SUBMISSION

SENATE STANDING COMMITTEE ON EDUCAITON EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry into Fair Work Bill 2008

NATIONAL PAY EQUITY COALITION

and

WOMEN'S ELECTORAL LOBBY AUSTRALIA Inc

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The National Pay Equity Coalition (NPEC) and the Women's Electoral Lobby Australia(WELA) take this opportunity to thank the members of the Senate for holding this Inquiry into the Fair Work Bill. We are however, disappointed about the short timeframe allowed for the making of Submissions for such comprehensive changes to the Australian industrial relations system.

NPEC was formed in 1988 to address the issue of unequal earnings for men and women in Australia. Its activities include publicity education, lobbying of governments both State and Federal and representation in industrial tribunals and government inquiries on all issues relating to women's earnings and workforce participation. WEL is a feminist non-party political lobby group founded in 1972. WEL has long contributed to policy development and debate and continues to act as a research/advocacy groups on issues that disadvantage women.

Over almost four decades our organisation have played major roles in earlier Equal Pay Cases and have, for the last twenty years, focused most of our efforts on the undervaluation of women's work and the increasing decentralisation of wages bargaining in Australia. Much of our work has been in the formal industrial relations system.

From our early days we have appeared in the Australian Industrial Relations Commission to press for the adoption of new wage-fixing principles which would allow for a fair valuation of women's work. We have opposed the move to enterprise bargaining as the main path for pay increases since the early 1990s. We point out that de-centralised bargaining has a detrimental effect on pay equity outcomes. International and Australian research indicates that de-centralised bargaining has failed to improve gender wage relativities and in fact produces uneven results. (Whitehouse, Gregory, Hammond and Harbridge, Hall and Fruin). We point out that the major improvements in resolving pay equity have come through decisions from the State and Federal industrial tribunals. The ability to make decisions that effect whole classes of workers has a significant impact on spreading pay equity. Our involvement in the industrial relations system compels us to comment on the comprehensive change set out in the new Fair Work Australia Bill.

We opposed the move to Australian Workplace Agreements in the Workplace Relations Act 1996. We appeared in the NSW Pay Equity Inquiry in 1998 and the NSW Equal Remuneration Principle proceedings in 2000. We have made submissions to all parliamentary inquiries that effect women's work, paid maternity leave, and the Australian Fair Pay Commission. We have appeared in the current Federal Award Modernisation proceedings and have made a substantial submission to this process.

INTRODUCTION:

THE INDUSTRIAL RELATIONS SYSTEM -Key Developments for Women

There have been several key stages in industrial relations developments in Australia that have effected women's work and gender pay inequality.

These stages can be summarised as follows:

1) 1969 and 1972 Equal Pay Principles adopted by the (then) Australian Conciliation and Arbitration Commission, tested by the 1986 comparable worth case;
2) The extension of the minimum wage to women
3) Award restructuring and the minimum rates adjustment process;
4) 1993 Federal legislative amendments, tested by way of the 1995-1998 HPM proceedings;
5) New equal remuneration principles at State level (2000, 2002) following State based pay equity inquiries; and
6) WorkChoices.

1969 and 1972 Equal Pay Principles

The first Federal equal pay decision in 1969 prescribed equal pay for equal work. Women could claim equal pay if they were performing work 'of the same or a like nature and of equal value'. The decision had little impact, since only a small proportion of women workers were doing the same work as men, and the decision also excluded work largely performed by women..

In 1972 the Federal Commission adopted a new and more far-reaching principle of 'equal pay for work of equal value'. This accelerated the dismantling of 'male' and 'female' classifications in awards. However, in some cases former female classifications were simply incorporated within the lower levels of the existing classification structures. There were limited detailed investigations of the actual value of work done by women, the assumption being that 'women's work' was of a lesser value.

In 1974 the Commission decided to extend coverage of the minimum wage to women. This decision had a significant role in reducing Australian gender wage differentials and showed clearly the scope for cnetralised wage fixation to reduce wage inequality based on sex.

In 1986 there was an attempt by the union movement to have the concept of comparable worth adopted by the Commission to advance the application of the 1972 principle. Essentially this concept provided for equal pay for work of equal value to be achieved by comparing the value of work performed by women employees with the value of work performed by male employees engaged in different work for the same employer.

This case was unsuccessful, with the Commission finding that the concept of comparable worth was incompatible with its historical reliance on work value as a means of assessing the value of work. The Commission ruled that the 1972 principle was still available for implementation, but at the same time narrowed the opportunities through which the principle might be utilised.

Award Restructuring and the Minimum Rates Adjustment Process

The processes of award restructuring and minimum rates adjustment were commenced in the industrial relations system in the late 1980s. These processes had the capacity to improve the relative wages of women workers because they involved the creation of new relativities and the alignment of rates across awards for male and female dominated occupations and industries. They also promised the adoption of skill-based classification structures for all occupations, which would give many women access to a career path for the first time.

