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**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, Public hearings, Commonwealth Parliamentary Offices Sydney**
**Main Conference Room, Friday 26 September 2008**
**Discussion points by Dr Michael Lyons and Ms Meg Smith**
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1. Our comments relate to three (3) aspects of the Committee's terms of reference:

- Current structural arrangements in the negotiation of wages that may impact disproportionately on women;
- The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation;
- The need for further legislative reform to address pay equity in Australia.

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

1. The fact that there has been no successful application to have the federal equal remuneration provisions remedy gender-based undervaluation of work clearly shows the need for reform and different approaches to be considered. Moreover, as it is the Rudd Government's policy to create "a uniform, national industrial relations system for the private sector", and thus continue the policy of federal industrial relations laws prevailing over State laws (Rudd, K 2007, "Facing the future", address to the National Press Club by federal Labor leader Kevin Rudd MP, 17 April, p. 12), places an obligation on the Government to establish means to achieve equal remuneration for work of equal value that are equivalent to, or better than, the State laws and tribunal processes that are over-ridden by virtue of section 109 of the Constitution..

2. The existing right to equal remuneration in federal labour law is founded under the external affairs power of the Constitution. In this way Australia's signatory status to the ILO's Equal Remuneration Convention No. 100 can be given legislative effect. The form of this particular construction compromised the relationship between the legislative provisions concerning equal remuneration and other key sections of the legislation. In a pre-WorkChoices environment this stymied the intervention of the Full Bench of the AIRC and the ability of applicants to use the equal remuneration provisions to exercise a variation to a federal industrial award.

The legislation as it stands cites the notion of "rates of remuneration established without discrimination based on sex" by way of explicit reference to the ILO's Equal Remuneration Convention. As demonstrated through the HPM proceedings in the AIRC (Australian Industrial Relations Commission 1998, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, 94 Industrial Reports 129), this notion has carried a problematic interpretation of the provisions. Hence, consideration should be directed to:

- examining whether the equal remuneration provisions can be authorised by the external affairs power (section 51(29) of the Constitution), but legislatively expressed in a way that does not impede the federal tribunal's or applicant parties' recourse to these provisions, in conjunction with other provisions of the legislation. These "other" provisions explicitly include the powers of the Full Bench (or equivalent) and provisions that address the variation of federal awards;

- examining whether the equal remuneration provisions can be legitimised by the external affairs power, but expressed in a way that provides the reference to "rates of remuneration established without discrimination based on sex" involves a prospective test and requiring the tribunal to establish rates of pay that reflect gender-neutral valuation of work; and

- examining whether the equal remuneration provisions are more appropriately authorised by an alternative power, the corporations power. This investigation would examine the impact of

removing Australia's signatory status to the ILO's Equal Remuneration Convention as an explicit reference point within the federal statute, but assess the advantages that may accrue from expressing the right to equal remuneration in a manner similar to that in the *Industrial Relations Act 1999* (Qld). This legislative provision carries the following features:

- there is no reference to "rates of remuneration without discrimination based on sex",
- the provisions apply to all industrial instruments within the jurisdiction of the Queensland Industrial Relations Commission – thus recognising the importance of industry settlements and minimum wage determination to gender pay equity, and
- there is no requirement for a comparator group of employees to demonstrate unequal treatment.

3. The positive developments in the State jurisdictions of New South Wales and Queensland were assisted, particularly in the Queensland jurisdiction, by the conjunction of legislative provisions with an equal remuneration wage-fixing principle to guide the tribunal and the industrial parties in the application of the provisions. Such a construction is absent in federal labour law. While the 1972 equal pay for work of equal value principle remains extant, it cannot provide detailed guidance to the tribunal in the application of the current provisions, introduced in 1993, because it preceded those provisions.

