Supplementary Submission

to the

Fair Work Act Review Panel

Review of the Fair Work Act 2009

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Introduction

1. The Australian Services Union [ASU] made an initial submission to the Review dated 17th February 2012. The Union now makes a further submission in response to submissions by employer organisations.
2. This brief supplementary submission deals with two matters raised by employer organisations in their submissions to the Review:
3. They are:

- Equal Remuneration
- Transfer of Business

Equal remuneration

4. The ASU's initial submission noted that the Fair Work Act 2009 introduced new provision with regard to equal remuneration. The Workplace Relations Act 1996 provided:

> **623 Equal remuneration for work of equal value**
>
> (1) A reference in this Division to **equal remuneration for work of equal value** is a reference to equal remuneration for men and women workers for work of equal value.

5. The Fair Work Act now provides:

> **302 FWA may make an order requiring equal remuneration**
>
> *Power to make an equal remuneration order*
>
> (1) FWA may make any order (an *equal remuneration order*) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
>
> *Meaning of equal remuneration for work of equal or comparable value*
>
> (2) *Equal remuneration for work of equal or comparable value* means equal remuneration for men and women workers for work of equal or comparable value.

6. A number of employer submissions refer to the provisions of the Act with regard to equal remuneration, among them the Australian industry Group, NSW Business Chamber and the WA Chamber of Commerce and industry. These organisations are familiar with the Equal Remuneration case in the social and community services sector just decided since they participated in the case.

7. AiG's submission on the case is the most comprehensive and this employer body makes the following recommendation to the Review:

> *14. Equal remuneration*
>
> *Some important changes need to be made to the equal remuneration provisions of the Act given the looseness of the provisions, including:*
>
> • *A requirement that FWA be satisfied that any unequal remuneration is as a result of gender based discrimination;*
>
> • *Removal of the phrase 'comparable value' throughout Part 2-7.*
>
> • *Inclusion of a provision which identifies that the terms of an equal remuneration order cannot be made to operate beyond a single employer.*
>
> • *Inclusion of a provision which requires FWA, prior to making any equal remuneration order, to consider whether enterprise bargaining is a more appropriate mechanism to resolve any wage inequality*[1]

8. The simple effect of AiG's submission and recommendation, in the unlikely event that it is adopted by the Parliament, would be to prevent any further successful equal remuneration cases of the type successfully run recently by the ASU and the other applicant unions in the social, community and disability services sector. Notwithstanding the fact that AiG says it supports equal remuneration, AiG will be aware that the effect of its recommendation would be to prevent further successful equal remuneration cases of the type recently determined from being run.

9. This would flow as a result of

   - requiring successful applicants to show discrimination as a threshold issue,
   - removal of the concept of comparable value, and
   - preventing equal remuneration orders operating beyond any single employer.

[1] AiG Submission, pages 19, 83-87

10. As previously submitted by the ASU, the equal remuneration provisions of previous Federal industrial relations Acts have been little used since the equal award wage cases of 1969 and 1972.

11. A detailed history of equal pay in Australian industrial jurisdictions was given in evidence in the recent SACS pay equity case. Meg Smith, Senior Lecturer in the Employment Relations Program, School of Management, University of Western Sydney provided the tribunal with a comprehensive history of the jurisdiction. The evidence of Ms Smith is on the public record and can be found here: http://www.fwa.gov.au/sites/remuneration/submissions/ASU_Submission_W3.pdf

12. The ASU refers the Review Panel to this history as the most comprehensive statement of the history of both the legislative provisions and jurisprudence as it relates to Australia. At the national level, the last effective equal pay decisions were with respect to award wages in 1969 and 1972. These resulted in a significant improvements in the level of gender wage equality in this country but progress stalled as the equalisation of award wages did not resolve the question of gender wage inequality as a result of differing levels of over-award payments or equal remuneration more generally.

