

**Proposed Amendments to the *Workplace Relations Act 1996* : Issues for Discussion at meeting of women's organisations with Mr Peter Reith, Minister for Employment, Workplace Relations and Small Business
Sydney, Wednesday, August 18, 1999**

Introduction

Women's organisations welcome the opportunity to be consulted on the proposed amendments to the Government's *Workplace Relations Act 1996*. The Government consulted our groups in 1996 on the Workplace Relations Bill, and some of the concerns we raised at that time were addressed in amendments to the Bill.

We have followed with interest the operation of the *Workplace Relations Act* over the last two and a half years, and believe we can make some constructive comments on the proposed amendments, and on ways of strengthening the *Act* in relation to women's needs. We look forward to having our concerns addressed on this occasion.

There are many areas of interest to us in the proposed amendments. For the purposes of this paper, however, we will confine ourselves to the following areas:

- a) equal remuneration
- b) protection of the pay, working conditions, workplace safety and job security of women employees
- c) part-time work provisions
- d) maternity protection
- e) the needs of small business employers and employees.

We canvassed some of our concerns relating to point b) in our last meeting, and do not intend to raise the same points again in this meeting. However, we have included our position on all of the above matters in this document so as the Minister may have a complete record of all of our concerns.

a) Equal remuneration

- *Improving the effectiveness of the equal remuneration provisions*

Since the enactment of the equal remuneration provisions in the *Workplace Relations Act 1996*, one major test case has been concluded (the HPM case) and another (*The Age* case) is under way. There has also been a major pay equity inquiry conducted by the NSW Industrial Relations Commission.

All of these proceedings have shown that there is currently a significant technical barrier in Australia to the achievement of equal pay claims. This is the legal requirement to prove discrimination per se in the setting of pay rates, in addition to proving that work of comparable value performed by men and women is paid differently.

We feel sure that it was not the intention of the Government to have equal pay claims founder on this technicality when it adopted the equal remuneration provisions in the WRA.

It may be of interest that Justice Glynn found in the recent NSW Pay Equity Inquiry that a requirement to prove that a difference in remuneration for men and women workers for work of equal value was a result of discrimination was outside of, and inconsistent with, ILO Convention 100 on Equal Remuneration.

We believe it would be particularly helpful to have an equal remuneration principle established to provide guidance for employers, unions and employees with the move to more negotiation taking place at the workplace level, where the parties may not understand the full implications of the equal remuneration provisions.

- *AWAs and unequal pay for comparable work*

Proposals to allow different AWAs to workers doing comparable work appear to be inconsistent with equal remuneration provisions of the Act and the Convention on which they are based. Under ILO Convention 100, the form of industrial regulation (award, collective or individual agreement) makes no difference to equal remuneration requirements. The relevant considerations are remuneration (all components) and the value of work. There is no basis for implying that AWAs can somehow be exempt from these provisions of the Act.

Recommendations:

That the equal remuneration provisions of the act be reviewed with a view to amendment to remove technical barriers to the achievement of pay equity

That the Government support the adoption of an appropriate Equal Remuneration Principle by the AIRC, so as to clarify the legislative provisions and enable them to achieve their original objective of bringing about equal remuneration for women

That the proposal to allow for different AWAs to be offered to workers doing comparable work be abandoned.

b) Protection of the pay, working conditions, workplace safety and job security of women employees

A number of the proposed amendments relate to this issue, particularly those concerning the award system, Australian Workplace Agreements (AWAs), the No Disadvantage Test, the role of the Australian Industrial Relations Commission (AIRC) in settling workplace disputes, Federal award coverage, unfair dismissals and the role of unions in enforcing awards, agreements and workplace safety.

Our concerns in these areas are founded on our knowledge of women's position in the Australian workforce. Women often work in small workplaces and in poorly unionised areas. Women are more likely than men to work on a part-time or casual basis. For example, almost three-quarters of part-time workers are women, and 63% of casual workers are women. Women are therefore less likely to be in a strong position to bargain individually or collectively for the superior pay and working conditions which are theoretically available via workplace bargaining. They are more likely to be covered only by minimum award conditions.

