Playing catch-up: Gender pay equity and the pursuit of effective jurisprudence in Australia, 1969-2007

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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A significant vote of thanks is due to my supervisor, Bruce Wilson. His sense of narrative along with his clarity and persuasive advice has thoughtfully eased me past a number of obstacles. In doing so he has taught me much about supervision. Thank you as well to Belinda Probert for her counsel at an earlier time.

The concept of narrative takes me to those places where my interest in gender pay equity was forged – early professional work with the then Amalgamated Metal Workers’ Union, with particular thanks to the late Jim Baird, Greg Harrison and the National Research Centre; and activism within the National Pay Equity Coalition.

I wish also to recognise the staff at the Noel Butlin Archives Centre, the Australian Industrial Registry and the Industrial Registry at New South Wales for their willingness to support all manner of inquiry, both substantive and tenuous. On this note I would like also to acknowledge those practitioners who consented, often bravely, to be interviewed.

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A significant debt of gratitude is due to Peter Ewer – a dear and long-time friend and comrade - for his insight and unyielding confidence that this project would see the light of day. In equal measure much of what passes here has its origin in the deep well of support that is my family. To my parents, Jean and John, and to David, Richard, Alex and their families I convey my deep appreciation. My father is not here to witness this project but I sense implicitly his support.

And now to that which is most precious. My most significant thanks goes to my partner Bernard Moore and sons David and Declan. As would be expected this endeavour nudged the contours of family life – their acceptance of such disruptions might have been anticipated but the love that accompanied it was unsurpassed.
ABSTRACT

This thesis examines the optimal design of gender pay equity regulation in Australian labour law. The examination is framed by a weakening in Australia’s gender pay equity performance since the industrial breakthroughs of 1969 and 1972, an outcome at odds with a policy apparatus that directs more attention to the needs of women in waged labour. This inquiry is advanced by a case study examination of industrial proceedings that provide a unique opportunity to assess three stages of pay equity reform: the adoption of federal equal pay principles in 1969 and 1972; a legislative entitlement to equal remuneration, introduced to federal labour law in 1993; and distinct initiatives developed in two state industrial jurisdictions.

The project of gender pay equity reform in Australia, following the end of the long post-war boom, has been accompanied by a series of competing discourses. This has comprised both a right to equal remuneration and a series of institutional arrangements and relationships that compromise this right. The basis of Australia’s class settlement has been recast in favour of capital in a way that is prejudicial to gender pay equity being achieved. In this brave new world capital remains resistant to revaluing the price of feminised labour. Thus this recast settlement has gendered consequences which are evident also in the masculinist construction of labour law institutions and their processes. It is these dimensions that underpin the resistance to redressing the institutional and cultural determinants of rates of pay and the weakness of measures directed nominally to this task.

If federal labour law is to be effective, the right to equal remuneration for work of equal value is a key starting point and remains an important foundation in capturing feminist claims on the state and the market. It requires accompanying institutional measures that enable examination and remedy of the undervaluation of women’s waged labour and which do not necessarily test the validity of those rates of pay through reference to embedded, masculinised norms and practices. It was measures akin to these that emerged from developments in state jurisdictions, developments that were swept away by the latest phase of neo-liberal reform. To enable collective and aggregate reform the right to equal remuneration needs to be conjoined to wage determination in industry settlements.
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<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
</tr>
<tr>
<td>ACAC</td>
<td>Australian Conciliation and Arbitration Commission</td>
</tr>
<tr>
<td>ACAS</td>
<td>Advisory, Conciliation and Arbitration Service</td>
</tr>
<tr>
<td>ACCI</td>
<td>Australian Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>ACJ</td>
<td>Judgements of the Arbitration Court of New Zealand</td>
</tr>
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<td>ACM</td>
<td>Australian Chamber of Manufactures</td>
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<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
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<td>ACTHA</td>
<td>Australian Capital Territory Heath Authority</td>
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<td>ACTU</td>
<td>Australian Council of Trade Unions</td>
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<td>ADB</td>
<td>Anti-Discrimination Board of New South Wales</td>
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<tr>
<td>AFBPW</td>
<td>Australian Federation of Business and Professional Women</td>
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<td>AFPC</td>
<td>Australian Fair Pay Commission</td>
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<tr>
<td>AGPS</td>
<td>Australian Government Publishing Service</td>
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<tr>
<td>AIRC</td>
<td>Australian Industrial Relations Commission</td>
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<td>AIG</td>
<td>Australian Industry Group</td>
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<td>AIR</td>
<td>Australian Industrial Registry</td>
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<tr>
<td>ALP</td>
<td>Australian Labor Party</td>
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<td>ALR</td>
<td>Australian Law Reports</td>
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<tr>
<td>AMWU</td>
<td>Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union</td>
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<td>ANF</td>
<td>Australian Nursing Federation</td>
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<tr>
<td>AR</td>
<td>Industrial Arbitration Reports</td>
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<tr>
<td>ASCO</td>
<td>Australian Standard Classification of Occupations</td>
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<td>ASU</td>
<td>Australian Services Union</td>
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<td>AWA</td>
<td>Australian Workplace Agreement</td>
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<td>AWU</td>
<td>Australian Workers’ Union</td>
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<tr>
<td>BCA</td>
<td>Business Council of Australia</td>
</tr>
<tr>
<td>C</td>
<td>(in legal citation) Commissioner</td>
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<tr>
<td>CAEP</td>
<td>Council of Action for Equal Pay</td>
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<td>CAE</td>
<td>College of Advanced Education</td>
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<td>CAI</td>
<td>Confederation of Australian Industry</td>
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<td>Can</td>
<td>Canada</td>
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<td>CAR</td>
<td>Commonwealth Arbitration Reports</td>
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<td>Cat</td>
<td>Catalogue</td>
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<tr>
<td>CBCS</td>
<td>Commonwealth Bureau of Census and Statistics</td>
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<td>CFMEU</td>
<td>Construction, Forestry, Mining and Energy Union</td>
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<td>CHRR</td>
<td>Canadian Human Rights Reporter</td>
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<td>Abbreviation</td>
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<td>Cir</td>
<td>Circuit</td>
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<td>CPSAR</td>
<td>Commonwealth Public Service Arbitrator Reports</td>
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<tr>
<td>CREA</td>
<td>Centre for Regional Economic Analysis</td>
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<tr>
<td>Cth</td>
<td>Commonwealth</td>
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<tr>
<td>DOLAC</td>
<td>Departments of Labour Advisory Committee</td>
</tr>
<tr>
<td>DP</td>
<td>(in legal citation) Deputy President</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEOC</td>
<td>Equal Employment Opportunity Commission</td>
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<td>EES</td>
<td>European Employment Strategy</td>
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<tr>
<td>EOC</td>
<td>Equal Opportunities Commission</td>
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<tr>
<td>EOWA</td>
<td>Equal Opportunity for Women in the Workplace Agency</td>
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<td>EPD</td>
<td>Employment Practices Decisions</td>
</tr>
<tr>
<td>EPR</td>
<td>Equal Pay Review</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>F.Supp</td>
<td>Federal Supplement</td>
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<tr>
<td>HEF</td>
<td>Hospital Employees’ Federation of Australia</td>
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<tr>
<td>HREOC</td>
<td>Human Rights and Equal Opportunities Commission</td>
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<tr>
<td>IAOW</td>
<td>Industrial Association of Workers</td>
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<td>IG</td>
<td>Industrial Gazette</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>IR</td>
<td>Industrial Reports</td>
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<tr>
<td>IRLR</td>
<td>Industrial Relations Law Reports</td>
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<tr>
<td>IRCNSW</td>
<td>Industrial Relations Commission of New South Wales</td>
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<tr>
<td>J</td>
<td>(in legal citation) Justice</td>
</tr>
<tr>
<td>LHMU</td>
<td>Liquor Hospitality and Miscellaneous Union</td>
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<tr>
<td>LMC</td>
<td>Labour Ministers Council</td>
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<tr>
<td>MRP</td>
<td>Marginal Revenue Product</td>
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<tr>
<td>MTFU</td>
<td>Metal Trades Federation of Unions</td>
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<tr>
<td>MTIA</td>
<td>Metal Trades Industries Association</td>
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<tr>
<td>NBAC</td>
<td>Noel Butlin Archive Centre</td>
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<tr>
<td>NCW</td>
<td>National Council of Women</td>
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<td>NPEC</td>
<td>National Pay Equity Coalition</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>NSWIR</td>
<td>New South Wales Industrial Registry</td>
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<tr>
<td>NTB</td>
<td>National Training Board</td>
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<tr>
<td>NTEU</td>
<td>National Tertiary Education Union</td>
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<tr>
<td>NWCC</td>
<td>National Women’s Consultative Committee</td>
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The unions asked that these proceedings be treated as a test case and it is a fair inference from the way in which arguments were presented that there was general agreement (except in the case of private trading banks) that they should be so treated. We therefore think that the principles expounded for the guidance of the Public Service Arbitrator and the Commissioner in the present cases would be appropriate in other cases, even where total wages are being considered. It will be necessary in due course for a separate examination to be made of each determination and award in respect of which applications for equal pay between the sexes are received, and we suggest that the following principles which will be applied in the matters before us should be applied in deciding those other applications:

(1) the male and female employees concerned who must be adults, should be working under the terms of the same determination or award;

(2) it should be established that certain work covered by the determinations or award is performed by both males and females;

(3) the work performed by both the males and females under such determination or award should be of the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;

(4) for the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees the Arbitrator or the Commissioner, as the case may be, should in addition to any other relevant matters, take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same conditions;

(5) considerations should be restricted to work performed under the determination or award concerned;

(6) in cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case appropriate classifications should be established for the work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide range of work;

(7) in considering whether males and females are performing work of the same or like nature and or equal value, considerations should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to only one establishment;

(8) the expression of 'equal value' should not be construed as meaning 'of equal value to the employer’ but as of equal value or at least of equal value from the point of view of wage and salary assessment;
(9) notwithstanding the above, equal pay should not be provided by application of the above principles where the work in questions is essentially or usually performed by females but is work upon which male employees may also be employed.

APPENDIX TWO

1972 EQUAL PAY FOR WORK OF EQUAL VALUE PRINCIPLE
(AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION)

1. The principle of ’equal pay for work of equal value’ will be applied to all awards of the
Commission. By ‘equal pay for work of equal value’ we mean the fixation of award wages by a
consideration of the work performed irrespective of the sex of the worker. The principle will apply
to both adults and juniors. Because the male minimum wage takes account of family
considerations it will not apply to females.

2. Adoption of the new principle requires that female rates be determined by work value
comparisons without regard to the sex of the employees concerned. Differentiation between male
rates in awards of the Commission have traditionally been founded on work value investigations
of various occupational groups or classifications. The gap between the level of male and female
rates in awards generally is greater than the gap, if any, in the comparative value of work
performed by the two sexes because rates for female classifications in the same award have
generally been fixed without a comparative evaluation of the work performed by males and
females.

