

# EEO in a Neo-Liberal Climate\*

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*Dedicated to the memory of Clare Burton who resolutely devoted herself to the cause of gender equity<sup>+</sup>*

**This paper interrogates the ways in which different meanings of equality and inequality are produced within political and legal discourses. With particular regard to the Australian experience, the paper considers the significance of the disappearance of affirmative action (AA) from the equality lexicon with the repeal of the federal AA legislation and its replacement with the equal opportunity (EO) for women in the workplace legislation. Even as this change was being implemented, EO was already being superseded in favour of “diversity.” It is argued that the linguistic changes signal a shift to the right of the political spectrum which emit deeply conservative and regressive messages regarding the gendered character of the workplace. Illustrations are drawn from the dissonant relationship between women and authority.**

## INTRODUCTION

The acceptance of women in public and professional life continues to be equivocal, despite the striking changes that have occurred over the last century. Women still have to struggle to be accepted as authoritative knowers within public life, the universities, the professions, and the higher echelons of corporate life, albeit that a belief in equality for all citizens is a central plank of the Western intellectual tradition (ALRC 1994; Lake 1999). Equality, however, is never absolute. Whenever it has been a norm, it has always coexisted with a norm of *inequality* and *exclusion*. Inequalities of class, wealth and status, which intersect with sex and race, are an inevitable corollary of a free-

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enterprise system. Structural inequalities have been underpinned by liberal legalism, the linchpin of which is equality *before* the law (or formal, or procedural equality), not *substantive* equality (or equality of result, or distributive justice). Because the formalistic meaning of equality is compatible with *inequality* and *injustice*, the question to be asked has not moved beyond that posed by Aristotle more than two millennia ago: *equality in respect of what?* (1959, §1282b). Aristotle himself had no trouble with the exclusion of women (and slaves) from his equality prescript, for they were deemed to be inferior *by their natures* (§1260a).

As the meaning of equality is always contested, closure can never be attained. The social variables relevant to its constitution, all located somewhere on a slippery slope between inequality and equality, are subject to constant change and reinterpretation. Despite their oppositional character, equality and inequality are not discrete. An equality claim can be understood only in relation to *inequality*, and vice versa, because the relationship between them is a symbiotic one. The permeable nature of equality renders it susceptible to changed meanings according to the prevailing context so that what is deemed to be equality in one context becomes inequality in another.

It is notable that few official texts refer to the norm of inequality. The dark side of the equality story is repressed, or naturalised, in terms of individual ability, choice or application. In this way, society's preference for Benchmark Men is masked. By Benchmark Men, I mean those who are invariably white, Anglo-Celtic, heterosexual, able-bodied and middle class, and who constitute the standard against which women and Others are measured. As feminist scholars have been busy deconstructing the social fictions of Benchmark Men, it is inevitable that the equality story has also been subjected to scrutiny. This does not mean that feminists necessarily want to jettison equality itself, for the concept continues to possess an allure while at the same time it is viewed with suspicion.

In this paper, I want to elaborate on the way that particular understandings of equality, equality of employment opportunity (EEO) and affirmative action (AA) are socially produced within the politico-legal terrain. I want to go behind the veneer of legislative texts which purport to effect equality for women at work. I propose to use the *Affirmative Action (Equal Opportunity) for Women Act 1986* (Cth) (AAA) and its successor, the recently enacted *Equal Opportunity for Women Act 1999* (Cth) (EOA), as the primary official accounts. In the course of the analysis, I will pay heed to the way the transition from social liberalism to neo-liberalism has influenced the changing meanings of equality and AA. I suggest that minimalist interpretations currently in vogue in official discourses are designed to instantiate *inequality* for women at work.

## EQUALITY

As equality is frequently used in modernist discourse as though its meaning

were unchanging and self-evident, I will commence by briefly adverting to its philosophical underpinnings, which continue to inform contemporary understandings. I do not propose to embark on a detailed excursus on equality, as there is already an extensive literature on the topic (e.g., Rossi 1970; Rawls 1971; Westen 1982; de Lepervanche 1984; MacKinnon 1989; Thornton 1990; Parashar 1994; Voet 1998; Phillips 1999).

As the concept of equality dates back at least as far as pre-classical Athens, it is apparent that we are not looking at a trendy concept of recent derivation. What is novel about its recent incarnation is that equality discourse may now include women, Aboriginal people, gays and lesbians, and people with disabilities, all of whom were formerly excluded. Their inclusion, however, is by no means unqualified. The discourse of formal equality is invariably conducted at a high level of abstraction so that the particularities of difference are sloughed off. The historical exclusion of women and Others has meant that the point of view of Benchmark Man has been able to pose as the universal because it was the *only* official point of view. Women and racialised Others were confined to the private realms of discourse and their "tongues were silent on the public issues of the day" (Elshtain 1981, 14–15). Their tongues are no longer silent, which means that women's struggles to be admitted to the society of equals in the public sphere have contributed to an understanding of equality as a contested field. As Judith Butler points out, those formerly denied social power have appropriated terms from the dominant discourse and reworked them as rallying points in political movements (Butler 1997, 157–158). Equality is a prime example.

The political constitution of equality is such that it has conventionally been imagined only in terms of citizenship which, by definition, is an exclusionary concept that distinguishes between those who are "in," or "not in," a relevant community. Those who are "in" are, theoretically, all treated the same way and any differences between them are irrelevant. Differences, or particularities, are unseeable in a sphere of generality (Thornton 1995b). Thus, in the case of Athens, we know that all community members were not eligible for citizenship; women, slaves and metics (resident aliens), that is, the overwhelming majority of the population, were excluded.

Athens, the template for modernist understandings of the political, illustrates the point that equality is a relative concept that is shaped by the dominant social values of the time. It reveals the need to go behind the universal veil to see the particularities of inequality, for the exclusion of women and racial minorities was long considered entirely consistent with a norm of equality. From this usage, we see how political language functions to constitute political thought (Wilson 1990, 9; Cameron 1992). The point is further illustrated by the way a homology has developed between equality and the public sphere, on the one hand, and inequality and the private sphere, on the other, dualisms which, in turn, have assumed a gendered character. In the Aristotelian schema, the equality of benchmark citizens (the Equals) was contin-

gent on the inequality of slaves and women. That is, by taking responsibility for necessary work, slaves and women enabled citizens to participate in the affairs of government. The world of necessity, the *oikos*, or private sphere, where the life-sustaining business of production and reproduction was carried out by those who were unfree and unequal, came to be imbued with a sense of inferiority, in contradistinction to the superior domain of the polis or public sphere, where citizens were supposedly free and equal (Thornton 1995a).