While gains were made in some areas, in others the establishment of award relativities was still based on assumptions about the lesser value of women's work and the centrality of male dominated classifications to benchmarks in Australian wage fixing. Classification structures providing career paths were not guaranteed through this process.

1993 Federal Legislated Amendments

1993 amendments to the Industrial Relations Act spelt out the entitlement of men and women to equal remuneration, and gave the AIRC the capacity to issue equal remuneration orders. Based on ILO Convention 100, the provisions required the Commission to establish rates of remuneration 'without discrimination based on sex".

The HPM case (1995-1998) is the only application under these provisions that proceeded to final arbitration. Rather than widening the scope for equal remuneration claims, the reference to discrimination, and in turn the Commission's interpretation that applicants must demonstrate that disparities in earnings have a discriminatory cause, tightened the grounds on which equal remuneration claims could be heard in the Federal system.

New Equal Remuneration Principles at State Level

As a response to the plataeuing of gender pay equity ratios and uncertainty regarding the capacity of the Federal system to address pay equity, a number of States initiated pay equity inquiries in the late 90s and early 2000s.

In NSW, Queensland and Tasmania these inquiries resulted in new Equal Remuneration Principles being adopted by their Industrial Relations Commissions (NSW 2000, Tasmania 2000, Queensland 2002). In shifting the focus of industrial tribunals from discrimination and comparable worth to the historical undervaluation of women's work, these developments represented a major breakthrough for pay equity. The concept of undervaluation overcame the assumption that earlier rates had been set correctly, but did not require demonstration that the rates had been set incorrectly because of sex discrimination. The test of undervaluation did not revert to a male standard in order that applications be successfully prosecuted. Applicants could use a range of comparisons, including other areas of feminised work. The Queensland Principle, was capable of application to a wide range of industrial instruments.

The Principles in New South Wales and Queensland jurisdictions recognised the need to ground their application in industry awards and minimum wage determination. This approach recognised the strong reliance of women on minimum rates of pay in awards and their disproportionately low engagement in enterprise bargaining.

Following the adoption of the Equal Remuneration Principles, unions in NSW and Queensland made a number of successful equal remuneration applications for female-dominated awards. In NSW unions were successful in winning significant pay increases for State government employed librarians, library officers and archivists, and for child care workers. In Queensland, unions won significant pay increases for dental therapists and child care workers.

WorkChoices

The advent of WorkChoices in 2005 spelt an end to these promising developments in pay equity in the industrial relations system. The *Workplace Relations Act* (as amended) retained the 1993 Federal legislative amendments for equal remuneration for work of equal value but with an explicit reference to a 'comparator group of employees' and increased complexities in access to this remedy.

The WorkChoices amendments specifically excluded the operation of the new State Equal Remuneration Principles. Furthermore, the erosion of the award system heralded by WorkChoices threatened a disproportionate effect on women's pay, given their reliance on minimum rates awards.

Fair Work Australia Bill-

The Australian Labor Party was elected in November 2007 on a promise to restore fairness and replace workplace rights removed under the previous Government. The new Government has made commitments to provide a Fair system of work for Australian workers. The new Fair Work Australia Bill constructs an industrial system based upon National Employment Standards, Modern Awards and Collective Bargaining. While there has been little time to fully consider and consult since the tabling of the Fair Work Australia Bill and this Inquiry we wish to comment and give our recommendations to many, but not all aspects of the Bill. We feel that the timeframe for comprehensive review has been too short and somewhat impossible for voluntary community organisations to fully participate in the process.

A New Modern Award System

Importance of the Award system to Women:

We acknowledge the important role in regulating awards that Federal and State Tribunals have historically played in securing greater equality for women workers. Historically awards set by the various tribunals have played a significant role in the setting of pay and conditions of work for women. Women have been more reliant on award wage determination than men.

It is clear that moves to a more de-centralised bargaining system has failed to make advances in closing the gender pay gap or delivering advances in women's workforce equality. Advances delivered to the majority of women workers have been the result of institutional advances and their application in the industrial arena. While our Organisations appreciate the need for flexible bargaining arrangements at a workplace level we see it as a necessity that it is underpinned by a strong and comprehensive modern award system that provides appropriate entitlements and wages to workers excluded from of the bargaining system. Studies indicate that the undermining of award conditions by Australian Workplace Agreements and the deleterious impact on women and low paid workers reinforces the need for an inclusive award system that cannot be undermined. (see Peetz, NFAW, WEL & HREOC, Victorian, Queensland Government Reports, Pocock, Preston)

Women are more likely to be concentrated in jobs covered by minimum rates awards with less access to collective enterprise bargaining agreements. For example, in the female-dominated accommodation, cafes and restaurants industry, 57% of employees are covered by award only, while 8.8% are covered by a collective agreement. By contrast, in the male-

dominated electricity, gas and water supply industry, 0.9% of employees are covered by award only, and 84.4% are covered by collective agreements. In the female dominated retail industry (which has 1.3 million employees), 28.7% of employees are covered by award only, while 34.8% are covered by collective agreements. In the female dominated health and community services industry (which has 992,000 employees), 25.4% of employees are still covered by award only (from data compiled by Bray and Waring, 2008). Reference: M. Bray and P. Waring. *The Continuing Importance of Industry Studies in Industrial Relations*, University of Newcastle 2008.