3. The new principle may be applied by agreement or arbitration. The eventual outcome should
be a single rate for an occupational group or classification which rate is payable to the employee
performing the work whether the employee be male or female. Existing geographical differences
between rates will not be affected by this decision.

4. Implementation of the new principle by arbitration will call for the exercise of the broad
judgement which has characterised work value inquiries. Different criteria will continue to apply
from case to case and may vary from one class of work to another. However work value inquiries
which are concerned with comparisons of work and fixation of award rates irrespective of the sex
of employees may encounter unfamiliar issues. In so far as those issues have been raised we will
comment on them. Other issues which may arise will be resolved in the context of the particular
work value inquiry with which the arbitration is concerned.

5. We will now deal with issues which have arisen from the material and argument placed before
us and which call for comment or decision.

   (a) The automatic application of any formula which seeks to bypass a consideration of the
work performed is, in our view, inappropriate to the implementation of the principle we
have applied. However, pre-existing award relativities may be a relevant factor in
appropriate cases.

   (b) Work value considerations should, where possible, be made between female and male
classifications within the award under consideration. But where such comparisons are
unavailable or inconclusive, as may be the case where work is performed exclusively by
females, it may be necessary to take into account comparisons of work value between
female classifications in different awards. In some cases comparisons with male
classifications in other awards may be necessary.

   (c) The value of the work refers to work in terms of award wage or salary fixation, not
worth to the employer.
(d) Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work. In particular this situation may arise with generic classifications. A similar situation may arise with respect to junior employees. Whether in such circumstances it is appropriate to establish new classifications or categories will be a matter for arbitrator.

(e) In consonance within normal work value practice it will be for the arbitrator to determine whether differences in the work performed are sufficiently significant to warrant a differentiation in rate and if so what differentiation is appropriate. It will also be for the arbitrator to determine whether restrictions on the performance of work by females under a particular awards warrant any differentiation in rate based on the relative value of the work. We should however indicate that claims for differentiation based on labour turnover or absenteeism should be rejected.

(f) The new principle will have no application to the minimum wage for adult males which is determined on factors that are unrelated to the nature of the work performed.

6. Both the social and economic consequences of our decisions will be considerable and implementation will take some time. It is our intention that rates in all awards of this Commission and all determinations under the Public Service Arbitration Act should have been fixed in accordance with this decision by 30th June, 1975. Under normal circumstances, implementation should take place by three equal instalments so that one-third of any increase is payable no later than 31st December, 1973, half of the remainder by 30th September, 1974, and the balance by 30th June, 1975. This programme is intended as a norm and we recognise that special circumstances may exist which require special treatment.

7. Nothing we have said is intended to rescind the 1969 principles applicable to equal pay for equal work which will continue to apply in appropriate cases. We have taken this step because an injustice might be created in cases based on equal pay for equal work where females could become entitled immediately to male rates under those principles.

6. ANOMALIES AND INEQUITIES
(a) Anomalies
(i) In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this Principle will not be a vehicle for general improvements in pay and conditions and that the circumstances warranting the improvement are of a special and isolated nature.
(ii) Decisions which are inconsistent with the Principles of the Commission applicable at the relevant time should not be followed.
(iii) The doctrines of comparative wage justice and maintenance of relativities should not be relied upon to establish an anomaly because there is noting rare or special in such situations and because resort to these concepts would destroy the overriding concept of this Principle.
(iv) The only exceptions to (iii) are that catch-up for the metal industry standard and adjustment of paid rates awards to establish an equitable base may be processed as anomalies. All such claims should be lodged by 31 December 1983.

(b) Inequities
(i) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason. Such inequities shall be processed through the anomalies conference and not otherwise, and shall be subject to all the following conditions:
   (1) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.
   (2) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.
   (3) In addition to similarity of work, there exists some other significant factor which makes the situation inequitable. An historical or geographical nexus between the similar classes of work may not of itself be such a factor.
   (4) The rate of pay fixed for the class or classes of work being compared with the work in issue is a reasonable and proper rates of pay for the work and is not vitiated by any reason such as an increase obtained for reasons inconsistent with the Principles of the Commission applicable at the relevant time.
   (5) Rates of pay in minimum rates awards are not to be compared with those in paid rates awards.
(ii) In dealing with inequities, the following overriding considerations shall apply:
   (1) The pay increase sought must be justified on the merits.
   (2) There must be no likelihood of flow-on.
   (3) The economic cost must be negligible.
   (4) The increase must be a once-only matter.

(c) Procedure
(i) An anomaly or inequity which is sought to be rectified must be brought to the Anomalies Conference by the peak union councils, namely, the ACTU and the CPA, or by any union not affiliated with those bodies.
(ii) The matter is first discussed with the employers and other interested parties at the Conference.

(iii) The broad principles for processing the anomaly or inequity raised are:

(1) If there is complete agreement as to the existence of an anomaly or inequity and its resolution, and the President is of the opinion that there is a genuine anomaly or inequity, the President will make the appropriate order to rectify it.

(2) If there is no agreement at all, one or two situations can arise. Either the President will hold that there is no anomaly or inequity falling within the concept of the Conference which would mean an end of the matter as far as the Conference is concerned or on the other hand the President could hold that there was an arguable case which would then go the Full Bench of the Commission for consideration.

(3) This procedure can be departed from by agreement and with the President’s approval.

(4) In the case of matters in the Australian Public Service they may have to be dealt with somewhat differently in order to comply with the provisions of the Public Service Arbitration Act.

APPENDIX FOUR

EQUAL REMUNERATION PROVISIONS, INDUSTRIAL RELATIONS ACT 1988 (CTH)

Part VIA--Minimum Entitlements of Employees
Division 2--Equal remuneration for work of equal value

s.170BA Object

The object of this Division is to give effect, or further effect, to:

(a) the Anti-Discrimination Conventions; and
(b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
(c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No. 111, and a copy of the English text is set out in Schedule 9.

s.170BB 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.

(2) An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

s.170BC Orders requiring equal remuneration

(1) Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.

(2) Without limiting subsection (1), an order under this Division may provide for such increases in rates (including minimum rates) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.

(3) However, the Commission may make an order under this Division only if:

(a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and
(b) the order can reasonably be regarded as appropriate and adapted to giving effect to:
(i) one or more of the Anti-Discrimination Conventions; or
(ii) the provisions of the Recommendation referred to in paragraph 170BA (b) or (c).

s.170BD Orders only on application

The Commission must only make such an order if it has received an application for the making of an order under this Division from:

(a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or
(b) the Sex Discrimination Commissioner.

s.170BE No order if adequate alternative remedy exists

The Commission must refrain from considering the application, or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:

(a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
(b) will ensure, for the employees concerned, equal remuneration for work of equal value.

s.170BF Immediate or progressive introduction of equal remuneration

The order may implement equal remuneration for work of equal value when the order takes effect. However, if it is not deemed feasible to implement it immediately, the order may implement it in stages (as provided in the order).

s.170BG Employer not to reduce remuneration

(1) An employer must not reduce an employee's remuneration (within the meaning of the Equal Remuneration Convention) for the reason, or for reasons including the reason, that an application or order has been made under this Division.

(2) If subs. (1) is contravened, the purported reduction is of no effect.

s.170BH Division not to limit other rights

This Division is not intended to limit any right that a person or trade union may otherwise have to secure equal remuneration for work of equal value.

s.170BI Additional effect of division

(1) Because of this section, this Division has the effect it would have if section 170BA were repealed and paragraph 170BC(3)(b) were omitted. The effect is additional to, and does not prejudice, the effect that this Division has otherwise than because of this section.

(2) The Commission must determine by arbitration an application made under this Division as it has effect because of this section.

(3) The Commission may make an order under this Division (as it so has effect) only if:
(a) it considers that the order is necessary to prevent an industrial dispute about equal
remuneration for work of equal value; and
(b) it has given to each organisation or other person who, in its opinion, would be likely to
be a party to the dispute an opportunity to be heard in relation to the making of the
order.

(4) An order so made must be expressed to bond only each of the following as the order
specifies:

(a) the organisations and other persons to whom the Commission has given, as required by
subsection (3), an opportunity to be heard;
(b) the respective members of those organisations.

Source: Industrial Relations Act 1988 (Cth) as at 10 March 1994 following passage of the
Industrial Relations Reform Act 1993 (Cth).
APPENDIX FIVE

EQUAL REMUNERATION PROVISIONS, WORKPLACE RELATIONS ACT 1996 (CTH) (31 DECEMBER 1996)

Part VIA--Minimum Entitlements of Employees
Division 2--Equal remuneration for work of equal value

s.170BA Object

The object of this Division is to give effect, or further effect, to:

(a) the Anti-Discrimination Conventions; and
(b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
(c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No. 111.

s.170BB 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.

(2) An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

s.170BC Orders requiring equal remuneration

(1) Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.

(2) Without limiting subsection (1), an order under this Division may provide for such increases in rates (including minimum rates) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.

(3) However, the Commission may make an order under this Division only if:

(a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and
(b) the order can reasonably be regarded as appropriate and adapted to giving effect to:
   (i) one or more of the Anti-Discrimination Conventions; or
   (ii) the provisions of the Recommendation referred to in paragraph 170BA(b) or (c).
s.170BD Orders only on application

The Commission must only make such an order if it has received an application for the making of an order under this Division from:

(a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or
(b) the Sex Discrimination Commissioner.

s.170BE No order if adequate alternative remedy exists

The Commission must refrain from considering the application or from determining it, if the Commission is satisfied that there is available to the applicant, or to the employees, whom the applicant represents, an adequate alternative remedy that:

(a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
(b) will ensure, for the employees concerned, equal remuneration for work of equal value.

170BF Immediate or progressive introduction of equal remuneration

The order may implement equal remuneration for work of equal value when the order takes effect. However, if it is not deemed feasible to implement it immediately, the order may implement it in stages (as provided in the order).

s.170BG Employer not to reduce remuneration

(1) An employer must not reduce an employee’s remuneration (within the meaning of the Equal Remuneration Convention) for the reason, or for reasons including the reason, that an application or order has been made under this Division.

(2) If subsection (1) is contravened, the purported reduction is of no effect.

s.170BH Division not to limit other rights

Subject to section 170BHA, this Division is not intended to limit any right that a person or trade union may otherwise have to secure equal remuneration for work of equal value.

s.170BHA Applications under this Division

(1) An application must not be made under this Division for an order to secure equal remuneration for work of equal value for an employee if proceedings for an alternative remedy:

(a) to secure such remuneration for the employee; or
(b) against unequal remuneration for work of equal value for the employee; have begun:
(c) under another provision of this Act; or
(d) under another law of the Commonwealth; or
(e) under a law of a State or Territory.