Our experience in many organisations which provide advice and assistance to women employees is that women in these workplaces are commonly subjected to unfair and unlawful dismissal, or to harassment, discrimination, and reductions in their hours of work and other conditions to a point where they are forced to resign from their jobs. Such women are often unaware that a union covers them, or of how to join a union. They are also often subjected to intimidation, subtle or blatant, by their employers to prevent them from joining a union or from seeking union assistance.

i) the award system

- *the award safety net*

We are concerned that the proposals to further reduce the award safety net, to remove from awards certain allowable matters and to impose new prerequisites for safety net increases may have the unintended consequence of leaving vulnerable women with even less protection and in a more disadvantaged position than they are now. Women are more likely to rely on awards than men and women are less likely to be covered by enterprise agreements. For example, AWIRS 1995 found that awards are the dominant determinants of rates of pay in the female-dominated industries of retail, education, health and community services and accommodation, cafes and restaurants. Further, women are a large proportion of the part-time workforce and part-time workers are heavily reliant on the award system.

Changes to the 'Objects of the Act' will therefore disproportionately disadvantage women workers. The proposal that the 'award act as a safety net providing basic minimum wages and conditions of employment in respect of appropriate allowable matters to help address the needs of the low paid' effectively denies many women workers a fair and equitable wage. Historically the tribunal system, when setting awards, has had a commitment to the social objective of a fair and equitable minimum wage.

The award system was based on notions of social equity, justice and merit. In the *Workplace Relations Act 1996* there was a move away from the principles of a fair and equitable minimum to that of ensuring *a safety net* of fair and minimum wages and conditions, within the context of living

standards generally prevailing in the Australian community, economic factors and the needs of the low paid.

The *Workplace Relations Amendment Bill 1999* further reduces the concept of a fair and equitable minimum by restricting awards to the role of a 'safety net providing *basic* minimum wages and conditions to help redress the needs of the low paid and to ensure that awards do not provide for wages and conditions above the safety net'. The role of the award safety net becomes that of providing basic minimums to protect the low paid (Section 88A and 88B).

The adherence to a concept of a fair wages system is further eroded in the Government's *Regulation Impact Statement* (page 7) which, when referring to the award simplification process, maintains awards as a 'fair and reasonable safety net for low paid and disadvantaged workers' but directs that in the process awards are to be simple instruments that do not impede workplace efficiency, or organisational effectiveness and which give primacy to the productivity and efficiency requirements of the business.

As many women are award dependent it is very likely that they will be relegated to a basic minimum for the 'low paid' and we are concerned that concerns for the productivity and efficiency of the business will override their needs. We would suggest that the goals of equity and fairness and those of productivity and efficiency of the business are not mutually exclusive, but rather inter-dependent. The goals of equity and fairness should be given the same status as productivity and efficiency.

We oppose the proposal that safety net adjustments will not flow onto awards that have not been simplified (Section 113 (3)). This will mean that women who are dependent on awards which have not been simplified will not get minimum pay increases. This proposal penalises women through no fault of their own.

- *allowable matters*

We were concerned in 1996 with the move towards reducing allowable matters in awards. Some of our fears have been realised. For example, the award simplification process so far has resulted in women losing employment rights such as paid maternity leave (e.g. the Employment National Award). The current proposals to further reduce the allowable award matters give us cause for concern.

We oppose the removal of skill-based career paths from allowable award matters. This undermines the enormous amount of work done to build career paths into low-paid female-dominated awards in the past 10 years in areas where the award is the predominant form of wage regulation (e.g. in the clothing industry). The development of such career paths has been an essential strategy in the quest for pay equity for women.

We oppose the removal from awards of provisions similar to those covered in other legislation (e.g. long service leave, public holidays, workers' compensation payments). In some cases, State legislation provides inferior conditions to Federal awards. For example, the qualifying period for long service leave in some female-dominated Federal awards is less than the qualifying periods in some State laws.

The qualifying period for long service leave, and the availability of public holidays, are very important concerns for women workers trying to balance work and family responsibilities. Workers' compensation make-up pay is particularly important for injured women workers in low-paid jobs.

Furthermore, if States reduce the entitlements in their legislation, women, given their weaker bargaining power, are unlikely to be able to negotiate this into their contracts.

We are concerned about the removal of transfers between work locations from allowable matters. We need to ensure that this has no effect on the right contained in the present Federal award parental leave standard provisions for a pregnant employee to be transferred to a safe job.

We oppose the removal of matters pertaining to training and education (including training, study leave and fees) from allowable matters in awards. We feel certain that women will not be able to bargain successfully for these conditions in those workplaces where employers are reluctant to allow women to make use of the training entitlements they now have in their awards.

Recommendations:

That the Objects of the Act be amended to provide for 'an award system which provides fair and equitable minimum standards of wages and conditions, which is secure and consistent, and which reflects the social and economic needs of employees in the context of living standards generally prevailing in the Australian community'

That the award simplification process restate this commitment to a fair and equitable minimum standard of wages and conditions.