Clearly, the understandings concerning gender pay equity developed in State jurisdictions, and articulated by way of new equal remuneration principles founded on the construct of *undervaluation*, are more capable of addressing gender pay equity than available in current federal law. Further consideration should therefore be directed to:

- examining whether there are any barriers within federal labour law to a federal industrial tribunal determining an equal remuneration principle, similar to those developed in New South Wales and Queensland, to guide the implementation of the nominal right to equal remuneration; and

- examining whether the terms of the equal remuneration principle, similar to that determined in New South Wales and Queensland, can be directly drafted within the terms of the federal equal remuneration provisions.

4. An obstacle, among many, encountered along the path towards full application of ILO 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*. While "value" is not defined in the ILO Convention, it is interpreted to mean the "worth" of a job for purposes of calculating employee compensation or remuneration.

5. Another important obstacle is the conviction that methods adopted to advance equal pay for work of equal value between men and women constitutes interference in the labour market, thus creating "inefficiencies". Yet, this position ignores the presence of "discrimination" (i.e. societal misconceptions and lack of opportunities) within labour markets (e.g. labour market segregation). Therefore, methods other than labour market forces should be used to ensure application of the equal pay for work of equal value principle.

6. A third obstacle to the application of the principle of equal pay for work of equal value is the cost factor (i.e. "the public interest"). Application of a "public interest test" to pay equity claims in Queensland have been relied on to limit the full effect of the QIRC's equal remuneration wage-fixing principle. Employers' capacity to absorb increased labour costs, and not fully pass them on to their customers, has not been explored in detail, but instead has been asserted by using hypothetical financial information. As Table 1 shows, raises in fees charged by long day care providers increased regularly in New South Wales and Queensland even without the onset of equal remuneration award wage decisions (Industrial Relations Commission of New South Wales 2006, *Re Miscellaneous Workers Kindergartens and Child Care Centres (State) Award*, [2006] NSWIRComm 64 (IRC No. 5757 of 2004), 150 Industrial Reports 290; Queensland Industrial Relations Commission 2006, *LHMU v Children's Services Employers Association*, [2006] QIRComm 50 (24 March 2006), 181 Queensland Government Industrial Gazette 568).

**Table 1:** Fees changes by Queensland and NSW long day care centres, 1997-2006.

| Service type | weekly fees range | 1997 | 1999 | 2002 | 2004 | 2006 |
|---|---|---|---|---|---|---|
| ***Commercial for-profit*** | | | | | | |
| | NSW | $159 | $168 | $193 | $222 | $248 |
| | Queensland | $145 | $151 | $173 | $195 | $214 |
| | | | | | | |
| ***Community /not-for-profit*** | | | | | | |
| | NSW | $168 | $178 | $201 | $228 | n/a |
| | Queensland | $147 | $155 | $167 | $186 | n/a |

(*Source*: Federal child care census)

Indeed, the President of Childcare Queensland (which represents the interests of over 750 child care centres in that State), Gwynn Bridge, has recently commented rises in fees charged is due to the cost of petrol, food, interest rates and tightening of child to staff ratios, and not simply the effect of the QIRC equal remuneration decision of 2006 (media release, Friday 6 June, 2008, Childcare Queensland,<www.childcareqld.org.au>).

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

7. *Equal remuneration* has a broader meaning than *equal pay*. It encompasses all types of payment in cash or kind made to employees. It is the Rudd Government's policy to strengthen rights concerning equal remuneration for work of equal value (Australian Labor Party 2007, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April, p. 12). 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. 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. However, a French law on gender equality at work passed in May 2001 obliged employers to negotiate at company level.

Further, the QIRC must not certify an agreement unless the employer remunerates all men and women employees of the employer equally for work of equal or comparable value (*Industrial Relations Act 1999* (Qld), s. 156). Given that gender pay equity is not addressed in bargaining, a more proactive collective bargaining means is required.

8. With good faith bargaining under Forward with Fairness, the parties are required to:

- attend and participate in meetings at reasonable times;
- disclose relevant information in a timely manner, subject to appropriate protection for commercial-in-confidence information;
- respond to proposals made by a party in a timely fashion;
- give genuine consideration to the needs of the other parties, and provide reasons for their responses; and
- refrain from impulsive or unfair conduct, or conduct that undermines freedom of association or collective bargaining.

