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## **Submission**

To

**Parliament of Australia**

**House of Representatives**

**Standing Committee on Employment and Workplace Relations**

**Inquiry into**

**Pay Equity and Associated Issues relating to  
Increasing Female Participation in the Workforce**

ewr.reps@aph.gov.au

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**Submitted by:** Associate Professor Taksa and Dr Anne Junor

**Organisation:** Industrial Relations Research Centre  
The University of New South Wales

**Address:** Floor 5, Australian School of Business  
UNSW Sydney 2052

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1. We make this submission as Director and Deputy Director respectively of the Industrial Relations Research Centre at the University of New South Wales. One of us is a former non-judicial member of the Equal Opportunity Division of the NSW Administrative Decisions Tribunal and a researcher of gender, migration and inter-cultural work relations. The other has worked on the design of a skills recognition tool as a small part of the Aotearoa-New Zealand Pay and Employment Equity Plan of Action. We make this submission in a personal capacity. It does not necessarily reflect the views of other members of the Industrial Relations Research Centre, or of UNSW.
2. We thank the Committee for the invitation to make this submission, and welcome the opportunity to do so. We congratulate the Committee for establishing the Inquiry, which is very timely. We address in turn the issues listed in the letter of invitation.

### **The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues**

3. There are two aspects to the question of data adequacy. The first is on the labour supply side, and goes particularly to available labour market data collected by the Australian Bureau of Statistics. The second is on the labour demand side, and relates to data made publicly available by organisations.
4. We have found the Australian Bureau of Statistics to be highly responsive to client data requirements, within the constraints imposed by budgets and data collection methods. With household surveys, sample sizes and definitional issues may restrict the collection of data about important issues such as the labour market experience of Indigenous, culturally and linguistically diverse and immigrant women. Definitional issues have complicated data collection on casual and part time employment, as working patterns and contractual arrangements have become more variable. Alison Preston and Therese Jefferson<sup>1</sup> have well summarized the strengths and weaknesses of ABS hours and earnings data. The Employee Earnings and Hours survey (ABS Cat. No. 6306.0) provides information on gender, industry, occupation and firm size and methods of pay-setting. Some employment modes are covered (full-and part time), but not others (fixed-term and casual workers and dependent contractors). This information is not longitudinal, and is published only bi-annually. Yet longitudinal data are particularly important for an accurate understanding of the variable earnings of women in insecure employment.
5. We welcome the current initiative by the Australian Bureau of Statistics to consult with researchers on ways to enhance data collection to assist monitoring gender equity.

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<sup>1</sup> A. Preston and T. Jefferson (2007) 'Trends in Australia's gender-wage ratio', *Labour and Industry* 18(2): 69-84.

6. We submit that on-going data collection on gender-based occupational mobility would provide important missing data on the dynamics of labour market barriers faced by workers with care-giving commitments. Research being undertaken by Tanya Carney, a PhD student of one of the authors of this submission, has used longitudinal data from the Household, Income and Labour Dynamics in Australia (HILDA) survey, to show the operation of labour market segmentation, generated by long working hours norms in a number of higher status occupations, and resulting in the downward career mobility of mothers.<sup>2</sup> A better understanding of this form of occupational exclusion, which ties pay inequity to gendered care-giving rather than to gender as such, could result in effective targeting of approaches to achieving equitable remuneration.
7. The Average Weekly Earnings survey (ABS Cat. No. 6302.0) provides time series (but not individual longitudinal) data by gender. It excludes 45% of the female workforce – those not working full time (of whom 75% are women). We submit that accurate monitoring of trends in the gender wage gap must include women working part-time. This may be achievable by collecting hourly and weekly earning data on the basis of hours worked. This is a complex issue, because a high proportion of part time employees, particularly women, are employed casually, and their earnings relative to non-casuals are inflated by up to 25 per cent by leave loadings. This inflation is artificial as leave entitlements are not factored into earnings data for non-casual employees. The implication is that the gender pay gap would be even higher if casual employment were included.
8. Where gender-based pay and employment data are based on institutional statistics originally collected for some other purpose (for example ABS education data), we have startling instances of the under-reporting of casualisation. This may result from the formulae by which full-time equivalence is calculated. These formulae often under-count unpaid hours of work, either whether this work performed as unpaid overtime in the workplace or as the take-home work required in order to complete work projects.<sup>3</sup> In feminised occupations, for example in the health, education and community sectors, responsibilities do not always fit neatly into the working-hours formulas that underpin pay rates.
9. Several academic researchers have noted that the gender pay gap actually increases with age and years in the labour market, because of women's flatter career structures,

