrimination.

Goldman's point implies that those who supervise the attainment of goals should consider them not as mechanical tools but as educational tools, which provide an opportunity for meaningful dialogue with the target setters in the organisation. Goldman criticises many affirmative action programs, especially those that seek to meet goals or timetables. He observes that these goals operate as *de facto* quotas, and efforts to meet them often lead to unjustified reverse discrimination. He suggests that if the aim of affirmative action programs is to create an impartial attitude towards all who apply for a job, 'then the goals and timetables seem inconsistent in concept and even moreso in practice' (p. 219).

Goldman's point that a target is a more sophisticated form of quota is important because it suggests that the setting of targets necessarily results, in practice, in the implementation of the ideal of equality of result, and implies that discriminatory practices based on this ideal should replace practices based on consideration of an individual's merit and capacities. He states that early affirmative action programs in the United States, which were largely voluntary, were gradually transformed by over-zealous bureaucrats into compulsory quotas:

> While an administrator must show good faith efforts if he fails to meet the minority goal, no such efforts must be demonstrated . . . if he does meet it . . . And the time-consuming efforts necessary to gather documentation and present arguments to demonstrate good faith efforts when goals are not met may in themselves motivate reverse discrimination in order to avoid such administrative burdens. (pp. 214-15)

'Merit' and 'competence' are themselves ambiguous concepts, and agreement can never be reached on their precise meaning. However, it is possible to identify an essential element without which hiring practices cannot be said to be based on merit: applicants must be selected on the basis of individual characteristics deemed to be genuine occupational qualifications. In this sense, merit excludes preference simply on the basis of race, or sex, or any other characteristic unrelated to the performance of the job.

It is arguable that equal employment opportunity management plans need not strictly comply with the *Affirmative Action Handbook,* or with the *Guidelines for the Development of Equal Employment Opportunity Management Plans* (Sydney Office, 1981a). Indeed, there are many statements in these documents to the effect that organisations subject to legislative restraints have a good deal of freedom to design plans that take into consideration their special circumstances. But since the Anti-Discrimination Act, 1977 gives the Director a broad power to review the terms and efficacy of management plans, and since the Director is guided by the *Handbook* and the *Guidelines*, it could reasonably be assumed that public service departments and authorities would have to devise management plans that complied strictly with these documents.

Each public authority and department is bound to submit annual reports to the Director of Equal Opportunity in Public Employment, indicating the results of its program. The Office of the Director of Equal Opportunity in Public Employment published guidelines for the preparation of these annual reports (Sydney Office, 1981b). If the Director is 'dissatisfied with any matter relating to the preparation or implementation of a management plan by an authority or any failure or omission of an authority with respect to the preparation or implementation of a management plan' (Anti-Discrimination Act, 1977, section 122M), she may refer the matter to the Anti-Discrimination Board (ADB).

The Director's power to make references is both wide in scope and lacking in any objective criteria. The power of the Office of the Director would be increased even more if, as was recently suggested during the first Equal Opportunity in Employment Conference in Sydney, this Office were to become the **sole** authority to which equal opportunity officers were to report (Robertson, 1984:2). At present, these officers are employees of the department or authority for which they work and are responsible to the Director of Affirmative Action, who is usually a senior Executive Officer of the organisation involved.

Once a reference has been made, the Board 'shall endeavour to determine a reference and may, for that purpose, hold an investigation into the reference' (s.122N(1)). A cursory glance at

sections 122N-122Q shows that the Board's investigatory powers are both broad and discretionary. At the conclusion of an investigation, the Board may either make recommendations to the Director or authority, or furnish a report with or without recommendation to the Minister. The Minister may direct the authority to amend its management plan.

There is nothing in the Anti-Discrimination Act, 1977 that explicitly prevents the treatment of targets as quotas. If there were an inconsistency between the anti-discrimination provisions and the affirmative action provisions of the Act, then the equal opportunity management provisions would prevail because they are part of the later Anti-Discrimination (Amendment) Act, 1980, which amended the original Anti-Discrimination Act, 1977. The 1977 Act in fact expressly facilitates the introduction of a form of hard affirmative action involving the selection and recruitment of applicants simply on the basis of race. Section 14 of the Act makes it possible for organisations to apply for an exemption from the anti-discrimination provisions of the Act so that competition for a job can be restricted legally to the members of one designated group only. The merit principle is then allowed to operate only within the designated group. It is assumed that for positions open only to a specific group, an applicant's race is a genuine occupational qualification, justifying the restriction of the operation of the merit principle.

An exemption from the anti-discrimination provisions of the Act is certainly an efficient way to increase minority representation in the New South Wales Public Service. But is it really necessary to sacrifice the usual practice of open competition if and when race is **a** genuine occupational qualification? If race is **one** (as opposed to the only) qualification, then there would be no need to limit the operation of the merit principle to one group only. Aboriginals would be selected for desirable positions if their qualifications and experiences were **as good as** those of non-Aboriginal applicants, because an applicant's 'Aboriginality' would make him or her the best applicant. In any event, in the New South Wales Teaching Service, approved applicants deemed to be Aboriginal are accorded absolute preference for employment if they are residents of this State and financial members of the New South Wales Teachers Federation.

The Education Department pursues reverse discrimination for two reasons: to increase its numbers of Aboriginal teachers, and to provide avenues of employment for suitable Aboriginal persons. However, such practices are not limited to the Teaching Service as the following advertisement for a position of Trainee Ranger with the New South Wales National Parks and Wildlife Service clearly demonstrates:

Trainee Ranger Programme (Aboriginal), National Parks and Wildlife Service. Position No.: 82/1. Applications are invited from Aboriginal people, both male and female, possessing the necessary qualifications and experience to undertake training to become Rangers with the New South Wales National Parks and Wildlife Service . . . In these positions an applicant's race is a genuine occupational qualification and is authorized under the provisions of Section 14 of the Anti-Discrimination Act, 1977. Qualifications: . . . applicants must be of Aboriginal descent and identify as an Aborigine.

Affirmative Action and the Autonomy of Tertiary Institutions

On 28 September 1983, the Office of the Premier of New South Wales issued a News Release announcing that universities and colleges of advanced education would in future be required to comply with the State Government's policy of providing equal employment opportunity for all their employees as set out in the Anti-Discrimination Act, 1977. Subsequently, the Minister of Education sent a letter to all Chancellors of universities and Presidents of councils of colleges of advanced education, advising them of this change in Government policy. The Government's view was that scheduling universities and colleges under part IXA of the Act, which deals with equal opportunity in public employment, was the only way it could ensure that its objectives in equal employment opportunity would be achieved in the tertiary educational sector. The Minister particularly drew attention to subsection 122J(1) of the Act, which requires each institution to 'prepare and implement an equal employment opportunity management plan in order to achieve the objects' of the legislation.

There is no doubt that women are underrepresented in universities and colleges of advanced education as compared to their total numerical strength in the society. For example, according to figures released by the Australian Vice-Chancellor's Committee, 'there are at present considerably more men than women employed in teaching and research positions (17 per cent women in 1983) and the imbalance is greater at the senior level than at the junior (2 per cent women at professional level; 43 per cent in tutorial posts)' (*The University of Sydney News*, 1 May 1984). The fact that women and, as proper empirical research would probably establish, ethnic minorities are underrepresented on the staff of tertiary institutions is not in dispute; what should be discussed is whether it is necessary to schedule universities and colleges of advanced education under the affirmative action provisions of the New South Wales legislation in order to correct the existing imbalance.

There has been little debate on this issue. It is important, however, because a thorough investigation may reveal some features of universities and colleges of advanced education that make hard affirmative action programs undesirable or inapplicable. The scheduling of tertiary institutions under the legislation only became a 'public' debate following an occasional address delivered by the Vice-Chancellor of the University of Sydney, Professor John Ward, on 31 March 1984. In his address, Professor Ward questioned the wisdom and desirability of bringing the University under the formal control of the State in equal opportunity and anti-discrimination matters. His reluctance to embrace enthusiastically the affirmative action provisions of the legislation presumably stems from his fear that equal employment opportunity management plans may affect or threaten the autonomy of the University. This could happen in a number of ways.

First, hard affirmative action programs could change dramatically the functions of tertiary institutions. There is, of course, no general agreement among educational authorities about what the proper function of a university is. Some writers emphasise that 'a commitment to the disinterested pursuit of truth is a necessary condition for an institution's meriting the name "university"' (Chipman, 1984b:7). But proponents of hard affirmative action programs maintain that universities may be used as instruments of social engineering aimed at solving persistent ills in the wider society — a description that would offend most tertiary institutions. Nevertheless, some educational policy makers have suggested recently that research undertaken in universities should be more closely aligned with and more responsive to national priorities. For example, the Commonwealth Minister for Education and Youth Affairs, Senator Susan Ryan, is reported to have said in an interview:

> It is a great paradox to me that our universities which, we might suppose, draw on the best knowledge about the world we live in and give instruction in the best means of increasing that knowledge, are not moved to initiate **corporate social action** of any kind by that knowledge. (Future Age, 1983:9; emphasis added)

She continues that it is time for the universities 'to reexamine the role they play ... in society' and promises that universities who undertake this examination 'with the vigour and enthusiasm the Government thinks appropriate, then they can count on the Government's full support'. The above statement, if reported correctly, apart from demonstrating an intention to commit the university corporately 'to a particular interpretation of the wider society' (Chipman, 1984c:26), is certainly consistent with the view that tertiary institutions are instruments of social engineering.

Chipman, commenting recently on the role of the university, argues that a university should never be committed corporately to a particular set of extrinsic ideals about the wider society because 'such commitments always can and historically generally have compromised the distinctive and fundamental mission' of the university (1984c:26). This 'distinctive and fundamental mission' was recently described by the Vice-Chancellor of the University of Sydney:

> To preserve and transmit knowledge is also a duty of universities ... But, there is another, quite distinctive part of university work that is ultimately even more fundamental than the preservation and transmission of knowledge. **It is the extension of knowledge through research and scholarship.**
>
> No university can guarantee to preserve its intellectual standards, or the standards of its degrees, unless most of its teaching staff are actively at work at the frontiers of knowledge. Without the constant stimulus of new ideas, revision of concepts and challenges to established knowledge, the whole business of teaching and transmission of knowledge is liable to be superficial and to be left behind by research undertaken elsewhere. (Ward, 1984a:98; emphasis added)

Thus, the preservation, transmission and **extension** of knowledge through research and scholarship are the fundamental missions of a university, and the successful completion of this function requires the constant 'stimulus of new ideas, revision of concepts and challenges to established knowledge', involving free debate and cogent reasoning. Ward's statement is supported by Chipman, who describes the proper function of the university in the following terms:

> I think it is fair to say that every university has the function of imaginatively imparting, extending and acquiring knowledge, **and that it should therefore be academically staffed by those people who, on the best evidence which can be obtained, are best equipped to do so,** within the areas circumscribed by the particular university's more particular mission. (Chipman, 1984b:7; emphasis added)

In establishing and clarifying the relationship between the specific function of a university and the appointment of the best possible applicant, Chipman argues that academics should be appointed on the basis of their individual ability to contribute to and to profit from their involvement with the function of tertiary institutions. As is well known, it is difficult to identify the relevant characteristics of these individuals. While the intellectual aptitude of applicants can be measured by their paper qualifications, other qualities of mind and character may also be relevant in tertiary institutions but

cannot be assessed readily. If the imaginative imparting, extension and acquisition of knowledge is identified correctly as the proper function of tertiary institutions, then this function may well be depreciated if the introduction of hard affirmative action programs, including the setting of targets and goals, were to result in the appointment of some applicants who are less qualified than others, and who under traditional criteria would not have been selected.

This argument, based on the specific function of tertiary institutions, is even more forceful if the function of tertiary institutions is compared with the function of the public service. Such comparison is worthwhile because both the public service and tertiary institutions are covered by the affirmative action provisions of the New South Wales Anti-Discrimination Act, 1977, yet tertiary institutions differ greatly from other sectors of the 'public service' with regard to their specific function.