That payment of minimum safety net increases not be conditional upon awards being simplified.

That skill-based career paths, long service leave, public holidays, workers' compensation make-up pay, training and education leave, and the right to transfer to a safe job during pregnancy be retained as allowable award matters.

ii) Australian Workplace Agreements (AWAs)

Evidence suggests that there are two groups on AWAs—those with strong bargaining power on high pay and negotiated conditions and those with weak bargaining power on lower pay, small or no wage increases and reduced employment rights. Reputable research on AWAs indicates that they have lower pay increases spread over a longer period of time than other forms of industrial regulation, and are more likely to have features of particular concern to women, such as an increased span of hours.

Evidence so far does not dispel the fears we held for women with the move in the 1996 *Workplace Relations Act* away from centralised forms of regulation towards more individual agreements between employers and employees.

We believe that the further shift towards individual agreements promoted by the proposed amendments must be underpinned by stronger, not weaker measures to ensure AWAs do not disadvantage women and that they are open to monitoring for their impact on women's pay and working conditions.

- *the No Disadvantage Test*

In order to be effective and to protect the interests of women workers, the No Disadvantage Test must be transparent and open to public scrutiny. We oppose the proposal that allows the application of the Test to be left with the Employment Advocate and not referred on to the Commission for perusal, as it would mean that the test is applied in a less transparent way and with no avenue for public scrutiny.

We are concerned that the Employment Advocate can approve an AWA even if it does not satisfy the test on the basis that the Advocate is satisfied that 'it is not contrary to the public interest'. (Section 170 VCB 1 to 8 and Section 170VCC). When referring to the public interest, the Advocate must apply the principles (if any) set by the President of the Commission. The proposals state that the President *may* establish principles. There is no requirement to do so, and there is no established set of criteria on which the principles of public interest can be applied by the Advocate. We believe such principles need to be developed with some urgency.

We also believe that it is important that those agreements which are approved which do not comply with the No Disadvantage test but which are held by the Employment Advocate not to be contrary to the public interest be made available for public scrutiny. We consider it very important that such information be available to organisations with a legitimate interest in the impact on women of such agreements.

We believe that the role of the AIRC in the application of the No Disadvantage Test should be retained and that there should be a review of

the operation and application of the Test, with a view to improving its effectiveness through greater transparency and openness to public scrutiny.

- *relationship of AWAs to Certified Agreements*

We are also concerned with the proposal that AWAs are to be allowed to override Certified Agreements. Some employers may abuse this provision by prevailing on vulnerable women employees to accept pay and conditions inferior to the Certified Agreement standard. We feel that any new provisions on AWAs must improve safeguards against exploitation rather than expose women to greater risk of exploitation.

Recommendations:

That the Australian Industrial Relations Commission retain its role in the application of the No Disadvantage Test. We suggest that a process be undertaken to monitor and review the application and operation of the No Disadvantage Test and that the Government support an application to the Full Bench of the Commission to establish clear principles in regard to the 'public interest'

That the Government set up an information system which provides inexpensive and ready access to data and information on the contents of AWAs, to allow for better monitoring of the gender impact of AWAs.

That the Employment Advocate make available for public scrutiny all data on AWAs approved which do not satisfy the No Disadvantage Test.

That the proposal to allow AWAs to undermine Collective Agreements and awards be abandoned.

iii) The role of the Australian Industrial Relations Commission (AIRC)

We are concerned that many of the proposals in the Bill will have the effect of weakening the role of the AIRC. We believe that the AIRC has historically worked in the interests of Australian women by presiding over a centralised wage fixing system (demonstrated to be more conducive to pay equity than decentralised systems), and by being the site of breakthrough on working conditions vital to women workers (e.g. maternity leave and family leave).

We have already indicated our concerns about the removal of certain matters from the Commission's jurisdiction to conciliate and arbitrate (the 'allowable matters'). We are also concerned that proposals to limit the Commission's power to arbitrate in paid rates awards will disadvantage teachers, nurses and public sector workers if they cannot reach agreement with employers.

We oppose the development of mediation as an alternative to the role of the AIRC, rather than as an additional option. The AIRC has proven to be a responsive and accessible means for bringing workplace negotiations and disputes to a satisfactory resolution where one or other party refuses to negotiate in good faith or stalls on meeting or discussing the matter in question. We have seen many cases where an employer's refusal to respond to complaints compounds serious workplace problems being experienced by women, such as discrimination, harassment or intimidation by supervisors or workmates. Sometimes the compulsory conciliation powers of the AIRC are the only means by which a woman is able to have the matter dealt with seriously.

