Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Bill 2008, by Dr Michael Lyons and Dr Meg Smith, School of Management, University of Western Sydney, January 2009.

Preliminary

1. This submission is does not necessarily reflect the views and opinions of the staff and management in the School of Management or the University of Western Sydney.

Introduction

2. We welcome the Fair Work Bill 2008, as it addresses some of the worst excesses of the Coalition's WorkChoices amendments of 2005. We further recognise that the Bill is consistent with the Government's 2007 election commitments (Australian Labor Party 2007, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April), unlike the Coalition's amendments of 2005 (Explanatory Memorandum 2005, 'Workplace Relations Amendment (WorkChoices) Bill 2005', (circulated by the authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP), House of Representatives, Canberra, p. 5).

3. As professional researchers of employment and industrial relations issues, the generation and dissemination of, and public access to, reliable data was lacking in the WorkChoices era. In the pre-WorkChoices era, examples of AWAs were available with the names of the parties 'blacked out'. At all events, with confidentiality and other legal issues addressed, promulgation of clauses in individual agreements remained crucial to the analysis of the workplace relations system and developments in terms and conditions of employment. However, dissemination of WorkChoices agreement data was ended because of the OEA's 'serious concerns about the methodology' used in the May 2006 Senate Estimates sample that resulted in 'focusing on certain characteristics in isolation, without considering what else the parties may have agreed, had the potential to produce misleading and distorted results' (McIlwain, P 2006, Evidence to Senate Employment, Workplace Relations and Education Committee, Estimates hearing, 2 November, *Hansard,* The Senate, p. 7). And with respect to collective agreements generally and non-union 'employee' agreements specifically, employers had the option of making an agreement exempt from publication, resulting in a skewed population of collective agreements available for research purposes and less certain the results of analysis, research findings and conclusions.

4. Analysis of all instruments in terms of their content in the forms of categories of clauses enables comparisons to be made across industries, occupations and time. This is useful because it can identify trends and causes of changes within the workplace relations system and enables the pinpointing of similarities and differences which can facilitate ongoing productivity and efficiency improvements (e.g. types of working time flexibility between

industries with different pay structures). Moreover, it aids policy makers, employers (and their representatives), employees (and their representatives), and the Australian community. For these reasons, we welcome the Bill's proposed clause 601(4), which states:

> FWA must publish the following, on its website or by any other means that FWA considers appropriate: (a) a decision that is required to be in writing and any written reasons that FWA gives in relation to such a decision; (b) an enterprise agreement that has been approved by FWA under Part 2-4.

5. Nevertheless, we have concerns with certain aspects of the Bill, be they the words and expressions used or possible outcomes. Our comments relate to four (4) aspects of the Bill's objects and hence the Committee's terms of reference:

   - Establish a guaranteed safety net of minimum terms and conditions;
   - Recognise the right to freedom of association and the right to be represented in the workplace;
   - Provide effective compliance mechanisms; and
   - Emphasise enterprise level bargaining underpinned by good faith bargaining obligations and rules governing industrial action.

   Owing to the interrelations of these aspects, we do not deal with them individually, but instead discuss them in terms of their practical application in the context of the Bill's proposed regulation of workplace and industrial relations arrangements in Australia.

Unlawful termination and unfair dismissal

6. Clause 773 is to allow an application for unlawful termination of employment to be made within 60 days after the employment was terminated. However, clause 394 is to limit an application for unfair dismissal to be made within 7 days after the dismissal took effect. The Bill's EM (Explanatory Memorandum 2008, 'Fair Work Bill 2008', House of Representatives, Commonwealth Parliament, Canberra) does not attempt to justify the reduction in time to be made for an unfair dismissal application from 21 days to only 7 days. This has a very real likelihood of disadvantaging employees generally, and 'unsophisticated' employees not represented by a trade union in particular. Therefore, we submit the Senate should restore the unfair dismissal application time period to 21 days.

7. The proposed 'Small Business Fair Dismissal Code' is a welcomed alternative to the WorkChoices blanket unfair dismissal exemption for firms with fewer than 101 employees (clause 388). The Code is to apply to 'businesses with fewer than 15 employees' (EM r219). However, we have concerns that a small business is not defined with precision: does it mean a workplace, corporate entity, wholly-owned subsidiaries of corporations, or something else? The expression 'associated entities' in clause 23 is not all

[*] While the 15 employees is to be calculated by a 'head count', a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis. We submit the Bill and/or its regulations should more precisely define a small business to avoid situations where 'sham' arrangements are devised so that each workplace of business is classified as a small business even though they form part of a medium-sized, or large, enterprise employing casual workers on an 'irregular' basis.