There are two points I want to extrapolate from this brief account because of the way that they continue to animate contemporary understandings of gender equality. First, despite the best endeavours of the feminist movement to appropriate equality and realise the aphorism, “the personal is the political,” equality remains largely comprehensible only in the public sphere because of the power of the dominant discourse. The family has never been possessed of a comparable notion of equality, because it formerly embodied a strict hierarchical ordering, with a master at the head and subordinated Others—women, slaves and children—subject to his authority. Even though a man is no longer automatically pater familias, the idea of equality between all members of a family, including children, strikes us as odd (Kearns 1984). The family, despite its multiple contemporary formations, remains a private site of *inequality* which continues to be resistant to public sphere norms. Legal discourse perennially both reflects and reconstitutes the notion of a dichotomy between public and private life.

The second point I wish to extract from the ancient social script is the symbiotic nature of the relationship between public and private spheres, whereby women and slaves assumed responsibility for reproduction and the preponderance of caring and household work *in order that* the master might be free to participate in the polis. In modern society, until recently, it has also been a societal expectation that women take responsibility for the household and children, while men attend to public affairs and the market. Women’s increased participation in the latter has disturbed the conventional symbiosis, although the realm of necessity has not diminished. The burden of reproduction still falls on women, who are also expected to take primary responsibility for the care of children. However, if equality for women is construed only in terms of public life, the inequalities of the private sphere remain invisible.

Despite, or perhaps because of, the struggle for feminist appropriation, scant regard is accorded this skewed concept of equality within mainstream political and legal discourses; equality continues to be conceptualised as an overwhelmingly *public* sphere notion.<sup>1</sup> There is the occasional good news story regarding the establishment of a workplace creche or a father assuming responsibility for child care, but the gendered symbiosis between public and private spheres has been resistant to change. The idea of equality in the private sphere remains inchoate because the decision to treat the family as a private realm beyond legal regulation emanates from a collective decision of Benchmark Men in the public sphere. Hence, anti-discrimination leg-

isolation, which purports to have equality for women as its *raison d'être*, makes a particular point of immunising the inequalities of family life from scrutiny. While the proscription of discrimination by an employer on the ground of family responsibility destabilises the notion of a rigid separation between public and private spheres, the employer perspective enables only an oblique glimpse of “private” life, certainly not a major interrogation of it.<sup>2</sup>

At this stage, I also draw attention to the ambiguous status of the market, which includes private-sector employment, as well as business activity. The market was not an element of the Aristotelian schema, as production occurred within the private sphere qua family in pre-modern societies. The Aristotelian notion of the public sphere was restricted to the sphere of government. The market today, while ostensibly private, is shaped and regulated by the state, although the degree of regulation varies from time to time. I stress the facilitative role of the state, which includes the more *laissez-faire* policies associated with neo-liberalism, to which I shall return. When we focus on the paradigmatic market values of competition policy, private gain and promotion of the self, it is apparent that such values are indubitably associated with *inequality* of outcome. I suggest that the concepts of equal treatment and equal opportunity have emerged in equality discourse to accommodate the dual social norms of equality and inequality. I shall briefly outline the salient features of these key concepts.

The principle of equal treatment, or formal equality, is central to liberalism, the dominant political philosophy of the contemporary Western world. Equal treatment requires that all those who are similarly situated should be treated in the same way. This manifestation of equality is succinctly captured by the idea of equality before the law, because it most clearly involves a formal or procedural understanding, rather than a substantive one. For example, liberal society accepts that justice requires the same treatment and the same punishment to be meted out to everyone charged with, say, a particular traffic offence. A strict equal treatment standard allows no advertence to the sex, race or class of a person. The standard purports to be blind to all characteristics of identity, including those pertaining to history and background.

Similarly, in the context of employment, equal treatment is not about equity, distributive justice, or equality of outcome; it is not about the representativeness of women in public life or the workforce, nor is it about remedying past wrongs. A formalistic incarnation of equality enables liberalism to avert its gaze from the unequal effect that equal application can produce. Not only does equal treatment suit a free-enterprise economy because it accommodates inequality emanating from competition, but it legitimates the masculinist domination of public life by ignoring the competitive advantage conferred by the fraternal ties of school, sporting, and club life. Because it is central to legality, equal treatment manages to carry with it a sense of legitimacy, as well as fairness and impartiality. The assumption that equal treatment is

synonymous with justice helps to explain its popular allure, despite its disproportionate effect on those who are not similarly situated.

In view of the market's commitment to competition, wealth maximisation and inequality, EEO is necessarily a limited concept in terms of the collective good, for it privileges liberal individualism. The opportunity referred to is a right to compete for social goods. The idea that everyone should be free to *compete* signals the centrality of EEO to liberalism. Indeed, competition, in the sense of being engaged in a race, informs the popular understanding of EEO, which also takes account of the fact that workplace outcomes, in respect of status, pay and conditions of work, are unequal. The assumption is that, if all are equal at the starting points, the "best person" will win the job, or the promotion, and streak ahead of his or her competitors in status, pay and other rewards. Within this paradigm, merit is assumed to be transparent but, like equality, it is a contested and politically contingent concept (Thornton 1985; Burton 1988). The neutral veneer of merit serves to mask the construction of the "best person."

The official texts are thin when it comes to offering a philosophical justification for EEO. Unproblematic and categorical assertions are the order of the day. EEO is defined by the Australian Council of Trade Unions (ACTU) in a somewhat circular fashion as "the principle which ensures that employees are treated equitably and fairly regardless of their race, sex, disability or any other characteristic as defined in EEO legislation" (1998, 1). If "opportunity" includes the chance to compete for high level positions, what does equal opportunity mean in terms of authority in the workplace? As Lorraine Code has pointed out, "the notion of *female* authority is still so much at the outside limits of our experience that it requires great imaginative effort to see what is involved in being a woman of authority" (1986, 61–62; cf. Jones 1993). Even in the private sphere, women have rarely had authority.<sup>3</sup> The discourse is wholly unable to grapple with something as elusive as the gendered construction of authority. Once we begin to scrutinise EEO in context, it begins to sound more and more like a hollow mantra.

There is no regard to the affective, material or corporeal factors that spring from the realm of necessity, which may mean that the "opportunities" some women want may differ from simply being permitted to share social goods with men. They may be seeking to accommodate work and family in satisfying ways, or a more equitable division of responsibilities in the home, but "opportunity," like "equality," is a potent sign that is politically informed. As with equality, "equal opportunity in respect of what" is the question one must ask (O'Neill 1976). Despite this ontological perplexity, EEO has become the normative usage of equality in the workplace.