Yet, it will not oblige a party to positively respond to every topic in the log of claims, so long as they are otherwise bargaining in good faith in relation to important employment issues and demonstrated a willingness to reach a collective agreement. Importantly, the negotiating parties are not compelled to reach an agreement; they can agree to "walk away" and allow the existing industrial regulatory arrangements to continue, or they can *jointly* request Fair Work Australia to help them reach

agreement (or *jointly* request Fair Work Australia determine specific matters in dispute). This is unlikely to imbed the concept of gender pay equity into the collective bargaining process.

Indeed, Deputy Prime Minister Gillard informed the National Press Club on 17 September 2008:

> "Compulsory arbitration will not be a feature of good faith bargaining. Arbitration will be limited to exceptional circumstances only – where industrial action is causing a threat to safety or health, a threat to the economy, or significant harm to the parties."

9. 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 Forward with Fairness legislation will retard the application of gender pay equity.

In addition, while the Government plans to allow a union or bargaining agent representing low paid workers in award dependent industries or industry sectors that have historically not had access to collective bargaining (and over-award agreements) because of a disproportionate rate of small, stand-alone workplaces, and independent firms to apply to Fair Work Australia for entry into a new "low-paid stream" to bargain with a specified list of employers and make multi-employer collective agreements, they will not be able to take protected industrial action to advance their interests or claims. Instead, they will be able to utilise Fair Work Australia's good faith bargaining rules and powers of mediation and conciliation, but Fair Work Australia will only be able to make a binding determination if all the parties agree. Again, this is unlikely to advance the application of gender pay equity because employers are unlikely agree.

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

10. Any method for determining rates of pay 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.

11. The Hight Court of Australia's innovative interpretation of the corporations power (section 51(20) of the Constitution) in the majority judgement of the "WorkChoices Case" (*New South Wales & Ors v Commonwealth* (2006) 229 CLR 1; 231 ALR 1, [2006] HCA 52; 156 IR 1) now means federal equal remuneration legislative provisions no longer need to mirror the language of international treaties for their validity, and therefore can more precisely express their intent. Our suggested legislative provisions, below, seeks to advance the policy commitment the Government made to the Australian people at the 2007 election, and more effectively advance Australia's international treaty obligations:

> **Orders requiring equal remuneration**
> (1) Fair Work Australia may make any order it considers appropriate to ensure employees covered by the order receive equal remuneration for work of equal value.
> (2) An order may provide for an increase in remuneration rates, including minimum rates.
> (3) When a modern award is reviewed every four (4) years by Fair Work Australia to ensure it remains relevant, the review shall include the need or otherwise to make an equal remuneration for work of equal value order.
> (4) Fair Work Australia may make an order to cover the workplaces controlled by a party who failed to meet their good faith bargaining obligation with respect equal remuneration for work of equal value on application by a union or bargaining agent who was negotiating with the employer for a proposed agreement.
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> **When Fair Work Australia must and may only make order**
> Fair Work Australia must, and may only, make an order if it is satisfied the employees to be covered by the order do not receive equal remuneration for work of equal value.

**Immediate or progressive introduction of equal remuneration**
The order may introduce equal remuneration for work of equal value—
(a) immediately; or (b) progressively, in specified stages, but the time period must not be longer than three (3) years.

**Employer not to reduce remuneration**
(1) An employer must not reduce an employee's remuneration because an application has been made to Fair Work Australia for an equal remuneration for work of equal value order.
(2) If an employer purports to do so, the reduction is of no effect.

**Negotiations must be in good faith**
When negotiating the terms of a proposed agreement, the proposed parties to the agreement must negotiate in good faith.
*Examples of good faith in negotiating—*
• agreeing to meet at reasonable times proposed by another party
• attending meetings that the party had agreed to attend
• complying with negotiation procedures agreed to by the parties
• not capriciously adding or withdrawing items for negotiation
• disclosing relevant information as appropriate for the negotiations
• negotiating with all of the parties
• supplying reasons why the concept of equal remuneration for work of equal value already exists in the workplaces to be covered by the proposed agreement.