It would be misguided to assume that the proposed provisions will assist award dependent women employees simply on the premise that unions will be better placed to increase the scope of collective agreements. The reality of these industries is that they feature thousands of scattered workplaces with few employees in each, making it difficult for unions to negotiate collective agreements to cover all employees in these industries. These industries have traditionally been covered by common rule awards which have at least provided some universal standards for pay and conditions for these workers. It is essential that proper standards are maintained for the many workers who have traditionally been, and will continue to be, reliant on awards only.

Award Modernisation

As stated above Awards remain a significant instrument in governing the wages and employment conditions of many women workers and despite attempts to downgrade awards they play an important role for both workers and employers.

We acknowledge the priority of modernising awards as a means of securing many entitlements that were lost to workers under Australian Workplace Agreements and the WorkChoices legislation.

An important commitment to the Australian community to restore a fair work system was to ensure a modern and fair system of awards and National Standards.

On 28th March 2008 the Minister for Employment and Workplace Relations signed an award modernization request which provides the Australian Industrial Relations Commission when carrying out the award modernization process to have regard to the following factors:-

Division 2 – Award modernisation process

576B Commission's award modernisation function

> (1) It is a function of the Commission to carry out one or more award modernisation processes.
>
> (2) In performing its functions under this Part, the Commission must have regard to the following factors:

(a) promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;

(b) protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply;

(c) the needs of the low-paid;

(d) the desirability of reducing the number of awards operating in the workplace relations system;

(e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value;

(f) the need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce;

(g) the safety, health and welfare of employees;

(h) relevant rates of pay in Australian Pay and Classification Scales and transitional awards;

(i) minimum wage decisions of the Australian Fair Pay Commission;

(j) the representation rights, under this Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

(a) promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;

(c) the needs of the low-paid;

(e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value;

(f) the need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce;

(h) relevant rates of pay in Australian Pay and Classification Scales and transitional awards

It is of some concern that the current award modernization process is resulting in the removal of many entitlements from awards. At this early stage we have seen outcomes that will reduce rates of pay for some workers and the removal of conditions such as paid maternity leave. We therefore are concerned that the current award modernization process will leave awards as a skeletal set of terms and conditions. Awards must remain relevant and together with National Standards be comparable to entitlements enjoyed by others in the workforce. To relegate many workers, particularly women to a lesser standard is unfair. We would suggest that modern awards should be measured against comparable wages, conditions and entitlements attained in relative and comparable collective agreements.

We welcome the inclusion of the principle of equal remuneration for work of equal or comparable value in the modern awards objective and the minimum wages objective in the Bill (S 134 and S284).

We would also suggest that the Award Modernisation process provides an opportunity for the Commission to give impetus to the above Objectives and to review awards for equal remuneration. Our Organisations made Submissions to the Australian Industrial Relations Commission suggesting that the Aged Care Industry Award Modernisation undertake an equal remuneration review.

However, we note that the Bill falls short of its Objects in that it does not include a requirement to include equal remuneration provisions in modern awards (Chapter 2, Part 2-3, Division 3, *Subdivision C: Terms that must be included in modern awards*)

We recommend that new modern awards should not lead to a downgrading of wages and conditions contained in awards and that they must remain comparable and elative to entitlements enjoyed by the general Australian workforce. Modern awards should be measured against wages and conditions in comparable and relative collective agreements.

We recommend that in the modernisation process a contemporary assessment of work value and classification structures and rates of pay be undertaken in order to satisfy the legislative requirement of addressing the needs of the low paid, providing for the principle of equal remuneration for work of equal value, assisting employees to balance work and family and improving retention and participation in the workforce.

We recommend that to ensure consistency with the principles of the modern award objective and the minimum wages objective, that Subdivision C be amended to include a

requirement that a modern award must include reference to the award providing for equal remuneration for work of equal value (as defined above).

The Bill provides that the FWA may only vary modern award minimum wages if it is satisfied that the variation is justified for work value reasons [S 156(3)].

The Bill defines 'work value reasons' as

reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done [S 156(4)].

We recommend that S 156(4) be amended to include

(d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.

Such a provision would make the conditions for modern award variation consistent with the equal remuneration principles of the modern awards objective and the minimum wages objective.