In recognition of the fact that women are expected to take responsibility for child care, feminists have sought to define EEO so as to include attention to hours of work and work-based child care, in a way that at least gestures in the direction of substantive equality. Increasingly, however, EEO is

being deployed as little more than a rhetorical phrase. This rhetoric is notable in job advertisements where employers, including universities, continue to claim that they are EEO employers. By advertising that they are EEO employers, corporations claim to have sloughed off any prejudice they might have had in the past, and are now fully committed to fairness and the non-discrimination principle. However, there is no obligation on employers to do anything of substance. Provided that there is no artificial handicap at the starting point by virtue of sex, race, sexuality, or other proscribed characteristic, the norm of *inequality* in the market can reassert itself. That is, differential end points can be reached as a result of differences in individual ability, enterprise and application. If some people (predominantly men) become vice-chancellors and others (predominantly women) do not progress beyond the level of lecturer within the academic hierarchy, it is believed that the application of the merit principle will have ensured that the “best person” has risen to the top and any concern about inequality of outcomes is assuaged. By focusing strictly on the ostensible neutrality of merit at the point of entry and paying scant attention to what happens subsequently, the merit principle is naturalised within a culture of inequality, even in organisations where all senior positions are held by men. Once we begin deconstructing the mask of merit, however, a different picture emerges (e.g., MIT 1999). Thus, in addition to the question *opportunity in respect of what?* one must also ask, *from whose perspective?* EEO is necessarily a contested terrain.

As a result of campaigns by the women’s movement, discrimination on the ground of sex (as well as race, sexuality and disability) was proscribed from the 1970s when it was recognised that equal treatment was rarely available to women, either in employment or other spheres of public life, despite the liberal rhetoric of formal equality.<sup>4</sup> It was initially believed that instances of sex discrimination constituted anomalies within the prevailing egalitarianism, which could be remedied on an individualised case-by-case basis. The pious hope was that the ripple effect from each complaint would modify social behaviour to the extent that discrimination would eventually disappear altogether.

“Sex” itself, however, is another problematic concept within the political lexicon, for it is a socially constructed term which is more likely to be used in respect of women than men; it does not refer to a biological category alone. Michelle Boivin explains that it is because gender precedes biological sex that so many inequalities against women have been created (1999; cf. Gatens 1991). To focus only on biological distinctions, such as reproduction, is to naturalise those inequalities. Boivin observes, “[n]either language nor law recognizes the fact that sexual identity is a social construct” (1999, 222). This is the crucial point. It means that we are trying to use a remedial tool that (deliberately?) mis-diagnoses what the problem is in the first place. Not only is “sex,” generally speaking, represented as a reductive biological category in sex discrimination legislation, but there is no reference to any of the multi-

farious factors of identity that interconnect with sex, including race, sexuality and disability, which may produce particular manifestations of discrimination.

The equal treatment model, which underpins sex discrimination legislation and which is dependent on comparability with Benchmark Man, is better equipped to handle blatant cases of exclusion, denial of promotion or access to benefits than the subtle interactions of daily life that operate to constitute workplaces in highly gendered ways. Gendered practices often become ingrained within the fabric of the workplace so that they are no longer noticed or questioned. I have used the term “micro-inequities” to refer to the everyday practices that go to make up the subtle pattern of systemic disadvantage within the gendered workplace (Thornton 1996). Meyerson and Fletcher refer to the phenomenon as “the problem with no name” (Meyerson and Fletcher 2000; cf. Jaffee 1989; Johnson 1993), in which women are described as “not fitting in” to organisational cultures. Thus, even to speak up for oneself may invite pejorative labels, such as “control freak,” whereas the comparable man is described as “passionate”; she is “aggressive” while he is “assertive,” and so on, and so on (Wacjman 1999, 59–62). Women also receive fewer resources, it takes them longer to be promoted, and they tend to leave the organisation at above average rates. If women complain about their treatment, they are labelled “troublemakers” (e.g., Theodore 1986; Thornton 1996). The normativity of the gendered workplace occludes the ability to discern its discriminatory impact. Sex discrimination as biological sex clinches the disregard for such practices, despite the fact that the principle of equality between men and women may be an express object of the legislation.<sup>5</sup>

The legislation, which I have dealt with in depth elsewhere, is based on recognition by an individual (woman) that she has been treated less favourably than a man in the same or similar circumstances (Thornton 1990; cf. Middlemiss 2000). Having identified the discriminatory act, not an easy task when it is likely to be imbricated with normative workplace practice and social structures, the person aggrieved then bears the burden of proving it. Even the concept of indirect discrimination, which transcends the simple comparability model, is incapable of capturing the subtle ways that women are constructed as lacking authority, because such practices must be sheeted home to an identifiable wrongdoer (Hunter 1992; Thornton 1993). Systemic discrimination, by its nature, defies the causative nexus, because it is rooted deep in the social psyche. The standard of proof is such that sex discrimination may actually be legitimated if the complainant then fails to satisfy the burden. This may well be the case where corporate might is invoked against a woman who has dared to besmirch the name of her employer by taking her complaint into the public arena. The corporation will not hesitate to use its greater power and resources to control the evidence, adduce damaging pretextual evidence against the complainant, intimidate witnesses, and possibly force her to leave—if she has not already left by the time her complaint is heard.



Despite the liberal hope that a commitment to EEO, bolstered by anti-discrimination legislation, would ensure that any hurdles confronting women at work would be overcome, this has clearly been impossible. Indeed, the existence of legislation outlawing discrimination has subtly conveyed the impression that discrimination against women is a thing of the past (Gaze 1999, 172). In the popular imagination, discrimination tends to be equated with exclusion, but women now rarely encounter difficulty in being "let in," at least at base-level entry. They outnumber men in undergraduate higher education enrolments (Hayes 1999), and their formal qualifications are likely to be at least as good as those of their male peers. However, the problem is much more than structural, and is at least partly explicable by the ambivalence surrounding the realm of necessity, and the interpretation of corporeality and care within masculinist cultures.<sup>6</sup> Caring for others is not a characteristic normally associated with Benchmark Man. Thus, when women with family responsibilities are measured against this standard in sex discrimination complaints, they are invariably found wanting.

The biologist approach to sex may partially explain why complaints of sexual harassment are more likely to result in successful outcomes than those pertaining to discriminatory workplace practices. However, the proscription of sexual harassment is also functional, as sex at work has the potential to disrupt productivity (Thornton 1991, 465). Jenny Morgan suggests that it is morality, rather than equality, that explains the different responses (Morgan 1995). Whatever the reasons for accepting sexual harassment as a harm, it is assumed that maintaining women as a docile, ancillary and contingent labour force is not discriminatory. Hence, the individual complainant confronts a virtually insuperable burden in having to prove that her employer has discriminated against her when the practices of that particular workplace are simply a small fragment of a societal mosaic of inequality.