As it is the primary function of the public service to serve the public, a good argument could be made for the proposition that hard affirmative action programs are desirable in the public service because the service is expected to be responsive to the needs and aspirations of the community it serves. This argument was advanced in the *Handbook* (p. 13) to justify the introduction of equal employment opportunity programs in the State. It could be expected that a 'participatory' public service, in which every group was represented in accordance with its total numerical strength in the society, would be able to offer a more satisfactory (but not necessarily the most efficient) service than one consisting of members of the Anglo-Saxon majority or males only.

This argument was made strongly by the American writer Krantz, who describes a 'participatory bureaucracy' as one in which each minority group is represented at every significant occupational level of the public service according to its proportion of the population of the relevant jurisdiction. He approves of this participatory bureaucracy for the following reasons:

> In theory, at least, a bureaucracy that accurately mirrored the social, economic and ethnic composition of the nation not only would be descriptively representative, but could be symbolically more acceptable — and might be more accountable and responsive as well as functionally more effective. (Krantz, 1976:78)

Of course, a participatory bureaucracy that 'accurately mirrored ... the ethnic composition of the nation' can be achieved only if some people are appointed simply on the basis of their race or sex even though formally better qualified applicants are available. The only way to achieve a participatory bureaucracy without violating the principle of merit is to assume that skills and interests are

distributed uniformly throughout society. This assumption is rebuttable at best and probably erroneous. Thus, the achievement of the participatory bureaucracy implies that the public service, in the main, does not have open-ended degrees of excellence and insists only on the possession of the necessary minimum requirements.

Krantz's argument cannot be extended to tertiary institutions because these institutions do have such open-ended degrees of excellence. The selection and recruitment of academics who possess only the necessary minimum requirements would violate the function of tertiary institutions, identified above as the imaginative acquisition, imparting and extension of knowledge. The weight of scholarly opinions supports the argument that the nature of a university is incompatible with the selection or recruitment of applicants who are **good enough** (as opposed to 'best') for the job.

For example, Goldman (1979:ch.2) argues that some positions in the community have open-ended degrees of excellence. It might be possible to define a set of minimum qualifications for, say, a law lecturer, which an applicant for these positions must possess. But it is not possible to enumerate an exhaustive set of qualifications because one cannot set out in advance **all** factors that will be relevant in the selection (or promotion) of academics. This is so because, as Goldman points out, there is no 'ceiling' that can be put on certain selection criteria like articulateness, ability to do research, etc. In other words, there is no point beyond which we can say that competence is irrelevant or immaterial.

Thus, the role of an academic has no simple functional characterisation. A prospective academic's ability to impart knowledge may be an essential requirement of the position, but someone with administrative skills, or with a flair for innovative research or adept at public relations, would also have relevant characteristics. In other words, the function of the academic is defined, at least in part, more by the occupant than by the institutions of which the role is a part. **It follows that the nature of academic positions and institutions offers compelling evidence that tertiary institutions cannot be treated in the same way as the public service.**

The inherent inability to define clearly the role of an academic leads to a second argument that casts doubt on the desirability of introducing hard affirmative action programs in tertiary institutions. Using the language of the New South Wales legislation, an equal opportunity management plan involves 'the collection and recording of appropriate information' (Anti-Discrimination Act, 1977, s.122J(2)(c)). This means that positions and jobs must be functionally defined. Indeed, sound statistical analysis depends on a functionally exhaustive characterisation of the variables.

Statistical job classifications usually define the main function that

persons with minimum qualifications would be able to perform. If this argument is correct, then the introduction of hard affirmative action programs involving goals and targets must eventually be followed by a demand to define functionally all academic positions. But according to our earlier argument one cannot characterise positions for which there are open-ended degrees of excellence.

It is argued often that the most innocent form of preferential hiring is *ceteris paribus* discrimination, which involves giving preference to a female or minority applicant **if she or he is equally well qualified** as a male applicant. This type of preferential hiring is based on the assumption that it is possible for two applicants to be equally well qualified. However, in jobs where there is no ceiling on the ideas of excellence and competence, it is not possible or desirable to define the functions an appointee may be expected to perform. In these circumstances a tie between two equally well qualified applicants is not likely to happen frequently. Therefore, even if every tie involved a female or minority applicant (which is highly improbable) a *ceteris paribus* preferential hiring policy would not produce a statistically significant increase in the employment of women and minority academics. Chipman (1984b:8) assesses *ceteris paribus* discrimination:

> The only way in which a *ceteris paribus* positive discrimination for women policy could produce a statistically significant 'balancing' of female academic staffing is if there is a subtle shift to thinking of advertisements for academic staff as involving functionally exhaustive characterizations of the positions. While this would **appear** to those outside the academic community to be preservation of the merit principle, for only those who satisfied the description of the position would be appointed, it would in fact amount to a **radical departure** from the merit principle, for it would no longer entail the selection of the person whose **degree** of competence and excellence in relation to the qualities and responsibilities to do with teaching and research specified in the position description was the highest of those who applied.

The arguments developed above are valid not only for academics but also for certain nonacademic positions as well. Some nonacademic positions are more amenable or susceptible to a functional definition than others. In particular, I would suggest that 'quasi-academic' positions such as research assistants and demonstrators are not readily susceptible to rigid functional definition. The people holding these sorts of positions are often part of an academic research team or unit. Their positions need to be defined functionally in a way that allows academics to choose staff that fit the peculiarities of their teaching and research needs.

These arguments indicate that the scheduling of tertiary

institutions under the New South Wales affirmative action legislation could well affect the independence of these institutions. Nevertheless, proponents of affirmative action programs may still not be convinced, stressing that the relevant literature on the Act and the *Guidelines for the Development of Equal Employment Opportunity Management Plans* repeatedly emphasise that authorities and departments (and by implication tertiary institutions) are to be given a good deal of freedom in the design and implementation of management plans. Hence, in theory, at least, the introduction of soft affirmative action programs may satisfy the requirements of the legislation.

There are, however, strong indications that soft affirmative action measures may not satisfy the authorities. The first indication is that the decision of the New South Wales Government to schedule tertiary institutions under the legislation came after some of these institutions introduced a number of impressive affirmative action measures that could be described appropriately as 'soft'. For example, the University of Sydney adopted in 1981 'a firm and extensive policy towards identifying impediments to the advancement of women ... within the University' (Ward, 1984b:74). This policy led, among other things, to the appointment of a Research Fellow whose job is to investigate the position of women, and to 'a number of reforms in matters relating to every possible form of undesirable discrimination that may appear from time to time' (Ward, 1984b:74).

If the Government had been satisfied with those soft measures, then the scheduling of tertiary institutions (or at least some of these institutions) would not have been necessary. Since the Government regarded the scheduling as the only way it could ensure its objectives in equal employment opportunity would be achieved, the conclusion that more than soft measures are required is inevitable and unavoidable.

The second indication concerns the discretionary nature of the power of the public servants responsible for implementing and supervising affirmative action measures. The powers of review vested in the Director of Equal Opportunity in Public Employment and of the Anti-Discrimination Board are potentially very wide and there is no guarantee that these powers will not be exercised to bring about proportional group representation. The point is that the autonomy of tertiary institutions in hiring might be affected by how public service officials choose to exercise or refrain from exercising their powers. Even if a tertiary institution made a careful distinction between targets and quotas (a distinction without a difference, as argued in Chapter 2), the major problem would be that public service officials would not make this distinction. Also, if, as is often claimed by proponents of affirmative action, the

Anti-Discrimination Act, 1977 does give a great deal of freedom to institutions covered by it, why should it be so important to bring tertiary institutions under part IXA of the Act, which deals with equal opportunity in public employment? Would it not be sufficient to exhort tertiary institutions to regularly review their own employment practices in the hope that they, with the help of their own equal opportunity officers, will deal promptly with any discriminatory practices?

A number of tertiary institutions outside New South Wales have adopted or are considering voluntary affirmative action policies. A reading of these policies illustrates the dramatic confusion that exists between the two ideals of equality introduced in Chapter 1. For example, the affirmative action policy of the South Australian College of Advanced Education describes affirmative action as a means 'to encourage change by providing structures within which change may occur'. While this statement may be compatible with the ideal of equality of opportunity, the policy goes on to explain that the 'Staffing Committee be required to examine the percentage of male and female staff on contract, both academic and general, and take the relative percentages into account when considering tenure' and that the 'test of equal opportunity for women in the College lies in the representation of women throughout the institution in proportion to their availability in the College population' (South Australian CAE, 1982:1). Taking into account the relative percentages of male and female staff in considering the award of tenure is an obvious repudiation of the merit principle (Chipman, 1984b:10). This is worrying in view of the fact that the South Australian College of Advanced Education participated in the voluntary affirmative action pilot scheme introduced by the Commonwealth Government following the publication of the policy-discussion paper *Affirmative Action for Women* (Ryan and Evans, 1984). This paper and its proposals are the subject of the next section.

The Proposals of the Commonwealth Government

In June 1984 the Commonwealth Government released a policy discussion paper introducing the Government's immediate plans for improving job opportunities for women as well as proposals for future affirmative action legislation (Ryan and Evans, 1984). The authors of the paper point out that prior to its release, the impending introduction of affirmative action programs had created 'controversy and apprehension' (p.2). Apprehension was fuelled by the fear that the Government would impose quotas on private employers (as opposed to the public service) and that women would be forced into the workforce, thereby neglecting the traditional roles

of women. Although the paper claims that these fears were based 'on ill-founded assumptions' about the intentions of the Government, the fear that the guidelines outlined in the Government paper will result in the imposition of quotas must be taken seriously.

The Government's discussion paper, the salient feature of which is the spectacular absence of compelling arguments in favour of hard affirmative action programs involving targets, closely follows the proposals and procedures described in the *Affirmative Action Handbook* of the New South Wales Government. As in the New South Wales *Handbook*, the paper identifies the four stages involved in the preparation and implementation of equal employment opportunity plans and emphasises that the setting of goals or targets is an 'essential' requirement for a plan. The paper contains a number of unambiguous references to the effect that each employer organisation would design programs suitable for the conditions and traditions of the industry concerned:

> The Programs should be largely employer-determined, that is, devised by the particular organisation or employer on the basis of information gathered by that organisation. Programs will not succeed if they are imposed from outside. However, the Government will provide experts to advise organisations on whether their Program's objectives and the strategies proposed for achieving those objectives are realistic and reasonable.
>
> Affirmative Action Programs should contain goals which may be expressed in numerical terms ... These goals express the expectation that the desired numerical outcomes will be achieved by the positive strategies outlined in the Programs ... Setting such goals is an essential guide to evaluating the success of an Affirmative Action Program. (Ryan and Evans, 1984:9)

Any perceptive reader will immediately detect the Big Brother mentality in the above quotation. This mentality largely destroys the credibility of the claim that the affirmative action program will be 'employer-determined'. Indeed, since goals and targets are described as an 'essential' part of an affirmative action program, soft programs that do not involve the setting of targets will not be sufficient. Also, it is made clear in the paper that 'if the Program's goals have not been met, the organisation needs to determine the reasons and revise its strategy in the light of this information' (p.48). Thus, ultimately, a numerical target **must** be reached.

The paper repeatedly emphasises that its affirmative action proposal 'is compatible with appointment and promotion on the basis of the principle of merit, skills and qualification' (p.3) and that 'numerical goals are not quotas' (p.16). Targets and goals are described as 'forward estimates' (p.4), which should preferably be

expressed in numerical or percentage terms in order to determine whether or not genuine progress has been made. In the language of the paper, goals and targets 'express the expectation that the desired numerical outcomes will be achieved by the positive strategies' (p.9) outlined in an affirmative action plan.

