# Submission

to

Senate Education, Employment and Workplace Relations Committee

# Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

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**Submission to the Senate Education, Employment and Workplace Relations Committee, Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, by Dr Michael Lyons and Ms Meg Smith, School of Management, University of Western Sydney, February 2008.**

## 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 Transition Bill, as it addresses some of the worst excesses of the Coalition's Work Choices amendments of 2005. We further recognise that the Transition Bill is consistent with the Government's 2007 election commitments (ALP 2007 a; 2007b), unlike the Coalition's amendments of 2005 (Explanatory Memorandum 2005, p. 7).

3. However, we are concerned that the Transition Bill will not correct some potentially harmful aspects of the Work Choices Act, and thus still makes it possible for some workers to be denied conditions of employment under the "Award Modernisation" process.

## Gender pay equity under the Work Choices amendments

4. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) has an objective (section 3) of "assisting in giving effect to Australia's international obligations in relation to labour standards". One of the international labour standards specifically referred to in the 2005 Act is the International Labour Organization's 1951 Equal Remuneration Convention. Despite the reduction of powers, functions and responsibilities of the Australian Industrial Relations Commission (AIRC) under the Work Choices regime, the 2005 Act directs the AIRC to take into account the need to apply the principle of equal pay for work of equal value in the performance of its functions (section 104). The 2005 Act also directs the Australian Fair Pay Commission (AFPC) to apply the principle that men and women should receive equal remuneration for work of equal value in the performance of its functions (section 222). Further, under the current federal industrial relations system an individual is able to make a complaint to the federal anti-discrimination tribunal (the Human Rights and Equal Opportunity Commission) if her or he believe they have been discriminated against because of the pay of gender based unequal remuneration, and seek an order from the AIRC for equal remuneration to be paid in the future. Consequently, it could be argued that the existing federal system pays significant attention to the issue of gender pay equity. However, section 16 of the amended *Workplace Relations Act* excludes the operation of "a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value".

5. The Human Rights and Equal Opportunity Commission (HREOC) has expressed disquiet about the ability of the Work Choices amendments to deal with the issue of gender pay equity and noted in the process “State industrial tribunals have had most success in assessing the historical undervaluation of women’s skills and determining the work value of occupations traditionally carried out by women employees” (HREOC, 2006, p. 28).

6. While the 2005 Act retained the equal remuneration provisions of the 1996 Act, they only provide a nominal right to equal pay for work of equal value because they are based on a test of sex discrimination: applicants need to demonstrate remuneration had been established with discrimination based on sex. This test fails to address gender pay inequity, which is generally systemic and not necessarily a result of overt discrimination. Thus the provisions cannot adequately address the issue of the lower earnings returns that women receive from their qualifications and experience (in comparison to men), and cannot adequately address the issue of undervaluation of the work traditionally performed by women because of gender based stereotypical assumptions regarding the concept of “skill”

7. The test of discrimination as the threshold for an equal remuneration claim, the test that is presently required by provisions in the *Workplace Relations Act*, has shown to be problematic in the only case to proceed to arbitration under the federal equal remuneration provisions (AIRC 1998).

**Gender pay equity under the Transition Bill**

8. We note with concern that the Transition Bill does not correct the gender pay equity limitations of the 2005 amendments, or the 1996 Act, as the Bill appears to be silent on the issue of gender pay equity.

9. While we recognise the Government policy of strengthening rights concerning equal remuneration for work of equal value (ALP 2007a, p. 12), we submit that the deficiencies of the existing federal statute should be corrected in the Transition Bill in the light of the Hight Court of Australia’s innovative interpretation of the corporations power (section 51(20) of the Constitution) in the majority judgement on the “Work Choices Case” (*New South Wales & Ors v Commonwealth* (2006) 231 ALR 1, [2006] HCA 52;156 Industrial Reports 1).

10. In the absence of changes to the existing federal equal remuneration provisions, section 16 of the *Workplace Relations Act* and the effective prohibition on pattern bargaining by trade unions especially mean it is difficult – if not impossible – for unions representing workers employed in female dominated occupations to pursue the issue of gender pay equity. It now requires negotiating more than one collective agreement with common wages extending beyond a single business, that is pattern bargaining, which is proscribed by section 421 of the 2005 amendments. It is our understanding the Transition Bill does not correct this anomaly.

**Awards**

11. While we concede the Transition Bill's "award modernisation" clauses are an improvement on the Coalition's "award rationalisation" provisions of the Work Choices amendments, we submit there is still the prospect that certain workers could be disadvantaged by this process.