13. Ms Smith's evidence as to the effect of the previous Federal IR laws was, in summary:

> *61. In summary, the limitations of the 1993 provisions can be traced to the form of the provisions which rested on a misplaced faith in sex discrimination as a means of remedying gender pay inequity. It had been envisaged that the legislative reference to discrimination would give the right to equal remuneration a more substantive legal foundation. In practice it made the task of success claiming equal remuneration more difficult. The direction to discrimination and its interpretation by the Commission supported a narrow form of job comparison. This form of comparison is ill suited to forms of evidence that have been relied upon historically to support work value based claims. The particular institutional apparatus that supported the 1972 equal pay for work of equal value privileged collective appraisals of work value, and through that appraisal, industry applications and remedies. The legal hurdles in the sex discrimination test meant that it favoured prosecution at the level of the individual worker, or of the workplace, such that an individual woman or a workplace group of women have to demonstrate in the disparate and discriminatory processes in their determination of their wages.*[2]

[2] Equal Remuneration case, Exhibit ASU3, par 61.

14. Estimates of the gender wage gap remain at the level of 17-35%, depending on how the comparison is done.[3]

15. Developments in equal remuneration jurisprudence had occurred principally at the level of State tribunals, especially in NSW and Queensland where extensive inquiries into equal remuneration were conducted. The Fair Work Act draws at least in part on this State jurisprudence and experience.

16. The Fair Work Act 2009 included for the first time in the federal law the concept of equal remuneration for work of *comparable value* as well as for work of equal value. This change was significant and allows applicants to succeed in cases if they can show that work is undervalued because of gender reasons compared to employees who do work similar or comparable worth. A male comparator group is not required, nor is evidence of discrimination.

17. The essence of the recently decided case was that work that was being remunerated at certain levels when done by employees of State and local governments was comparable to work that was being done in the not for profit sector and which was being undervalued and under-remunerated for reasons significantly related to gender.

18. The SACS pay equity case would not have been successful and could not have applied to a whole sector if the provisions sought by AiG had been in place.

19. The ASU supported the change to the Federal legislation extending the concept of equal pay for equal or comparable worth believing it to be important to achieving pay equity for women workers. The Union is vindicated by the decision of the majority of the Full Bench which found that a case had been made out that work in the sector as a whole was undervalued for reasons related to gender.

20. The Review Panel should be aware that the SACS pay equity case was a major case, conducted over nearly two years, involving substantial witness evidence [75 witnesses], nearly two hundred exhibits [including witness statements], nearly three weeks of on site inspections, and extensive written and oral submissions by the applicants, State and federal Governments, sector employers and peak bodies, including major employer associations including AiG, Australian Business Chamber, AFEI and ACCI.

21. The case was the subject of two major decisions by the Full Bench which extensively canvassed the issues before it. In the May 2011 decision, the Full Bench unanimously

[3] Megan Clement-Couzner, What Does Equal Pay Mean Now?, New Matilda, 8th February 2012

concluded that "for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment" .[4]

22. If the proposals of AiG were to be adopted, the Full Bench would not have been able to make an Order remedying this situation. The ASU strongly urges the Review Panel to reject the submissions of AiG and other employer organisations so that future pay equity cases can also be determined on their merits without the imposition of arbitrary tests and threshold requirements that would render future cases unwinnable.

23. The ASU obviously welcomed the successful outcome of the SACS case which will ensure equal remuneration for many employees in the SACS sectors when fully implemented.

Transfer of Business

24. A considerable number of employer organisations have criticised the operation of the Transfer of Business provisions of the Act.

25. In 2008, the ASU welcomed key elements of the new provisions of the Fair Work Act dealing with transfer of business, particularly the elimination of the 12 months life on transmitting agreements. However, the Union was and remains concerned that the new provisions did not deal with all situations whereby employers can effectively transmit businesses or parts of their business to other entities without employees being able to have their terms and conditions of employment fully and appropriately protected.

26. This is because the new Act retained a key element from the WorkChoices legislation, that is, that industrial instruments do not transfer unless there are transferring employees.

27. The ASU submits that this means that the effectiveness of the Act in maintaining the integrity of the safety net of awards and agreements and protecting employees whose work is effectively transmitted is not comprehensive and effective in all circumstances.