Enforcement and union rights of entry

8. While the rights and entitlements created by legislation, awards and agreements are an important aspect of the regulation of employment, they will have little practical effect if they are not enforced. Traditionally, the responsibility for enforcing employee entitlements under awards and agreements was shared between authorised industrial inspectors and trade unions. Owing to the prosecution powers of trade unions, the role of enforcing employee entitlements largely remains the responsibility of unions, even though the official responsibility lies with various industrial 'inspectorates' such as the Workplace Ombudsman (the remained Office of Workplace Services), and under the Bill the Fair Work Ombudsman's 'Fair Work Inspectors'.

9. Under WorkChoices, trade unions were still allowed a role in enforcement, but this role was 'aligned with the right of a union to enter a premises to investigate breaches of industrial instruments' (Department of Employment and Workplace Relations 2005, Submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005, submission no. 166, p. 66). Hence, the capacity of unions to perform an enforcement function was uncertain, as union officials' 'right of entry' to a workplace to investigate possible breaches of an award, agreement or the legislation was restricted. The WorkChoices laws only allowed union officials a right of entry to a workplace for the purpose of investigating a breach of an award, an agreement, or the legislation if the suspected breach affected at least one employee who was a member of the respective union. Given that union density in Australia is only about 20%, this restriction meant that 80% of employees had to rely on the Workplace Ombudsman's '275 full-time

[*] Section 50AAA of the *Corporations Act 2001* (Cth) defines 'Associated entities' thus: (1) One entity (the ***associate***) is an associated entity of another entity (the ***principal***) if subsection (2), (3), (4), (5), (6) or (7) is satisfied. (2) This subsection is satisfied if the associate and the principal are related bodies corporate. (3) This subsection is satisfied if the principal controls the associate. (4) This subsection is satisfied if: (a) the associate controls the principal; and (b) the operations, resources or affairs of the principal are material to the associate. (5) This subsection is satisfied if: (a) the associate has a qualifying investment (see subsection (8)) in the principal; and (b) the associate has significant influence over the principal; and (c) the interest is material to the associate. (6) This subsection is satisfied if: (a) the principal has a qualifying investment (see subsection (8)) in the associate; and (b) the principal has significant influence over the associate; and (c) the interest is material to the principal. (7) This subsection is satisfied if: (a) an entity (the ***third entity)*** controls both the principal and the associate; and (b) the operations, resources or affairs of the principal and the associate are both material to the third entity. (8) For the purposes of this section, one entity (the ***first entity***) has a ***qualifying investment*** in another entity (the ***second entity***) if the first entity: (a) has an asset that is an investment in the second entity; or (b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

equivalent' inspectors. The reliance on this poorly resourced federal agency was not an adequate alternative substitute for the enforcement role of trade unions, which has been described by the Federal Court of Australia as 'legitimate and important', for if unions do no preform this function 'contraventions will go unpunished' (cited in Lee, M 2006, 'Regulating enforcement of workers' entitlements in Australia: the new dimension of individualism', *Labour and Industry*, vol. 17, no. 1, p. 48). While the Bill is to allow a right of entry to hold discussions with non-members, we submit that this should also include inspection and enforcement if the respective union is able to represent the industrial rights of the non-member, and the non-member makes an 'undertaking' to become a financial member of the relevant union consistent with its rules.

10. While some employers and their representative organisations might oppose this suggestion, we draw the Committee's attention to the comments of Ross Gittins in this regard ('Why Gillard's Fair Work Bill is a fair cop', *The Sydney Morning Herald*, 29 November 2008):

> More than 80 per cent of enterprises don't have a union presence. This is partly because the workers in those enterprises don't have a great desire to join a union and partly because unions don't have the resources to organise the many small sites. Some employer groups are arguing that since only 14 per cent of private sector employees are union members, unions should be given no rights. A more sensible attitude would be that, since the union movement is in serious decline, any rights it's given will make little difference.