The biologicistic construction of "sex" impedes the ability of sex discrimination legislation to address the cultural reasons as to why women are constructed as lacking in authority (Thornton 1996; Sinclair 1998; Claes 1999; Wacjman 1999). Indeed, it might be suggested that the narrow formalism of the non-discrimination principle, as contained in sex discrimination legislation, is deliberately designed to occlude the material reality in order to retain the institutional power of Benchmark Men.

The interpretation of equality in a way that accords with equity and distributive justice constitutes compelling evidence of the deployment of the term by feminist and critical race scholars. With the passage of anti-discrimination legislation, more attention began to be paid to the substantive understanding of equality when it was recognised that the equal treatment model underpinning the legislation was incapable of realising any more than an impoverished and formalistic notion of equality.

The residual animus against women in authoritative positions has remained intractable,<sup>7</sup> because there is an inclination for decision makers to

appoint people who look like themselves (Ginsburg and Merritt 1999, n128; Wacjman 1999, 18). If the preponderance of decision makers are Benchmark Men, the phenomenon of homosocial reproduction ensures that little change occurs in the profile of appointees, particularly at senior levels. Resistance to the promotion of women to authoritative positions puts paid to the idea that if talented women are “let in” to an organisation under conditions of equal treatment, they will eventually be accepted as authoritative knowers. Substantial evidence regarding the persistence of the “glass ceiling” has been documented (e.g., Still 1997; Baxter and Wright, 2000). As suggested, complaint-based sex discrimination legislation is unable to address the way this gendered phenomenon is lodged deep within the social psyche, particularly in respect of the social construction of corporeality and the feminine.<sup>8</sup> Accordingly, for the last couple of decades the attention of feminist activists has focused on the mechanisms by which substantive equality might be realised.

The lack of an authoritative forum to facilitate public ventilation of the issues has contributed to relatively unsophisticated approaches to equality by decision makers. The absence of an express guarantee of equality in the Australian Constitution has meant that equality has never been subjected to regular rigorous scrutiny by the courts,<sup>9</sup> as is the case in a number of overseas jurisdictions. The Australian Law Reform Commission conducted an inquiry into equality for women, which recommended extensive reforms, including the passage of an Equality Act (ALRC 1994). Unsurprisingly, in light of the neo-liberal turn, nothing further was heard of it.

The contested meaning of equality played out in legal texts and legal fora revolves around the tension between the equal treatment and the substantive equality standards, although there are many shades of meaning in between. AA is a manifestation of substantive equality that looks to end result. Because focusing on outcomes is so much more threatening than starting points, the detractors of AA have succeeded in producing a political meaning that, they aver, conflicts with equality, which they construe as same treatment in its minimalist procedural sense.

## AFFIRMATIVE ACTION

AA requires an exception to be made to the strictness of the equal treatment principle. Rather than the one-to-one comparability of anti-discrimination law, it was recognised that proactive strategies, or “special measures,” were considered necessary to counteract the cumulative history of exclusion and disadvantage (Thornton 1990, 137–138, 222–227; Leon 1993). Article 4(1) of the UN Convention on the Elimination of All Forms of Discrimination against Women expressly authorises “temporary special measures aimed at accelerating *de facto* equality between men and women.” A revamped special measures clause was included in 1995 in the *Sex Discrimination Act 1984* (Cth), s.7D, in recognition of the limitations of the adherence to the equal

treatment standard, which required “extra steps . . . to facilitate equality” (Parliament of Australia 1995, 2477).<sup>10</sup> As suggested, the biologist argument has been a powerful legitimator of different treatment in respect of sex. Hence, broad-based remedial measures, designed to challenge the gendered character of workplace cultures, are likely to be deemed threatening and destabilising. What is normative has a “rightness” about it that renders claims of inequality, unfairness and injustice difficult to make out. Those asserting inequality invariably occupy the subject position of the underdog in both having to challenge orthodoxy and bear the burden of proof.

AA authorises the development of initiatives to alter the gender profile of the workplace. Feminist activists hoped that AA would address systemic discrimination against women, including the deep-seated animus operating at a subliminal level, as well as more overt discriminatory structures. There is no specificity as to what such measures might entail, which can extend from, first, a “letting in” model through special training programs, scholarship and bridging courses; second, an accommodation model which makes special provision for the needs of women with family responsibilities; third, a preferential hiring model which includes quotas.<sup>11</sup> The imposition of quotas is the most contentious strategy, particularly if sex were to be the only *relevant* characteristic, and qualifications and experience were incidental. Absolute preference for male war veterans has existed from time to time,<sup>12</sup> but so-called “hard” quotas have almost never been used in AA programs for women anywhere, and certainly not in Australia. Nevertheless, within the contentious public discourse surrounding AA, conservatives have succeeded in equating the term with the most extreme form.<sup>13</sup> AA, then, proves itself to be very elastic within the equality lexicon, with a meaning that is highly sensitive to political context (Thornton 1997).

So wedded is mainstream liberalism to the idea of equality as equal treatment that the term “reverse discrimination” was coined in the United States to capture the repugnance associated with *different* or *affirmative* treatment that purported to take account of historic discrimination. Such programs (if state-based) were challenged under the Equal Protection Clause of the Constitution (Thomas 1999; Ginsburg and Merritt 1999); conservative judges favoured the narrow, equal treatment approach, while those of a more progressive persuasion favoured the result-oriented interpretation. The same tension between the formalistic and substantive interpretations of equality were replicated within legal, philosophical and popular discourses.

Before considering the Australian legislative texts, I will briefly advert to the experiences in the United States, Canada and Europe in order to highlight responses to the headlong collision between equality precepts which simultaneously mandate both equal treatment and AA.

The Fourteenth Amendment of the American Constitution, with its guarantee of “equal protection of the laws” has been a major influence in the development of equality jurisprudence in the Western world. The issue of the

narrow interpretation of equality as equal treatment versus a broad interpretation mandating compensatory justice is one that has divided American society for a quarter of a century, although the primary focus of AA has been on race rather than sex.<sup>14</sup> The issue of AA in relation to sex has arisen under the federal anti-discrimination statute, Title VII of the Civil Rights Act. For example, in *Johnson v. Santa Clara*,<sup>15</sup> an AA program was developed to improve its statistical profile of women and minorities in the craft area. When the appointment of a woman over an equally qualified man was challenged as unlawful sex discrimination, a majority of the Supreme Court found that the plan did not offend an equal treatment interpretation of the Act. The flexibility of the AA measures was commended and the need for a case by case determination in order to break down patterns of employment segregation on the basis of sex was recognised. This discretionary approach represents the "soft" and acceptable face of AA.