We are very concerned to see this avenue of assistance to working women closed off by this proposal. We are concerned also that the proposals prohibiting compulsory conciliation while mediation is under way may be abused by some employers, so that mediation is strung out indefinitely with no real action being taken to resolve a problem.

Furthermore, access to the AIRC in dispute situations is at present free, while the new option of private mediation services will incur a cost, one which is unlikely to be affordable for many low-paid women employees.

Recommendation:

That the AIRC retain all of its current conciliation and arbitration powers, and that access to the AIRC remain free of charge.

iv) Federal award coverage

We are concerned at the proposal to make it more difficult for employees in some other form of employment relationship to achieve federal award coverage. This will have a significant effect on women who have previously relied on state awards in places where state minimums have been reduced, i.e. Victoria. This has a particular impact on the predominantly female areas of retail and hospitality employment in Victoria, and it is for this reason that we are concerned with this provision.

Recommendation:

That the proposal to repeal Section 4(1) Subsection 152(5) be abandoned.

v) Unfair dismissals

Despite unfair dismissal and anti-discrimination laws, we know that women are still regularly subjected to unfair and unlawful dismissals (such as on grounds of pregnancy). We also regularly see women forced into constructive dismissal as a result of dangerous work practices, harassment, bullying, reduced or intolerable pay or working conditions and refusal to accommodate family responsibilities. Therefore we are

concerned that protections for women in the event of an unfair or unjust dismissal are not reduced in any way.

For these reasons we are concerned that with the proposal to limit the basis on which constructive dismissal cases may be taken. We are also concerned with the proposals to make it more difficult and expensive for women to lodge unfair dismissal claims with the AIRC.

It is our experience that it is already difficult enough for women to pursue unfair dismissal claims, and that the outcomes of successful claims are usually very modest (for example, pay in lieu of a small period of notice). When women have been dismissed, they are usually in a position of having no income, and are therefore unlikely to be able to afford the proposed \$100 filing fee. We are also concerned that the proposed amendments providing that costs may be awarded against applicants, and that applicants may be required to provide security for costs, could discourage women in this position from making valid unfair dismissal claims.

Proposals in the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* to limit access of casual workers and workers in small workplaces to unfair dismissal procedures is likely to have an unfair impact on women, who are more likely to be found in these categories (for instance 32% of working women are employed as casuals; 54% of accommodation workers and 39% of retail workers are casual workers). This is potentially discriminatory.

Unfortunately we are aware of employers already using casual employment as a device to avoid unfair dismissal provisions. We fear that the proposed amendment will only encourage this practice further.

While understanding the operational requirements of small business, we do not accept that women working in small business should by virtue of that fact alone have inferior employment protection, given the absolute necessity of secure employment to women's financial well-being. This view is held also by those of us who run small businesses.

We consider the proposal in the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* to limit unfair dismissal remedies to employees with more than 6 months' continuous employment as an additional unnecessary burden on women employees. Our small business members believe that the present 3 month period should be adequate for a competent employer to assess an employee's suitability, and that problems which may arise beyond this point can be lawfully dealt with within the present law.

Recommendations:

That the proposed new section 170DA (on constructive dismissal) be abandoned.

That the proposals to increase the filing fee for unfair dismissal claims, the proposals to make it possible to have costs awarded against an applicant, and to make it be possible for the AIRC to order the applicant to give security for costs be abandoned.

That the proposals in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 to deny casual workers, workers in small workplaces and workers with less than 6 months' service with an employer access to unfair dismissal procedures be abandoned.

vi) The role of unions, the Inspectorate and women's community organisations in enforcing awards, agreements and workplace safety

Women have a number of avenues to redress the problems of discrimination, underpayment, exploitation and issues of health and safety. These include public industrial relations and anti-discrimination authorities, Working Women's Centres, unions, and legal advisers. Although the performance may vary, unions can provide a particularly fast, responsive and effective means of sorting out women's problems in the workplace in contrast to some of the more legalistic avenues. Sometimes unions work in combination with some of the other avenues of help to achieve a satisfactory outcome. We are concerned that this proposal limits the access of women to a proven avenue of assistance.

We are also aware that unions have played an important role in the governing of awards and the regulation of workplace health and safety standards. Women, particularly outworkers, often work in non-unionised sites.

In our experience women are often too intimidated or unaware of how to join or invite a union into their workplaces. Proposals to limit the right of entry to the invitation of a member who can be identified by her employer will mean that, in effect, exploitation and health and safety problems will continue and not be acted upon in many workplaces.