Good faith bargaining, equal remuneration and low-paid workers

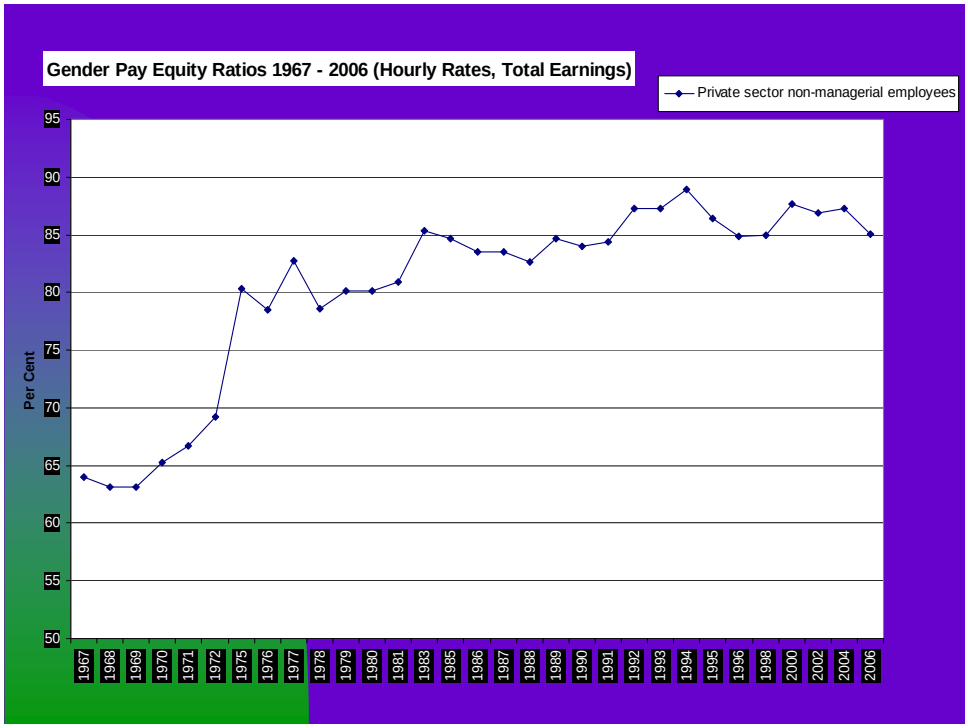
11. An obstacle, among many, encountered along the path towards full application of ILO Equal Remuneration Convention No. 100 is the belief that gender pay equity means men and women should receive equal pay *only when they have the same qualifications and experience* and *when they are performing the very same work under the same conditions*. In the Australian context, this equates to misunderstandings about the difference between the notions of equal pay for equal work (the 1969 federal principle) and equal pay for work of equal value (the 1972 federal principle). Indeed, there still seems to be much confusion about the differences between the two concepts, as the EM to the Fair Work Bill 2008 shows: 'The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions' (r1191). This misunderstanding is also evident in the community, as the survey findings of the Diversity Council of Australia report (Diversity Council Australia, Submission to the House of Representatives Standing Committee Inquiry into pay equity and associated issues related to increasing female participation in the workforce, 2008, submission no. 11, p. 11):

> Most Australians are unaware of the correct definition of pay equity, in both the Australian community overall and the business community more specifically. In the general community, only 12% of people think pay equity means "equal pay for men and women doing different but equivalent jobs". Nearly two thirds of people (63%)

think it means “equal pay for men and women doing the same job” (a significantly more restrictive definition), whilst 26% of people did not know, or gave alternative incorrect answers.

12. As Figure 1 shows, the hourly earnings gap between women and men in Australia declined under the Howard government, and challenges the assertion of the ACCI that ‘Australia’s employers consider that there have been significant gains in pay equity as our system has been reformed since the early 1990s’ (Australian Chamber of Commerce and Industry 2008, Submission to the House of Representatives Standing Committee on Employment and Workplace Relations, Inquiry into pay equity and associated issues related to increasing female participation in the workforce, submission no. 84, p. 29).

Figure 1



13. Clause 302 is to allow Fair Work Australia (FWA) to make ‘equal remuneration orders’ so that there is ‘equal remuneration for men and women workers for work of equal or comparable value’ for whom the order(s) applies. However, the concept of ‘equal remuneration’ is not defined. *Equal remuneration* has a broader meaning than *equal pay*. It encompasses all types of payment in cash or kind made to employees. Any method for determining ‘skill’ ultimately involves some element of subjectivity. This, however, does not excuse sex-based stereotyping from entering the process, as this is a major reason for the undervaluation of jobs

and tasks performed primarily by women or those perceived as intrinsically 'feminine' in nature. The methods adopted should not undervalue skills normally required for jobs that are in practice performed by women, such as care-giving, manual dexterity and human relations skills, and nor should they overvalue those skills typically associated with jobs traditionally performed by men, such as physical strength and use of machines, plant and equipment.