Unlike the New South Wales *Handbook*, the paper does not explicitly state that 'the success or failure of affirmative action depends on statistical results' (Ziller, 1980:63). But there can be little doubt that statistical results will in fact determine whether or not an affirmative action plan is deemed to be successful. This opinion stems from the fact that the paper views the underrepresentation or underutilisation of women in the workforce as proof of the existence of past societal discrimination — a spectacular simplification of the many complex reasons that may have contributed to this underrepresentation. Nevertheless, the paper identifies the purpose of an affirmative action plan as the development of objectives and strategies '**to remedy the discrimination disclosed by the statistical analysis** of the workforce and the review of personnel policies and practices' (Ryan and Evans, 1984:46; emphasis added; see also Thornton, 1984:125).

In this context, it is worth remembering that the Commonwealth Government has introduced a number of schemes that involve explicit preference on the basis of sex. For example, the Government introduced recently a special cash rebate for employers who recruit additional female apprentices in trades other than hairdressing. Under this scheme an employer is entitled to up to $4,000 tax exempt benefit for each additional female apprentice, if certain criteria are met. Also, the Commonwealth Government included a requirement in its Community Employment Program Guidelines that 50 per cent of jobs created under the program go to women. The guidelines of this program specify that projects 'should provide equal access to employment opportunities for men and women and that in each State or Territory all practical steps must be taken through project selection, recruitment practices and special training measures to ensure that women receive an equal share of the jobs created' (Ryan and Evans, 1984:33).

It becomes difficult to see how these writers are still able to claim that affirmative action programs involving targets, goals or outright quotas 'are a way of ensuring that an organisation's employment practices, in particular recruitment, selection and promotion, will be based on the individual merit and fitness of applicants and employees for specific jobs, without regard to factors such as sex' (p.8).

These examples, in addition to a number of statements made in Australian affirmative action literature, reveal that those responsible for the implementation of such programs do not and cannot

continue to make a sharp distinction between targets and quotas. Equal employment opportunity management plans already submitted to the appropriate authorities in New South Wales are replete with specific numerical targets that call for the appointment of a number of Aboriginals, women and immigrants simply on the basis of sex, race or ethnic background. Consequently, targets result in the partial or total exclusion of majority applicants.

Sometimes, as is the case in the Government's paper, a valiant attempt is made to distinguish between targets and quotas on the ground that a target does not attract a penalty for noncompliance whereas a quota does. However, this argument misses the point that the presence or absence of a penalty does not change the real nature of a numerical requirement. The discussion paper's claim that it does not follow the much criticised United States examples is a deceptive attempt to stifle discussion about the central issue involved in the affirmative action debate, namely whether targets are a more sophisticated version of quotas and whether hard affirmative action programs replace the ideal of equality of opportunity with the ideal of equality of result.

Following the publication of the discussion paper, the Commonwealth Government invited a number of companies and tertiary institutions to participate in a well-publicised voluntary affirmative action pilot program, aimed at increasing the number of women in the workforce. They received assistance from a special Affirmative Action Resource Unit established for that purpose in the Office of the Status of Women in the Department of the Prime Minister and Cabinet. The paper outlined the functions of this Unit as follows:

> The experts in this Unit will be able to assist employers design their Affirmative Action Program and will be available to help when unanticipated problems arise. These experts will also assist employers to monitor the progress of their Program. All information supplied to the Government by participant organisations will be treated with full regard to its sensitivity. Information identified by organisations as being of particular commercial sensitivity will be treated as provided and received in confidence for the purposes of the Freedom of Information Act. (pp.52-3)

The paper also emphasised that the Commonwealth Government intended to legislate in order to place a statutory obligation on government departments and authorities to develop and implement equal opportunity management programs for women, Aboriginals, immigrants and the disabled. To this end the Government subsequently introduced the *Public Service Reform Act* 1984 (Radford, 1985:32-42), which obligates Commonwealth departments to prepare and implement equal employment opportunity programs

and to send written statements describing the implementation of their programs to the Public Service Board within 12 months of the legislation's coming into force. These programs are designed to increase the participation of women and members of 'designated groups' in the public service. The term 'designated group' is defined in the Act as including any of the following:

1. members of the Aboriginal race of Australia or persons who are descendants of indigenous inhabitants of the Torres Strait Islands;
2. persons who have migrated to Australia and whose first language is a language other than English;
3. persons who are physically or mentally disabled; and
4. any other class of persons declared by the regulations to be a designated group for the purposes of this definition.

In addition to these initiatives, the Commonwealth Government also set up a Working Party to be chaired by Senator Susan Ryan, the Minister for Education and Youth Affairs and Minister Assisting the Prime Minister on the Status of Women, and consisting of representatives of business, trade unions, educational institutions and women's organisations. According to the paper, the Working Party will report to the Government '**on the details and content** of legislation to cover all private sector organisations employing more than 100 people and all higher education institutions' (Ryan and Evans, 1984:53; emphasis added). This seems to suggest that the Working Party's task is limited to fine-tuning the decisions already taken by the Government. Indeed, the Working Party is to report only on the 'details and contents', not on the desirability of affirmative action programs for companies employing more than 100 persons. This is disappointing because it makes whether or not a program should be introduced a nonnegotiable issue, and because it pre-empts any discussions on the issues that **do** matter, namely the moral and philosophical appropriateness of such programs.

The Business Council of Australia and the Confederation of Australian Industry and their representatives on the Working Party opposed the introduction of any prescriptive legislation. These organisations eventually decided to set up a Council for Equal Employment Opportunity. The Commonwealth Government, however, rather than considering self-regulatory nonlegislative alternatives, announced in October 1985 that it would introduce affirmative action legislation for women in the private sector and tertiary education institutions. Under the proposed legislation, companies, depending on the number of employees, will be required progressively to comply with the legislation; employment opportunities in tertiary institutions will be covered as from 1986. The legislation will make it compulsory for employers to report

annually to a new government agency within the Department of Employment and Industrial Relations on their progress. Companies with at least 100 employees will be required to develop affirmative action plans, involving the 'setting of objectives and forward estimates' for increasing the number of women in the workforce.

The Commonwealth proposals for prescriptive legislation display some sensitivity to the question of hard versus soft affirmative action programs. Supporters of the proposals seek to show that targets (or forward estimates) are not the same as quotas, that relevant criteria for employment are not being simply set aside, and that opponents of the proposals are guilty of discrimination. The opponents, however, claim that the traditional focus on merit and achievement is being changed to sponsorship or ascription as legitimate bases for societal rewards.

Conclusion

My study of the affirmative action debate in Australia reveals that equal employment opportunity policies whose proponents claim facilitate access to career opportunities without sacrificing the merit principle have in reality turned into 'equal outcome' policies. 'Equal outcome' policies have been accompanied (and indeed facilitated) by comprehensive statistical studies clearly demonstrating the underrepresentation and underutilisation of women, Aboriginals and immigrants in the workforce. This statistical underrepresentation as well as the extent of occupational segregation are seen as evidence of the inherent discriminatory nature of our society.

These statistical studies are used in equal employment opportunity management plans involving goals or targets as 'a benchmark against which programs may be evaluated for their effectiveness' (Ziller, 1980:38). Thus, in the absence of more reliable indicators, the statistical analysis of the workforce is seen by the proponents of hard affirmative action both as an expedient indicator of the existence of discrimination in our society and of the progress made by equal opportunity management plans.

I have argued in this Chapter that the present fascination with equal outcomes results in the gradual replacement of the ideal of equality of opportunity by the ideal of equality of result, even though this replacement is not acknowledged by supporters of hard affirmative action programs. It was not the purpose of this Chapter to analyse arguments in favour of or against the introduction of target- or quota-based hard affirmative action programs. But the heated debates surrounding them in the United States and their *de facto* introduction by both the New South Wales and the Commonwealth Governments indicate the need for detailed public

discussion. Therefore, these issues will be treated at length in Chapters 5 and 6.

The purpose of this Chapter was to clarify the connection between affirmative action programs and ideals of equality, which was identified in Chapter 1 as the key issue in the affirmative action debate, and to argue that New South Wales legislation and Commonwealth proposals have failed to distinguish between the soft and the hard forms of affirmative action. The two ideals of equality are confused and the legislature should make clear which ideal of equality it wants to see implemented.

At present, language consistent with the ideal of equality of opportunity is used to implement a competing and conflicting ideal of equality. This practice confuses the concept of affirmative action and hides the real course of action some policy makers have apparently decided upon. The law and the proposals do not clarify whether hard affirmative action programs that involve discrimination in favour of certain groups are legal. Hence, claims could be made that these programs disregard the very principles on the basis of which Australia condemns discrimination as an invidious practice.

Chapter 5

Affirmative Action and Compensatory Justice

Introduction

In Chapter 1, I introduced the distinction between soft and hard affirmative action programs. I have argued that the present emphasis on hard affirmative action programs is a consequence of the gradual expansion of the concept of discrimination. Discrimination is no longer identified as an 'intentional' act; the concept increasingly incorporates the consequences of the application of rules or practices that are neutral on their face but discriminatory in their operation.

The national debate on affirmative action is not over whether direct and indirect discrimination exist in our society. The debate concerns how best to move from a social reality of discrimination to an ideal society free from discrimination. Many affirmative action programs today in Australia can be characterised as soft. Examples of such programs are contained in *Guidelines for Employers: Equal Employment Opportunities for Women*, published by the National Labour Consultative Council in 1980.

In the main, soft affirmative action programs are customary responses to social problems even though debate continues about the appropriateness of specific programs. Indeed, there appears to be a general consensus that society has a responsibility to remedy the consequences of both direct and indirect discrimination. However, some 'remedies' proposed by policy makers and trend setters cannot be described as soft or remedial programs because they involve preferences based solely on race or sex.

I have argued in the preceding Chapters that there is a real danger whenever goals, targets or timetables are required because they are

nothing more than sophisticated forms of quotas. I have also argued that the use of quotas, whether explicit or disguised, in order to 'attain approximate proportional representation of both sexes in positions of responsibility' (Allen, 1980:1) militates against the anti-discrimination principle according to which people should be treated without regard to race or sex.

In the remainder of this monograph I will examine whether there are strong and compelling reasons for reversing or modifying the anti-discrimination principle. In particular, I will analyse arguments for and against the introduction of hard affirmative action programs, which involve the setting of goals, targets or quotas.

Some proponents of hard affirmative action programs defend them on the ground that they will produce many social benefits in the future for minority members and women as well as for society as a whole (Bayles, 1972:309; Boxill, 1972:117; Kaplan, 1966; Nagel, 1973; Sher, 1973:82; Thomson, 1973:367). Other advocates, rather than concentrating on the future benefits of a policy of preferential hiring, offer backward-looking arguments that deal with compensation (Sadurski, 1984:572-600). These backward-looking arguments are the subject of this Chapter. In particular, I will consider whether the need to compensate victims of societal discrimination is a sufficient justification for the selection and recruitment of minority applicants and women for employment simply on the basis of their race or sex.

Compensation for Societal Discrimination

Hard affirmative action is often described by its proponents 'as a means of redressing the many years of discrimination against women' (Pine, 1983) (and by implication minority members) in all spheres. In awarding reparations for past societal discrimination, compensatory justice aims at making 'whole those who were injured by putting them where they would have been "but for" the injustices suffered' (Duncan, 1983:510). The concept of compensation for societal discrimination involves an extension of the already familiar principle that identifiable acts of discrimination necessitate a remedy. This extension is justified, so the argument goes, because past discrimination by society as a whole has denied women and members of minorities employment and in some cases even educational services. This point is made strongly in a submission to the Human Rights Commission Project on Affirmative Action by the Women's Electoral Lobby, Perth, where it is stated that 'our members are totally in support of affirmative action programs as a means of redressing the many years of discrimination against women in all spheres' (Pine, 1983).