(2) Subsection (1) does not prevent an application under this Division if the proceedings for the alternative remedy:
(a) have been discontinued by the party who initiated the proceedings; or
(b) have failed for want of jurisdiction.

(3) If an application under this Division has been made for an order to secure equal remuneration for work of equal value for an employee, a person is not entitled to take proceedings for an alternative remedy under a provision or law of a kind referred to in subsection (1):

(a) to secure such remuneration for the employee; or
(b) against unequal remuneration for work of equal value for the employee.

(4) Subsection (3) does not prevent the taking of proceedings for an alternative remedy if the proceedings under this Division:

(a) have been discontinued by the party who initiated the proceedings;
(b) have failed for want of jurisdiction.

Schedule 7 (13) of the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) introduced transitional and saving provisions as they applied to the equal remuneration provisions of the legislation. These provisions make reference to the meaning of s. 170BHA.

(1) Subsection 170BHA(1) and (2) of the Workplace Relations Act have effect in relation to the prevention of an application being made under Division 2 of Part VIA of that Act on or after commencement of this Schedule, whether or not the proceedings for an alternative remedy referred to in subsection 170BHA(1) began before the commencement.

(2) Subsections 170BHA(3) and (4) of the Workplace Relations Act have effect in relation to the prevention of proceedings for an alternative remedy referred to in subsection 170BHA(3) on or after the commencement of this Schedule, whether or not the application under Division 2 of Part VIA referred to in that subsection was made before that commencement.

s.170BI Additional effect of Division

(1) Because of this section, this Division has the effect it would have if section 170BA were repealed and paragraph 170BC(3)(b) were omitted. That effect is additional to, and does not prejudice, the effect that this Division has otherwise than because of this section.

(2) The Commission must determine by arbitration an application made under this Division as it has effect because of this section.

(2A) Section 170N does not prevent the Commission from exercising its arbitration powers under Part VI during a bargaining period (within the meaning of Division 8 of Part VIB) for the purposes of this section.

Note: In exercising its arbitration powers, the Commission may adjourn the arbitration until the bargaining period has ended.

(3) The Commission may make an order under this Division (as it so has effect) only if:

(a) it considers that the order is necessary to prevent an industrial dispute about equal remuneration for work of equal value; and
(b) it has given to each organisation or other person who, in its opinion, would be likely to be a party to the dispute an opportunity to be heard in relation to the making of the order.

(4) An order so made must be expressed to bind only such of the following as the order specifies:
(a) the organisations and other persons to whom the Commission has given, as required by subsection (3), an opportunity to be heard;
(b) the respective members of those organisations.

Source: *Workplace Relations Act 1996* (Cth) as at 31 December 1996 following passage of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth)
APPENDIX SIX

EQUAL REMUNERATION PROVISIONS, WORKPLACE RELATIONS ACT 1996 (CTH) (27 MARCH 2006)

s.620 Object

The object of this Division is to give effect, or further effect, to:
(a) the Anti-Discrimination Conventions; and
(b) the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
(c) the Discrimination (Employment and Occupation) Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1958 and is also known as Recommendation No. 111.

Note: Employer, employee and employment have their ordinary meaning in this Division. See sections 5, 6 and 7 and Schedule 2.

s.621 Relationship of this Division to other laws providing alternative remedies

(1) The Commission must not deal with an application under this Division if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:

(a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
(b) will ensure, for the employees concerned, equal remuneration for work of equal value.

(2) The Commission must not deal with an application under this Division for an order to secure equal remuneration for work of equal value for an employee if proceedings for an alternative remedy:

(a) to secure such remuneration for the employee; or
(b) against unequal remuneration for work of equal value for the employee;
have begun:
(c) under another provision of this Act; or
(d) under another law of the Commonwealth; or
(e) under a law of a State or Territory.

(3) Subsection (2) does not prevent the Commission from dealing with an application under this Division if the proceedings for the alternative remedy:

(a) have been discontinued by the party who initiated the proceedings; or
(b) have failed for want of jurisdiction.

(4) If an application has been made for an order under this Division to secure equal remuneration for work of equal value for an employee, a person is not entitled to take proceedings for an alternative remedy under a provision or law of a kind referred to in subsection (2):

(a) to secure such remuneration for the employee; or
(b) against unequal remuneration for work of equal value for the employee.
(5) Subsection (4) does not prevent the taking of proceedings for an alternative remedy if the proceedings under this Division:

(a) have been discontinued by the party who initiated the proceedings; or
(b) have failed for want of jurisdiction.

(6) A remedy under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment, that consists solely of compensation for past actions, is not an alternative remedy, or an adequate alternative remedy, for the purposes of this section.

s.622 Relationship of this Division to AFPC decisions and the Australian Fair Pay and Conditions Standard

(1) The Commission is to have regard to decisions of the AFPC in making orders under this Division.

(2) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:

(a) the group of employees who would be covered by the order applied for; and
(b) the comparator group of employees;

are both entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.

(3) To avoid doubt, subsection (2) does not apply if employees in one or both of the groups are entitled to a rate of pay higher than the applicable guaranteed rate.

(4) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:

(a) the group of employees who would be covered by the order applied for is entitled to a rate of pay that is higher than the rate of pay the group would be entitled to under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7; and
(b) the comparator group of employees is entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part 7.

(5) To avoid doubt, subsection (4) does not apply if the comparator group of employees is entitled to a rate of pay higher than the applicable guaranteed rate.

(6) To avoid doubt, subsections (2) and (4) apply regardless of the source of the employee's entitlement to be paid the rate of pay.

(7) In this section:

*basic periodic rate of pay* has the same meaning as in Division 2 of Part 7.
*basic piece rate of pay* has the same meaning as in Division 2 of Part 7.
*casual loading* has the same meaning as in Division 2 of Part 7.
comparator group of employees means employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates.

s.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.

(2) An expression has in subsection (1) the same meaning as in the Equal Remuneration Convention.

Note: Article 1 of the Convention provides that the term “equal remuneration for men and women workers for work of equal value” refers to rates of remuneration established without discrimination based on sex.

s.624 Orders requiring equal remuneration

(1) Subject to this Division, the Commission may make such orders as it considers appropriate to ensure that, for employees covered by the orders, there will be equal remuneration for work of equal value.

(2) Without limiting subsection (1), an order under this Division may provide for such increases in rates (other than those set by the AFPC) of remuneration (within the meaning of the Equal Remuneration Convention) as the Commission considers appropriate to ensure that, for employees covered by the order, there will be equal remuneration for work of equal value.

(3) However, the Commission may make an order under this Division only if:

   (a) the Commission is satisfied that, for the employees to be covered by the order, there is not equal remuneration for work of equal value; and

   (b) the order can reasonably be regarded as appropriate and adapted to giving effect to one or more of the following:

       (i) the Anti-Discrimination Conventions;

       (ii) the provisions of Recommendations referred to in paragraphs 620(b) and (c).

s.625 Orders only on application

The Commission must only make such an order if it has received an application for the making of an order under this Division from:

(a) an employee, or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order; or

(b) the Sex Discrimination Commissioner.

s.626 Conciliation or mediation

(1) If an application is made for an order under this Division, the Commission must, before starting to hear and determine the matter to which the application relates:

   (a) attempt to settle the matter by conciliation; or

   (b) at the request or with the consent of both the applicant and any employer of employees who, if the order applied for were made, would be covered by it – refer the matter for mediation by an independent person specified in the request or consent.

(2) The Commission may order:
(a) the applicant, or a representative of the applicant; and
(b) each employer of employees who, if the order applied for were made, would be covered by it, or a representative of those employers;

to attend the conciliation or mediation.

(3) The Commission may order that the employees who, if the order applied for were made, would be covered by it, or a representative of those employees, be allowed to attend the conciliation or mediation.

(4) The Commission may order that:

(a) the applicant; or
(b) each employer of employees who, if the order applied for were made, would be covered by it;

inform the employees concerned of:
(c) the making of the application for an order under this Division; and
(d) the details of the application and the order applied for; and
(e) the time and place at which conciliation or mediation will take place.

s.627 If conciliation or mediation is unsuccessful

(1) If:
(a) the Commission forms the view that all reasonable attempts to settle the matter, or part of the matter, to which the application relates by conciliation have been unsuccessful; or
(b) if the Commission referred the matter to an independent person for mediation – the independent person informs the Commission that all reasonable attempts to settle the matter, or part of the matter, by mediation have been unsuccessful;
the Commission must advise accordingly the applicant and each employer of employees who, if the order applied for were made, would be covered by it.

(2) The Commission may order that:
(a) the applicant; or
(b) each employer of employees who, if the order applied for were made, would be covered by it;

inform the employees concerned of the Commission’s advice under subsection (1).

(3) If the Commission advises persons under subsection (1), the Commission is to proceed to hear and determine the matter, or part, that was not settled.

s.628 Hearing of matter by member who conducted conciliation

(1) If a member of the Commission has exercised conciliation powers under section 626 in relation to a matter, the member must not hear or determine, or take part in the hearing or determination of, the matter if a person who was present at the conciliation objects.

(2) The member is not taken to have exercised conciliation powers in relation to the matter merely because:
(a) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
(b) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.
s.629 Immediate or progressive introduction of equal remuneration

The order may implement equal remuneration for work of equal value when the order takes effect. However, if it is not deemed feasible to implement it immediately, the order may implement it in stages (as provided in the order).

s.630 Employer not to reduce remuneration

(1) An employer must not reduce an employee’s remuneration (within the meaning of the Equal Remuneration Convention) for the reason, or for reasons including the reason, that an application or order has been made under this Division.

(2) If subsection (1) is contravened, the purported reduction is of no effect.

s.631 Employer not to prejudice employee

(1) An employer must not, for the reason, or for reasons including the reason, that an application or order has been made under this Division, do or threaten to do any of the following:

(a) dismiss an employee;
(b) injure an employee in his or her employment;
(c) alter the position of an employee to the employee’s prejudice.

(2) Subsection (1) is a civil remedy provision.

s.632 Penalties etc. for contravention of section 631

(1) The Court, or the Federal Magistrates Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the defendant) who has contravened section 631:

(a) an order imposing a pecuniary penalty on the defendant;
(b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
(c) any other order that the court considers appropriate.

(2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.

(3) The orders that may be made under paragraph (1)(c) include:

(a) injunctions; and
(b) any other orders that the court considers necessary to stop the conduct or remedy its effects.

(4) In this section:

eligible person means any of the following:
(a) a workplace inspector;
(b) a person affected by the contravention;
(c) an organisation of employees that:
   (i) has been requested in writing, by the employee concerned, to apply on the employee’s behalf; and
(ii) has a member employed by the employee’s employer; and
(iii) is entitled, under its eligibility rules, to represent the industrial interests of the
employee in relation to work carried on by the employee for the employer;
(d) the Sex Discrimination Commissioner;
(e) a person prescribed by the regulations for the purposes of this paragraph.