The Canadian Charter of Rights and Freedoms (1982) contains clauses which simultaneously guarantee both equal treatment (s. 15(1)) and AA for the purposes of "the amelioration of conditions of disadvantaged individuals, or groups" (s. 15(2)). Hence, the contradictions of equal treatment versus substantive equality inhere within the charter itself, which means that the problem is left to the courts to untangle. The Canadian Supreme Court has nevertheless rejected a strict equal treatment model and held that discrimination arising from disadvantage justifies special programs.<sup>16</sup> Again, the selective invocation of AA suggests that the desired degree of flexibility acceptable to liberal legalism has been achieved.

In the European Union, the focus of AA, or what is known as "positive action," has been exclusively directed to women. The most recent statement, the Amsterdam Treaty (1999), article 141(4), allows positive action, although it is not binding on member states. Positive action is widely used in Germany but, as is the case elsewhere, such schemes are highly controversial. A scheme that accorded women *automatic* preference, where male and female candidates were equally qualified for a post in which women were under-represented was struck down by the European Court as unlawful sex discrimination.<sup>17</sup> In the more recent cases involving tie-breaker schemes, *Marschall* and *Badeck*, positive action was upheld because the preference was discretionary, rather than automatic.<sup>18</sup> That is, as in *Johnson*, the flexibility of "soft quotas" was preferred over "hard quotas," thereby assuaging the fears articulated by opponents of AA that unqualified women might be appointed.

What tipped the scales in *Marschall* was the recognition that even when a male and female candidate were equally qualified, male candidates tended to be promoted ahead of female candidates because of stereotypical assumptions about women's private sphere responsibilities. That is, because it is assumed that women, "will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not

mean that they have the same chances” (paras 29–30). As Barnard and Hervey point out, recognition that the equal treatment model favours men because of prejudices and stereotypes is in itself a significant step towards substantive equality (1998, 340). In *Badeck*, the candidates had been the subject of an “objective assessment” which took account of their personal situations.

The overseas experiences within formal interpretive sites contrast with the regressive approach now found in Australia, which was at the cutting edge of feminism and public policy in the 1970s and 1980s. The most dramatic manifestation of the official resiling from AA is illustrated by the repeal of the AAA but, first, a brief outline of this Act is necessary.

Given the passion associated with the overseas experience of AA, it is no surprise to learn that the passage of the extremely modest Australian AAA was highly contentious (Braithwaite 1998). Originally, AA measures were intended to be included as a complementary strategy to the complaint-based approach of the Sex Discrimination Bill, but the AA section had to be removed in order to make it acceptable to parliament. This rebuff, together with denunciations from social conservatives and the business lobby, explains the ultra timidity of the AAA that surfaced two years later, but which still managed to attract fierce opposition. Not only were hordes of women going to be forced out of their homes and into the workforce, but the gravamen of the attack was that *unqualified* women would be given preference over well-qualified men. This myth continued to be repeated throughout the life of the AAA (1986–1999).<sup>19</sup> The negative construction of AA reveals something of the latent fear at the heart of the gender equality in the workplace debate—that women might take men’s jobs (cf. Heagney 1935). The conjunction between AA and unqualified, or unmeritorious, women is a familiar trope designed to ridicule the idea of women in positions of authority—as in Aristophanes’ plays, *Lysistrata* and *The Ekklesiazusae*. More recently, the language of AA has been moulded to infer that Benchmark Men are its victims because of the “legal privileges” supposedly accorded blacks (men and women) and white women (cf. O’Sullivan 2000).

The legislation is a curious creation. Because of the fear of deviating from a strict equal treatment model, the legislature did not mandate AA as such, but the preparation of AA programs by corporations—including universities—with more than 100 employees. Compliance focused on filing an annual report, rather than on the introduction of substantive AA measures in the workplace. The sanction for non-compliance, that is, the failure to file a report, was to name the offender in the AA agency’s annual report which was tabled in parliament. In accordance with the idea that the Act should encourage compliance, rather than punish corporations for what was perceived to be a dubious transgression, the United States model of contract compliance was subsequently introduced, which meant that an AA program was a precondition to securing a government contract. Whether the incentive worked, or whether it was disregarded by decision makers, is not clear, but the sanction

was never imposed.

The Act accorded with the minimalist model of AA. With no more than a gentle nudge, it suggested that employers initiate “appropriate action” in their workplaces in order to eliminate discrimination against women. The AA plans required employers to “set objectives” and make “forward estimates,”<sup>20</sup> but it is apparent from the way these terms were defined that they were no more than general aims devised in accordance with individual workplace cultures; they fell far short of hard, or mandatory, quotas. To assuage a concern that the Act might be thought to authorise hard quotas, which would allow women to be appointed by virtue of sex alone, the Act expressly acknowledged the centrality of the merit principle.

Despite the softly-softly approach of the AAA and the high degree of deference to management, commitment to it was lukewarm. The study of compliance by Strachan and Burgess reveals the favouring of a minimalist approach by a majority of the 2,000–2,500 organisations involved. For example, compliance with the consultation requirement (with both women and unions) was weak—an assessment based on information provided by the corporations themselves. Of the habitual non-compliant organisations, Strachan and Burgess state: “It is clear that a number of employers do not care if they are named in parliament” (2000, 3). What is more, no one from the AA agency checked on the validity of what appeared in the forms, or conducted any follow-up (7). The point I am making here is not so much to criticise the Agency as to stress the vacuity of the AAA in the absence of an adequate enforcement mechanism.

Even though the AAA was clearly toothless legislation and any initiatives developed as part of an AA program were protected by the SDA,<sup>21</sup> the relentless attack on the AAA continued until it was repealed.

## THE NEO-LIBERAL TURN

Changes in the political climate in Australia in recent years have been marked. At the time of the enactment of the AAA, commitment to social liberalism had already begun to wane. Social liberalism recognised that the state did have a mandate, albeit contested, to effect modest redistributive and progressive measures for the common good. Centralised wage fixing, equal pay, maternity leave, occupational health and safety legislation, and anti-discrimination legislation were all examples of initiatives effected under social liberalism.