14. The understandings concerning gender pay equity developed in State jurisdictions, and articulated by way of equal remuneration wage-fixation principles founded on the construct of *undervaluation*, are more capable of addressing gender pay equity than a test of 'discrimination' or tests insisting upon binary forms of job comparison. While the EM acknowledges 'Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques' (r1191), we submit the Bill should be amended to include the expression 'undervaluation' as the basis for FWA to examine the appropriateness of issuing an equal remuneration order. We note as well that FWA may wish to avail itself of a wider suite of work value assessment methods than simply job evaluation.

15. Traditionally, collective bargaining and collective agreements have not been used as often as they could to promote equal pay for work of equal value, both in Australia and in other jurisdictions. So, if collective bargaining is 'essential to a functioning democracy', the concept of gender pay equity should not be excluded from the collective bargaining process. As only about 20% of Australian employees rely on awards as their method of establishing pay rates, any exclusion of the collective bargaining process from the equal remuneration provisions of the Bill will retard the application of gender pay equity. For this reason, we welcome the provisions of clause 306 that allow FWA's equal remuneration orders to prevail over terms of a modern award, an enterprise agreement or another FWA order that is inconsistent with an equal remuneration order.

16. To give practical effect to clause 306, we submit that equal remuneration should be an aspect of good faith bargaining. Hence an additional 'good faith bargaining requirement' should be added to clause 228(1): '(d) supplying reasons why the concept of equal remuneration for work of equal or comparable value already exists in the workplaces to be covered by the proposed agreement'.

17. We welcome the proposals in the Bill (Chapter 2, Part 2-5, Division 2) regarding 'Low-paid workplace determinations'. However, we have concerns with the 'public interest' provision of clause 262(5).

18. The cost factor (i.e. 'the public interest') has consistently been relied on by some employers to deny low-paid workers improvements in their conditions of employment and/or rates of pay. Employers' incapacity to absorb increased labour costs has consistently been asserted by using hypothetical financial information (e.g. AIRC 1990, *Re Child Care (Australian Capital*

Territory) Award 1990 and Another Award, 39 IR 194; AIRC 2005, *Re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998*, [2005] AIRC 28; IRC of NSW 2006, *Re Miscellaneous Workers Kindergartens and Child Care Centres (State) Award*, 150 IR 290; QIRC 2006, *LHMU v Children's Services Employers Association*, 181 QGIG 568). We submit that the concept of the 'public interest' should not be confused with the concept of an individual employer's 'incapacity to pay'. To do otherwise would undermine the concept of 'fair', for this is the foundation of the scheme of Bill and its proposed operations.

Protected industrial action

19. Clause 426 would allow FWA to suspend protected industrial action if the action causes significant harm to a third party, including reducing the third party's 'capacity to fulfil a contractual obligation' (clause 426(4)). The Bill's EM notes:

> The purpose of this clause is to provide FWA with a means to address significantly serious impacts that industrial action is having on the welfare of third parties. It allows for a respite from industrial action which is causing them significant harm. The harm to the third party would need to be significant, that is a more serious nature than merely suffering of a loss, inconvenience or delay. Therefore, it is anticipated that FWA would suspend industrial action on this basis only in very rare cases. (r1728)

20. We have concerns with the proposed clause 426. In the higher education industry, for example, this could mean a student could apply for a suspension of protected industrial action because their semester/term results were not processed and/or finalised due to the action, and it is a term of their own employment contract that their employer will continue to subsides their studies (with fee relief and time release) if they obtain a passing grade in a subject(s) or unit(s). While clearly the student would only experience an 'inconvenience or delay', and not suffer 'significant harm' in such circumstances, the current wording of clause 426 does not expressly state this. To avoid any doubt that the intension of the Parliament is that a suspension of protected action be done 'only in very rare cases', we submit the clarifying paragraph of the EM (r1728), or words very similar it, should be explicitly contained in the Bill – either as a subsection or as an explanatory note.

21. Notwithstanding the issues raised in this submission, we welcome the proposed changes the Fair Work Bill 2008 makes the federal industrial relations system, and commend the Bill to the Senate.

***