In recent years, there has also been a growing acceptance among

the political parties that gross injustices have been committed against Aboriginals. The judiciary has also taken notice of these unquestionable facts. For example, Justice Murphy of the High Court of Australia said in the case of *Commonwealth* v. *Tasmania* (1983) 46 Australian Law Reports 625:

> The history of the Aboriginal people of Australia since European settlement is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalization, attempted genocide and systematic and unsystematic destruction of their culture. (p.737)

Professor Alice Tay also notes that

> Today Aborigines have . . . the highest death rate, the worst health and housing conditions, and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population. (Tay, 1984:97)

This evidence may well encourage some people to argue that the familiar practice of compensation for identified instances of discrimination should be extended to 'the present effects of past discrimination that is not specifically identified' (Sedler, 1979:155). This argument, which may seem even more compelling in light of the continued existence of indirect and systemic discrimination against Aboriginals, will be discussed in detail in the next section of this Chapter.

There is evidence that organisations representing women have 'cashed in' on opposition to racism to generate opposition to sexism as well. This equation of sexism with racism, which Chipman calls 'one of the more cynical enterpreneurial extensions of human thought' (1984c:18), is described by Dummett:

> Anti-sexism has in fact imitated much of the language of anti-racism, transferring it unadapted in some cases, for example, where women are referred to as a minority, which they observably are not. The word 'sexism' itself is a coinage struck from the mould of racism, and the word 'liberation' draws its power from association with the fight against colonialism, against economic imperialism, against disenfranchisement, fought by non-Europeans in many parts of the world; it resounds with echoes of events in Vietnam and southern Africa. Anti-sexism has in short, cashed in on the turnover of the worldwide racial conflict. The style of its complaints and demands seeks to elevate women's escape from the domination of men to the same importance as the fight against racism . . . It has either to show that the separate struggle of women as women is as significant in international politics and economics as the struggle of oppressed and despised racial groups, or else it has to imply that racism is no worse than sexism. (Dummett, 1979:37,43)

Let us examine whether this 'unadapted' transfer of the anti-racism language to the problems generated by sexism is valid. Some proponents of hard affirmative action programs for women argue that the spectacular underrepresentation of women (and Aboriginals) in the workforce is the consequence of societal discrimination, and that underrepresentation is a social 'evil' that must be remedied. Although it is possible to correct underrepresentation quickly and efficiently through the introduction of sexual (and racial) hard affirmative action programs involving targets and quotas, proportional representation is not, in this context, pursued for its own sake. It is pursued as a means of compensating for any present competitive disadvantages of women and members of minorities **caused by past societal discrimination.** In other words, a policy of hard affirmative action for women would be justified only to the extent that past societal discrimination is indeed responsible for the present disadvantages experienced by women.

But once this relationship between past societal discrimination and present deprivation is considered carefully, it becomes difficult to lump Aboriginals and women together as **equally** deserving of hard affirmative action programs as a way to remedy their underrepresentation in the workforce. This difficulty arises from the fact that, while racial discrimination by the society as a whole may be regarded as the single most important contributing factor to the present plight of Aboriginals, many factors, some of them unrelated to sexual discrimination, may have contributed to the present underrepresentation of women in the workforce. Some of these factors reveal direct as well as indirect discrimination; however, other factors may be 'a result of the tendency of men and women to make different choices — even when given the same range of alternatives to choose from' (Hoffmann and Reed, 1982:188; Deaux, 1985:74). Nevertheless, some organisations representing women would argue that society's inability to correct this tendency demonstrates the existence of sexism, and is to a considerable extent responsible for the present underrepresentation of women in positions of influence in our society.

Thus, insisting that direct and indirect sexual discrimination is indeed the most important contributing factor to the present underrepresentation of women in the workforce makes it easier to liken a claim of sexism to a claim of racism. If it is accepted, however, that factors other than past societal discrimination have contributed to the present underrepresentation of women in the workforce, then hard affirmative action programs introduced to increase their representation should differ from those designed for Aboriginals.

The situation of women differs markedly from that of Aboriginals in another important way. The past exclusion of Aboriginals from

employment opportunities has been only one element in an interlocking pattern of deprivation and exclusion, which often resulted in other disadvantages including inadequate housing, lack of education, and even undernourishment. Past societal discrimination against women has not resulted in the same other disadvantages because of formal and informal social arrangements that protect women. Without analysing such arrangements in detail, it suffices to mention that they often relate to measures aimed at promoting family cohesion. Thus, while the present underrepresentation of women in the workforce is not in dispute (it is well documented), past societal discrimination in the field of employment was only one cause, not the determinant factor.

Many writers, including lawyers and philosophers, continue to treat the causal connection between past societal discrimination and present deprivation as relevant. For example, Wasserstrom argues that the 'fundamental evil' of past discrimination concentrated power in the hands of white males; this evil makes the quotas of contemporary affirmative action programs 'commendable and right':

> Programs that discriminated against blacks or women . . . were a part of a larger social universe which systematically maintained an unwarranted and unjust scheme which concentrated power, authority, and goods in the hands of white males. Programs which excluded or limited the access of blacks and women into these institutions were wrong both because of the direct consequences of these programs on the individuals most affected and because the system of racial and sexual superiority of which they were constituents was an immoral one. (Wasserstrom, 1977:618)

In an American educational context, this relationship between past societal discrimination and present deprivation has been made strongly by Justice Brennan in *Regents of the University of California* v. *Bakke* (1978) 438 U.S. 265. This landmark case involved a preferential admission program introduced by the University of California at Davis to increase the proportion of minority students. The University reserved a specific number of places for members of certain designated groups. This reservation of places, which involved the selection of applicants simply on the basis of their race, was described by the University of California as a necessary means to remedy the effects of past societal discrimination. Justice Brennan argued that the purpose of the University of California in remedying the effects of past societal discrimination is sufficient 'where there is a sound basis for concluding that minority underrepresentation is substantial and chronic' (*Bakke*, p.362). Thus, for Justice Brennan, substantial underrepresentation removes the need to prove specific, identifiable instances of discrimination. For him, race-conscious remedies,

including race-based admission quotas, might be used to remove underrepresentation of minority members if there is reason to believe that such underrepresentation is itself the product of societal discrimination. Brennan's position is premised upon the belief that had there been no societal discrimination, the percentage of blacks and other minorities admitted under normal procedures would approximate their percentage in the total population. Brennan's point can also be found in the relevant Australian literature.

As mentioned above, the underrepresentation of women and Aboriginals in the workforce is often seen as proof of societal discrimination necessitating hard affirmative action programs. Thus, mere reference to social indicators, including statistics, is regularly considered sufficient to prove past societal discrimination. Nevertheless, this practice is fraught with dangers. These dangers are alluded to by Justice Powell in his judgment in *Bakke*. Justice Powell argued that it is not permissible to use race-based admission quotas as a remedy for past societal discrimination even if to do so would facilitate social planning. He recognises that the state has a 'legitimate and substantial interest in ameliorating . . . the disabling effects of identified discrimination' (p.307). But he argues that there is no justification for racial preferences that impose disadvantages upon persons like Bakke with the sole purpose of helping certain racial groups in society perceived as victims of societal discrimination. Such a policy rests on what he calls 'an amorphous concept of injury that may be ageless in its reach into the past' (p.307). He argues that without a finding of a specific, identifiable act of discrimination 'it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another' (p.307).

The thrust of Justice Powell's argument against compensation for societal discrimination stems from his assessment that hard affirmative action programs impose disadvantages upon innocent persons. How can hard affirmative action programs as a means to compensate for societal discrimination harm innocent persons? I submit that a hard affirmative action program harms innocent persons if the relationship between the program and its purpose, namely compensation for societal discrimination, is not genuine.

If it is possible to establish that there exists no genuine relationship between a preferential hiring program and the purpose for which it was introduced, then it is likely that some beneficiaries of the program may be preferred without themselves having been discriminated against. In such case, using the language of Justice Powell, 'the government has no compelling justification for inflicting such harm' (*Bakke*, p.307) on other innocent persons competing for the benefit. In order to ensure that the number of innocent victims of preferential hiring programs is reduced to a

minimum, it is necessary to insist on the closest possible relationship between preferential hiring and compensation for societal discrimination.

The genuineness of this relationship can be prejudiced in two ways. First, preferential hiring programs can suffer both from over- and under-inclusiveness. Justice Powell's concern is that the group whose members will benefit should be selected carefully in order to achieve the closest possible relationship between the hard affirmative action program involved and compensation for societal discrimination. Second, this relationship can be prejudiced because these programs may result in some persons having to pay a disproportionate amount of the costs, while compensation does not reach the needy. These issues are discussed in the following sections.

Target Groups: The Issues of Over- and Under-inclusiveness

One of the most vexatious objections to preferential hiring programs aimed at compensating for the present effects of past societal discrimination is that they suffer from both over-inclusiveness and under-inclusiveness. The problem of over-inclusiveness arises because membership in certain groups, defined by race, ethnic background or sex, is used as a proxy for disadvantage. This phenomenon is described in the relevant literature by Posner, who argues that race and ethnic background are used often as indicators of other characteristics, which the members of the group are deemed to possess. His comments are written in the context of affirmative action in the educational system but they are equally applicable to employment issues:

> Race in this analysis is simply a proxy for a set of other attributes — relevant to the educational process — with which race, itself irrelevant to the process, happens to be correlated. The use of a racial proxy in making admissions decisions will produce some inaccuracy — blacks will be admitted who lack the attributes that contribute to genuine diversity. (Posner, 1974:9)

Hence, the genuineness of the relationship between preferential hiring and compensation for societal discrimination depends on the extent to which race (or sex) is indeed an indicator of the social evil which the program aims to remove, and the extent to which taking race (or sex) into account is an appropriate method of combating that evil. According to Nickel (1975:551), an 'important way of distinguishing justifiable from unjustifiable uses of racial classification is in terms of the soundness of the alleged correlation between race and a relevant characteristic'.

If race and sex are used as indicators of the existence of other characteristics, then there is a real possibility that some people will be preferred even though they themselves have not been disadvantaged by past societal discrimination. Nevertheless, they would still profit from compensatory benefits, for example preferences in hiring, because disadvantage is determined by reference to race or sex and not by other characteristics that more accurately determine the extent to which a person is disadvantaged by societal discrimination.

Wasserstrom attempts to answer Posner's arguments. He argues that an objection to hard affirmative action programs on the ground that they are over-inclusive is weak because it is 'important to see that the objection is no different in kind from that which applies to all legislation and rules' (Wasserstrom, 1977:618-19). As an example, he refers to the usual practice of restricting voting rights to those who are 18 and older, even though by doing so we exclude some people who are mature enough to cast a vote. As the fit between preferential hiring and past societal discrimination can never be precise, these programs function in the same way as all other classificatory schemes.

It is certainly true that the essence of legislation is to classify and that every classification necessarily involves some inequality. However, Wasserstrom's example involves a classification on the basis of age, which has not been regarded traditionally as a morally irrelevant characteristic. His argument that race and sex should be taken into account in the process of distributing burdens and benefits in society does not affect my argument that preferential hiring programs that involve appointment on the basis of race or sex result in the unequal distribution of jobs.

Proponents of preferential hiring programs, in deciding that some designated racial and ethnic groups are eligible to benefit from preferential hiring, adopt what has been called by Justice Powell a 'two-track' theory. Under this theory more benefits are allocated to individuals belonging to preferred and designated groups defined by race, ethnic background or sex than to individuals from groups whose members are not considered for preferential hiring (*Bakke*, pp.295-7). This may result in the preferential hiring of applicants who never suffered the effects of past societal discrimination practiced against the group of which they are members. The importance of all this is clear: over-inclusiveness may reduce the number of places for which other comparable applicants would be able to compete.