The swing to the right of the political spectrum and the emergence of the new corporatism has led to a resiling from a notion of common good in favour of privatisation, deregulation and profit-making (e.g., Davis, Sullivan and Yeatman 1997; Costar and Economou 1999; Walker and Con Walker 2000). The political orientation in favour of the market has emerged with the full support of the state; there is no invisible hand at work here. Globalisation

is similarly as much a state strategy as a market one (Burnham 1999). Within this economically rationalist environment, social justice initiatives began to be denigrated as old fashioned because they allegedly impeded the realisation of efficiency and productivity within the market. Economic rationalism reached a high point with the election of the Liberal–National Party Coalition Government in 1996. Within an environment in which the discourse of the market is all-encompassing, it was inevitable that the AAA fell foul of de-regulatory forces. Neo-liberalism has also been able to capitalise on populist discontent with social justice initiatives, particularly the idea that special measures in favour of Aboriginal and NESB people discriminated against Anglo-Australians. Extremist politicians, such as One Nation's Pauline Hanson, played upon populist fears that "equality had gone too far."

The neo-liberal agenda aspired to repeal the AAA and revive an archaic model of "the family," but neither of these ends were politically feasible. It was certainly no longer possible to expel married women from the workforce, as had occurred at the end of World War II in order to make room for returned servicemen, but it was possible to dilute the AAA to inhibit any prospect of substantive equality for women.

A review of the AAA was conducted in 1998. While the review recommended retention of the Act, it made recommendations in accordance with the prevailing business-oriented political environment. The review critiqued the eight-step approach of the AAA, finding it to be "inconsistent with a business environment which increasingly emphasises outcomes and leaves managers to determine the processes that are most effective in delivering those outcomes, at the workplace level, that are consistent with their wider corporate strategies" (Regulatory Review 1998). The review was of the opinion that the Act took insufficient cognisance of globalisation and deregulation, and recommended greater deference to employers (Business Council of Australia 1998). Although the evidence suggests that the new corporatism has exercised a disproportionate effect on women workers (e.g., Blackmore and Sachs 1997), this is treated as incidental to the "good of the economy." The implicit suggestion is that equity and efficiency are diametrically opposed, but equity must give way to efficiency. I suggest, however, that the idea of equity as a drag on business encodes a fear of feminisation of the workplace, a latent fear that had been temporarily cloaked by social liberal initiatives. It is not just that the market is the measure of all things.

As a result of the recommendations of the review, a new Act was passed at the end of 1999, which maintained the basic framework of the AAA, but effected some significant changes.<sup>22</sup>

In order to "dispel the notion of quotas once and for all" (Coalition Response 1998), the new Act makes no mention of AA whatsoever. All references to AA have been replaced with "equal opportunity for women in the workplace." This includes changing the name of the administering agency from the AA agency to the Equal Opportunity for Women in the Workplace

Agency.<sup>23</sup> The reference to “forward estimates” has also gone, again because of the spectre of quotas lurking behind the term. By continuing to equate AA with the most extreme model, even as a subtext of the new Act, the presumption is reinforced that women as a class are unworthy. The presumption is rebutted only if individual worth can be proven. This message deflects attention away from the gendered construction of workplace cultures. To assuage the perennial concern about admitting large numbers of unqualified women, there is a new objects section, which includes an intention to “promote the principle that women should be dealt with on the basis of merit.” In addition to reassurance that the Act does not promote the appointment of unqualified women, the wording of the merit clause from the former Act has been retained in the interpretation section of the new Act: “Nothing in this Act shall be taken to require a relevant employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit” (EOA s. 3(4)). Employers are thereby assured that the sex of a person need *never* be taken into account in either hiring or promotion decisions. Strict equal treatment is assured in accordance with the gender-blind principle mandated by anti-discrimination legislation.

On the seemingly positive side, the definition of “employment matters” has been expanded to include “sex-based harassment of women” and arrangements for dealing with “pregnant, or potentially pregnant employees and employees who are breastfeeding their children” (s. 3(10)).<sup>24</sup> The employer must address such matters in the preparation of an EO program (s. 8 (3)), although I reiterate that there is no substantive injunction to implement what appears in a program. It should also be pointed out that SDA s. 31 already permits the granting of “rights or privileges in connection with pregnancy or childbirth,” so the new Act hardly blazes any new trails. Nevertheless, the advertence to embodied realities does disrupt the hollow meaning otherwise accorded AA in the EOWA.

The requirements for the development of an EO program have been diluted, particularly in regard to the omission of any reference to aims, goals, “objectives” or “forward estimates.” While there must be consultation with employees, particularly women, or their nominated representatives, the reference to unions has gone. In any case, “consultation” is another term capable of multiple interpretations; soliciting the views of women staff does not mean that those views will influence the course of decision making in masculinist workplaces.

The reporting requirements have also been weakened, even though minimal under the AAA, to conform with the preferred path of self-regulation. In accordance with the deregulatory stance of neoliberalism, the Act is infused with a sense of deference towards management, just as the “equal opportunity is good for business” rhetoric focuses entirely on the benefits for management. This perspective is supported by the EO Agency website which encourages employers to have an effective workplace program



in place because it will increase “productivity,” reduce training costs, and so on, for *them* (EOW Agency). Social justice for women is accorded scant regard within this rhetoric.

Despite the recent passage of the EOWA with its eviscerated concept of EEO, the favoured rhetoric is already moving away from both EEO and AA, in accordance with the neo-liberal resiling from gender equality and social justice generally. Corporate employers have been abandoning EEO officers in favour of “mainstreaming” for some time. They claim to be establishing more broadly based equity and access units inclusive of minority interests, such as those of Aboriginal people, people with disabilities and ethnic and religious minorities. Within this diffuse cluster of interests, which tends to be invoked primarily as a marker of cultural and ethnic difference (e.g., CCH ¶14–000), the rhetoric of diversity has emerged.

One of the clearest indications that yet another change in direction has occurred is manifest in recent literature and publicity material pertaining to the Australian public service:

In the first full year of the implementation of Workplace Diversity Programs (WDPs), many agencies are still bedding down the changes that will take them from an Equal Employment Opportunity (EEO) culture to a workplace diversity culture. Agencies have been working through the challenges these changes represent, including how to manage diversity and create an inclusive environment that values and utilises the contribution of people of different backgrounds, experience and perspectives (PSMPC Webpage).