Award Flexibility Clause

Modern Awards are required to contain Award Flexibility Clause. We are concerned that these Flexibility clause s could undermine awards, could lead to award evasion and exploitation of many women workers. This would be pa rticularly so in workplaces with low levels of union organisation or union membership.. Flexibility clauses are based upon the parties `agreeing' . We would point out that many women lack the job security and employment status negotiate wages and conditions. That flexibility has been very much an employer driven demand providing little `flexibility' for the worker. The idea of `agreeing' is as false a concept as the idea of freely negotiating an individual agreement (AWA)a concept that was rejected by the Australian community. We also fear that as there is no mechanism for the vetting of flexibility clauses, no mechanism for proper advice, consultation or appeal. Flexibility clauses have the propensity to create very unfair work arrangements.

We recommend that Fair Work Australia have jurisdiction to oversee the fairness of Flexibility clauses and provide a process of negotiation and appeal.

Equal Remuneration Orders

We welcome the inclusion of specific provisions in the Bill to allow FWA to make equal remuneration orders (S 302)

However, we are concerned that equal remuneration has not been adequately defined in the Bill. The definition needs to identify what is included in 'remuneration'. Remuneration includes more than just pay; it includes all types of payment in cash or kind made to employees. ILO Equal Remuneration Convention No. 100 contains a specific definition of 'remuneration' for the purposes of defining equal remuneration.

We are also concerned that there is no specific reference in the equal remuneration definition or the equal remuneration provisions of the Bill to the inequity that arises from a historical undervaluation of the skills required in jobs normally occupied by women. Without such a reference, there is a risk that equal remuneration orders will be limited to situations where it can be proven that equal remuneration is not available between the same or comparable jobs. The factor of undervaluation of feminised work per se has been recognised and applied in the NSW and Queensland industrial jurisdictions following pay equity inquiries in both of these States. Any process for determining whether it is appropriate to issue an equal remuneration order must take into account the possibility of previous undervaluation of the skills required for jobs typically carried out by women.

The legislation should specifically state that it provides a right to equal remuneration for work of equal value and that right covers both work that is the same of similar in nature and work that is dissimilar but has equal or comparable in value. There still are problems relating to equal pay for equal work, including differences in starting rates and/or performance pay for women and men, and the legislation clearly needs to cover that as well as equal pay for work of equal value.

The legislation should state how equal remuneration claims can be pursued in each type of employment contract (including collective agreements, award, and over-award payments). There should be a requirement for awards to provide for equal remuneration, as was included in the NSW Industrial Relations Act (s.23), supported by a Practice Direction (No.6) from the Industrial Relations Commission (attached).

We welcome that the Bill removes the requirement to prove discrimination in making equal remuneration claims. We would submit that more successful outcomes may be achieved when the parties are not required to prove an act of discrimination and instead rely on evidence that gender has affected the valuation and remuneration of the work. This enables a fresh investigation of the value of the work by a gender-neutral means to be undertaken. The value of work should be defined consistently with concepts of work value applied by Australian industrial tribunals, and the Equal Pay Principles, specifically including such components as skill, responsibility, and working conditions.

The legislation should be supported by Equal Remuneration Principles along the lines of those developed by the NSW, Tasmanian and Queensland Industrial Relations Commissions. The lack of success in equal remuneration cases in the Federal jurisdiction under the previous legislation demonstrates the need for specification of principles for interpreting and applying the legislative requirements.

We draw the Committees attention to the adoption of specific equal remuneration principles following pay equity inquiries in NSW and Queensland. These principles have facilitated the consideration of equal remuneration claims in the NSW and Queensland industrial tribunals.

We would hope that the FWA in adopting principles for dealing with equal remuneration applications would draw on the considerable recent work that has been done in the State jurisdictions on establishing and applying equal remuneration principles. Copies of the NSW Equal Remuneration Principle (adopted 2000) and the Queensland Equal Remuneration Principle (adopted 2002) are attached.

It is particularly important that cross-enterprise, cross-industry claims/comparators can be pursued. Since many organisations have been structured around one or a few activities and have a single or a few occupations. In many jurisdictions, cases cannot be pursued because of the absence of comparators employed by the same employer and/or in the same enterprise. In Australia, the award system has allowed cross-enterprise, cross-industry and cross-employer claims and this has contributed to Australia's historically good performance on equal remuneration.

There is also a consistent relationship between the level of the minimum wage and the gender wage gap. A strong and enforceable minimum rate is important in lifting women from low wages. We note the decline of the minimum rate as a proportion of earnings and support the setting of minimum rates by an independent body that allows for submissions, hearing of evidence, and open and transparent decision making. We see the return of wage setting to the AIRC as a positive step.

We recommend that the definition of equal remuneration for work of equal or comparable value in S 302 (2) be amended to give a specific definition of 'remuneration', consistent with the definition of remuneration in ILO Equal Remuneration Convention 100.