(5) A regulation prescribing persons for the purposes of paragraph (e) of the definition of eligible person may provide that a person is prescribed only in relation to circumstances specified in the regulation.

s.633 Proof not required of the reason for conduct

(1) If:
(a) in an application under section 632 relating to a person’s conduct, it is alleged that the
conduct was, or is being, carried out for a particular reason; and
(b) for the person to carry out the conduct for that reason would constitute a contravention of section 631;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason, unless the person proves otherwise.

(2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 838 for interim injunctions.

s.634 Extraterritorial extension

(1) This Division, and the rest of this Act so far as it relates to this Division, extends to an employee whose remuneration is determined by or under this Act, a law of a State or Territory or a contract of employment made in Australia, even though one or both of the following apply:

(a) the employee is employed wholly or partly in work outside Australia;
(b) the employee’s employer operates, exists, is incorporated, or is otherwise established, outside Australia.

Note: In this context, Australia includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the Acts Interpretation Act 1901.

(2) In this section:
this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

APPENDIX SEVEN

EQUAL PAY DIRECTIVE (75/117) (COUNCIL OF THE EUROPEAN COMMUNITIES)

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, an in particular Article 100 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market;

Whereas it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions;

Whereas the Council resolution of 21 January 1974 concerning a social action programme, aimed at making it possible to harmonize living and working conditions while the improvement is being maintained and at achieving a balanced social and economic development of the Community, recognized that priority should be given to action taken on behalf of women as regards access to employment and vocational training and advancement, and as regards working conditions, including pay;

Whereas it is desirable to reinforce the basic laws by standards aimed at facilitating the practical application of the principle of equality in such a way that all employees in the Community can be protected in these matters;

Whereas differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of 30 December 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay.

HAS ADOPTED THIS DIRECTIVE:

Article 1 The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Article 2 Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 3 Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.
Article 4 Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.

Article 5 Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.

Article 6 Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.

Article 7 Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.

Article 8 1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within one year of its notification and shall immediately inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 9 Within two years of the expiry of the one-year period referred to in Article 8, Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 10 This Directive is directed to the Member States.

APPENDIX EIGHT

EQUAL REMUNERATION PROVISIONS, INDUSTRIAL RELATIONS ACT 1996 (NSW)

s.19 Review of awards

(1) The Commission is required to review each award before September 2001 and subsequently at least once in every 3 years.

(2) The purpose of a review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards.

(3) The Commission must take account of the following matters in the review of awards:

(a) any decisions of the Commission under Part 3 or any other test case decisions of the Commission,
(b) rates of remuneration and other minimum conditions of employment,
(c) part-time work, casual work and job-sharing arrangements,
(d) dispute resolution procedures,
(e) any issue of discrimination under the awards, including pay equity,
(f) any obsolete provisions or unnecessary technicalities in the awards and the case of understanding of the awards,
(g) any other matter relating to the objects of the Act that the Commission determines.

(4) The Commission must also take account of the effect of the awards on productivity and efficiency in the industry concerned.

(5) During a review of awards, relevant industrial organisations and any other parties to the awards may make submissions on any of the matters being reviewed.

(6) The Commission is to make such changes to awards as it considered necessary as a result of a review.

s.21 Conditions to be provided in awards on application

(1) The Commission must, on application, make an award setting any of the following conditions of employment:

(a) ordinary hours of employment;
(b) equal remuneration and other conditions for men and women doing work of equal or comparable value;
(c) employment protection provisions;
(d) provisions relevant to technological change;
(e) sick leave;
(f) part-time work;
(g) casual work.

(2) Those conditions to be set:

(a) in accordance with any relevant requirement of this Division and any other provisions of this Act, and
(b) with due regard to any established principles of the Commission or other matters considered relevant.

(3) Those conditions may be set in a new award or by the variation of an existing award dealing with the matter.

(4) This section applies even though there is an existing award dealing with the matter.

**s.23 Equal remuneration and other conditions**

Whenever the Commission makes an award it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

*Source: Industrial Relations Act 1996 (NSW) as at 2 September 1996.*
### APPENDIX NINE

**INDUSTRIES AND OCCUPATIONS NOMINATED FOR INVESTIGATION BY THE NEW SOUTH WALES PAY EQUITY INQUIRY**

Table A9.1: Industries and occupations nominated by the industrial parties and interveners to New South Wales Pay Equity Inquiry

<table>
<thead>
<tr>
<th>Industry/Occupation</th>
<th>Nominating Party</th>
<th>Supporting Party(ies)</th>
<th>Opposing Party (ies)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canteen industry</td>
<td>Australian Liquor, Hospitality and Miscellaneous Workers Union</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures; Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Catering industry</td>
<td>Australian Liquor, Hospitality and Miscellaneous Workers Union</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Child care workers engaged in long day care centres in the private sector¹</td>
<td>The Crown, Labour Council of New South Wales, KU Children’s Services</td>
<td></td>
<td>Employers’ Federation of New South Wales, Local Government and Shires Association, Australian Chamber of Manufactures</td>
</tr>
<tr>
<td>Child care workers in local government</td>
<td>The Crown, Municipal Employees Union</td>
<td>Labour Council of New South Wales</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Clerical workers employed under the Clerical and Administrative Employees (State) Award 1996²</td>
<td>Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Clerical officers employed under the provisions of the Clerical Officer Agreement No. 2515 of 1988</td>
<td>Public Service Association</td>
<td>Australian Chamber of Manufactures, The Crown, Labour Council of New South Wales</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Clothing industry – outworkers</td>
<td>Textile, Clothing and Footwear Union of Australia</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures, Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Confectionery Industry</td>
<td>Australian Manufacturing Workers’ Union</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures, Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Hairdressers and beauty therapists</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
</tbody>
</table>

¹ Although the appendices to the Pay Equity Report (Industrial Relations Commission of New South Wales, 1998c: 65) do not record that the nomination of private sector child care was supported by the Australian Liquor, Hospitality and Miscellaneous Workers Union, the nomination was actively supported by the union - Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.

Table A9.1: Industries and occupations nominated to New South Wales Pay Equity Inquiry (cont.)

<table>
<thead>
<tr>
<th>Industry/Occupation</th>
<th>Nominating Party</th>
<th>Supporting Party(ies)</th>
<th>Opposing Party (ies)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher education industry&lt;sup&gt;3&lt;/sup&gt;</td>
<td>National Tertiary Education Union</td>
<td>Australian Chamber of Manufactures          The Crown</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Home care workers, excluding Health Care professionals</td>
<td>Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures, Labour Council of New South Wales</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Mannequins and models</td>
<td>Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures          The Crown</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Nurses in public hospitals</td>
<td>Australian Chamber of Manufactures</td>
<td>Labour Council of New South Wales          The Crown, Employers’ Federation of New South Wales</td>
<td></td>
</tr>
<tr>
<td>Poultry process workers and hand packers</td>
<td>Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures          The Crown</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Product assemblers in the machinery and equipment manufacturing industry</td>
<td>Labour Council of New South Wales</td>
<td>The Crown</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Restaurant industry</td>
<td>Australian Liquor, Hospitality and Miscellaneous Workers Union</td>
<td>The Crown, Labour Council of New South Wales</td>
<td>Australian Chamber of Manufactures, Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>School ancillary staff</td>
<td>Labour Council of New South Wales, Public Service Association</td>
<td>The Crown</td>
<td>Australian Chamber of Manufactures, Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Seafood process work performed by women</td>
<td>Labour Council of New South Wales</td>
<td>The Crown</td>
<td>Employers’ Federation of New South Wales</td>
</tr>
<tr>
<td>Social and community services industry</td>
<td>Council of Social Service of New South Wales&lt;sup&gt;4&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Industrial Relations Commission of New South Wales (1998c) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Appendices to the Report to the Minister, pp. 63-70.

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<sup>3</sup> The appendices to the Pay Equity Report (Industrial Relations Commission of New South Wales, 1998c: 65) note that the higher education industry was nominated by the NTEU and latter withdrawn by the NTEU on the 29 January 1998. The NTEU would dispute that they nominated the industry for examination in the context of the Inquiry’s terms of reference.

APPENDIX TEN

RECOMMENDATIONS OF THE NEW SOUTH WALES PAY EQUITY INQUIRY

Table A10.1: Legislative changes recommended by the NSW Pay Equity Inquiry

<table>
<thead>
<tr>
<th>Section</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>s.3(f)</td>
<td>amended so as to distinguish pay equity and discrimination</td>
</tr>
<tr>
<td>s.6(2)</td>
<td>amended to specifically incorporate pay equity</td>
</tr>
<tr>
<td>s.19(3)(e)</td>
<td>amended so as to distinguish pay equity and discrimination. Furthermore, s.19 (3) should be</td>
</tr>
<tr>
<td></td>
<td>amended to incorporate a reference to the undervaluation of work</td>
</tr>
<tr>
<td>s.35(1)</td>
<td>should specifically refer to the need to ensure pay equity</td>
</tr>
<tr>
<td>s.47</td>
<td>should be amended so as to exclude 'pay equity' considerations from the limitations of the section</td>
</tr>
<tr>
<td>s.136(1)</td>
<td>amended to provide that the Commission must exercise any functions under the section so as to</td>
</tr>
<tr>
<td></td>
<td>achieve pay equity. Provision should expressly empower the Commission to make orders to ensure</td>
</tr>
<tr>
<td></td>
<td>equal remuneration</td>
</tr>
<tr>
<td>s.158(1)</td>
<td>should be varied by the removal of the words “or discrimination in the work place”</td>
</tr>
<tr>
<td>definitions</td>
<td>in the context of equal remuneration and pay equity provisions the word “remuneration” is defined</td>
</tr>
<tr>
<td></td>
<td>to have the same meaning as given in the Equal Remuneration Convention No 100. This approach will</td>
</tr>
<tr>
<td></td>
<td>also permit the consideration of overaward payments within the context of the equal remuneration</td>
</tr>
<tr>
<td></td>
<td>principle.</td>
</tr>
</tbody>
</table>

Source: Compiled from Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume II.
Table A10.2: Recommendations made by the NSW Pay Equity Inquiry – Equal Remuneration Principle