The two-class theory also overlooks the point that preferential hiring programs may result in the creation of yet another 'disadvantaged' or 'discriminated against' minority **within** the majority. Then these programs would merely shift the burden from

one group to another but would not solve any problem. It is likely that preferential hiring programs do create new disadvantaged groups. Indeed, the majority members who do miss out on suitable or desired employment as a consequence of preferential hiring programs are likely to come from the bottom of the white or male distribution, whereas the minority members or women who benefit from such programs are likely to come from the top of the minority or female distribution. Sowell, a black economist, makes the same point in the context of preferential admission to American colleges and universities:

> It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a DeFunis or a Bakke. Even aside from personal influence on admissions decisions, the rich can give their children the kind of private schooling that will virtually assure them test scores far above the cut-off level at which sacrifices are made. Just as the students who are sacrificed are likely to come from the bottom of the white distribution, so the minority students chosen are likely to be from the top of the minority distribution. In short, it is a forced transfer of benefits from those least able to afford it to those least in need of it. (Sowell, 1978:42)

Thus preferential hiring programs may well shift the social burden from one group to another. The creation of new 'disadvantaged' groups can, however, be largely avoided by establishing a link between past societal discrimination and actual deprivation, so that only those individuals who have been discriminated against on the basis of race or sex are included among the beneficiaries of preferential hiring programs.

Establishing such a link raises several questions. How far back into the past should the search for discrimination be made? And should the scope of the compensation be determined by the nature and the extent of the wrong? Failure to answer these questions may lead to over-inclusive programs.

The further back into history the search for discrimination is made, the more likely that preferential hiring programs will be over-inclusive. The passage of time makes it more difficult to prove a link between past societal discrimination and the present effects of such discrimination. Furthermore, the search raises the vexing question of whether past societal discrimination should include acts that are only now perceived to be reprehensible. Because some acts are deemed to be reprehensible by modern standards, it does not follow that they were recognised as reprehensible in the past. For example, the 17th century Dutch lawyer Hugo Grotius was probably objectively reporting the views of his compatriots when he wrote that women are inherently inferior to men (Grotius, 1926:29-30). Unequal treatment of women was an acceptable and an

anticipated practice in 17th century Holland. Should a link be established between these acts and present deprivation of women? We are, after all, unable to move back to the moment when a wrong was done and imagine how the world would have developed if it had not been done.

The fact that race, ethnic background or sex are used as reliable indicators of disadvantage caused by societal discrimination may also result in preferential hiring programs that are under-inclusive. Nonpreferred groups that can be defined by characteristics other than race, ethnic background or sex are excluded from preferential hiring programs even though some or all of their members may be able to point to disadvantage for which societal discrimination is clearly responsible. Discrimination practised in the past against some religious groups illustrates this point. Unless they also qualify as members of a preferred group, members of these minority groups do not benefit from preferential hiring programs.

For example, in the relevant Australian literature 'migrants' are defined as people born outside Australia, whose first language is not English, and their children (EEO provisions, 1984). This definition would seem to exclude English-speaking Asian immigrants even though they have suffered societal discrimination in the past. Does it mean that, if societal discrimination has been responsible for robbing a people of their identity, they do not need to be considered for inclusion in a preferential hiring program?

This question would still be relevant if a previously identifiable group was able to overcome, through its own efforts, its minority status. If the members of such groups were to benefit from a preferential hiring program, then this inclusion could well be interpreted as over-inclusiveness (as opposed to under-inclusiveness) because they no longer suffer from the present effects of past societal discrimination.

Hence, selecting and defining a preferred minority represents a major problem to proponents of hard affirmative action programs. The difficulties associated with attempts to select deserving groups are not arguments against preferential hiring as such. They only illustrate the importance of establishing standards capable of defining a preferred minority, because groups who do not come within the definition are not allowed to benefit from the program.

It could be argued that it does not seem necessary to aid all minority groups equally since governments have the duty to identify and 'correct the most serious examples of ... imbalance, even though in so doing it does not provide an immediate solution to the entire problem of equal representation within the legal system' (*DeFunis* v. *Odegaard* [1973] 82 Wash.2d 11, 507 P.2d 1169, p.1184). However, this statement begs the question. In fact, there is considerable evidence that once different groups are aided unequally

other groups will claim to deserve the benefits as well. For example, in the United States, in *DiLeo* v. *Board of Regents of the University of Colorado* (1978) 590 P.2d 486, an Italian-American law school applicant challenged a hard affirmative action program administered by the University of Colorado Law School. The School designated Negroes, American Indians, Mexican Indians and Puerto Ricans as disadvantaged groups who could take advantage of the program. DiLeo did not challenge the establishment of a program that preferred disadvantaged students in general, but he wanted the program redrawn along nonracial lines in order to qualify.

A related point, made by the Confederation of Australian Industry in its submission to the Human Rights Commission Project on Affirmative Action, is that hard affirmative action programs require 'a pecking order in terms of priorities' (Confederation of Australian Industry, 1983). The Confederation provides an example:

> If hard affirmative action programmes involving numerical targets or quotas are implemented to benefit, say women, migrants and the disabled, then some rule of priority must be established for these separate groups. In other words, one particular disadvantaged group will need to be designated as being entitled to more preferential treatment than the others. (p.3)

The Confederation sees a 'vast array of problems for industry' that 'raise a variety of social and economic issues which appear all too often to be totally ignored by the proponents of these programmes' (p.4).

Over- and under-inclusiveness could be avoided by individually testing applicants in an effort to find out who is suffering from the effects of past societal discrimination. But individual testing is clearly impractical because of the high expense and the loss of administrative efficiency involved. However, this raises the question of whether administrative efficiency is a sufficient reason for justifying either over- or under-inclusiveness. Goldman describes the argument for efficiency as follows:

> While there is only a high correlation between being black, for example, and having suffered discrimination and so being deserving of compensation, the balance of justice in practice favors preferential treatment for the whole group, even though such a policy will occasionally result in undeserved benefits . . . It is better, the argument holds, to award compensation that is deserved in **almost** all cases than to have a program that in practice would amount to almost no compensation at all; in effect, a policy that would not be accepted in an ideally just world becomes best in practice. (Goldman, 1979:94-5)

The difficulty in this argument, recognised explicitly by Goldman, is that administrative efficiency may result in the hiring of minority

group members or women who were never discriminated against and in the exclusion of majority applicants who, under traditional selection criteria, would have been appointed. Administrative efficiency as a justification for over- or under-inclusiveness does not hide the fact that admission simply on the basis of race or sex frustrates attempts to select the most competent applicants.

Another objection to a preferential admission program based on compensation for societal discrimination is that the burdens of compensation are shared unequally by the majority members and the benefits of compensation are distributed unequally among individual minority members or women. The thrust of this argument is that if compensation for societal discrimination is approved, then there should be additional rules specifying each individual's contribution to the compensation. For example, why should only **some** individuals be asked to make sacrifices to compensate **some** members of preferred groups? If discrimination is 'societal', compensation should be paid by the whole community, not just a few individuals.

This point seems to have been lost in the Australian affirmative action literature. For example, in January 1984 the Office of Special Employment of the New South Wales Government compiled a list of innovative projects, sponsored by state and local governments and community groups, which meet the criteria of the Community Employment Program (CEP) (New South Wales Office of Special Employment, 1984). This list, in addition to describing the projects and identifying the target groups, gives precise goals or numerical targets. As it is implemented, the CEP excludes disadvantaged persons who are not among the selected target groups; it also disadvantages those who under traditional merit rules would have been able to gain employment. This results in some persons being required to repay a disproportionate share of the total debt.

Furthermore, if benefits go to certain preferred groups, then there should be additional rules specifying the relationship between compensation to groups and the distribution of that compensation to individual members of those groups. As already seen in this section, it could be argued that the applicants who are disadvantaged by such programs are likely to come from the bottom of the white or male distribution (Sowell, 1978:42). In the same way, the minority members or women who are able to take advantage of a preferential hiring program are likely to come from the top of the minority or female distribution. Thus preferential hiring programs represent a forced transfer from the most disadvantaged majority or male applicants to the most advantaged minority or female applicants. Moreover, such transfers favour those minority members and women least in need of preferential hiring because they are

most able to obtain suitable appointments in any case. The same argument is made by Goldman (1979:90-1):

> If the reason why minority-group members tend to be less qualified for various positions is to be found in prior patterns of discrimination, then those who are now most qualified will tend to be those who have been discriminated against least in the past. Thus a policy of preferential treatment directed toward groups as a whole will invert the ratio of past harm to present benefit, picking out just those individuals for present preference who least deserve compensation relative to other members.

If the arguments of these writers are correct, then compensation for societal discrimination may not reach the most needy because of the absence of criteria specifying the distribution of compensatory preferences to individual members. It is particularly significant that older minority members and women probably would be undercompensated since it might be reasonably assumed that older persons have suffered more from direct and indirect discrimination than younger persons. This objection brings out the fact that a preferential hiring program aimed at remedying societal discrimination may be unjust with regard to both majority **and** target group members. The argument that preferential hiring programs result in discrimination against innocent victims is emphasised by Sowell (1978:42):

> The past is a great unchangeable fact. **Nothing** is going to undo its sufferings and injustices, whatever their magnitude. Statistical categories and historic labels may seem real to those inspired by words, but only living flesh-and-blood people can feel joy or pain. Neither the sins nor the sufferings of those now dead are within our power to change. Being honest and honorable with the people living in our own time is more than enough moral challenge, without indulging in illusions about rewriting moral history with numbers and categories.

Compensation for Past, Specific, Identifiable Acts of Discrimination

The conclusion to be drawn from the previous section is that compensation should ideally be limited to specific, identifiable instances of discrimination lest disadvantages be imposed on members of both the majority and the minority. Even though this rule seems clear, its practical application is fraught with many problems because it is so easy, unintentionally, to create over- and under-inclusive classifications.

First, there is the question of who should pay the compensation. The obvious answer is the perpetrator of the discriminatory act or acts. However, more likely than not, the perpetrator cannot be

located or identified. Even if the perpetrator is identified, he or she may no longer be in a position to compensate the victim of discrimination. If the perpetrator's successor were to be held responsible, then doubts would be cast on the viability of the rule that only specific instances of racial or sexual discrimination be compensated. Indeed, if a successor could be liable for discriminatory acts committed by a predecessor, then the point in time at which the discriminatory act occurred becomes irrelevant, resulting in the difficulty of establishing a nexus between the act of racial or sexual discrimination and the injured party. Such compensation system would be enormously difficult; indeed it might be totally inoperable; and it might amount to compensation for societal discrimination rather than for instances of specific discrimination.

Second, there is the question of the morality of asking third parties to compensate for specific acts of discrimination committed by their predecessors. The mere fact that one happens to be a successor is in itself not a sufficient basis for liability. However, if the discriminatory policy is continued or some clear unearned benefits of the policy have passed to the successor, then a persuasive case might be made in favour of finding the successor liable. Naturally, evidence of the continued application of a discriminatory policy would prove a specific act of discrimination, giving rise to compensation of the party discriminated against.

Even if a specific perpetrator is located, compensation is not a simple matter. Major problems still arise because of the time elapsed between the original discrimination and the actual compensation. In the simplest case, the original discriminatory act consists of the fact that a minority member or a woman, who is at least as qualified as a majority or male applicant, is refused an appointment solely on the basis of race or sex. At the time of compensation, however, he or she may not be as qualified as the persons who then apply. Indeed, there is a strong possibility that applicants who were denied a job solely on the basis of race or sex will not be as qualified as the persons who apply at the time compensation is considered. For example, in the 1960s Australia enjoyed full employment and a booming economy, which even required that immigrants be imported to sustain the economic growth. As the economy started to stagnate and unemployment became an everyday reality, and as timid attempts were made to overhaul our industrial technology in the 1970s, companies and organisations raised their hiring standards beyond the minimum level necessary to ensure the satisfactory performance of a job. Thus it is possible that minority members and women may not be selected now because hiring standards have raised to a level far beyond that needed to succeed as an employee.

It is not surprising that precisely in difficult economic times increasing demands are being made to give minority members and women a fair go, even if it involves changing the traditional rules of selection. This is ironic because in a non-expanding economy innocent victims will have to pay the price for this social revolution. Also, there is considerable resistance in the business community towards the idea that employers alone should bear the cost of rectifying the results of past discrimination against minority members and women, especially in a stagnant economy.