We recommend that S 302 (2) be amended to include reference to undervaluation per se, by providing, for example, that equal remuneration requires an assessment that the work is appropriately valued. Skills, knowledge and conditions should be valued thoroughly, fairly and without reference to the gender of the worker.

We recommend that the new Act includes provision for FWA to adopt principles for dealing with equal remuneration claims, or alternatively, provision for the President,

under S 582, to give detailed directions on how equal remuneration applications are to be handled by FWA.

We recommend that the four yearly review process should ensure that awards fulfil equal remuneration requirements and also reviews should be able to be undertaken at any time as one of the special grounds on which the Minister can initiate a review.

NATIONAL EMPLOYMENT STANDARDS

The new Fair Work Australia framework provides a more comprehensive set of legislated National Employment Standards than was provided under the WorkChoices regime. This is welcome. We acknowledge the Government's commitment to provide an appropriate safety net of entitlements that enable workers to participate in a fair work relationship which assists them to balance their work, family and social life. We are however concerned about the exercising of rights and entitlements.

We stress also the importance of a compliance and enforcement. We suggest that workers must be aware of rights and entitlements and must be able to effectively and inexpensively be able to exercise these rights. We recommend a clear and accessible process. It is our understanding that Fair Work Australia does not have capacity to arbitrate grievances and disputes in NES and awards and that their powers are limited to making recommendations and conciliating. Any dispute as to entitlements will be performed by the Federal Court or the Federal Magistrates Court. We submit that this process poses difficulties for many workers and is unsuitable for industrial disputes. We suggest that the specialist tribunal, Fair Work Australia provides the best forum and should have power to mediate, conciliate and arbitrate disputes in awards and NES.

Requests for Flexible Working Arrangements:

We are pleased with the Government's objective to assist working families to balance work and family responsibilities.

We feel that it is appropriate to extend the provisions set down in the Family Leave Provisions Test Case decided in the Australian Industrial Relations Commission in 2005 to widen forms of flexible work arrangements and eligibility to all employees with children under school age.

The `right to return to work' provisions

The Bill provides for employees to request a `right to return to work'. An employer must respond within 21 days. An employer can refuse requests on reasonable business grounds. What might be considered reasonable business grounds for refusal is not defined. We suggest that this will bring about confusion and uncertainty. Further there is no appeal

mechanism. This uncertainty and lack of formal grievance procedure leaves the provisions unknowable and unenforceable. We believe that it is unrealistic to expect that many employees, particularly women will be in a position to successfully negotiate on an equal basis access to this implied entitlement. There is no compliance or enforcement mechanism and Fair Work Australia cannot arbitrate on this issue, any dispute over NES can only be referred to the Courts or arbitration by consent. This may render this Standard inoperable and ineffective. It will be very difficult for many women to negotiate this entitlement.

We recommend that as regards to the `right to return to work' that a grievance, appeal and dispute settling process be available to the parties.

We recommend that workers have a proper legal appeal mechanism and that FWA have the power to ultimately hear and arbitrate on disputes in this Standard.

We also recommend that the Right to Return to Work provisions be considered in the light of the Victorian Government's amendments to Equal Opportunity Act 1995 and came into effect in September 2008 that extent the range of what constitiutes discrimination against parents and carer's in employment matters. The amendments also set down provisions that more clearly articulate what is reasonable in considering the accommodation of right to return to work.

Public Holidays:

We note that the NES protects public holiday and a workers choice to work or not work on such days. We are however concerned that it is unclear that penalty rates will apply to wages earned on public holidays.

We argue that working on public holidays carries many disadvantages and that workers ought to be fairly compensated for disturbing social conventions and are enjoyed by the rest of the community.

We recommend that penalty rates be set down in modern awards and be protected in NES.

Notice of Termination and redundancy pay:

We agree that access to Termination and redundancy pay provides a safety net for workers in the loss of their employment. We are somewhat confounded however that these provisions are denied to workers employed in workplace which employ less than 15 workers.

It is difficult to imagine that workers who lose their jobs in small workplaces do not face the same financial difficulties when losing their jobs. We do however note that small business employers may face financial difficulties. We suggest that a table of entitlements for small business employees be developed similar to that contained to many awards. This would

acknowledge problems associated with small business but also give protection to employees. It would also ensure give effective to a safety net which is enjoyed by all workers.

We recommend that rights and entitlements be universally applied.

Collective Bargaining

Fair Work Australia sets out a framework for establishing workplace centered collective bargaining system. It provides a system for agreement making and sets down procedures for good faith bargaining.

Collective bargaining provides a much better outcome for women than individual bargaining and can be an effective pay equity strategy, especially where the bargaining is for a particular occupation (for example: nursing). It can provide an opportunity to negotiate about conducting equal remuneration reviews and implementing pay equity plans. Pay equity outcomes are generally higher in more collective employment relations environments. Collective bargaining is unlikely to be an effective strategy for occupations with low unionisation and/or little industrial strength, and/or where unions have few women and/or are not supportive of pay equity for women.