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<sup>2</sup> Tanya Carney, a PhD student of one of the authors, is analysing the extent to which segregation and downward career and earnings mobility, are functions of feminised care-giving, rather than of gender as such. Reported in C. Fox (2008) 'It's a long and winding road to reasonable hours', *The Australian Financial Review*, 27 May.

<sup>3</sup> One of us has documented the startling incidence of low pay and long-term exclusion even amongst highly qualified women in the university and vocational education sectors, where up to half of all teaching is carried out by hourly-paid casuals, typically earning less than \$20,000 a year, even when this work is main-job. A. Junor (2004) 'Casual University Work: Choice, Risk, Inequity and the Case for Regulation', *Economic and Labour Relations Review* 14(2)276-304.

<sup>4</sup> To our knowledge, rather little official statistical monitoring occurs in Australia on such longitudinal wage compression. The Equal Opportunity for Women in the Workplace Agency provides excellent on-line resources to assist organisations in reviewing the pay outcomes of vertical segregation, as well as of horizontal occupational and job segregation, but such reviews are voluntary and the data, not being publicly available, do not inform wage and salary policy.

10. There appears to be a dearth of statistical data on the labour market situation of Indigenous, culturally and linguistically diverse and immigrant women, and women with disabilities, especially in cases of multiple labour market disadvantage. Concluding its 2006 country review of Australia, the UN Committee on the Elimination of Discrimination Against Women was quite critical of Australian efforts in these fields, as well as of Australia's record on refugees and trafficked women.<sup>5</sup> One of its criticisms, though not specifically in the employment field, related to the thinness of available Australian data. Part of the process of improving Australia's human and labour rights record will thus be a system of better data collection.
11. We regret the demise, after 1991 and 1996, of what was originally intended to be an ongoing mapping of workplace relations practices – the invaluable Australian Workplace Industrial Relations Survey, which provided a statistically valid and reliable window into workplaces. We submit that the revival of this ongoing research agenda by the Department of Education, Employment and Workplace Relations could provide a vehicle for a contextual understanding of issues relating to pay equity.
12. When it comes to requirements for the collection and publication by organisations of data on women's pay and employment, a 'light touch' approach has been adopted by the Equal Opportunity for Women in the Workplace Agency.. At present, this agency has considerable scope for waiving compliance with the Equal Opportunity for Women in the Workplace Act. Regulations under this act that tighten up the definition of what constitutes 'all practicable steps' to address equal opportunity.
13. As a result of waivers and lack of transparency in data publication, Australian information on women's location in private sector organisation career paths is patchy. The absence of comprehensive private sector data points to a need for further education and information of employers, employees and unions.

**The need for education and information among employers, employees and trade unions in relation to pay equity issues.**

14. The Australian Industrial Relations Commission (AIRC) has now published exposure drafts of Modern Awards in the first-stage industries, and has called for comment by

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<sup>4</sup> P. Armstrong (2007) 'Back to basics: Seeking pay equity for women in Canada', *Labour and Industry* 18(2):14—15; S. Dex, K. Ward and H. Joshi (2008) 'Gender Differences in Occupational Mobility in the 1958 Age Cohort', *Work, Employment and Society* 22(2): 263-280.

<sup>5</sup> UN CEDAW (2007) Committee on the Elimination of Discrimination against Women Thirty-fourth session 16 January-3 February 2006, available [http://www.ofw.facs.gov.au/downloads/pdfs/cedaw\\_concluding\\_comments\\_2007.PDF](http://www.ofw.facs.gov.au/downloads/pdfs/cedaw_concluding_comments_2007.PDF), accessed 12 September, 2008.