Over the last few years the effectiveness of the Inspectorate in enforcement of laws that govern wages and conditions has been seriously curtailed. Without such bodies women workers are particularly vulnerable to exploitation and underpayment of minimum wages. We seek an active and effective Inspectorate.

We commend the work of the women's community organisations funded by the Government in assisting women, particularly those in poorly organised workplaces, with agreement-making, award enforcement, unfair

dismissals and health and safety problems. We urge that the Government continue to support these organisations in their important work.

Recommendations:

That the proposal requiring a union representative to have a current invitation in writing from a union member employed at the premises to gain access to a workplace (Section 285C(2)) be abandoned.

That the Government initiate a review of the objects and function of the Inspectorate with the purpose of re-invigorating and maximising its effectiveness so as to ensure that workers in less organised sectors are not subject to undetected and continued exploitation.

That the Government continue to commit ongoing and secure funding for community organisations that provide information and assistance to women in the negotiation of employment contracts, the mediation of disputes and the regulation of workplaces.

c) Part-time work provisions

Our concerns in this area have always been to ensure regular and predictable hours of work for part-time employees, and to ensure that women are not forced into part-time work when their preference is for full-time work or longer hours, for the purposes of financial survival.

In the 1996 Act, the Government took into account some of these concerns by defining in the Act a 'regular part-time employee' as an employee who works less than full-time ordinary hours, has reasonably predictable hours of work and receives pro-rata award pay and conditions.

We believe, however, that this does not go far enough. Women workers usually work part-time because of other responsibilities their families rely on them to meet (e.g. child care or elder care). It is essential for part-time women workers to have *totally* predictable hours of work so that they can meet these commitments. Schools and child care centres close at particular times each day, and do not open on weekends. These are the non-negotiable realities that most women who work part-time must work around.

Furthermore, we believe that if it is the Government's intention to provide for more flexible hours options in the workplace mainly to assist workers with family responsibilities, there should be provisions to prevent full-time jobs being made part-time, or part-time hours being reduced, by a unilateral decision of the employer without regard to the employee's needs and wishes.

Recommendation

That in the definition of “regular part-time employee” in the Act, the words “reasonably predictable hours of work” be replaced by “regular and predictable hours of work”

That the allowable award matters include provisions ensuring that the hours of an existing employee cannot be reduced without consultation and agreement with the employee.

d) Maternity protection

The *Workplace Relations Act 1996* at present provides for rights to leave immediately before and for some time after the birth of a child, but does not provide for other employment protection during the course of a pregnancy. In order to strengthen the Act in relation to workers with family responsibilities, we propose that the Government seriously consider adopting ILO Convention 103 -Maternity Rights. This would create a constitutional basis for general legislation in this area, after which we would propose that the Government build on the existing Parental Leave provisions in the Act by inserting at least the current minimum federal award standard for employment rights during pregnancy into the Act. This would ensure a minimum standard of employment protection for women during pregnancy, as well as after the birth of the child.

We understand the reasons for the present delay in adopting ILO Convention 103. Until these difficulties are overcome, we would suggest an alternative measure which could be adopted under present constitutional powers. This is to include in the Act a general provision that there be no discrimination against a worker because of her pregnancy. In addition, we would reiterate the importance of the right to a transfer to a safe job during pregnancy being included in the allowable award matters, as discussed above.

Recommendations:

That the Government ratify ILO Convention 103 on Maternity Rights as soon as technically possible, then include appropriate general pregnancy provisions in the Workplace Relations Act.

That the Government immediately include in the WRA a general provision to prohibit discrimination on account of pregnancy.

e) The needs of small business employers and employees

Given the genuine concerns of the Government to assist small business in its role as employer, we propose that the Government allocate greater resources to the education of small business (many of whose operators are women) on the matters that lead to employment problems, such as unfair and unlawful dismissals and discrimination.

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This would build on the major employer education campaign on the *Workplace Relations Act 1996* which the Government undertook in 1997 throughout Australia.

Some obvious areas for education are:

- selection procedures-how to select suitable staff
- communication skills
- how to counsel and warn employees who are not performing
- discrimination and harassment policies and procedures.

We feel that this approach is preferable to one which removes the rights of the many women working in small business to basic protections such as those against unfair dismissal.

Recommendation:

That the Government conduct an education campaign for small business about employer obligations and how to avoid workplace problems such as unfair dismissals, and an education campaign for employees about processes, rights and obligations of the different forms of legal arrangements that cover employment.

**Women's Electoral Lobby
National Pay Equity Coalition
Business and Professional Women Australia (NSW Division)
WETTANK
YWCA**