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National Pay Equity Coalition and the Women's Electoral Lobby

Supplementary Submission Two

House of Representatives Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce

We refer to our attendance with the Committee on the 14th May 2009 and thank the members of the Committee for allowing our Organisations to make our Submissions.

We make a further Supplementary Submission in response to issues raised at our hearing.

In our discussions we raised the issue of the right to arbitration in Fair Work Australia and the importance that this right has had on advancing pay equity. We also discussed the importance and effectiveness of tribunal decisions made in the institutional industrial system.

The Chair in response to our Submission on the importance of arbitration referred to the fact that the system had undergone massive change and that under the Corporations power` …it is very difficult to have compulsory arbitration in a system that says you cannot have it anymore'.

Apart from limited rights to arbitration in the low paid sector, as it stands the new industrial system is mostly based upon arbitration by `consent'.

There seems to be some confusion in the Federal Government between a policy decision to remove compulsory arbitration from the Federal system and a constitutional incapacity to do so. The fact is the Workchoices decision of the High Court in *NSW and others v. Cth* [2006] HCA 52 the majority found that corporations power in s51(20) was virtually open ended. It would clearly be within power for the Federal Parliament to create a law which compelled constitutional corporations to settle industrial disputes by arbitration in the last resort.

Some argue that the required separation between judicial and administrative powers that arose from the *Boilermakers* case as a reason for the Commission not to be empowered to arbitrate because there was a risk that a determination of an arbitral decision could be a determination of legal right. This argument fails to take into account the practical operation of the Federal industrial tribunals. The fact is that the Federal tribunals have been successfully navigating the line between judicial and administrative power for 100 years.

Further we would submit there appears to be a inconsistency in arguing `constitutional incapacity' as Fair Work Australia does provide access to arbitration in provisions that cover the low paid bargaining sector.

Further the continued existence of the conciliation and arbitration power, the treaty obligations of Australia which can be enlivened through the foreign affairs power and the propensity of the States to refer power in relation to workplace relations to the Commonwealth give ample capacity to the Commonwealth to found a robust power to settle industrial disputes through arbitration.

We therefore submit that the decision to remove compulsory arbitration from the federal scene was a policy decision rather than a lack of constitutional power.

We submit that the short life of the Victorian system created by the Employee Relations Act shows the problems of industrial systems which rely on consent arbitration as a final step in dispute settlement procedures because in cases such as these, employers will rarely consent and perpetual impasse often results. This is exacerbated when parties lack bargaining power. In situations of an impasse the parties have the option to `walk away' as stated in the Explanatory Memorandum of the Fair Work Bill. The option of `walking away' does not provide a means of solving the pay equity problem and will not provide a fair outcome for women workers.

President Zeitz of the Victorian Employee Relations Commission expressed frustration and not having adequate power to intervene and settle long running disputes in that the Commission's hand were tied. Further, in his Inquiry into the Victorian Industrial Relations System, Professor Ron MacCallum found that a `significant number of Victorian employees were disadvantaged under this system'. He recommended that that any new Victorian Commission should have similar powers that are possessed by the NSW and Qld Commission and that when employees have failed to resolve a grievance may make application to the Tribunals for assistance in resolving the grievance.

The Macallum Inquiry found that parties to a grievance should have the capacity to resolve disputes by conciliation and arbitration…. They believe that there is a critical need in a small number of cases for an independent tribunal to resolve such disputes (2000:197)

We again remind the Committee that in all equal pay cases, reasonable hours, work and family cases and paid maternity leave cases conducted in the past, employing bodies objected to the running of these cases and resolution was arrived at either by arbitration or in settlement in the light of a resort to arbitration.

We also refer to the discussion with the Committee regarding the material impact and effectiveness of decisions from industrial tribunals on the women's workforce and the `adversarial' nature of these procedures. We reiterate the importance of these cases

conducted in the Federal and State industrial jurisdictions. These decisions have resulted in the adjustment of wages for women in industries and occupations where their work was undervalued and not properly remunerated because of gender related factors. We draw the Committees attention to the latest Decision in the Queensland Industrial Relations Commission Queensland Community Services and Crisis Assistance Award – State 2008, which quickly and efficiently arrived at a decision that undervaluation existed, that it was gender related and arbitrated the appropriate remedy. This Decision indicates that the setting of Principles and the work done in previous cases are now providing guidance for effective and efficient means of addressing the undervaluation of women's work.

Decisions from industrial tribunals have remedied pay inequity in an effective manner which unfortunately would not have been achieved through less formal mechanisms. We refer the Committee to the many informal programs that once having advanced through gender audits and stages which identify of unequal remuneration, have then failed when it has come to taking remedial action or in rectifying the problem.

We submit that pay equity will rarely be achieved by `consent' or without recourse to more formal legally enforceable mechanisms.

We therefore reiterate our claim of the importance of the institutional legal mechanisms that have been available within the industrial system in re-dressing the problem of pay equity and again make the argument for a specific equal remuneration division within Fair Work Australia which provides a right to arbitration and enforceable decisions.

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