The unequivocal embrace of diversity is grounded in a brief allusion to “utilising diversity” in new public sector legislation.<sup>25</sup>

On its face, the term “diversity” appears to be unassailable as a workplace aim, as it connotes inclusiveness and tolerance in accordance with the best liberal tradition. However, the status of women within the rhetoric of diversity is uncertain. Of course, women are not a discrete category: they are Aboriginal, NESB, lesbian, and so on. Anti-discrimination legislation tends to operate on the artificial basis that characteristics of identity can be disaggregated, which places Anglo-Australian women and women who identify primarily with minority interests in competition with one another. Advertence to the category “woman” has been increasingly difficult since attacks were made as far back as the mid-1970s, alleging that the Australian women’s movement was “essentialist” because it paid insufficient attention to race and class (O’Shane 1976; Huggins 1994). Since then, but particularly since the mid-1980s, the alliance between women has been fractured and parlous. The problem has been exacerbated by the essentialising character of the legal texts to which I have adverted. Diversity discourse takes advantage of dissent by occluding the feminine, if not erasing it altogether.

Like AA, the language of diversity first emerged in the United States, where it appeared in the context of ethnic diversity in education in the 1970s.<sup>26</sup> With the conservative turn in politics, the validity of that aim has

been questioned (Banks 1999, 123–132). In any event, it is notable that diversity as a social good never progressed very far in the United States in respect of employment, despite the attempts by Blacks and other minorities to imbue it with substance (Banks 1999, 123–32). Unsurprisingly, “managing diversity” does not appear to have effected any significant change in either the United States or Britain, where the rhetoric has been in vogue for some time (Wacjman 1999, 21).

Philosophically, the standpoint of diversity differs fundamentally from that of anti-discrimination, EEO and AA, all of which begin from the implied premise that there is an *injustice* or an *inequality* that needs to be remedied, such as sexism, racism, homophobia or disablism: “diversity” obscures the issue of inequality which is at the heart of the matter (cf. Gaze 1999, 151). Just as equality is blanched of meaning in the absence of a dialectical relationship with inequality, diversity is reduced to empty rhetoric in the absence of an antinomy. Without a reactive element, diversity is incapable of producing little more than a comforting feel-good glow.

The phrase “managing diversity” is increasingly being used in the Australian neo-liberal employment context to facilitate desired ends, such as competition policy (e.g., Hay 1996; Cope and Kalantzis 1997). “Managing” locates the phrase directly in the domain of management, which can invest it with the meaning it currently favours, while “diversity” positions it well away from the mooted intrusiveness of legal prescripts. Indeed, the imperative in favour of diversity is based on the construction of EEO as a narrow legalistic concept that is an impediment to business, while diversity is a broad but beneficent concept beyond the law, which comports with managerial freedom. This assessment is made explicit in the CCH guide for EEO practitioners:

Workplace diversity is a broader issue than equal opportunity, as the latter is based around legal requirements and takes a fundamentally reactive approach. The concept of equal opportunity does not allow for attitudes and values, or ensure behavioural and attitudinal changes, and can thus be regarded as a component of diversity management. Diversity management is a broader, proactive approach which extends beyond a commitment to legal and social responsibility. (CCH ¶14–050)

As we saw with AA, EEO is now similarly being invested with an exaggerated meaning in order to stigmatise it. In contrast, “diversity” is constituted as a good, for it places no constraint on the freedom of employers. The currency of the language of diversity effectively legitimates a diminution of commitment to workplace equity (cf. Bacchi 2000, 1). It seeks to persuade us that we live in a post-EEO world because sex discrimination no longer exists (Wacjman 1999, 29).

Bacchi argues that managing diversity is the new equity discourse that is supplanting EO and AA in Western democracies (2000, 3). Nevertheless, the discourse has little to do with equity in fact. As women and minorities have insistently sought to move beyond notions of procedural fairness to

a realisation of distributive justice, a preference for the language of diversity represents a counter-movement in favour of something more anodyne and less threatening. I would submit that the discourse of diversity, with its implicit erasure of women, conveniently occludes a deep-seated misogyny concerning the discomfiting presence of women in non-traditional areas of work, particularly positions of authority. Managerial control of diversity ensures that we hear nothing of diversity within the ranks of management itself. The rhetoric of “managing diversity” adroitly deflects attention from reflexivity to more manageable organisational sites.

## CONCLUSION

I have suggested that the idea of substantive equality, or distributive justice, for women in the workplace is viewed as highly provocative in a neo-liberal climate in which government and the market have formed an intimate liaison. As Beth Gaze points out, distributive justice on the grounds of sex and race is regarded as radical in a polity that accepts only a limited version of equality of opportunity, without even getting to the question of class:

If distributive justice was taken seriously as a basis for affirmative action on traditional discrimination grounds, it might be difficult to avoid looking at other claims to distributive justice, such as class or socio-economic status, and this would subvert the competitive basis of capitalism. (1999, 173)

Legislation mandating preparation of a plan as a mechanism for achieving EEO for women at work, or mouthing the bland rhetoric of diversity, falls far short of a utopian notion of distributive justice. In any case, it might be noted that approximately only 44 per cent of all women are covered by the EOWA, as most women work in organisations with fewer than 100 employees. The majority of working women, then, can rely on little more than the receding echoes of moral suasion associated with *inequality*.

As suggested at the outset, the asymmetry of the public/private dichotomy defies any simple remediation, but a narrow interpretation of equality as equal treatment, which focuses on the public sphere qua market, is incapable of addressing private sphere responsibilities, other than in a tokenistic manner. In order to make both spheres satisfying and rewarding, it may be that pressure should be directed to altering normative systems of work, which are overwhelmingly male (Tancred 1999), rather than be seduced by the centripetal pull of equality which is also conceptualised according to a masculinist standard. The impossible goal of equality in terms of the *same* patterns of work results from the pervasiveness of the idea of equality as equal treatment. Women are always expected to comport with the career patterns established by Benchmark Man. We hear nothing within the discourse of “managing diversity” of alternative patterns of work, or a rethinking of equality in light of the sphere of necessity. A symmetrical model of equal treatment imposed

upon an asymmetry cannot produce anything other than inequality of outcome. Individual good, not common good, is the leitmotif of neo-liberalism, which means that systemic discrimination is conveniently ignored.

Through the concepts of equality and its various permutations, I have sought to show how "language usage is a site of covert struggle for gender meanings" (Showalter 1989, 1), particularly how equality has continued to be interpreted to the advantage of Benchmark Men. While feminists have sought to appropriate equality, we see the unwillingness of the dominant discourse to relinquish it. Instead, its meaning has been diluted, and the weaker meaning legitimised when women are the claimants within supposedly remedial legal regimes. In the case of AA, detractors resorted to the opposite tactic and sought to destroy it by exaggerating its meaning. The anodyne concept of diversity, seized on with alacrity by neo-liberals, has sought to neutralise any conflictual element altogether.