We therefore acknowledge that the Bill makes provision for facilitated bargaining for the low paid. This acknowledges that the employment relationship is one of unequal bargaining parties. FWA will have the ability to call compulsory conferences to bring the parties together and to take a more hands-on role. FWA will also be able to require a third party to attend a conference. FWA will be able to facilitate bargaining in this stream by the use of compulsory conferences and good faith bargaining orders which would not otherwise be available in multi-employer bargaining. There will also be capacity for FWA to make workplace determinations on the application of one party. Protected industrial action is not available. We would submit that protected industrial action must be extended to cover multi-employer bargaining.

We would submit that the provisions relating to bargaining in the low paid sector should encourage the spread of a system based on collective bargaining in the low paid sector .However we would submit that these provisions allowing a role of compulsory assistance from FWA and the making of orders should to extended to the whole of the bargaining regime – to all parties, not just the low paid sector, seeking to make collective agreements. As FWA Bill stands at the moment the failure to seek a right to arbitration will not encourage the growth of collective bargaining.

Also, the level at which wages are determined has been important in determining the success and the outcome of bargaining systems. We would submit that decentralised enterprise bargaining which restricts the ability of decisions to flow through to occupational groups in other organisations or covered by different awards or agreements will restrain the spread of equal remuneration. In fact it will be detrimental to gender equality workforce outcomes for women. Research indicates that Australia's system that enables centralised decisions to effect whole classes of workers and compulsory conciliation and arbitration in the face of unresolvable disputes has positive outcomes for weaker groups in the bargaining process (Whitehouse, Hammond and Harbridge, Gregory).

The International Labour Organisation Convention recommendations 86, 98 and 163 set out rights and obligations for collective bargaining. Recommendation 163 states free choice of bargaining at `any level whatsoever'. Workers must have the right to bargain agreements at national, industry, occupational or workplace levels. We would submit that if bargaining is to provide a method of achieving wage justice for women than it must be able to be conducted at a national, industry, occupation and workplace level and should be able to flow across agreements and awards. (An example would be an occupation such as Librarians who work in varying industries and workplaces)

We recommend that if collective bargaining is to be successful in addressing gender inequality and creating a fair system of work for women then the rules governing bargaining in the industrial system must include rights to call parties to negotiate, conciliate and, in the event of failure to agree, for Fair Work Australia to arbitrate on agreements and make awards on an occupational, industry and workplace level. Provisions relating lawful protected industrial action should be extended to bargaining in the low paid sector and to multi-employer bargaining generally.

RIGHT OF ENTRY

The Howard Government was particularly hostile to trade unions and to workers right to organise and represent workers. Trade unions had always played an important role in the regulation of workplaces and this was particularly important in matters of health and safety and exposing of exploitative labour practices in such areas as outworking and unregulated workplaces. The Howard Government placed restrictions on the rights of unions to enter workplaces and therefore lessened the likelihood that unfair labour practices could be exposed and ended. We draw the Committee's attention to the concerns of Asian Women at Work. We are concerned that restrictions on entry to workplaces where unions have no members will allow exploitative work practices to continue. Problems associated with the failure to identify and eradicate breaches was also exacerbated by a poorly resourced

enforcement agency. The role of trade unions in proper and fair workplace standards is historical and important. We also believe that the restrictions on right of entry violation our obligations for freedom of association and rights to organise under the International Labour Organisation.

We recommend that restrictions on union right of entry to workplaces where there are no members be removed and that unions be able to freely perform inspection, advice and enforcement function.

UNFAIR DISMISSAL

The reinstatement of a fair and just unfair dismissal regime is particularly important to women workers. The WorkChoices legislation removed the rights to protection from arbitrary and unfair dismissal from many women workers. Women are particularly exposed to unfair dismissal and termination as many work in smaller workplaces, they are often in the low wage sector and find recourse to legal and assistance legal processes too expensive. They are often subject to sexual harassment and discrimination on pregnancy grounds and family responsibilities. Many women work on casual contracts in the retail and services sectors.

We note that the new Fair Work Australia Bill excludes workers in small workplaces from the same rights extended to the general Australian workforce in that workers in small businesses have a longer qualifying period applied before they gain this right.. This is very disappointing and we would argue is discriminatory. Rights should not be determined by the size of the workplace where a worker works.

We would also argue that the seven days for lodging of an application is too short and that the qualifying period of six months probation is too long. We also find that the exemption from giving notice during qualifying periods of employment is far from fair and that the right to be given appropriate notice must be reinstated.

We understand that the Bill allows that in Transfer of business a new employer can require a transferring employee to re-serve qualifying period before gaining unfair dismissal rights. This is extremely unfair and particularly damaging to workers who have been long term employees. This provision must be removed.