October 10, 2008. In a Statement on 12 September, 2008, the Full Bench stated at Clause 33, in relation to the absence of stand-down and anti-discrimination clauses:

*...Nor have we included anti-discrimination clauses as discrimination is the subject of legislative regulation elsewhere ...these matters can be further considered if necessary.*<sup>6</sup>

We respectfully submit that this matter definitely does need to be taken up in each of the four stages of the Award Modernisation process. It is important that the Commission makes a clear differentiation between the individual rights-based approach of anti-discrimination jurisdictions, and the collective rights-based approach of an Equal Remuneration Principle that gives full effect to Australia's international treaty obligations. We submit that the forthcoming legislation requires the inclusion of an Equal Remuneration Principle. As argued later in this submission, it will be important to ensure that classification structures are based on the principle of equal remuneration for work that is the same or similar in nature or of the same or comparable value. Time and trouble could be saved by inserting into Modern Awards a clause allowing variation to include the results of such work value studies. Because of the number of women (including Indigenous and culturally and linguistically diverse women and women with disabilities) who are award-dependent, it is vital that the Award Modernisation process is carried out with a clear view to ensuring that skill, responsibility, and the nature and conditions of the work, are considered in determining classification structures in Modern awards.

15. If the Award Modernisation process is not carried out under such a principle of equal or comparable value, the rationalisation process, based on industry awards, will simply repeat the history of the 1969 and 1972-74 equal pay and equal value exercises, whose limitations have only partially been addressed forty years later. Requirements under this legislation were often met by slotting female classifications in underneath male, without consideration being made to genuine work value assessments. In many industries, such work value assessments have never been finalised. At best the Minimum Rates Adjustment process of the late 1980s provided some needs-based compression at the low-wage end.

16. As an example of the importance of equitable classification structures, we draw attention to the high turnover rates amongst Personal Care Assistants in aged care facilities. Extensive research, commissioned by the then Department of Family and Community Services and Indigenous Affairs and published in 2004-5, provided extensive quantitative and qualitative evidence of the link between high levels of turnover and very high levels of dissatisfaction with pay structures. In this large-scale survey, over 60 percent of respondents were dissatisfied or strongly dissatisfied with their pay. A typical comment was;

*...Twenty years' experience, six years of study and I could earn more as a barmaid ...with a lot less stress involved.*<sup>7</sup>

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<sup>6</sup> [2008] AIRCFB 717.

Yet both Australian and US research, and the New Zealand research of one of the authors, has indicated the high levels of relational, practical, cognitive and organisational skills required in personal care work.<sup>8</sup> The social problems being built up by the ongoing undervaluation of work in the aged care industry are manifest and have been canvassed at length in the references cited. Yet there does not seem to be a strong public awareness of how this problem might be addressed.

17. More generally, we submit that a way of addressing the need for education about pay and employment equity (a need shared by employers, employees, trade unions and indeed by institutions administering the wages system) would be the requirement of a General Equalities Duty or Single Equality Duty. The institutions set up as part of the Fair Work Australia one-stop-shop, could be bound by this duty through the legislation establishing the system. In the UK, Wales and Scotland, such a Duty brings together equal treatment principles in the areas of gender/gender identity, race, disability, religious belief and sexual orientation. The mainstreaming of equity considerations is now a positive duty on government agencies, and it has a prospective element. For example the National Assembly for Wales requires initial equality impact assessments of proposed policy and procedural changes.
18. Transparency is an important part of the process of education about pay and employment equity. The Forward with Fairness legislation should include the right of individuals or unions to request information about the remuneration of specified workers or groups of workers, with the capacity to challenge unreasonable denial of such claims. In the UK since at least 2003, a methodology has been developed for discovery of information about potential comparators in preparing individual claims, with safeguards for individual privacy. We submit that in Australia this information needs to be available for both individual and collective claims in different jurisdictions. It has become increasingly important as the growth of broadbanding, performance-related pay and indirect pay options has resulted in a growing disconnect between published base pay rates and actual total remuneration.
19. We submit that pay equity audits or reviews have proved to be a powerful educative tool. In the UK, where individual pay equity claims had skyrocketed to over 17,000 a year in 2006, a proposed method for dealing efficiently with the underlying problem took the form of advice to the offending organisation to undertake a pay and

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<sup>7</sup> S. Richardson and B. Martin, B. (2004) *The Care of Older Australians: A Picture of the Residential Aged Care Workforce*, National Institute of Labour Studies, Flinders University, Adelaide, pp. 26-7. See also J. Healy and M. Moskos (2005) *How Do Aged Care Workers Compare With Other Australian Workers?* Adelaide: National Institute of Labour Studies, Flinders University; M. Moskos and B. Martin. (2005) *What's Best, What's Worst? Direct Carers' Work in their Own Words*, The National Institute of Labour Studies, Flinders University, Adelaide.