If the introduction of affirmative action targets were to result in the appointment of less-qualified minority members and women at the time of compensation, would the displaced majority members and males then have the right to claim compensation because they were discriminated against on the basis of their race or sex? Goldman points out that this would lead to regression in compensation claims, and it would make us all petitioners for compensation and favours:

> The reason is that the rights of the white males being overriden or denied are of exactly the same type as the rights formerly denied to victims of the original discrimination, and it is not clear on the surface why similar compensation should not be owed this second class of individuals. (Goldman, 1979:122)

That Goldman's fears are not mere speculation is well illustrated by the case of *McAleer* v. *American Tl. and Tel. Co.* (1976) 416 F.Supp. 435, pp.435-441, a sex reverse discrimination case. Plaintiff McAleer, a male, was denied promotion by the American Telephone and Telegraph Company even though he was entitled to it under the provisions of a collective bargaining agreement. The job was given to a less qualified, less senior female solely because of her sex. The Company justified its actions by pointing to a consent judgment containing a preferential hiring program that obligated it to favour female employees regardless of seniority, in order to eliminate past sex discrimination. The District Judge acknowledged the constitutionality of the policy of reverse discrimination but also ruled that the disadvantaged employee was entitled to compensation rather than promotion. He relied for support on *Franks* v. *Bowman Transportation Co.* (1976) 424 U.S. 747, where the Supreme Court referred to the possibility of monetary compensation for innocent employees who were affected adversely by the employer's conduct (*Franks*, pp.777,780-1). This solution, however adequate it may seem, raises the problem of whether it is just to compel the perpetrator of an injustice (or his or her successor) to compensate both the victim of past sex discrimination and an innocent third party.

The difficulties associated with identifying specific instances of discrimination do not affect the well-established principle that race- and sex-conscious programs may be required where specific past discrimination can be proved. With regard to race-conscious programs, Justice Powell's judgment in *Bakke* reaffirms that there is a profound difference between the use of racial classifications to compensate for societal discrimination and racial classifications that respond to identifiable instances of discrimination. Compensation for societal racial or sexual discrimination is compatible with the ideal of equality of result, which aims at equal representation in the workforce. It also leads, as I have argued, to the displacement of innocent persons. This theme will be elaborated in the next chapter, in which forward-looking arguments, including utilitarian considerations, for justifying preferential hiring programs based on race or sex are discussed.

A Conclusion with a Warning

The arguments presented in the preceeding sections are familiar to scholars (as opposed to practitioners) working in the affirmative action field, even though they have been largely overlooked in the Australian affirmative action literature. The arguments are important because they question the correctness of using race, ethnic background or sex as proxies for other characteristics that members of the racial or ethnic group or sex are deemed to possess, thereby necessarily leading to under- and over-inclusive preferential hiring programs.

One basic idea underlies and permeates the claim that minority members and women should be compensated for past societal discrimination: people who are discriminated against deserve the same rewards in the 'real' world that they would have received in an 'ideal' world. Careful consideration of the preceding sections, however, exposes this idea as an untenable product of human imagination. The conditions that would justify compensation for societal discrimination are simply not being met. Societal discrimination, by definition, involves injuries that cannot possibly be assimilated to the concept of specific, identifiable instances of discrimination.

Furthermore, the costs of the injuries caused by societal discrimination cannot be determined and the persons who inflicted or profited from the discrimination cannot be satisfactorily identified (which is necessary lest innocent persons be asked to pay the price). Chipman points out the absurdity of representing preferential hiring policies in terms of compensatory justice:

> The . . . fallacy is to think that reverse discrimination, or indeed any forms of affirmative action which do not extend equal support or benefit to every group in the community, can be justified in the name of restitutive justice. Thus it is commonly said that positive discrimination in favour of women or underrepresented ethnic groups is justified up to, but only until, their proportion in that institution reflects their proportion in the wider community, as **compensation** for prior unjustified discrimination against members of the groups in question. Leaving aside the real question of to what extent so-called under-representation has been caused by discrimination, it is absurd to represent these policies as a form of restitutive justice. For how is it supposed to compensate those women (or members of certain ethnic minorities) who **were** wrongly discriminated against in the past (whatever be their true number) that **other** women get preferential treatment or selective support? Equally, how does it penalise those men (or non-members of appropriate ethnic minorities) that did wrongly discriminate in the past, that other men are now discriminated against? (Chipman, 1984c:23-4)

Attempts to justify preferential hiring programs in terms of compensatory justice must fail because of our inability to establish a genuine link between past societal discrimination and present disadvantage. However, if television and media coverage following the release of the Government's paper on *Affirmative Action for Women* is an indication, we can expect these attempts to continue unabated.

It is interesting to note that present advocates of preferential hiring programs were among the strongest opponents of racial and sexual quotas in the past. Their present support for preferential hiring programs involving targets or goals is a 'terrible sort of intellectual inconsistency'. Wasserstrom, a strong advocate of affirmative action programs involving preferential hiring, admits that this 'inconsistency' is a valid and convincing objection to such programs:

> At times past, employers, universities, and many social institutions did have racial or sexual quotas, when they did not practice overt racial or sexual exclusion, and it was clear that these quotas were pernicious. What is more, many of those who were most concerned to bring about the eradication of those racial quotas are now untroubled by the new programs which reinstitute them. And this is just a terrible sort of intellectual inconsistency which at worst panders to the fashion of the present moment and at best replaces intellectual honesty and integrity with understandable but misguided sympathy. (Wasserstrom, 1977:617)

Notwithstanding this intellectual inconsistency, Wasserstrom argues that discrimination against blacks and women was 'a part of a larger social universe which systematically maintained an

unwarranted and unjust scheme which concentrated power, authority, and goods in the hands of white males', and that hard affirmative action programs should not be condemned because 'they seek either to perpetuate an unjust society or to realize a corrupt ideal' (p.618). However, in clearly spelling out this 'evil' nature of past societal discrimination, he does not address himself to the question of whether hard affirmative action programs can be based on past societal discrimination without creating another evil and immoral 'system of racial and sexual superiority'.

This last point has been taken up by Posner, who advances perhaps the most compelling argument against preferential hiring programs based on compensatory justice. He argues that where 'race' becomes the criterion for assigning certain characteristics, 'it closely resembles and could be viewed as imparting legitimacy to the case for regarding discrimination against racial minorities as a proper, because (generally) efficient, form of conduct' (Posner, 1974:9). The use of racial classifications as a proxy for other characteristics is dangerous because it legitimises a mode of thought or approach used in invidious discrimination, and it could portend a resurgence of bigotry and prejudice. This point is important because it alerts us to the danger that a policy against invidious discrimination could be undermined by a hard preferential hiring program, which is rooted in the same habit of mind, involving the presumption that the use of race, ethnicity or sex is conclusive evidence of some attributes possessed by an individual. The point is reinforced by the fact that both the hostile **and** the well-disposed discriminators use race or sex as evidence of the same attributes. For example, a hostile discriminator may refuse to offer a job to an Aboriginal on the basis of the applicant's race; this discrimination occurs because the discriminator may associate 'black' with 'badly educated'. A well-disposed discriminator may favour a preferential hiring program as a means to improve ultimately the education of the members of the target group.

Chapter 6

Affirmative Action and Forward-looking Arguments

Introduction

Some proponents of preferential hiring aimed at proportional representation do not find compensatory justice arguments persuasive. Instead, they provide forward-looking arguments, including utilitarian arguments, to justify these programs. For example, some writers argue that the preferential hiring of minorities and women should be seen as a way of preventing future instances of discrimination, which otherwise would inevitably occur, and as a way of improving the socio-economic positions of minorities and women (Fullinwider, 1980:68-92; Gross, 1978:72-4). Other writers emphasise the necessity of promoting social peace and racial integration (Daniels, 1978:214; Fullinwider, 1980:70). In the main, these arguments are based on the assumption that the overall gains to society flowing from these programs exceed the overall losses, with the consequence that society is 'better off' as a whole. In what sense better off?

Dworkin has argued that a society could be better off in a **utilitarian** sense when 'the average or collective level of welfare in the community is improved even though the welfare of some individuals falls' (Dworkin, 1977:232). Society could also be said to be better off in an **ideal** sense 'because it is more just, or in some other way closer to an ideal society' (Dworkin, 1977:232) whether or not the average or collective welfare is improved.

Turning his attention to utilitarian arguments, Dworkin admits that they 'encounter a special difficulty that ideal arguments do not' (p.232). Utilitarian arguments confront us with the problem of how gains and losses in the overall collective welfare can be measured.

Dworkin introduces what he calls 'preference utilitarianism', whereby the policy makers assign equal weight to the preferences of all affected by the policy of preferential hiring. According to this view, a society is better off as a whole if a policy satisfies the aggregate of preferences in society:

> The members of the community will each prefer the consequences of one decision to the consequences of others . . . If it can be discovered what each individual prefers, and how intensely, then it might be shown that a particular policy would satisfy on balance more preferences, taking into account their intensity, than alternative policies. On this concept of welfare, a policy makes the community better off in a utilitarian sense if it satisfies the collection of preferences better than alternative policies would, even though it dissatisfies the preferences of some. (Dworkin, 1977:233)

Dworkin recognises that it is difficult to find a way to show that one policy satisfies more preferences than another policy, and he argues that voting may be the only effective way to discover the personal preferences of people with regard to a particular policy. A preference is personal if the person who reveals the preference considers only the consequences of the particular policy involved for himself. But Dworkin also recognises that the process of voting may not enable us to discover the personal preferences of people because some people, in expressing a preference for or against a particular policy, are motivated by their emotional attitudes to other people rather than by the anticipated consequences of the policy for themselves. When the political decision-making process is affected by factors extrinsic to it, it is said to be corrupted.

Thus, in the absence of a satisfactory way of weighing the costs and benefits associated with introducing and implementing a policy of preferential hiring, the social utility argument is inconclusive. Social cost-balancing 'is inherently weighted by a multitude of subjective factors, so that no one group's calculus of "the greatest good" need be accepted by any other group' (Duncan, 1982:525). A knowledgeable commentator, George Sher, has 'nothing to say about utilitarian justifications' because 'the winds of utilitarian argumentation blow in too many directions' (Sher, 1977:49-50).

Nevertheless, the social utility argument for preferential hiring is stronger than the arguments based on compensatory justice. The difficulties inherent in establishing the 'genuine' link between past societal discrimination and present disadvantages have caused significant problems for people attempting to justify preferential hiring programs with this argument. In a social utility context, however, there is a closer fit between preferential hiring and its aim, which is to improve quickly the career prospects of its beneficiaries and to bring about proportional representation.

Also, since those who benefit from a preferential hiring program are likely to come from the top of the minority or female distribution, a preferential hiring program based on compensatory justice can be criticised for favouring those who are least in need of preferences and have been least disadvantaged by past societal discrimination. This criticism, however, is not valid with regard to forward-looking arguments. The recruitment and selection of the least disadvantaged minority members and women is consistent with arguments that seek to justify a preferential hiring program on the ground that it will result in greater overall social utility. In fact, if the legitimacy of preferential hiring lies in maximising the average or collective welfare, then the absence of a tight fit between past societal discrimination and present disadvantage becomes irrelevant.