<table>
<thead>
<tr>
<th>Intent</th>
<th>ii. The principles would serve to ensure that:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) all instruments made by the Commission in the exercise of its jurisdiction would provide for equal remuneration and other conditions of employment for men and women doing work of equal and comparable value; and</td>
</tr>
<tr>
<td></td>
<td>(b) in female dominated industries and occupations that the work of employees is properly valued and in consequence is properly remunerated.</td>
</tr>
</tbody>
</table>

| Application | iii. The principle apply in all circumstances where the Commission exercises its powers and functions in relation to awards, enterprise agreements and the resolution of industrial disputes including circumstances where the parties to those matters reach consent arrangements or settlements. The principle would be an essential feature of the exercise of the Commission's powers in award review processes pursuant to s.19 of the Act. |

| Definition | iv (a) Remuneration be given have the same meaning as that expression in the Equal Remuneration Convention (Convention No 100). |

| Assessment Work Value | iv (b) The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle. |
|                      | (d) It is not necessary to find a gender causation or discrimination based on sex in order to make findings. The requirement is directed to the ascertainment of the appropriate value of work and to ensure that there is equal remuneration where there is equal or comparable value. |
|                      | v. The principle would provide an alternative basis for the assessment of undervaluation of work in female dominated industries which does not depend for its operation upon the existence of, or the making of, comparisons between female and male rates of pay. This principle will provide for the assessment of undervaluation simpliciter. |
**Table A10.2: Recommendations made by the NSW Pay Equity Inquiry – Equal Remuneration Principle (cont.)**

<table>
<thead>
<tr>
<th>Comparators</th>
<th>(ii)(e) Comparison for the value of work may be undertaken across and within industries and occupations, between different awards and with more than one comparison if required.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(f) ...the use of comparators is a foundation for wage fixation and is useful only to the extent that it furnishes the guide of some reliability to the proper rates. Accordingly, whilst comparison may be undertaken as to dissimilar work as between male and female workers (regardless of the award or industry in which the work is performed) it will be necessary to establish that there is a proper basis for comparison.</td>
</tr>
<tr>
<td></td>
<td>(g) The proper basis for comparison is not restricted to the similarity of work, as the essential ingredient of the principle is equal or comparable value. It is not necessary to find sameness or like nature of work. However, a range of factors might be relevant in considering comparability such as the history of the female dominated occupation or industry, award histories and the pattern of award variation and developments; the availability of credentialling arrangements and institutional arrangements that impact upon occupational market(s) such as regulatory schemes. Another reference point is the comparable circumstances of other occupations or industries in relation to matters such as education, training, qualifications and competencies.</td>
</tr>
<tr>
<td></td>
<td>(h) In making comparisons it may be appropriate to have regard to overaward payments or the absence thereof, provided that the components of the overawards are properly identified. Labour market, as opposed to work value considerations, should be excluded from consideration. In any event, overaward payments can only be used as a basis for comparison where there is no risk of a flow-on of increases in rates of pay.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Remedies</th>
<th>viii. The principle shall operate on the basis that male rates of pay shall not be reduced under any circumstances.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ix. A number of alternative approaches should be available to the Commission to remedy undervaluation. Each case should proceed on its own merits. Some possible approaches include reclassification of work, the establishment of new career paths, changes to incremental scales, reassessment of the broadbanding of classifications or skills, reassessments of definitions and the avoidance of generic descriptions of work which do not properly describe the value of the work.</td>
</tr>
</tbody>
</table>
Table A10.2: Recommendations made by the NSW Pay Equity Inquiry – Equal Remuneration Principle (cont.)

| Methodology | vi. In female dominated industries and occupations, it shall no longer be the presumption that the rates of remuneration have been properly assessed having regard to either the equal pay principles or proper work value assessments. In this regard it should not be assumed that all work has been valued correctly up to and including the structural efficiency processes and thereafter or that changes in work value have been taken into account. Moreover, it should not be assumed that assessments made by the Commission of the work value of these classes of employees have fully and adequately taken into account all relevant matters. Nor should it be assumed that the Minimum Rates Adjustment process, if undertaken, has been fully undertaken. |
| vii. It is essential that the Commission have regard to the history of the award and whether there have been any assessments made of the female dominated work in the past, in considering cases where this principle will apply. Furthermore, it will be important to consider whether the rates have been assessed on the basis of the sex of the worker. By this I do not import a discrimination test. The issue to be considered is a broad one having regard to a range of considerations includes the following: |
| (a) whether there some 'female characterisation’ or labelling of the work; |
| (b) whether there some underrating or undervaluation of the skills of the female employees per se; |
| (c) whether the industry or occupation has undervalued remuneration as a result of occupational segregation or segmentation; |
| (d) whether there are features of the industry or occupation which may have the potential to reduce the likelihood of a proper evaluation of the work such as the high degree of occupational segregation, the disproportionate representation of females in part-time or casual work, low rates of unionisation and low representation in workplaces covered by formal and informal work agreements and other considerations of that type. |
| (e) In considerations of this kind the Commission would be careful to undertake gender neutral assessments of the work and to place sufficient and adequate weight upon traditional work of women such as dexterity, nurturing, interpersonal skills and service delivery. These skills should be reassessed not only in the light of previous work value assessments (if any) but in the light an objective appraisal of those features of work. Clearly, if no previous work value assessment has been undertaken then such an assessment should be undertaken as part of the award review processes. |

| Economic Impact | x. In all cases the Commission should be mindful of the economic, and in particular the employment impact of any decision to review rates of pay or conditions. Naturally, an incremental or evolutionary approach to reform will facilitate a change in a way that minimises adverse economic or employment consequences. |

Source: Compiled from Industrial Relations Commission of New South Wales (1998b) *Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister*, Volume II.
APPENDIX ELEVEN

EQUAL REMUNERATION AND OTHER CONDITIONS PRINCIPLE
(INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES)

(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' overaward 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

(iii) the likely effect of its decision on employment.

(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.

Source: Re Equal Remuneration Principle (2000) 97 IR 177
## APPENDIX TWELVE

### COMPARISON OF NEW SOUTH WALES EQUAL REMUNERATION PRINCIPLE AND FINAL SUBMISSIONS OF INDUSTRIAL PARTIES

Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations

<table>
<thead>
<tr>
<th>Basis of principle/ application of the principle</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td>15.1 a) In exercising its jurisdiction under these principles the Commission shall, in accordance with section 23 of the Act, apply the principle of “equal remuneration and other conditions of employment for men and women doing work of equal or comparable value”. b) The Commission must be satisfied, prior to the making of any award, that the proposed award provides for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value, and for that purpose, the Commission shall take into account the matters dealt with in Equal Remuneration and Other Conditions Applications. 15.2 a) In accordance with s.21(1)(b) of the Act, an award shall, on application, be made or varied to provide for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.</td>
<td>1. The Equal Remuneration and other conditions of employment Principle applies to all aspects of the Commission’s jurisdiction as provided in the Industrial Relations Act including in consent matters. 2. Access to the Equal Remuneration and other conditions of employment Principle will be available on a case by case basis. Consideration of whether rates have been affected by the sex of the workers, and of whether remuneration for men and women workers is equal where work is of equal or comparable value, will not be restricted to industries or occupations that are or have been characterised by majority female employment. 3. The Equal Remuneration and other conditions of employment Principle does not require that it be demonstrated that differences in remuneration of men and women workers for work of equal value are caused by sex discrimination, however defined. 6. Where the value of work of men and women workers is assessed as equal or comparable across the various components of remuneration, equal remuneration and other conditions must apply for the men and women workers doing work of equal value. 13. The Equal Remuneration and other conditions of employment Principle operates irrespective of the operation of other wage fixing principles.</td>
<td></td>
</tr>
</tbody>
</table>
Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations (cont.)

<table>
<thead>
<tr>
<th>Assessment of work/ under-valuation</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td>(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.</td>
<td></td>
<td>4. It shall no longer be the presumption that rates of remuneration have been properly assessed, having regard to either the Equal Pay Principles or proper work value assessments. What is required is appropriate assessment of value of the work, unaffected by the sex of the workers, and equal remuneration for men and women workers for work of equal or comparable value. That assessment and setting of remuneration in relation to it must be based on real and cogent evidence about the value of work.</td>
</tr>
<tr>
<td>(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.</td>
<td>(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.</td>
<td></td>
<td>Consideration of whether valuing of work has been affected by the sex of the workers is broad and relevant matters include:</td>
</tr>
<tr>
<td>(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.</td>
<td>(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.</td>
<td></td>
<td>(a) whether there is some “female characterisation” or labelling of work;</td>
</tr>
<tr>
<td>(l) The expression ‘the conditions under which the work is performed’ has the same meaning as in Principle 6, Work Value Change.</td>
<td>(l) The expression ‘the conditions under which the work is performed’ has the same meaning as in Principle 6, Work Value Change.</td>
<td></td>
<td>(b) whether there is some under-rating or undervaluation of the skills of women employees per se;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(c) whether occupational segregation or segmentation has adversely affected remuneration; and,</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(d) whether there are features of the industry or occupation that may have influenced the valuation 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, low representation in workplaces covered by formal or informal work agreements and the incidence of consent awards/agreements. It is not required that changes in the value of work from any particular point in time be shown.</td>
</tr>
</tbody>
</table>
### Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations (cont.)

<table>
<thead>
<tr>
<th>Reference to comparators</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td>15.2 f) The Commission's consideration of the value of work performed under the award and/or classification may be assisted by a consideration of a comparator award(s) or comparator classification(s) and the remuneration and the conditions of employment of that comparator IN THAT COMPARATOR AWARD(S) OR CLASSIFICATION (S).</td>
<td>7. Comparators are not required to establish the value of work. Where comparators are used, they may be drawn across occupations and industries, irrespective of the form of industrial regulation or employment contract. Several comparators may be used. Comparisons are not restricted to similarity of work. Relevant factors in establishing comparisons include: (a) the history of the occupation or industry; (b) award histories and the pattern of award variation and development; (c) the availability of credentialling arrangements; and, (d) institutional arrangements that impact upon occupational markets, such as regulatory schemes; and (e) the comparable circumstances of other occupations and industries in relation to matters such as education, training, qualifications and competencies. 8. Comparisons within and between occupations and industries may be used for guidance in ascertaining appropriate rates of remuneration.</td>
<td></td>
</tr>
</tbody>
</table>
**Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations (cont.)**

<table>
<thead>
<tr>
<th>Methodology</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td>15.2</td>
<td>d) The consideration of the value of work performed under an award the subject of an application under this principle requires the exercise of the broad judgment that has characterised work value inquiries. In particular, the assessment of the value of the work and the establishment of rates of remuneration, is to be based on the nature of the work, skill, responsibility, and the conditions under which the work is performed, and the labour market, productivity and economic and other factors as the Commission considers relevant. A change in the value of the work need not be demonstrated in an application under this principle. e) The automatic application of any formula, which seeks to bypass a consideration of the value of the work performed, is inappropriate to the implementation of this principle.</td>
<td>5. The assessment of the value of work is required to be transparent, objective, and unaffected by the sex of the workers. Assessment of the value of work can include: (a) traditional work value components such as skill, responsibility, qualifications and conditions of work (including the work environment and the context in which work is carried out); and, (b) productivity, and labour market factors.</td>
</tr>
</tbody>
</table>
Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations (cont.)