<sup>8</sup> In addition to the Australian references just cited, see C. Wellin (2007) *Paid Care-Giving for Older Adults with Serious or Chronic Illness: Ethnographic Perspectives, Evidence, and Implications for Training*. Paper prepared for the National Academies Workshop on Research Evidence Related to Future Skill Demands, homepage <http://www7.nationalacademies.org/cfe>, date accessed 1 July, 2008; A. Junor, I. Hampson and K. Ogle (2009 forthcoming) 'New vocabularies of skill: The case of care and support work', in S. Bolton and M. Houlihan (eds), *Work Matters: Critical Reflections on Contemporary Work*, Basingstoke: Palgrave.

employment equity review and implement a follow-up response plans.<sup>9</sup> At this stage, however, an unduly 'light touch' legislative approach means that such audits will not be mandatory.

20. We submit that closer to home, New Zealand provides an excellent example of a Pay and Employment Equity Plan of Action. This five-year plan began in 2005 with Stage 1 of a systemic roll-out process, beginning with the core areas of public administration, education and health, and now extending in a second phase to crown authorities and then on to local government. Cabinet is due in 2009 to consider ways of extending the process to the private sector. The process has an educative function in that the format of the review and the shape of the response plan are based on local priorities, albeit with a tighter pay review requirement in heavily feminised areas.<sup>10</sup>
21. We submit that, as in New Zealand, such reviews should be carried out progressively over five years, beginning with the public sector but also in Australia beginning with large private sector organizations, adapting the EOWA reporting process. Each organisation should subsequently repeat the process at five year intervals. Issues addressed in the reviews will need to be defined broadly, but they should include work value, occupational segregation, and the fit between paid and unpaid work. We submit that in Australia, as in New Zealand, pay equity reviews be a mandatory part of the audit process in occupational and job classifications where over 70 per cent of workers are women. Mandatory reviews are doubly important where there are higher than average concentrations of women from other equity groups.
22. In Australia, the response options specified will need to include collective bargaining, work value cases and gender-neutral job evaluation processes. We submit that the Forward with Fairness legislation should require that reviews are carried out in good faith and include a dispute process. Reviews should be allowed at industry, sector and occupational levels, as well as within organisations. Private sector organisations refusing such good faith reviews should be ineligible for government contracts. Not only will this have an educative effect, it will decentralize the review process and the spread the expertise to perform it.
23. We submit that a specialised Pay and Employment Equity Resource Office be finalised once the legislation takes shape, but involving Fair Work Australia, EOWA, the Australian Human Rights Commission (AHRC) and possibly the Department of Education, Employment and Workplace Relations should support the review process, providing a code of practice, guidelines and support tools for gender neutral work

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<sup>9</sup> UK Equal Opportunities Commission (2003) *Code of Practice on Equal Pay*. Manchester and London: Equal Opportunities Commission; Department for Communities and Local Government (2006) *Government Action Plan: Implementing the Women and Work Commission Recommendations*. London: Department for Communities and Local Government; UK Department for Communities and Local Government (2007) *Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*. Consultation Paper. London: Department for Communities and Local Government, June.

<sup>10</sup> P. Hall (2007a) New Zealand's pay and employment equity story – building capacity, working together to make gender equity ordinary. Paper presented at Gender Work and Organisation Conference, Keele University, 27-29 June; P. Hall (2007b) 'Pay Equity Strategies: Notes from New Zealand and New South Wales', *Labour and Industry* 18(2): 33-46.

value assessments, and standards for assessing the gender-neutrality of commercially-available systems. The tools or techniques used should not be mandated, but be made available freely for adoption if found useful. Technical expertise will be needed to support the review process. This specialised Pay and Employment Equity Office should work with networks of practitioners and academics, including specialist practitioners, private consultants, non-government organizations and unions.