28. The ASU has had considerable experience in situations where businesses [and employees] are effectively transmitted without the protections of the Act applying to the employees. Two particular and distinct examples of this in the ASU's experience have been:

[4] [2011] FWAFB 2700 at par 291

- Qantas Valet Parking
- Qantas Holidays

29. In the first case, the contract to run Qantas valet parking was lost by one contractor and gained by another. In brief, since the business did not transmit from the first contractor to the second, no transmission of business occurred. Employees of the first contractor were offered jobs with the second contractor but on lesser terms and conditions as "new" employees [at the time, AWAs]. The same business and work was carried out and went from one business to another but no legal transmission occurred and the employees of Qantas valet parking were among the last victims of WorkChoices. This was unacceptable and this position remains under the current Fair Work Act.

30. The Qantas valet parking example was confirmed at Senate hearings into the then Fair Work Bill. This situation was also briefly referred to on the first day of the Committee's deliberations when the Committee was briefed by Departmental representatives. The Department confirmed that the Bill did not cover the type of situation that occurred with Qantas valet parking – see page 21 of the Hansard of the Committee's proceedings on the 11th December, 2008:

> ***Ms James***—*I could not comment on that except to say that the situation I have just described is a secondary transaction—I suppose that is the way you would describe it—rather than the primary transaction. I actually think they are quite common. We have seen a number of cases where, in fact, the Workplace Ombudsman has examined these sorts of examples. One is the Qantas valet case. Again, I do not remember all of the details of the facts of that case but that was a situation where certain services had been outsourced and then they went out to tender a second time and a new company won the tender. Employees went over. Employees were offered jobs—they did not have to accept them but they were offered jobs—but the terms and conditions were different. In the Qantas valet case, I think the ombudsman found that it was not a transmission of business under the current rules, and I think that we would probably say that we do not address those facts here.*

31. In the second case, Qantas sold a wholly-owned subsidiary [Qantas Holidays Ltd] to another company [Jetset TravelWorld Limited]. Qantas then purchased majority ownership of Jetset TravelWorld Ltd. Qantas Holidays Ltd became a wholly owned subsidiary of Jetset TravelWorld Ltd and another wholly owned subsidiary- a new

company– Qantas Business Travel Pty Ltd - was created to perform both holidays and corporate travel work.

32. Existing Qantas Holidays Ltd employees were transferred with their company to the new operation and the applicable industrial instruments transmitted. The new subsidiary, Qantas Business Travel Pty Ltd was also expanded to perform work previously done by direct employees of Qantas Airways Limited in the Qantas Business Travel [QBT] Division of Qantas. Since no employees of the old QBT Division transferred into the new QBT Company thus no transmission of business occurred with respect to this work. All new employees who would otherwise have been engaged by Qantas Holidays Ltd are now employed by the new corporate entity – Qantas Business Travel Pty Ltd. As these employees were not transferring employees, they did not benefit from transmission of business arrangements including transmitted industrial instruments even though work has effectively been outsourced or transmitted from Qantas to this new Qantas related company.

33. Despite the obvious interrelatedness of these companies and the transfer of business between them, because a corporate transaction has been able to be constructed that corrals the existing employees in companies on their existing conditions but provides for new employees to be engaged in a different “new” company, there is an ability to avoid the current awards and agreements just because no existing employee transfers to the new entity. This arrangement undermines both the integrity of the applicable safety net and the security of the transferring employees. It also results in employees working side by side on different terms and conditions of employment. This is unfair and inequitable.

34. Since the new entity did not have transferring employees, the Act does not consider this to be a transfer of business. This is a serious flaw in the Act, in the submission of the ASU.

35. The ASU submits that transfer of business rules should be amended to apply so that employers do not have the opportunity to outsource work through corporate restructure and avoid the necessity to continue to apply existing industrial instruments to employees doing the outsourced work. The test should be whether work has transferred, whether or not there is a direct transmission and whether or not there are transferring employees.