12. The submission to the Award Review Taskforce by the Australian Childcare Centres Association (ACCA), a federally registered employer association, proposed that the rationalised children's services awards should be based on "appropriately averaged" award wage rates because "more modest wages" than the current award (NAPSA) rate could be "offset by greater access to penalty and overtime rates" (ACCA 2006a, p. 5). This view was also expressed by the Child Care National Association in their 2007 submission to the AFPC (CCNA 2007). In other words, long day care employees in New South Wales (NSW) should have their wages reduced to a national average and thus be deprived of the benefits of the Industrial Relations Commission (IRC) of NSW's 2006 equal remuneration pay equity decision (IRC of NSW 2006).

13. We are concerned that the views of the ACCA and the CCNA could prevail under the Bill's "award modernisation" process, and thus children's services employees in NSW and Queensland would be penalised for having achieved a "gender neutral work value assessment" with State tribunal equal remuneration decisions of 2006 (IRC of NSW 2006; QIRC 2006a, 2006b). A prospect that even the AFPC has acknowledged (AFPC 2007, p. 15).

14. It is our understanding that the Transition Bill retains the shortcomings of "award rationalisation". The example of State (NAPSA) children's services awards relevant for long day care employees highlights this issue.

15. The proposed subsection 576S(1) seeks to eliminate discriminatory aspects of modernised awards, including sex, yet the proposed section 576T has the possibility of defeating this goal.

16. While the proposed subsection 576T(1) would allow State-based differences to be contained in modernised awards for a transition period of up to five (5) years, the proposed subsection 576T(2) ends the operation of any State-based differences after the transition period.

17. We submit the proposed section 576T contains the prospect of the submissions of the ACCA and the CCNA becoming a reality under a national children's services award (and possibly many other national awards in other industries or industry sectors), disadvantaging employees in NSW and Queensland merely because they had the benefit of State tribunal equal remuneration decisions.

**Conclusion**

18. The recent developments at the State-level in Australia are positive steps on the path to achieving gender pay equity. The commissioned case studies and inquiries demonstrate that State Labor governments have placed the issue of

the gender earnings gap on the policy agenda. The adoption by State industrial tribunals of “equal remuneration principles” is a major achievement in the process to eliminate stereotypical gender based attitudes embedded in minimum pay rates for female dominated industries and occupations regulated by industrial awards.

19. Application of equal remuneration wage-fixing principles by the industrial tribunals of NSW and Queensland has resulted in noteworthy, and in some cases significant, wage increases for the employees working in the respective female dominated workforce. The “crown librarians” decision resulted in pay increases of up to 37 per cent and the “child care” decision of the NSW tribunal resulted in wage increases of over 50 per cent for some workers. While the pay equity decisions of the Queensland tribunal have been less generous than the NSW tribunal, both the Queensland Industrial Relations Commission (QIRC) and the IRC of NSW have acknowledged that workers employed in the relevant female dominated industries and occupations – librarians, dental assistants and children’s services – have been disadvantaged because of an undervaluation of their work due to gender based factors. This outcome alone is a major achievement for the attainment of gender pay equity.

20. While the federal industrial relations legislation has had since 1994 an “equal remuneration” provision, no successful application has resulted under this provision due to the requirement to demonstrate discrimination in the wage rates of women workers. The current federal legislation excludes State industrial tribunals from considering pay equity claims for employees engaged by corporations by “covering the field” for constitutional purposes within the Australian federation’s law making authority.

21. We note with concern the Transition Bill does not appear to correct this situation.

22. The “award modernisation” process of the Transition Bill seems to retain the shortcomings of the Coalition’s “award rationalisation” process. There is still the prospect of prominent children’s services employers (and indeed employers in other industries) reviving the same arguments that were rejected by the IRC of NSW and the QIRC to reduce or limit the full benefit of their work value and/or equal remuneration decisions. The proposed national children’s services industry sector award is not to contain State-based differences after the transition period. The possibility that the national award would be based on “average” NAPSA wage rates across Australia is not corrected by the Bill, thus retaining the possibility of cutting the real value and/or dollar amount of the award pay for many children’s services employees (NSW in particular).

23. While we concede the deficiencies in the Bill will most likely be addressed when the Government gives legislative effect to its “Forward with Fairness” policy in the future, we submit the inadequacies of the existing federal industrial relations statute highlighted in this submission should be remedied sooner rather then later.

24. Notwithstanding the issues raised in this submission, we welcome the proposed changes the Transition Bill makes the federal industrial relations system, and commend the Bill to the Senate.

## References cited:


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