24. The EOWA has produced a very useful tool for auditing horizontal and vertical segregation. This can be made developed as part of the review process, and further tools added.
25. Within the educative process, we have a special interest in the development of a tool for identifying hitherto under-recognised skills, particularly in service . We explain this approach to skill auditing in predominantly female jobs in a final section of this submission.
26. The audit process will require good record keeping, with the relevant office empowered by legislation to make periodic assessments of sample reports and action plans.

**Current structural arrangements in the negotiation of wages that may impact disproportionately on women**

27. We are please that in her speech to the National Press Club on 17 September 2007, Deputy Prime Minister Gillard announced the establishment of a Minimum Wages Panel that will review minimum wages and casual loadings every year. Given the composition of the Panel – up to seven full-time and part-time members, specialists and generalists drawn from the wider community with relevant experience in economic and social policy, it appears unlikely that its remit will extend to examining issues of classification relativities within and between Modern Awards. Nevertheless, we make the strong submission that the panel include members with expertise in gender, Indigenous, racial and disability equality.
28. We note that Deputy Prime Minister Gillard has announced that Fair Work Australia will review Modern Awards every four years, starting in 2014. Given the concern we have expressed in paragraph 13 above, we submit that it is vital that all Modern Awards contain a clause enunciating the full application of an Equal Remuneration Principle, and that it allow applications for award variations at any time, in order to give effect to this Principle. We note that the Deputy Prime Minister has said that ‘outside these four-yearly reviews, awards will only be varied in limited circumstances, such as to remove ambiguity, uncertainty or discriminatory terms’. We welcome the inclusion of ‘discriminatory terms’, provided it is interpreted more broadly than the individual rights model contained in the Workplace Relations Act 1996 and the Work Choices amendments. We submit that it will be vital to include in the Fair Work Australia legislation, a specific provision that Modern Awards may be varied if they fail to comply with an Equal Remuneration Principle framed along the lines of the Queensland Principle, as outlined below.
29. ILO100 in Article 1 defines remuneration to include ‘the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or



indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment'. It is for this reason that over-ward payments also need to be covered by a national Equal Remuneration Principle. The Principle also needs to cover allowances, indirect pay in the form of benefits, and all forms of performance-related pay, such as bonuses and 'rewards'.

30. Of particular importance will be the need to ensure equality of superannuation. We submit that gender differences in superannuation entitlement, and in particular the retirement income inadequacy of casual employees' superannuation accumulation, is emerging as a major issue in gender pay inequity.<sup>11</sup>
31. We submit that all types of employees need to be covered explicitly by the principle of equal remuneration. This includes not only full-time ongoing employees, but part time, temporary, fixed-term, casual and seasonal workers and dependent contractors.
32. We welcome the June 2008 statement by the Deputy Prime Minister, that Fair Work Australia will act as an industrial umpire considering pay equity matters, in the context of setting minimum wages. This role will not, however, by itself change the problem of women's inequality of status and esteem in the workplace, where this is caused by the undervaluation of women's work.
33. For structural reasons, women (and men) of Indigenous, culturally and linguistically diverse and immigrant background, women with disabilities, and women working part time casually or as dependent contractors or shift workers, have limited voice. Particularly in smaller workplaces where women are concentrated, women (and men) in these groups may have limited union representation. It will be particularly important to establish mechanisms for representation and redress in these circumstances.
34. To summarise these concerns, and to suggest a way of addressing them, we submit that it will be essential that the new employment relations legislation have as a stand-alone Object the principle of ensuring equality of remuneration and other conditions of employment, for men and women, and for men and women of diverse cultural and linguistic backgrounds, for men and women with disabilities, and for men and women working in any employment mode (including part time, casual and contract) who are doing work of equal or comparable value.
35. We also submit that it is essential that each Modern Award contain a clause allowing consideration of work value in the context of the award's history, without relying on arguments based on discrimination or comparisons, and that if comparisons are undertaken they may be with relevant work in any occupation, industry or workplace. If such comparisons reveal inequity, then an application for award variation may be made outside the four-yearly review cycle.
36. It will also be essential, in the division of the Act regulating collective and common law Agreements, that provision be made for variation, during the life of any

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<sup>11</sup> H. Bateman (2006) Retirement Incomes: Adequacy of the Superannuation Guarantee, and Relative Efficiency of Industry and Retail Funds. Unpublished paper, Industrial Relations Research Centre, UNSW.