<table>
<thead>
<tr>
<th>Remedies</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(f)</td>
<td>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.</td>
<td>15.2 (Labor Council supported by the Minister for Industrial Relations) Where the Commission is satisfied that, having regard to the sex of the employees, the remuneration or other conditions of employment in the award and/or the classifications are undervalued, or that there is not equal remuneration and other conditions for men and women doing work of equal or comparable value, it may provide remedies for equal remuneration and other conditions including, but not limited to:</td>
<td>12. Remedies may include:</td>
</tr>
<tr>
<td>(g)</td>
<td>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.</td>
<td>(a) reclassification of work; (b) the establishment of new career paths; (c) changes to incremental scales; (d) reassessment of the broadening of classifications or skills; (e) reassessments of definitions; (f) amendment of generic descriptions of work which do not properly describe the value of work;</td>
<td></td>
</tr>
<tr>
<td>(h)</td>
<td>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.</td>
<td>(Australian Business Industrial) Where the Commission is satisfied that having regard to the sex of the worker there is not equal remuneration and other conditions for men and women doing work of equal or comparable value, it may provide remedies for equal remuneration and other conditions including, but not limited to:</td>
<td></td>
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<tr>
<td>(i)</td>
<td>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’ overaward payments.</td>
<td>(Employers Federation) Where the Commission is satisfied that the remuneration or other conditions of employment in the award have been established with discrimination based on sex, it may remedy the discrimination. Remedies include, but are not limited to:</td>
<td></td>
</tr>
<tr>
<td>(o)</td>
<td>Equal remuneration shall not be achieved by reducing any current wage rates or other conditions of employment.</td>
<td>(All parties agree with the following list of remedies) (i) reclassification of work; (ii) establishment of new career paths; (iii) changes in incremental scales; (iv) changes to rates of remuneration; and, (v) changes to other conditions of employment.</td>
<td></td>
</tr>
</tbody>
</table>
### Table A12.1: Comparison of Equal Remuneration Principle, agreed final position of major industrial parties and final position of Women’s Organisations (cont.)

<table>
<thead>
<tr>
<th>Remedies (cont.)</th>
<th>Equal Remuneration Principle</th>
<th>Agreed position of major industrial parties</th>
<th>Position of Women’s Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equal remuneration and other conditions shall not be achieved by reducing current remuneration or conditions of any of the comparator classifications within the award.</strong>&lt;br&gt;1. The Commission may phase in changes to the award under this principle and any increase in remuneration may be absorbed in any above award payment.&lt;br&gt;2. In considering any application under this principle the Commission must be satisfied by the parties that there is no likelihood of wage or condition leapfrogging arising out of changes to the award and that any change to the wage relativities which might result, not only within the relevant award but also against external classifications to which the structure is related, are justified.</td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Economic considerations</strong>&lt;br&gt;(m) The Commission will guard against contrived classification and over classification of jobs. It will also consider:&lt;br&gt;(i) the state of the economy of New South Wales and the likely effect of its decision on the economy;&lt;br&gt;(ii) the likely effect of its decision on the industry and/or the employers affected by the decision; and,&lt;br&gt;(iii) the likely effect of its decision on employment.</td>
<td>15.2&lt;br&gt;(h) In making or varying an award setting equal remuneration and other conditions of employment, the Commission is required to consider:&lt;br&gt;i. The state of the economy of New South Wales and the likely effect of its decision on that economy;&lt;br&gt;ii. The likely effect of its decision on the industry and/or the employers affected by the decision; and,&lt;br&gt;iii. The likely effect of its decision on employment.</td>
<td>14. Where the Commission is considering the economic effect of decisions under this Principle, economic impacts will be considered on the same basis as in any of the Commission's decisions, consistent with the requirements of the Act. In particular, the Commission will require specific evidence regarding any effect claimed on employment or the economic situation of particular occupations or industries or of the New South Wales economy generally. Where the Commission determines that equal remuneration increases should be phased-in over a period of time or otherwise less than fully and directly applied the Commission will explicitly state its reasons for its decision.</td>
<td></td>
</tr>
<tr>
<td>Procedural</td>
<td>Equal Remuneration Principle</td>
<td>Agreed position of major industrial parties</td>
<td>Position of Women's Organisations</td>
</tr>
<tr>
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<tr>
<td></td>
<td>(n) Claims under this principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.</td>
<td>15.2. b) Applications made under s.21(1)(b) of the Act will be processed before a Full Bench of the Commission, unless otherwise allocated by the President. c) This principle generally applies where the award or a classification in the award is or has been female dominated, although access to the principle will ultimately be determined by the Commission on a case-by-case basis.</td>
<td>9. The Commission will ensure that equal remuneration for men and women workers for work of equal or comparable value is provided in first awards including those based on existing rates and conditions, and that valuing of work and setting remuneration is not affected by the sex of the workers involved. 10. The Commission will consider during award reviews whether there is equal remuneration for men and women workers for work of equal or comparable value and whether assessment of the value of work or setting of rates is affected by the sex of the workers, especially in low paid, female-dominated, industrially weak occupations and industries. 11. Where necessary in the exercise of its jurisdiction the Commission may require the parties to address issues bearing on equal remuneration and other conditions of employment and encourage the industrial parties to cooperate in enquiring into the factors and bases of evaluation and remuneration (consistent with s.162(2)(J) of the Act and the Commission's other powers under the Act).</td>
</tr>
</tbody>
</table>

Source: Compiled from *Re Equal Remuneration Principle* (2000) 97 IR 177, Appendices B, C

Within the agreed position of the major industrial parties the material in **bold** was that pressed by the Labor Council and the NSW Minister for Industrial Relations. The material in **ITALIC UPPER CASE** was that pressed by the employer organisations.
APPENDIX THIRTEEN

EQUAL REMUNERATION PRINCIPLE (QUEENSLAND INDUSTRIAL RELATIONS COMMISSION)

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 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 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 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 comparison 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 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.

APPENDIX FOURTEEN

PAY EQUITY PRINCIPLE, TASMANIAN WAGE FIXING PRINCIPLES
(TASMANIAN INDUSTRIAL COMMISSION)

18. PAY EQUITY
18.1 In this Principle 'pay equity' means equal remuneration for men and women doing work of equal value.

18.2 Applications may be made for making or varying an award in order to implement pay equity. Such applications will be dealt with according to this principle.

18.3 Pay equity applications will require an assessment of the value of work performed in the industry or occupation the subject of the application, irrespective of the gender of the relevant worker. The requirement is to ascertain the value of the work rather than whether there have been changes in the value of the work. The Commission may take into account the nature of the work, the skill, responsibility and qualifications required by the work and the conditions under which the work is performed (which has the same meaning as it does for Principle 8 - Work Value Changes).

18.4 A prior assessment by the Commission (or its predecessors) of the value of the work the subject of the application, and/or the prior setting of rates for such work, does not mean that it shall be presumed that the rates of pay applying to the work are unaffected by the gender of the relevant employees. The history of the establishment of rates in the award the subject of the application will be a consideration. The Commission shall broadly assess whether the past valuation of the work has been affected by the gender of the workers.

18.5 The operation of this principle is not restricted by the operation of other wage fixing principles. However, in approaching its task, the Commission will have regard to the public interest requirements of Section 36 of the Act.

**APPENDIX FIFTEEN**

**SCHEDULE OF REQUESTS FOR INTERVIEWS**

Table A15.1 Schedule of Requests for Interviews

*Comparable Worth Proceedings*

<table>
<thead>
<tr>
<th>Name</th>
<th>Position of relevance to case proceedings</th>
<th>Response to request for interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jenny Acton</td>
<td>Advocate, Australian Council of Trade Unions</td>
<td>No Reply</td>
</tr>
<tr>
<td>Judith Cohen</td>
<td>Judge of the Australian Conciliation and Arbitration Commission</td>
<td>No Reply</td>
</tr>
<tr>
<td></td>
<td>Presiding member of the Commission in the following matters:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C No. 2219 of 1985, Application by the Royal Australian Nursing Federation to vary the <em>Private Hospitals’ and Doctors’ Nurses (ACT)</em> Award 1972 re rates of pay for nurses</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A No. 257 of 1986, Application by the Royal Australian Nursing Federation to vary the <em>Private Hospitals’ and Doctors’ Nurses (ACT)</em> Award 1972 re rates of pay for nurses</td>
<td></td>
</tr>
<tr>
<td>Edward Cole</td>
<td>Advocate Public Service Board, Australian Capital Territory Health Authority</td>
<td>No Reply</td>
</tr>
<tr>
<td>Philip Gardner</td>
<td>Industrial Officer and Advocate, Royal Australian Nursing Federation (ACT Branch)</td>
<td>Interviewed 18/5/2005</td>
</tr>
<tr>
<td>Sue Jackson</td>
<td>Advocate, Council of Action for Equal Pay</td>
<td>No Reply</td>
</tr>
<tr>
<td>Barry Maddern</td>
<td>President, Australian Conciliation and Arbitration Commission</td>
<td>Deceased</td>
</tr>
<tr>
<td></td>
<td>Presiding member of the Commission in the following matters:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C No. 2219 of 1985, Application by the Royal Australian Nursing Federation to vary the <em>Private Hospitals’ and Doctors’ Nurses (ACT)</em> Award 1972 re rates of pay for nurses</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A No. 257 of 1986, Application by the Royal Australian Nursing Federation to vary the <em>Private Hospitals’ and Doctors’ Nurses (ACT)</em> Award 1972 re rates of pay for nurses</td>
<td></td>
</tr>
<tr>
<td>Garry Moore</td>
<td>Counsel, Minister of State Employment and Industrial Relations</td>
<td>No Reply</td>
</tr>
<tr>
<td>Colin Polites</td>
<td>Advocate, Confederation of Australian Industry</td>
<td>Deceased</td>
</tr>
</tbody>
</table>