Proponents of the social utility argument may well urge, with considerable plausibility and despite the difficulties involved in social cost-balancing, 'that an effective preferential policy would result in net positive social effects of significant magnitude':

> The Social Utility Argument for preferential hiring, even when complete and made with the greatest cogency, will unavoidably be highly conjectural, imprecise, debatable. There will be ample room for reasonable people of good will to disagree on the wisdom of preferential hiring. Some would point to the inevitable incompleteness of a social utility defense of preferential hiring as a decisive reason for not adopting such a policy. This is a mistake. Social utility arguments against preferential hiring are also incomplete, imprecise, conjectural, and so on. The Social Utility Argument for preferential hiring need only show preferential hiring sufficiently promising as a superior alternative to justify a social experiment using it. The only real test of social programs is how they work when they are put into effect. (Fullinwider, 1980:72)

The existing Australian affirmative action literature does not make it clear whether proponents of affirmative action programs see these programs as a means to establish a better society in the utilitarian or in the ideal sense. Nevertheless, statements to the effect that these programs are expected to result in improved career prospects for their beneficiaries and in benefits for society as a whole are mentioned regularly in this literature. For example, the Government's paper *Affirmative Action for Women* insists that everyone will benefit from the introduction of these programs, and specifically identifies the benefits for employers, employees and unions. The writers of the paper state confidently that these programs will result in better human resources management in the sense that 'organisations can better match skills and abilities to jobs', thereby leading to 'increased economic effectiveness' (Ryan and Evans, 1984:16; see also Duncan, 1982:528). Also, in elaborating

the benefits of affirmative action programs for employees, the writers of the paper state that the opening up to women of jobs from which they were previously excluded will result in 'greater freedom of choice in respect of occupations . . . in which they have previously been under-represented' (p.16; see also Gittins, 1984).

The paper fails to distinguish between the soft and the hard versions of affirmative action. The affirmative action programs advocated in the paper are described as implementing the ideal of equality of opportunity, which is accomplished when the entitlement of people to compete for valued rewards, including suitable employment, is determined exclusively on the basis of characteristics relevant to successful performance. However, as argued in Chapter 4, to the extent that the paper requires the setting of numerical targets, it does in fact advocate hard affirmative action programs.

I have identified measures aimed at the removal of arbitrary and unnecessary barriers to employment as soft affirmative action. It can reasonably be expected (but, due to the inherent difficulties involved in social cost-balancing, not demonstrated) that these measures will indeed result in better human resources management and increased economic effectiveness. It is not clear, however, that hard affirmative action programs, like preferential hiring, will provide equal benefits. Of course, the difficulties involved in weighing losses and benefits cannot be used as an argument against hard affirmative action programs, but they alert us to the need for methods capable of undertaking reliable cost-benefit analysis.

It is impossible within the confines of this monograph to discuss all or even most utilitarian arguments in favour of or against preferential hiring because there is a 'wide divergence in their specificity' (Goldman, 1979:141). Therefore, I propose to concentrate on an argument that is prominent in the relevant Australian affirmative action literature: the argument that a quick increase in minority members and women at all levels of the workforce is necessary in order to provide 'role models', who can encourage other members of the group to strive for the achievement of similar positions. The choice of this argument is not arbitrary because the existence of role models is often described as a necessary (but not sufficient) condition for the achievement of proportional representation of minorities and women at all levels of the workforce, including management.

The role model argument explains, at least in part, the present concern with proportional representation in the Australian literature. For example, in a report published by the Equal Employment Opportunity Bureau of the Public Service Board, the need for affirmative action measures in the Service is linked to the underrepresentation of women and their concentration in the 'lower

level, less satisfying and career-restricted areas of the public service' (Equal Employment Opportunity Bureau, 1984:13). Similarly, the Government's paper *Affirmative Action for Women* identifies the need to increase the participation rate of women at all levels of the workforce as the *raison d'être* of affirmative action programs (Ryan and Evans, 1984:18-31). The role model argument also illustrates particularly well the difficulties involved in making an accurate cost-benefit analysis.

The Role Model Argument

Preferential hiring might be justified by attempting to prove that the example provided by women employees or minority workers in public and private employment is likely to improve the self-image of other members of the group. In the American context, Greenawalt writes:

> The widespread assumption that blacks are more suited for menial jobs has affected the attitudes of whites towards blacks and the attitude of blacks toward themselves . . . Both blacks and whites need to see blacks in positions of community leadership, as well as to have a black perspective brought directly to bear on the resolution of many community problems. Increasing the number of blacks in high vocational positions and as community leaders will not only raise the aspiration of young blacks and dissipate white racial stereotypes, but may also ameliorate some stereotypes blacks have about whites. No longer will it be so easy to distinguish 'them' (the white power structure) from 'us' (the black oppressed), because 'them' will include many blacks. Other blacks will come more easily to see the constraints under which those with power operate and will abandon any oversimplified notion that those in responsible positions are invariably 'oppressors'. (Greenawalt, 1975:592; see also Goldman, 1979:142-3)

In Australia, the role model argument has been advocated by Byrne with regard to women:

> One prerequisite for a successful affirmative action programme — and for successful guidance and counselling in adolescence — is good, suitable and successful female role models. They do not exist in leadership . . . It is important **concurrently** to lever more gifted and/or motivated women to senior positions, to decisionmaking, to management, to policy levels, to foremen and shop floor supervisors, as to broaden the base of recruitment to the main stream. (Byrne, 1980:57-58)

Byrne also expresses the opinion that women should serve as role models 'until girls see role models ahead who will influence their natural choices without the (albeit) necessary artificiality of positive discrimination pioneer programmes' (p.58).

The role model argument suggests the selection of the least harmed women or minority members because they are arguably best able to prove the ability of their members to function effectively in employment. One possible negative side effect, pointed out by a number of organisations representing women, is that preferential hiring may in fact stigmatise capable women (Goldman, 1979:144).

A good argument could be made for the proposition that the preferential appointment or promotion of a minority member or a woman inhibits the beneficiary's capacity to function effectively as a role model. According to this argument, before preferential hiring programs employers who hired minority members or women knew they were employing gifted and highly motivated people. Now, it could be argued that all minority and female applicants are harmed because employers may no longer assume that these applicants are gifted and may therefore be reluctant to employ them. If less than maximally competent persons are employed or promoted because of preferential hiring programs, they may prolong the existing stereotypes rather than dispel them.

It does not help to argue that minority or female applicants may be able to prove their worth in the job-selection process, because the original presumption by prospective employers of reduced competence is sufficient to challenge the premise that preferential hiring programs are necessary because they encourage other members of the group to emulate role models. Also, the possibility that minority and female applicants may have to make a special effort to convince prospective employers of their competence casts doubt on the assumed benefits of a preferential hiring program. Stigmatisation must be considered as a general disutility in any cost-benefit analysis of preferential hiring programs.

Preferential hiring could be an insult to those women who have succeeded in their chosen fields on the basis of their own individual qualities. (This point was made by Women Who Want to be Women, South Australia, in a submission to the Human Rights Commission dated 10 September 1983.) It may also reflect badly on those minority members and women who apply unsuccessfully for suitable employment. But even then, proponents of hard affirmative action programs believe that the advantage of role models in public and private employment lies in the ability of women or minority employees to break down stereotypes about themselves (Goldman, 1979:142; Nickel, 1975:541).

Another problem is that selecting the least harmed women or minority members may promote ignorance among males and majority members about the minority or women, rather than make a positive contribution to the destruction of false stereotypes. In fact, it may result in the formation of different but also wrong stereotypes among the rest of the community. This is because

employees selected as the result of a hard affirmative action plan may be a poor guide to female and minority problems since they come from that section of the minority or female distribution that has largely avoided or long overcome those problems. Women and minority employees may differ from the majority of their own sex or race in terms of income, status and place of origin. Hence, their recruitment not only may result in the formation of wrong stereotypes but may even have the adverse effect of encouraging majority members and males to ignore or minimise the specific problems of these groups. Also, it is worth speculating on whether the recruitment of the least harmed minority members and women alienates them from others of their race or sex, thereby exacerbating intraracial and intrasexual divisions that many enlightened leaders regard as inconsistent with the dignity and aspirations of minorities and women in general. (These points were made by the Christian Pro Family Forum in a submission to the Human Rights Commission dated 12 June 1983.)

The preceding analysis indicates that any arguments for or against preferential hiring programs are inconclusive due to the difficulties involved in social cost-balancing. Therefore, as Goldman has pointed out, these 'challenges to utilitarian claims are not intended to defeat them decisively' (Goldman, 1979:149) but to highlight the relative value of arguments that such programs make society better off in a utilitarian sense.

The costs and the benefits discussed in this section relate only to the ability of the beneficiaries of preferential hiring programs to function effectively as role models and do not deal with the direct costs involved in preparing and implementing such programs. These direct costs are discussed briefly in the next section.

The Costs Controversy

Very little is known about the costs of preparing and implementing preferential hiring programs (see, for example, Welch, 1976). Therefore, I can only give a general indication of the likely direct costs involved in administering these programs. The Government's paper *Affirmative Action for Women* states that the administration of an affirmative action program should not be costly because it requires in many instances only 'the reallocation of existing resources and the reordering of existing priorities' (Ryan and Evans, 1984:48). It also foreshadows that costs associated with affirmative action programs may qualify for tax-deductibility (p.48), thereby substantially lowering the direct costs incurred by employers. Also, the paper indicates that the 'allocation of resources at the initial stages of the development of the Program will be greater than the follow-on requirements' and that a 'successful Affirmative Action

Program is one that is absorbed by the manager of each department or area into all personnel and planning decisions' (pp.49,50). However, the Business Council of Australia has reported that the participation of its members in the voluntary affirmative action pilot program 'has not been a free lunch' and that 'in one company the costs of the program have been about $¾ million and overall the cost to participating companies will have been between $5 million to $10 million, depending on the measurement of executive time' (Affirmative Action Resource Unit, 1985:6).

The costs associated with affirmative action programs were heatedly debated in Australia following an occasional address by the Vice-Chancellor of the University of Sydney, Professor Ward, on 31 March 1984. He complained in his address about the costs that will be incurred by the University of Sydney as a consequence of having been brought under the affirmative action provisions of the New South Wales Anti-Discrimination Act, 1977. In a subsequently published article, he calculated that these provisions would cost the University approximately $450,000 a year (Ward, 1984b:74). He said that implementing the affirmative action provisions would require a universal policy of advertising all vacancies, including temporary appointments and certain research assistantship posts, and he claimed that these changes would cost the University an extra $100,000 a year. He also predicted substantial increases in the Staff Office 'to handle advertising and to service a large increase in the number of selection committees'. He continued:

> At present many committees report only briefly. In future much more elaborate reports will be required, so that the full reasons for preferring one candidate to all others will have to be recorded and confirmed. Estimated costs of the process vary between $160,000 and $230,000 a year. The estimates include salaries and associated costs, such as superannuation, insurance and longservice leave provision. . . . The University is required to appoint an Equal Employment Opportunity Officer . . . The likely costs of the Officer and her research and clerical assistants are $100,000 a year, including the on-costs. (Ward, 1984b:74)

Following this address, Professor Ward was attacked from both within and outside the University even though his remarks were not directed to the desirability of eliminating racial and sexual discrimination but to the costs involved in implementing the legislation. As these calculations were made by the highest ranking officer in the University following extensive discussions with senior University staff, there is no reason to doubt their *prima facie* validity or their accuracy without strong indications to the contrary. Indeed, there are indications that the calculations are conservative because they deal only with the preparation and implementation of an affirmative action plan.

Ward's calculations are based on the expectation that the Anti-Discrimination Act, 1977, which requires the setting of goals and targets, will not result in the appointment of applicants simply on the basis of race or sex. I have argued in Chapter 4 that goals and targets by their very nature must involve the appointment of **some** applicants simply on the basis of race or sex, for if they did not do so then they would be redundant because the same result could be obtained by the rigorous implementation of the anti-discrimination principle.

If these arguments are correct, then indirect costs would be sustained by the University and by society in the sense that any appointment based on race or sex alone, without regard to individual merit, would have an impact upon the University's productive efficiency and function, identified as the imaginative imparting, acquisition and extension of knowledge. Of course, general agreement can never be reached on the definition of 'efficiency' because the concept is ambiguous. As Fullinwider has pointed out, the efficiency of an operation depends not only on the efficiency of each worker taken separately but also on the ability of workers to 'interact with one another and how well others interact with them' (Fullinwider, 1980:87). Thus, a company that in its selection procedures considers only the objectively measurable skills of applicants 'may not end up with the most productive or effective operation'.