Agreement, in order to ensure conformity to the Equal Remuneration Object of the new legislation. These provisions are necessary for the reasons outlined below.

### **The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation**

37. Unfortunately the current federal equal remuneration principle, embedded in the amended Workplace Relations Act, falls short of meeting Australia's obligations, incurred by ratification of the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW).
38. CEDAW Article 11 covers work, employment, social and economic security and maternity protection. It commits ratifying governments to ensuring the rights to 'equal treatment in respect of work of equal value' and 'equality of treatment in the evaluation of the quality of work'<sup>12</sup> Together, these two principles provide for a broad definition of equal value that allows comparisons across the boundaries of segregated occupations.. They also allow pay equity determinations to be based on work value assessments.
39. We submit that the federal workplace relations legislation of 1996 and 2005 places such restrictions on the pursuit of pay equity principles as to render the principles inoperable. It became clear in the 1998 HPM decision<sup>13</sup> that the legislative orders placed on the AIRC limited pay equity cases to a consideration of 'equal value', rather than the wider concept of 'evaluation of the quality of work'. It was ruled that claimants must establish that pay rates had been set *on the basis of discrimination* – doubly ruling out consideration of pay discrepancies created by the indirect or systemic effect of occupational or job segregation. The WorkChoices amendments further ruled out pay equity claims involving applicants or comparators covered by decisions of the Australian Fair Pay Commission. A Federal Court (2007) decision during the Tristar case added further restrictions by establishing that the federal jurisdiction has sole coverage of the field for any occupational group not entirely within the scope of a state jurisdiction, restricting its operation to state government and possibly local government employees. For employees in segregated occupations, there is little point in seeking relief in alternative human rights and anti-discrimination tribunals, as these provide individual rather than rather than collective redress, and thus are also restricted to looking at the sort of direct discrimination that arises from unequal treatment in the same job of people working for the same employer.
40. We submit that the most adequate expression of CEDAW in Australia is the Equal Remuneration determined by the Queensland Industrial Relations Commission:

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<sup>12</sup> UN Division for the Advancement of Women (1979) Convention on the Elimination of All Forms of Discrimination Against Women. Available <http://www.un.org.womenwatch/daw/cedaw/text/convention.htm>, accessed 1 September 2008.

<sup>13</sup> Australian Industrial Relations Commission (1998) *Automotive Food, Metal, Engineering, Printing and Kindred Industries Union v HPM Industries* 94 IR 129.

*'In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features...'*<sup>14</sup>

This principle spells out that the assessment must be transparent, objective, non-discriminatory and free of gender-based assumptions. Current work value, not work value changes needs to be demonstrated. It cannot be assumed that prior work value assessments, were bias-free. The history of the award is to be considered, with consideration of whether remuneration has been affected by gender. Indicators include:

- some characterization or labeling of work as 'female',
- some under-rating of the skills of female employees,
- whether the work is an industry or occupations undervalued because of segregation or segmentation,
- industry features that may have affected work value such as degree of segregation, concentration of women in part time or casual work, low unionization, low workplace union representation in workplaces characterized by formal or informal work arrangements, incidence of consent awards and agreements, and other considerations of that type;
- whether sufficient weight has been given to typical work performed and the skills and responsibilities exercised by women, conditions under which the work is performed and other relevant work features.

The key elements of the Queensland principle are that the evidence test is one relating to undervaluation, with no compulsory or threshold requirement that this evidence be based on establishing discrimination or that it rely on the use of a comparator. In this way, it overcomes the problem of addressing possible cases of systemic undervaluation in a segregated labour market.

41. Equitable treatment of immigrant women workers is less defined by Australia's obligations under international law. Unfortunately, despite being a net recipient of immigrant labour, Australia has not ratified any international treaties covering the rights of migrant workers. We submit that Australia should lead immigrant-recipient nations in ratifying the 1990 ILO *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.
42. Guestworkers were a new phenomenon under the previous government, and reports of serious abuses of the employment and human rights of 457 visa holders were rife. In announcing a new Pacific guest worker scheme, the Rudd Government has provided assurances that standard pay and conditions will apply. A framework for protecting their employment rights, including gender equity rights and rights to voice

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<sup>14</sup> Queensland Industrial Relations Commission Equal Remuneration Principle, QCU, QCCI, Industry Ltd anor, B450 of 2002.

and union access, will need to be clearly articulated in the new Fair Work Australia legislation.