We can (sometimes) be heartened by the fact that liberalism does not progress in a linear fashion but, pendulum-like, it swings to the left as the *resentment* of progressive interests react against conservatism.<sup>27</sup> Following a long period of conservatism, feminist reforms and other progressive measures began to emerge in Australia in the 1970s. We are now seeing a reaction against that reformism and the strength that it garnered among women, although the trajectory of change is complicated by technological change, as well as global political and economic movements. Nevertheless, feminist activists, both inside and outside government, are unlikely to accept excision of hard-won gains without demur (Sawer 1999). Although neo-liberalism is presently in the ascendancy in Australia, we see that a resiling from the conservative position has already occurred in the United Kingdom, where the impact of EEC law is exerting pressure in favour of a movement away from the weak view of equality as equal treatment (O'Hare 1998, 427).<sup>28</sup> While neo-liberalism can look like an unrelenting juggernaut at times, the European experience suggests that there are likely to be weak spots in its carapace.

EEO alone is incapable of delivering just outcomes for women, least of all of conferring authority on women. Nevertheless, feminists have been able to deploy discursively the discourse of EEO to the advantage of women in the workplace. Its empowering dimension (which, paradoxically, we find ourselves now extolling rather than dismissing) (cf. Bacchi 1996, 55) has not disappeared altogether, but its managerial location in the new EOA, a creature of deregulation, has eviscerated it. The loss of the dissonant language of AA and the dilution of that of EEO in favour of the nebulousness of "diversity" has made the position of women at work more parlous. It is time for the pendulum of social justice to be pushed, since it will not swing unaided, in the other direction.

## NOTES

- 1 But see ALRC (1994) which, influenced by legal feminism, argued for a concept of equality based on the relative social and material position of men and women. This was a radical proposal in light of equality theory, in that it included such factors as violence against women, the undervaluation of unpaid work and the media depiction of gender stereotypes.
- 2 E.g., *Sex Discrimination Act 1984* (Cth) (SDA), s.7A. See also *Hickie v. Hunt* (1998) EOC ¶92–910 (HREOC); *Bogle v. Metropolitan Health Service Board* (2000) EOC ¶93–069 (WA EOC); *Schou v. State of Victoria* (2000) EOC ¶93–100, ¶93–101 (VCAT).
- 3 As the long tradition of coverture at common law makes clear. On marriage, a woman lost all civil rights when she was deemed to have entered under the cover, or wing, of her husband (Blackstone 1979, 442).
- 4 The Australian legislation presently proscribing sex discrimination includes *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic.); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas.); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).
- 5 E.g., SDA s.3(d).
- 6 Sara Charlesworth's research in respect of the banking industry has shown compellingly that what she refers to as "motherhood grievances," that is, those arising from pregnancy and family responsibilities, figure disproportionately in sex discrimination complaints (1999).
- 7 The fact that women comprised only 8.3 per cent of women on Australian private sector boards in 1999 is exemplary (OSW 1999). For discussion of the gendered character of corporate governance, see Burton (1999).
- 8 The point is thrown into high relief in the case of *Dunn-Dyer v. ANZ Bank Ltd* (1997) EOC ¶92–897 (HREOC) involving a high level financier whose superiors referred to her as the "mother hen," and her section as "the mother's club" and "the nursery." See also Charlesworth (1999, 20).
- 9 It might be noted that, on one occasion, a minority of the High Court read an implied right to equality into the Constitution, but this interpretation was never accepted by the majority; see *Leeth v. The Commonwealth* (1992) 107 ALR 672, per Deane & Toohey JJ. For discussion of sex-based equality rights in the Australian context, see Morgan (1994).
- 10 The earlier special measures provision was challenged in *Proudfoot v. ACT Board of Health* (1992) EOC ¶92–417 (HREOC). For a perceptive

- ent discussion of equality with reference to the *Proudfoot* case, see Parashar (1994). See also the corresponding special measures clause of the *Racial Discrimination Act 1975* (Cth) s.8(1), based on the Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (1). For discussion of special measures in relation to racial equality, see *Gerhardy v. Brown* (1985) 159 CLR 70.
- 11 Cf. Advocate General Tesouro, in his opinion in the European Court of Justice Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.
- 12 E.g., *In Personnel Administrator v. Feeney* 99 SCt 2285 (1979), the American Supreme Court upheld an absolute lifetime preference for veterans. In Australia, the preference was of the “hard” variety, but was not permanent (Thornton 1990, 24–41).
- 13 For a thoroughgoing comparative study of AA in North America, Scandinavia and Australia, see Bacchi (1996).
- 14 The most famous case in which the issues crystallise is *Bakke v. Regents of the University of California* 438 US 265 (1978). For an overview of principles and case law, see Banks (1999).
- 15 480 US 616 (1987).
- 16 *Andrews v. British Columbia* [1989] 1 SCR 143; *Action travail des Femmes v. Canadian National Railway* [1987] SCR 1114.
- 17 Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051. For a detailed discussion of the legal principles and recent case law, see Shaw (2000); Barnard and Hervey (1998).
- 18 Case C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] All ER (EC) 865; *Re Badeck and others (Landesanwalt beim Staatsgerichtshof des Landes Hessen and Hessischer)* [2000] All ER (EC) 289.
- 19 E.g., Former Democrat Senator Don Chipp, a social progressive, was reported to have said after a decade of operation that the Act could force an employer to employ a woman, even if she were not suitable for the job (Parliament of Australia 1995, 2458).
- 20 AAA ss. 8(1)(g) and 8(3).
- 21 SDA, s.7D permits “special measures” for the purpose of achieving (substantive) equality between men and women.
- 22 The criticisms by the review and the Business Council of Australia echo throughout the debate on the 2nd Reading Speech of the EOA (Parliament of Australia 1999, 10143).
- 23 The official language of AA was quickly erased. For example, the tabbed heading “Affirmative Action” in the CCH, *Australia and New Zealand Equal Opportunity Law and Practice* disappeared virtually overnight and was replaced with “EEO—Legal Obligation”.
- 24 The UN Convention on the Elimination of All Forms of Discrimination against Women (1999) acknowledges the significance of enabling women to be able to fulfil both parenting and workplace responsibilities.

- 25 *Public Service Act 1999* (Cth) s.10(1)(c). See also PSMPC (2000).
- 26 E.g., *DeFunis v. Odegaard* 416 US 312 (1974); *Bakke v. Regents of the University of California* 438 US 265 (1978).
- 27 I have argued elsewhere that the Nietzschean concept of *ressentiment* may be invoked productively in respect of anti-discrimination legislation (Thornton 2000).
- 28 A notable legislative development in the UK context is the passage of the *Human Rights Act 1998*. A review of UK anti-discrimination legislation has also recommended significant changes, including the enactment of a single Equality Act (Hepple, Coussey and Choudhury 2000).

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