Some writers believe that the efficiency of minority members and women selected preferentially may be inhibited. Since they are not appointed solely on the strength of characteristics relevant to the performance of a job, they may not feel like 'authentic' employees (Graglia, 1970:359). The evidence on this point is conjectural, relying on common sense and experience. The issue involved is very sensitive and the deliberate and systematic accumulation of ordinary sociological statistics has been understandably difficult. Nonetheless, if these writers are correct, then this casts a serious doubt on preferential hiring as a means to increase the efficiency of an operation.

It is impossible to measure the impact of preferential hiring on the productive performance and efficiency of industry, but it could be substantial and cannot be ignored. Levin believes that hard affirmative action programs, including preferential hiring, are an 'unaffordable luxury in a competitive world' (Levin, 1983:47) because they are based on the idea that as long as people are minimally qualified all is well. This idea clearly overlooks the fact that 'there is a **continuum** of abilities from very high to very low' (Levin, 1983:47). The same point was also recently made by Chipman in a university context:

> *It is ... important that those of us within universities do more to explain the* **necessarily** top-ended openness in terms of competence and excellence in attributes associated with teaching and research. Otherwise, we will slowly but surely be dragged towards a public service or state school teacher appointment mentality, with a shift down towards being **good enough** for the job (at which point 'social justice' selection criteria take over). This must be considered a tragedy by those who are aware of the outstanding international reputation of so many Australian institutions of higher education, and the academics within them who were and still are selected in relation to open-ended criteria of competence and excellence. (Chipman, 1984b:8)

Thus, preferential hiring, if it suspends the traditional merit selection criterion, has an impact on the productive performance or efficiency of a university; this indirect cost may greatly exceed the direct costs calculated by Ward.

Imposing preferential hiring programs upon employers would add to the already considerable regulatory legislation. The policing of targets and goals would spawn a number of government agencies, which, in their zeal to enforce the relevant affirmative action legislation, could endanger the profitability of industry and its capacity to provide much-needed jobs. This point was made by the Confederation of Australian Industry:

> To burden industry further with major additional costs which will flow naturally from the implementation of hard affirmative action programmes can only further limit its capacity to satisfy the demands of the market place and thereby provide the employment opportunities to match this nation's ever-growing labour force. ... The results of a survey conducted of a representative sample of the Fortune 500 (i.e. the 500 largest American corporations) ... in 1981 ... show that the annual cost of all Equal Employment Opportunity requirements to the Fortune 500 totals some $1.5 billion. (Confederation of Australian Industry, 1983:4-5)

The direct costs to industry may, however, be offset by certain gains that could be expected following the voluntary introduction and implementation of preferential hiring programs. Voluntary compliance with the Government's proposed legislation reduces government hiring pressures and enables industry to concentrate on the fulfilment of its economic function, namely maintaining its profitability. Failure to comply with the legislation, however, would make industry prone to Government pressures involving costly negotiations and litigation, thereby endangering its economic viability. Sowell considers this issue:

> An employer's immediate liabilities are lowered by hiring from government-designated groups, but his longer run liabilities are raised

> insofar as employees from the government-designated groups can subject him to additional process costs whenever their pay, promotion, or discharge patterns do not coincide with those of others or with the preconceptions of government agencies. With the burden of proof on the employer — and often either impossible or prohibitively expensive — it is by no means clear whether he is better off in the long run to have acquired such potentially expensive employees as a means of reducing government hiring pressures. (Sowell, 1982:54)

In reply to Sowell's argument, proponents of preferential hiring argue that the direct cost to industry is, in any event, of secondary importance; the critical issue is that industry must accept its social responsibility. According to this argument, the costs of preferential hiring programs are irrelevant because the implementation of these programs will make society 'more just, or in some other way closer to an ideal society' (Dworkin, 1977:232). This is an important argument because it enables proponents of preferential hiring programs to ignore the direct costs involved. Hence, the argument merits attention in the next section.

Preferential Hiring and the Establishment of an 'Ideal' Society

The most difficult problem for those who believe that hard affirmative action programs will result in a more ideal society is the claim that these programs cannot possibly lead to an ideal society because they repudiate the anti-discrimination principle, according to which people should not be recruited or promoted on the basis of race or sex. Ely has attempted to develop an answer to this claim by demonstrating that preferential hiring programs are not incompatible with the anti-discrimination principle. He argues that hard affirmative action, including preferential hiring programs, is appropriate when the majority decides to favour a minority and to discriminate against itself (Ely, 1974:728-33). Thus, if the majority decides voluntarily to suspend the application of the anti-discrimination principle in order to extend preferences to designated minorities (or women), the continuing validity of the anti-discrimination principle is not affected.

Ely's arguments deal with racial discrimination but they are equally applicable to sexual discrimination. He makes a distinction between a 'we-they' relationship and a 'they-they' relationship. He argues that race-conscious measures that disadvantage minorities are rooted in a 'we-they' relationship: the 'we' represents the majority, which is in a position of strength, and the 'they' represents the minority. Hard affirmative action programs are rooted in a 'they-they' relationship, which connotes equality between the majority and the minority.

In Chapter 5 I argued that a group-based theory can be attacked easily on the ground that the policy of deliberately favouring minorities may well result in disproportionate harm to certain subgroups within the majority. Ely concedes this point implicitly when he notes that the benefits of a more discriminating formula involving the individual assessment of the qualifications of every applicant (rather than granting preference simply on the basis of race) must be balanced against the added administrative costs that individual assessment will entail. While recruitment and selection on the basis of race (or sex) is more efficient and cheaper from an administrative point of view, it is certainly not as fair as selection based on individual assessment.

Of course, any argument based on a 'we-they' relationship must be predicated upon the existence of unjustifiable discrimination. But where a 'we-they' relationship exists, two dangers inherent in the balancing process discussed above are significantly intensified. This point is explained by Ely:

> The first is that legislators will over-estimate the costs of bringing 'them' into a position of equality with 'us'. But the balance is likely to be skewed in another, though related, way — through an undervaluation of the countervailing interest in fairness ... The second danger is therefore one of overestimating the fit of the proposed stereotypical classification. By seizing upon the positive myths about our own class and the negative myths about theirs ... legislators may too readily assume that not many of 'them' will be unfairly deprived, nor many of 'us' unfairly benefitted, by the proposed classification. (Ely, 1974:733)

Ely contends that these dangers do not exist when the majority deliberately favours minorities and discriminates against itself. Indeed, it could reasonably be expected that the majority will have studied the consequences for itself of the preferential treatment of the minority.

Thus Ely accepts that a majority is not a monolithic structure and that the policy of deliberately favouring minorities may inflict disproportionate harm on certain subgroups within the majority. He also admits that the disadvantage inflicted upon itself by the majority may not be distributed evenly throughout the 'we' class and that this may be a reason to argue against hard affirmative action programs. This is, of course, a restatement of the issue of over- and under-inclusiveness. For example, if, in an Australian context, the majority decides to recruit Aboriginals simply on the basis of their race because they are considered poor, then this oversimplification (using race as a proxy for poverty) may burden some white majority members who are also poor; it may also undeservedly benefit those minority members who are rich. But

even though Ely is clearly aware of the dangers of over- and under-inclusiveness, he still relies on the concept of a group as a monolithic entity when he argues that 'where there is no reason to suspect that the comparative disadvantage will not be distributed evenly' throughout the majority, a 'classification that favors the "theys" does not merit "special scrutiny" ' (Ely, 1974:736). The problem is that the exception Ely describes could easily become the rule, for as Justice Rehnquist said in the American case of *Sugerman* v. *Dougall* (1973) 413 U.S. 634, 'it would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn on the road' (p.657).

Nevertheless, Ely's theory is interesting because it purports to prove that society is better off if it can be demonstrated that the comparative disadvantage which the majority inflicts upon itself is distributed evenly throughout the 'we' class. Furthermore, the theory attempts to develop forward-looking arguments in favour of preferential hiring programs without the need to undertake a cost-benefit analysis, which is traditionally involved in utilitarian arguments. But to the extent that the disadvantage inflicted upon itself by the majority disproportionately impacts upon some members or subgroups within the majority, the theory fails. In particular, Ely's theory does not explain why the right of the members of such subgroups to be free from racial discrimination can legitimately be sacrificed when some members of designated minorities are favoured. Is there a rule for sacrificing a person's right to be free from racial discrimination in order to favour others? This difficult issue may be clarified with a discussion of a hypothetical example.

In the usual and simplest case, person A discriminates against person B if A refuses to bargain with B for a job for reasons which have nothing to do with the job. Of course, cynics would probably say that, if B truly wishes to be free from racial discrimination, he should simply avoid A, which is exactly what A wants. But it is important to realise that B's right not to be discriminated against also places an obligation on A to avoid acting on the basis of his prejudices and biases.

Goldman also makes the point that employers have no absolute discretion to select people for employment. He identifies those who argue in favour of such a discretion in employment matters as 'libertarians', who deny 'that applicants for positions . . . could have rights to those positions' because these rights would conflict with 'the rights of the corporations to control their own assets or property and with the rights of their members to associate with whom they please' (Goldman, 1979:35). He concludes that the rights of individuals to equal opportunity justifies 'enforcement of a rule that restricts the rights of larger corporations to control their assets

by hiring or admitting whomever they choose' (p.41). But while this limitation on a corporation's freedom of action may be justified as a way to create an equal opportunity society, preferential hiring programs compel corporations to distribute employment opportunities simply on the basis of race and sex, thereby determining rights and liabilities on the basis of group membership. Such a policy, which encourages favoritism towards some designated groups, is open to the real objection that it is difficult to implement due to our inability to define satisfactorily the nature of a group. Such a policy could also be criticised on the ground that it makes a mockery of the anti-discrimination principle.

While it could be argued that preferential hiring programs may enhance the efficiency of industry and may even lead to an increase in average or collective welfare in a utilitarian sense, it is doubtful that society will be better off in an ideal sense. This doubt stems from the belief that the pursuit of the highest social utility must be carried out within the anti-discrimination principle, according to which people should be recruited, selected and promoted to positions without regard to race or sex. Of course, in the ultimate analysis, the anti-discrimination principle may well be consistent with the promotion of universal utility, in the sense that selecting applicants on the basis of characteristics that are relevant to the performance of a job will also result in utilitarian benefits for industry. Indeed, the compatibility of the anti-discrimination principle with the social utility argument may well explain why this principle is enforced generally. But it does not explain why the principle should still be adhered to even if the promotion of social utility were to require the recruitment, selection and promotion of some applicants simply on the basis of their race or sex. An answer may be that the right to be free from racial or sexual discrimination must not to be overriden by mere utilities.

As noted above, proponents of preferential hiring programs argue that these programs do implement the anti-discrimination principle and that they do not deny but rather affirm the ideal of equality of opportunity. They also argue that this ideal must, in practice, lead to equality of result, based on the assumption that skills and interests are uniformly distributed throughout the human race. If, however, this assumption is rebuttable, then preferential hiring programs, in aiming at the proportional representation of minorities and women at all levels of the workforce, while pretending to implement the ideal of equality of opportunity, would in reality be replacing it with the ideal of equality of result.

If equal outcomes are desirable, then the ideal of equality of opportunity, the implementation of which results in large disparities, will not be helpful. If this is the case, proponents of preferential hiring programs should argue outright for the ideal of equality of

result without pretending that their programs are consistent with the ideal of equality of opportunity. The problem, noted throughout this monograph, is that the ideal of equality of result leads to new classes of people who consider themselves victims of racially and sexually based policies. Professor Gross sums up the dangers involved in replacing the ideal of equality of opportunity by the ideal of equality of result:

> This new 'equality' substitutes for the rule of law or principle which took many centuries to establish, a rule of men which is no more than a rule of privilege and influence so rightly despised by the founders of liberal democracy. In such a game the winners will not be the formerly downtrodden but the new mandarins who have reached power. In trying to aid those unjustly treated we will have taken away a principal weapon forged for their protection. The formal principle of equality of opportunity should be kept because it is the only clear and safe way of ruling favoritism out of court. (Gross, 1978:108)

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