43. Culturally and linguistically diverse women are at a range of disadvantages in the workplace, not because of individual deficits such as low skills, but because of structural deficiencies in Australia's social and labour market frameworks for receiving immigrants. Many sources of voice and participation have been closed off. The erosion of English language tuition over the past 20 years, and strict guidelines governing timing of post-arrival access, have made access to English impossible for women with children. Status as spouse of a primary immigrant, ongoing issues of overseas skills recognition, loss of skills currency in fields such as IT and engineering, religious discrimination based on dress codes, and the low value given to fluency in other languages, have all been barriers to employment. The migrant resource centres, including women's centres, that flourished before 1995, have lost most of their funding. The upshot is a tendency to concentration in low-paid occupational segments, regardless of skill levels, and a denial of voice and organising capacity. To see these issues as matters to be addressed simply through safety net mechanisms is to compound the stereotyping of immigrant women by bundling them into one low-skilled category.
44. Culturally and linguistically diverse women placed outside the award and collective bargaining stream under WorkChoices were at a particular disadvantage in individual negotiation. Even for those covered by collective agreements, there is no longer a requirement that the provisions be explained in the community languages of the workplace as a condition for approval. It therefore is welcome news that Fair Work Australia will be given the power to facilitate multi-employer collective awards. Culturally and linguistically diverse women are concentrated in some of the areas to be covered by these awards, such as aged care and cleaning. We submit, however, that Fair WorkAustralia will need to be given powers to mandate good-faith bargaining and to exercise last-resort dispute settling powers. The ongoing restriction of union access to workplaces is also a problem.

#### **The need for further legislative reform to address pay equity in Australia.**

45. We submit that the most effective way of giving effect to Australia's obligations under its ratification of CEDAW is to include a stand-alone Equal Remuneration Object in the new Forward with Fairness Act, based on a clearly enunciated Equal Remuneration Principle. This means that the new employment relations legislation should specifically provide a right to equal remuneration for work of equal value and define equal value as covering work that is the same, work that is of similar nature, and work that is not similar in nature but the same or of comparable value.
46. We submit that the new Principle must explicitly state that establishing an equal pay claim does not require proof of sex discrimination, or the use of comparators. Rather, an equal remuneration claim can be made out by providing sufficient evidence that gender has affected the valuation and remuneration of the work. The remedy should thus be a fresh work value study, using a gender-neutral framework of analysis.
47. A gender-neutral work value study will rely on an unbiased definition of skill, and an assessment framework that takes account, not only of qualifications and physical tool-

48. We submit that the legislation should define the scope (if any) of allowable defences to gender pay inequities. Custom and practice or collective agreements or awards, should not constitute defences.
49. Further, we submit that Australia's obligations under its ratification of ILO Convention 100<sup>15</sup> apply to national laws, regulations, legally recognised wage determination mechanisms, and collective bargaining. This implies that the new legislation should include a statement that all types of industrial instrument – awards, collective agreements, over-award payments, contracts – make provision for pursuing equal remuneration claims.
50. In terms of a forum for pursuing pay equity claims, the shape of the new Fair Work Australia mechanisms is not yet clear. Whether or not pay and employment equity issues are to be addressed by a specialised division or tribunal within the new national system, we submit that the legislation should provide for institutions that can make determinations and provide both collective and individual remedies Human rights and discrimination law is well equipped to address discrimination between like comparators, but it is not well-placed to address the systemic undervaluation of segregated occupational groups.
51. We submit that therefore the new legislation must provide institutions ('umpires') that can make determinations and provide both individual and collective remedies, including orders that change the terms of industrial instruments prospectively (such as collective agreements). It should have the power to hear the outcomes of pay equity reviews and studies at industry, sector, occupational and organisational levels.
52. As a sign of commitment to the principle of pay equity, we submit that legislation should explicitly provide the right to equal remuneration, not only to workers in the private and not for profit sectors, but to workers in the public sector and to employees of contractors providing services to the federal government.
53. We acknowledge that it may be necessary to call for further submissions on the best place for equal remuneration legislation and the appropriate government support for it when the shape of the new national workplace relations system and the new sex discrimination system are settled.