We would recommend that rights and entitlements be universally applied irrespective of workplace size. Provisions requiring employees to re-qualify for unfair dismissals rights after a Transfer of Business should be removed.

ROLE OF THE FAIR WORK AUSTRALIA COMMISSION

Our Organisations are concerned that Fair Work Australia departs from a cornerstone of the Australian industrial relations tradition of access to compulsory conciliation and arbitration by an independent industrial tribunal. Access to arbitration in a specialised tribunal has always been considered a fundamental right underlying the notion of fairness in work relationship. This right has been particularly important for women in the fight for equal pay. The historic decisions made by industrial tribunals allowed for the more effective closing of the gender wage gap and the achievement of entitlements to encourage women's workforce participation. In all cases taken to the Tribunals and Commission employer organisations objected. **Put simply, if access to arbitration was to be by `consent' than these advances would not have occurred. Arbitration by consent offers nothing to Australian women workers!**

The Bill favours the use of a Court process rather than Fair Work Australia. Dispute settlement in matters of NES, Awards and agreements are to be resolved in the Federal Magistrates Court unless arbitration is at the consent of the parties. This would be a difficult process for many workers, particularly women. The Courts do not provide the specialist knowledge required to solve industrial issues.

We recommend that the Committee uphold the long held principles of fairness and reinstate the power to compel compulsory conciliation and arbitration as a final step to settle disputes to the Fair Work Australia Commission.

We recommend the appointment of a specialist Commissioner for Equal Remuneration to deal with applications for equal remuneration orders under S 302, and that the Equal Remuneration Commissioner be a member of any Minimum Wage Panel appointed by the President.

We also recommend that when appointment s to the Fair Work Australia Commission are made that consideration be made on the gender composition of these appointments. It has been a sorry experience that in the previous ten years there has been a failure to appoint women and compose a Commission that is representative of the general workforce.

Conclusion

The new Fair Work Australia Bill is an attempt to rebuild a fair system of work. It provides welcome improvements in the rights and entitlements of workers. It does not however completely remove the most harmful aspects of the WorkChoices regime. To restore fairness and balance to the Australian industrial system their needs to be a reinstatement of the powers of the independent umpire to conciliate and arbitrate to make orders and settle disputes. The work relationship is one that is based upon the relative industrial power of the parties, we therefore recommend that the parties have the right to compel parties to bargain and if necessary accept the arbitrated decision of the independent umpire.

The Australian industrial system, while not perfect, has provided a better outcome for women through the compulsory tribunals system than many other industrial systems. It has been through Decisions made in the State and Federal industrial tribunals that women's organisations and their trade unions have made advances in equal pay and women's workforce entitlements have been achieved.

A hallmark of `fairness' in the new modern award system will be to provide equal remuneration for work of equal value and awards and national standards that contain similar wages, rights and entitlements to those enjoyed by the general workforce. They must not create a levelling down of workforce entitlements and become bare minimums. This would exacerbate gender inequality. An inferior standard would be unfair.

We also suggest that when considering Fair Work Australia and women's inclusion and participation in Australia's economic and social wellbeing that they consider the current proposals for paid parental leave and the House of Representatives Inquiry into Pay Equity.

We also draw the Committees attention to the Submission to the Inquiry by Dr. Lyons and Dr. Smith of The School of Management, University of Western Sydney

Appendix One

New South Wales Equal Remuneration Principle (C2000-52) provides a useful framework for assessing whether an award provides equal remuneration for men and women workers for work of comparable value. The Principle is set out below.

Equal Remuneration and Other Conditions

(a) Claims may be made in accordance with the requirements of this principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis.

(b) The assessment of the work, skill and responsibility required under this principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.

(c) Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

(d) The application of any formula, which is inconsistent with a proper consideration of the value of the work performed, is inappropriate to the implementation of this principle.

(e) The assessment of wage rates and other conditions of employment under this principle is to have regard to the history of the award concerned.

(f) Any change in wage relativities which may result from any adjustments under this principle, not only within the award in question but also against external classifications to which the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.

(g) In applying this principle, the Commission will ensure that any alteration to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.

(h) Where the requirements of this principle have been satisfied, an assessment shall be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such assessments will reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

(i) Any changes made to the award as the result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' over-award payments.

(j) Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this principle, except to the extent of any undervaluation established.

(k) Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.

(l) The expression 'the conditions under which the work is performed' has the same meaning as in Principle 6, Work Value Change.

(m) The Commission will guard against contrived classification and over classification of jobs. It will also consider:

(i) the state of the economy of New South Wales and the likely effect of its decision on the economy;

(ii) the likely effect of its decision on the industry and/or the employers affected by the decision; and

(n) Claims under this principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.

(o) Equal remuneration shall not be achieved by reducing any current wage rates or other conditions of employment.