*HPM Proceedings*

<table>
<thead>
<tr>
<th>Name</th>
<th>Position of relevance to case proceedings</th>
<th>Response to request for interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Edward Arena</td>
<td>Human Resource Manager, HPM Industries</td>
<td>No Reply</td>
</tr>
<tr>
<td>Roger Boland</td>
<td>Director Industrial Relations, Metal Trades Industries Association Advocate, Metal Trades Industries Association</td>
<td>Interviewed 15/2/2005</td>
</tr>
<tr>
<td>Edward Cole</td>
<td>Advocate, Minister for Workplace Relations and Small Business</td>
<td>No Reply</td>
</tr>
<tr>
<td>Name</td>
<td>Position of relevance to case proceedings</td>
<td>Response to request for interview</td>
</tr>
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</tr>
<tr>
<td>Elizabeth Fletcher</td>
<td>Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission</td>
<td>Interviewed 20/2/2005</td>
</tr>
<tr>
<td>Kathryn Freytag</td>
<td>Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission</td>
<td>Interviewed 10/2/2005</td>
</tr>
<tr>
<td>Philippa Hall</td>
<td>Senior Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission</td>
<td>Interviewed 11/2/2005</td>
</tr>
<tr>
<td>Max Kimber</td>
<td>Barrister-at-Law, State Chambers&lt;br&gt;Counsel, HPM Industries</td>
<td>No Reply</td>
</tr>
<tr>
<td>Emma Maiden</td>
<td>National Research Officer, Australian Manufacturing Workers’ Union&lt;br&gt;Advocate, Australian Manufacturing Workers’ Union</td>
<td>Interviewed 21/2/2005</td>
</tr>
<tr>
<td>Kathy McDermott</td>
<td>Director, Equal Pay Unit, Federal Department of Industrial Relations&lt;br&gt;(at the time of the Inquiry into Sex Discrimination in Overaward Payments)&lt;br&gt;Policy Adviser, Federal Minister for Industrial Relations&lt;br&gt;(at the time of the 1993 legislative amendments)</td>
<td>Interviewed 7/12/2005</td>
</tr>
<tr>
<td>Ian Ross</td>
<td>Vice President, Australian Industrial Relations Commission&lt;br&gt;Presiding member of the Commission in the following matter: C No. 30630 of 1999, Automotive, Food, Metals Engineering, Printing and Kindred Industries Union and David Syme &amp; Co Ltd</td>
<td>No Reply</td>
</tr>
</tbody>
</table>
### Table A15.1 Schedule of Requests for Interviews (cont.)

**NSW Pay Equity Inquiry/NSW Equal Remuneration Principle Proceedings**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position of relevance to case proceedings</th>
<th>Response to request for interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard Cox</td>
<td>Director of Economic Research and Forecasting, New South Wales Treasury</td>
<td>Interviewed 21/4/2005</td>
</tr>
<tr>
<td></td>
<td>Member, Crown Working Party, New South Wales Pay Equity Inquiry</td>
<td></td>
</tr>
<tr>
<td>Leonie Glynn</td>
<td>Judge, Industrial Relations Commission of New South Wales Presiding member of the Industrial Relations Commission, New South Wales Pay Equity Inquiry</td>
<td>No Reply</td>
</tr>
<tr>
<td>Gail Gregory</td>
<td>Executive Officer, Labor Council of New South Wales Advocate for the Labor Council during the New South Wales Pay Equity Inquiry and through initial directions hearings in the Equal Remuneration Principle proceedings.</td>
<td>Interviewed 20/2/2005</td>
</tr>
<tr>
<td>Name</td>
<td>Position of relevance to case proceedings</td>
<td>Response to request for interview</td>
</tr>
<tr>
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<td>----------------------------------</td>
</tr>
<tr>
<td>Fran Hayes</td>
<td>Member, National Pay Equity Coalition&lt;br&gt;Convenor of Women’s Organisations during the New South Wales Pay Equity Inquiry</td>
<td>Interviewed 18/2/2005</td>
</tr>
<tr>
<td>John Hungerford</td>
<td>Deputy President, Industrial Relations Commission of New South Wales&lt;br&gt;Presiding member of the Commission, New South Wales Equal Remuneration Proceedings, provided majority judgement</td>
<td>No Reply</td>
</tr>
<tr>
<td>Tim McDonald</td>
<td>Senior Industrial Officer, Employers’ Federation of New South Wales&lt;br&gt;Advocate, New South Wales Pay Equity Inquiry and Equal Remuneration Proceedings</td>
<td>Declined Interview</td>
</tr>
<tr>
<td>Donna McKenna</td>
<td>Commissioner, Industrial Relations Commission of New South Wales&lt;br&gt;Presiding member of the Commission, New South Wales Equal Remuneration Proceedings, Provided Dissenting Judgement</td>
<td>Declined Interview</td>
</tr>
<tr>
<td>John Murphy</td>
<td>Barrister-at-Law, Frederick Jordan Chambers&lt;br&gt;Counsel, Crown in the State of New South Wales, New South Wales Equal Remuneration Principle proceedings</td>
<td>Declined interview</td>
</tr>
<tr>
<td>Alison Peters</td>
<td>Vice-President, Labor Council of New South Wales, New South Wales Pay Equity Inquiry and Equal Remuneration Principle proceedings&lt;br&gt;State Secretary, Australian Services Union (Social and Community Services Division)</td>
<td>Interviewed 14/3/2005</td>
</tr>
<tr>
<td>Grant Poulton</td>
<td>Senior Industrial Officer, Australian Business Limited&lt;br&gt;Advocate New South Wales Equal Remuneration Proceedings</td>
<td>Declined Interview</td>
</tr>
<tr>
<td>Peter Sams</td>
<td>Deputy President, Industrial Relations Commission of New South Wales&lt;br&gt;Presiding member of the Commission, New South Wales Equal Remuneration Proceedings, provided majority judgement</td>
<td>No Reply</td>
</tr>
<tr>
<td>Monica Schmidt</td>
<td>Judge, Industrial Relations Commission of New South Wales&lt;br&gt;Presiding member of the Commission, New South Wales Equal Remuneration Proceedings, provided majority judgement</td>
<td>No Reply</td>
</tr>
<tr>
<td>Jeff Shaw</td>
<td>New South Wales Attorney General and Minister for Industrial Relations, New South Wales Pay Equity Inquiry and Equal Remuneration Principle proceedings</td>
<td>Interviewed 14/3/2005</td>
</tr>
</tbody>
</table>
Table 15.1 Schedule of Requests for Interviews (cont.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Position of relevance to case proceedings</th>
<th>Response to request for interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael Walton</td>
<td>Counsel Assisting, New South Wales Pay Equity Inquiry</td>
<td>Declined interview</td>
</tr>
<tr>
<td>Michael Wright</td>
<td>President, Industrial Relations Commission, Industrial Relations Commission of New South Wales</td>
<td>No Reply</td>
</tr>
<tr>
<td></td>
<td>Presiding member of the Commission, New South Wales Equal Remuneration Proceedings, provided majority judgement</td>
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</tr>
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APPENDIX SIXTEEN

SEMI-STRUCTURED INTERVIEW QUESTIONS

COMPARABLE WORTH PROCEEDINGS, ANOMALIES AND INEQUITIES PROCEEDINGS

Royal Australian Nursing Federation (Phillip Gardner)

Comparable Worth Proceedings

Would you outline your role in the case?

Would you outline the circumstances that preceded the comparable worth case?

What was the impetus for the application and how would you characterise relations between the ACTU and the RANF?

Did the RANF’s application for a federal award influence the comparable worth application? (Follow up: What circumstances promoted the use of a RANF award as the test case? To what extent had this issue concerned the RANF Executive? Given that the case did not commence until 1985 what factors had delayed the onset of the case?)

What type of problems had unions experienced with the 1972 principle?

Why did the ACTU choose comparable worth as the means to approach the ambiguity in the 1972 principle concerning feminised worker? (Follow up: Who had recommended the comparable worth methodology to the ACTU/RANF?)

Did the ACTU/RANF consider options other than comparable worth? (Follow up: Why did the applicant unions reject utilising work value as the comparative methodology?)

To your knowledge did the ACTU consider other test cases?

The ACTU framed the case before the Full Bench as comprising two threshold issues concerning the continued availability of the 1972 principle. Was it the RANF’s expectation that the Bench would seek clarification of the ACTU’s submissions regarding comparable worth at the same time that it considered the threshold issues?

How prejudicial to the application was the Full Bench’s insistence that the ACTU furnish further details on comparable worth?

The Full Bench ruled against the use of comparable worth and essentially directed the applicant unions to the anomalies legislative provisions of the wage-fixing guidelines. In the subsequent case did the applicant unions bring forward the evidence that had been prepared for the comparable worth case?

What do you consider were the ramifications of the ACAC’s rejection of comparable worth?

To your knowledge did the case influence the ACTU’s submissions concerning the legislative provisions introduced in 1993?
Anomalies and Inequities Proceedings

Were there any impediments to the RANF pursuing the application through the anomalies and inequities provisions of the wage fixing principles?

The application was framed very differently to that of the comparable worth application. Was this a very conscious and deliberate shift in orientation?

The bulk of the evidence concerned the work value aspects of the application. What considerations influenced the weighting of the evidence?

Although the application carried a professional rates component, there was little evidence presented to support this application. What considerations influenced this weighting of the evidence?

Did the comparable worth and anomalies proceedings influence RANF strategy in how it would pursue future claims in industrial tribunals?

How did the comparable worth case frame the strategy in the subsequent case taken under the anomalies and inequities principle?

Why was there such a lack of evidence concerning professional rates in the subsequent case?
Would you outline your role in the case?

What role did the ACTU have in drafting the 1993 legislative amendments?

What difficulties had the ACTU encountered in finding an application to test the 1993 legislative provisions?

Was it the ACTU’s contention that the legislative provisions could only be tested through an application involving a single employer/workplace?

What was the ACTU’s initial assessment of the requirements of the legislative provisions – what onus did the legislative provisions place on the applicant?

Did you foresee the MTIA’s interpretation of the construction of the provisions and the constraint facing the Full Bench hearing equal remuneration applications?

What factors led to the application’s reliance on the metal industry competency standards?

Why did the ACTU reject the use of work value as a means of demonstrating that the work was of equal value?

Did the disparity in overaward payments provide an unwanted level of complexity in the case?

What problems did the application face in quantifying the work of the women at the centre of the application?

At the outset of the case was it the ACTU’s expectation that the AIRC would adopt the definitions of discrimination that were contained in the Sex Discrimination Act (as opposed to those relied upon in the s.150A proceedings)?

In its final submissions the ACTU argued the application of the onus of proof legislative provisions of the Sex Discrimination Act. Did the ACTU contemplate that the reference in the Equal Remuneration Convention to discrimination was a prospective one? i.e., that the AIRC simply needed to ensure that the rates of remuneration were free of discrimination based on sex.

How did you view Commissioner Simmonds’ original decision? Did you consider appealing the decision rather than launching a new application?

What conscious strategies did you adopt to support the new application? Did you at this stage consider advancing a prospective test of discrimination?

How welcome was the negotiated settlement?
The ACTU provided assistance to the AMWU in subsequent equal remuneration proceedings involving David Syme. What lessons did you take forward from the HPM proceedings?

Did the case demonstrate any limitations in the legislative provisions? (Follow up: If so, in what areas?)

Were the legislative provisions undermined by the broader shift in wages policy to enterprise bargaining?
Would you outline your role in the case?

How would you characterise the AMWU’s relationship with HPM prior to the case?

What factors were instrumental in influencing the different earnings trajectories of the general hands/storemen and packers/process workers?