### **Gender and skill recognition**

54. We have argued the need for a capacity to support a re-evaluation of the skill requirements of jobs with an award (or award-free) history that places them outside the masculinist traditions of skill assessment. These award traditions derive from a model of technical education and trade qualifications that has its origins in the male

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<sup>15</sup> International Labour Organisation (ILO) (1951) Equal Remuneration Convention No. 100. 165 UNTS 303.

apprenticeship system. Gradually, in a service economy, these traditions were modified, with the introduction of traineeships, the extension of competency standards into service occupations such as call centre work, and the development of qualifications within the Australian Qualifications Framework, ranging from Certificate III to degree level in areas such as child care and aged care. For example, close to 80 per cent of Personal Care Assistants in Australia have Certificate III qualifications<sup>16</sup>, a credential level that also covers electricians, motor mechanics; sound technicians and woodmachinists.

55. There are unresolved issues of the valuing of ‘soft skills’ – of the relative value place on working with sentient beings such as frail elderly people, compared with the value of working with insentient objects, such as plants, timber or metals.
56. At entry level, employers may use descriptions of personal attributes such as ‘maturity’, ‘resilience’, ‘empathy’ and ‘sense of humour’ as proxies for the skills they are seeking, and even deny their status as skills by explicitly describing them as ‘natural’. Such natural attributes are assumed to be ‘free gifts’, not value-creating skills. Even if the skills are recognised as having been learned, they tend not to be unpacked, but called ‘interpersonal’, or ‘communication’ or ‘time management’ skills, which is a bit like saying a woodmachinist has ‘woodworking skills’. Clearly, these skills need to be ‘unpacked. Whilst some of the skills may be somewhat transferable from life experience, jobholders need to learn to apply them in specific work contexts, incorporating them into ongoing work processes, and this capacity is a skill. An examination of competency standards indicates that discrete elements of competence, for example of call centre work or of team leadership may be defined, but what is less likely to be defined in qualifications and in occupational classifications is the way these skills are put together to integrate an ongoing work process and link it into the overall workflow.
57. Secondly, even when these intangible service skills are defined in qualifications, this tends to be at entry level. For example, where generic ‘employability skills’ are included in competencies, the very term ‘employability’ implies entry level. Yet higher levels of these intangible skills are required of experienced workers. Work processes are sustained through the higher-level application of these skills, based on problem-solving, solution-sharing and informal system-building. The skills in question are developed through experience, on the basis of practice, teamwork and informal leadership.
58. As a result of the under-recognition of such skills, one of the chief complaints of Personal Care Assistants, for example, is that they are paid very little more at the end of ten years than when they began.
59. Working for the New Zealand Department of Labour Pay and Employment Equity Unit, one of the authors has developed a comprehensive but parsimonious framework for identifying three sets of social and organisational skills (awareness-shaping, relational and coordinating), and for mapping the five cumulative levels through

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<sup>16</sup> S. Richardson and B. Martin, B. (2004) *The Care of Older Australians: A Picture of the Residential Aged Care Workforce*, National Institute of Labour Studies, Flinders University, Adelaide.

which they develop, through workplace practice. These levels range from novice, through stages of practice and proficient problem-solving, to the level of the expert worker, helping to maintain work systems. We have demonstrated how different combinations and levels of these skills contribute to outcomes such as service quality, customer focus, teamwork and informal leadership. These integrative skills form the basis of dynamic workplace activities.. We would welcome the opportunity to explore a way in which methods of identifying these skills could be included amongst resources that for aiding an accurate evaluation of the skill demands of jobs.

60. We welcome the changes that have been occurring on both the employment relations and the skills front, and believe that Skills Australia and Fair Work Australia have a role to play in a combined approach to the gender pay gap, (which is partly a skills recognition gap), and the skills shortage (which is partly a skills quality gap).<sup>17</sup> The common thread is a recognition of the value of women's social and organisational skills. With workforce ageing, there is an urgent need to transfer and build these skills, and to ensure their adequate recognition and remuneration.

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<sup>17</sup> S. Richardson (2007) *What is a Skill Shortage?* NCVER, Adelaide.