Appendix Two

The President of the Industrial Relations Commission also issued a Practice Direction as to how the Commission would satisfy its obligation under s23 of the Industrial Relations Act that an award the Commission is asked to make meets the equal remuneration requirement.(F. L Wright, *J. President* 14 July 2000)

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

PRACTICE DIRECTION No 6

Pursuant to Rule 89 of the Industrial Relations Commission Rules 1996

Applications for Consent Awards having regard to section 23 of the *Industrial Relations Act 1996*

1 The purpose of this Practice Direction is to provide an appropriate procedure for the making of consent awards having regard to:

(a) the requirements of section 23 of the *Industrial Relations Act* 1996, and

(b) the decision of the Full Bench of the Industrial Relations Commission of 30 June 2000 in *Re Equal Remuneration Principle* [2000] NSWIRComm 113.

2. This Practice Direction will become effective 14 days after it is published in the New South Wales Industrial Gazette.

3. In the Full Bench decision in *Re: Equal Remuneration Principle,* the Commission said at 155:

"Operation of s23 of the Act

Finally, and having in mind the cases advanced by the parties as to the proper construction of the Act which we have dealt with, we announce that a Practice Direction *will* in due course, issue to require parties seeking a consent award to file with the application an affidavit stating the basis upon which it is contended that the proposed award provides for equal remuneration and other conditions of employment for men and women doing work of

equal or comparable value. This material will form tile evidentiary basis upon which the Commission will in future base its consideration of the requirements of s23 of the Act."

4. When application is made for a consent award, the parties shall file an affidavit setting out the basis upon which it is contended that the proposed award provides for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

5. The affidavit referred to in paragraph 4 of this Practice Direction will usually form the evidentiary basis upon which the Commission will consider the requirements of s23 of the

Industrial Relations Act 1996.

6. In the absence of agreement between the parties, the obligation to file the affidavit referred to in paragraph 4 of this Practice Direction will be tile responsibility of the applicant.

7. The affidavit is to be filed either with the application for the consent award or within seven (7) days of the date on which the application for the consent award is filed.

Appendix Three

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – *s. 288 – application for statement of policy*

The Queensland Council of Unions and Others AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B450 of 2002)

EQUAL REMUNERATION PRINCIPLE

VICE PRESIDENT LINNANE

COMMISSIONER SWAN

COMMISSIONER BROWN 29 April 2002

STATEMENT OF POLICY

This matter coming on for hearing before the Full Bench of the Commission on 22 March, 16 April and 24 April 2002, the Commission declares by consent as follows:–

EQUAL REMUNERATION PRINCIPLE

1. This principle applies when the Commission:

(a) makes, amends or reviews awards;

(b) makes orders under Chapter 2 Part 5 of the *Industrial Relations Act 1999*;

(c) arbitrates industrial disputes about equal remuneration; or

(d) values or assesses the work of employees in “female” industries, occupations or callings.

2. 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. The expression “conditions under which work is performed” has the same meaning as in Principle 7 “Work Value Changes” in the Statement of Policy regarding Making and Amending Awards.

3. The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.

4. The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.

5. Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

6. In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

(a) whether there has been some characterisation or labelling of the work as “female”;

(b) whether there has been some underrating or undervaluation of the skills of female employees*;*

(c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;

(d) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or

informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or

(e) Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

7. Gender discrimination is not required to be shown to establish undervaluation of work.

8. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

9. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

10. Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

11. There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.

12. The Commission will guard against contrived classifications and over classification of jobs.

13. The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments.

14. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.

15. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.

16. Claims brought under this principle will be considered on a case by case basis.

17. This Statement of Policy will operate from 1 May 2002.

Dated 29 April 2002.

D.M. LINNANE, Vice President.

D.A. SWAN, Commissioner.

D.K. BROWN, Commissioner.

Appearances:–

Ms S. Herbert for the Queensland Council of Unions.

Ms Y. D'Ath for The Australian Workers' Union of Employees, Queensland.

Ms V. Semple for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Ms F. Bucknall for the Department of Industrial Relations.

Mr M. Smith and Mr P. Ryan for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Ms S. Davis and J. McDonald for the Australian Industry Group, Industrial Organisation of Employers (Queensland).

Ms L. Vanderstoep for the Retailers' Association of Queensland Limited, Union of Employers.

Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.

Mr R. Beer for the Local Government Association of Queensland (Incorporated).

Mr C. Lentini for the Queensland Hotels Association, Union of Employers.

Ms V. Lincoln for the Queensland Country Press Association – Union of Employers.

Mr G. Muir and Mr M. Patti of Employer Services Pty Ltd for the Private Hospitals Association of Queensland Incorporated, the Royal Queensland Bowls Association, the

Australian Dental Association (Queensland Branch) Union of Employers, the Child Care Industry Association of Queensland Incorporated and the Queensland Master Hairdressers' Industrial Union of Employers.

Released: 30 April 2002