36. Qantas is among a number of employers who have criticised the operation of the new Transfer of Business provisions in the Act. Numerous employers submit that the Act is cumbersome, administratively difficult to apply and results in unsatisfactory outcomes for both employers and employees. In particular, Qantas says:

> *Under the FW Act Qantas has been required to make numerous costly and resource intensive applications to Fair Work Australia (FWA) for case by case orders to prevent the transfer of instruments in these circumstances. In some cases staff have lost opportunities as a direct result of these provisions because of the time periods involved in seeking union cooperation in any approach to FWA. No Qantas application has been rejected; equally each application takes considerable resources to process for what, in all cases, are voluntary moves.*[5]

37. And again:

> *<u>Question 35. What has been the effect of the new transfer provisions on corporate restructuring activities such as in sourcing and out sourcing?</u>*
>
> *The provisions have created a difficult environment in which to make these decisions Qantas supports the BCA submission on this issue.*

38. The ASU submits that Qantas has benefitted from the Transfer of Business provisions under both the old and the new Act. The ASU submits that the available evidence does not support employer concerns that the new provisions have created a "difficult environment" for employers and that this is true for Qantas as well as other employers.

39. AiG also makes a number of submissions about Transfer of Business. AiG claims [amongst other things] that:

> *The current transfer of business laws are:*
>
> - *Impeding the restructuring of Australian businesses and hence impeding productivity and competitiveness;*
> - *Increasing redundancies and removing employment opportunities for many Australian workers;*
> - *Discouraging organisations which win outsourcing contracts from employing any of their clients' workers and, hence, many of these workers are made redundant by the client;*

[5] Qantas Submission to the Review Panel, page 5

- *Constraining opportunities for companies in the business of outsourcing (e.g. ICT companies);*
- *Deterring companies that wish to outsource functions from doing so and consequently opportunities for productivity improvement are lost ;*
- *Driving work and jobs offshore;*
- *Restricting employee career progression and redeployment opportunities within corporate groups;*
- *Imposing multiple and inconsistent employment conditions on employers resulting in higher costs, more red tape and reduced productivity, efficiency and staff morale;*
- *Imposing unworkable obligations on employers in excess of what is reasonable to protect employees' interests.*[6]

40. AiG refers to a number of tribunal decisions regarding Transfer of Business, including at least one decision [Optus Administration and ASU] in which the ASU was involved.

41. A search of decisions on the Fair Work Australia website relating to transfer of business shows the following:

- There were three decisions only related to transfer of awards, one of which was the Optus matter referred to by AiG and two of which were related to Westpac and the St George Bank.
- Forty cases involving agreements.

42. In three award related cases, the employer applications were successful. None appear to have involved more than a single limited and brief hearing.

43. The ASU notes that in the Optus case in which the ASU was involved since it involved an enterprise award to which the ASU was a party, was the result of an application made on the 30th March 2010 which was determined by the tribunal on the 19th April following a very short hearing. The ASU did not make submissions opposing the application.

44. This appears to be the case generally as well with regard to the applications relating to enterprise agreements. Of the 40 decisions reported, two were interim decisions and 36 were cases in which the employer's application was granted. Nearly all decisions

[6] AiG submission, page 88

were short and appear to involve no controversy. Where unions appeared, generally there was no opposition to the application. Some applications were determined on 'the papers'.

45. Three agreement-related applications involved Qantas or Qantas subsidiaries. In all cases it appears that, and certainly where the ASU was involved, there was no opposition to the applications and all were granted.

46. Only in two cases were any applications rejected. In one case, the employer presented insufficient material to justify the decision [no union appeared to make any contrary submission]. Only in one case does it appear that an application was fully contested with a hearing lasting three days and involving about 14 witnesses. The employer's application was rejected, as were related union applications.

47. In the submission of the ASU, the evidence does not support employer submissions that the Transfer of Business provisions of the Act are an unnecessary or inappropriate burden on employers. It would appear, on the contrary, it would appear that the provisions of the Act are working efficiently and effectively and should be retained [and strengthened as proposed above].

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