Why did the AMWU propose that the HPM be a suitable case for testing the equal remuneration legislative provisions?

Was it the AMWU’s contention that the legislative provisions could only be tested through an application involving a single employer/workplace?

What was the AMWU’s initial assessment of the requirements of the legislative provisions – what onus did the legislative provisions place on the applicant?

What factors led to the application’s reliance on the metal industry competency standards?
(Follow up: How decisive was the commitment to metal industry competency standards within the AMWU? What was the nature of the agreement with HPM concerning the use of the metal industry competency standards? At what time would you become aware that the MTIA would advise an alternative position?)

Why did the AMWU reject the use of work value as a means of demonstrating that the work was of equal value?

Did the disparity in overaward payments provide an unwanted level of complexity in the case?
(Follow up: Did this complexity arise because there was little employer documentation to substantiate the basis of the overaward payments?)

What problems did the application face in quantifying the work of the women at the centre of the application?

At the outset of the case was it the AMWU’s expectation that the AIRC would adopt the definitions of discrimination that were contained in the Sex Discrimination Act (rather than those considered in s.150A proceedings)?

In its final submissions the applicants argued the application of the onus of proof legislative provisions of the Sex Discrimination Act. Did the applicants contemplate that the reference in the Equal Remuneration Convention to discrimination was a prospective one? i.e., that the AIRC simply needed to ensure that the rates of remuneration were free of discrimination based on sex.

How did you view Commissioner Simmonds’ original decision? Did you consider appealing the decision rather than launching a new application?

What conscious strategies did you adopt to support the new application? Did you at this stage consider advancing a prospective test of discrimination?

How welcome was the negotiated settlement?
Did the case demonstrate any limitations in the equal remuneration legislative provisions? (Follow up: If so, in what areas?)

Were the legislative provisions undermined by the broader shift in wages policy to enterprise bargaining?
**MTIA (Roger Boland)**

Would you outline your role in the case?

Did the MTIA have any input to the equal remuneration amendments in 1993?

What was the MTIA’s initial assessment of the requirements of the equal remuneration legislative provisions – what onus did the legislative provisions place on the applicant?

Prior to the ACTU/AMWU taking the matter to a Full Bench you flagged that you would argue that a Full Bench was unable to take the action that was sought of it. Had you raised these jurisdictional issues prior to this time? Had such issues been discussed?

The issue of competency standards was both a key issue and contested throughout. What was your understanding of the use of competency standards at HPM?

The unions in their submissions argued that there was some shift in the position regarding competency standards vis-à-vis resolution of the claim. Were they misguided in this view?

What was your assessment of the position of the Full Bench towards the use of competency standards for the purpose of the classification?

Was the MTIA surprised that the AMWU/ACTU sought to rely on the metal industry competency standards as the means of demonstrating that the work was of equal value? (Follow up: What in your view were the key motivating factors?)

Why did the MTIA advise HPM that the competency standards were an inappropriate vehicle for the purposes of the application?

Did the application face difficulties because of the diverse nature of overaward payments in the metal industry? (Follow up: Did the absence of employer documentation ultimately assist the case of the employer parties?)

In the proceedings there was considerable attention directed to the definitions of discrimination that would be adopted. Were you surprised that there were not extensive submissions about the requirement to demonstrate a sex-based discriminatory cause for earning disparities? (Follow up: Did you anticipate submissions suggesting the test implied by the Convention was more of a prospective test?)

At the outset of the case was it the MTIA’s expectation that the AIRC would adopt the definitions of discrimination that were contained in the *Sex Discrimination Act* given the repeal of the s.150A provisions? (Follow up: Was this opposed because of the reversal of proof provisions?)

In the subsequent application taken by the AMWU/ACTU greater prominence was afforded to construct of work value. Did this orientation strengthen the case taken by the AMWU/ACTU? (Follow up: What influence did the altered nature of the application have on two subsequent decisions by HPM: the restructuring of the general hands and storemen classifications at HPM; the subsequent enterprise agreement with the AMWU that delivered substantial wage increases to women employed as process workers and packers?)
Do you think that these provisions raised particular tensions for the Commission particularly between its role as a tribunal setting properly fixed minimum rates, and these provisions which arguably enable it to arbitrate paid rates?

Did the case demonstrate any limitations in the equal remuneration legislative provisions? (Follow up: If so, in what areas?)
**AIRC – Commissioner Simmonds**

Confirm role in the case

The Full Bench has not issued any guiding principle on the interpretation of the equal remuneration provisions. Given this circumstance was it unusual for the HPM application to come to a single member of the Commission?

Was the interest in the case, and the number of parties that sought intervention status, unusual?

What was your initial assessment of the requirements of the legislative provisions – what onus do you think the legislative provisions place on the applicant? (Follow up: Discrimination, Work of Equal Value)

Were you surprised that you did not receive more detailed submissions from the applicants on what tests were required by the provisions – in particular the issues that attend the concept of discrimination?

Do you think that the applicants and interveners underestimated the rigour required by the discrimination test? (Follow up: Was this surprising given difficulties with similar definitions in equal opportunity jurisdictions?)

Would the application have been strengthened if the applicants had contended that the reference to discrimination in the Equal Remuneration Convention was a prospective one? i.e., that the AIRC simply needed to ensure that the rates of remuneration were free of discrimination based on sex. (Follow up: Had you contemplated such submissions?)

Arguably there was an opportunity, at the time of the amendments to the definitions of discrimination in the *Sex Discrimination Act*, for these issues to be addressed more definitively within the federal industrial jurisdiction. How influential was this omission and what factors were most instrumental in the AIRC rejecting the use of the definitions of discrimination that were contained in the *Sex Discrimination Act*?

Turning to the issue of work value, were you surprised that the AMWU/ACTU sought to rely on the metal industry competency standards as the means of demonstrating that the work was of equal value? (Follow up: To what extent was this influenced by discussion of competency standards during the full Bench proceedings, the inclusion of overaward payments in the claim, the commitment of the AMWU to the metal industry competency standards?)

In the subsequent application taken by the AMWU/ACTU greater prominence was afforded to construct of work value. Did this orientation strengthen the case taken by the AMWU/ACTU?

Did the application face difficulties because of the diverse nature of overaward payments in the metal industry? (Follow up: Did the absence of employer documentation ultimately assist the submissions of the employer parties?)

What issues emerged through HPM, the MTIA and the Commonwealth urging caution on the consideration of overaward payments?
Do you think that the continued reliance on work value criteria would be sustained if an applicant were to seek orders applicable to a multi-employer award? (Follow up: Is such an application possible? Is it the AIRC’s assessment that the legislative provisions could only be tested through a single employer application?)

What issues were raised by the HPM case concerning the equal remuneration legislative provisions? (Follow up: In what ways do they assist and/or impede the objective of equal remuneration?)
Confirm role in the cases involving s.170BD applications (Gunn & Taylor, David Syme)

The Full Bench has not issued any guiding principle on the interpretation of the equal remuneration provisions. Given this circumstance was it unusual for the Gunn & Taylor, David Syme applications to come to a single member of the Commission?

What was your initial assessment of the requirements of the legislative provisions – what onus do you think the legislative provisions place on the applicant? (Follow up: Discrimination, Work of Equal Value)

In the David Syme matter were you surprised that you did not receive more detailed submissions from the applicants on what tests were required by the provisions – in particular the issues that attend the concept of discrimination?

Do you think that the applicants and interveners underestimated the rigour required by the discrimination test? (Follow up: Was this surprising given difficulties with similar definitions in equal opportunity jurisdictions?)

Would the application have been strengthened if the applicants had contended that the reference to discrimination in the Equal Remuneration Convention was a prospective one? i.e., that the AIRC simply needed to ensure that the rates of remuneration were free of discrimination based on sex. (Follow up: Had you contemplated such submissions? What direction was provided by the previous decisions of Commissioner Simmonds, Ross VP and Munro J and the cases that had been run in those proceedings?)

Arguably there was an opportunity, at the time of the amendments to the definitions of discrimination in the Sex Discrimination Act, for these issues to be addressed more definitively within the federal industrial jurisdiction. How influential was this omission?

The HPM application before Commissioner Simmonds was run by the applicants with a lower than expected reference to work value. How influential was this strategy and Commissioner Simmonds’ rejection of the same to the perception of what type of assessments are required?

In the David Syme case you gave consideration to the issue of comparators and the form of assessments required by the provisions. Do you think that the provisions provide some direction to comparative assessments? (Follow up: Do you think such construction would be prejudicial if an applicant were to seek orders applicable to a multi-employer award?)

What issues were raised by the David Syme (the Age) case concerning the equal remuneration legislative provisions? (Follow up: In what ways do they assist and/or impede the objective of equal remuneration?)
Would you outline your contribution towards HREOC’s inquiry into sex discrimination in overaward payments?

What issues were prescient during this inquiry?

Did difficulties arise with the construct of discrimination?

How was the report received within government? With the industrial parties?

What factors shaped the drafting of legislative amendments (equal remuneration)? Were alternative policy responses considered, such as a recast equal pay principle? Why did the Commonwealth persist with discrimination when the HREOC Inquiry had shown it to be a difficult concept?

Did HREOC make submissions as to the equal remuneration legislative provisions?

Why were the legislative provisions considered necessary, and advantageous?

Did you view the introduction of the provisions, in an era of decentralised bargaining, problematic?

Describe HREOC’s contribution to the Full Bench’s consideration of the s.150A provisions.

What materials did HREOC prepare on direct and indirect discrimination?

What was the attitude of the industrial parties and the Commission to this material?

Why were particular definitions advanced in these proceedings that were different to those that would ultimately amend the Sex Discrimination Act?

What prompted HREOC to argue of a new principle to guide the tribunal’s use of the equal remuneration legislative provisions?

At the outset of the case was it your expectation that the AIRC would adopt the definitions of discrimination that were contained in the Sex Discrimination Act (rather than those considered in s.150A proceedings)?

Give your involvement in the lead up to the provisions under which the HPM case was determined, in what way did that case depart from what that which you had anticipated?
Would you outline your contribution towards HREOC’s inquiry into sex discrimination in overaward payments?

What issues were prescient during this Inquiry?

Did difficulties arise with the construct of discrimination?

How was the report received within government?

What factors shaped the drafting of legislative amendments (equal remuneration)? Were alternative policy responses considered, such as a recast equal pay principle? Why did the Commonwealth persist with discrimination when the HREOC Inquiry had shown it to be a difficult concept?

Why were the legislative provisions considered necessary, and advantageous?

Did you view the introduction of the provisions, in an era of decentralised bargaining, problematic?

How did the Commonwealth approach its intervention in the HPM proceedings?

What sign off procedures were put in place?

Did you foresee the MTIA’s interpretation of the construction of the provisions and the constraint facing the Full Bench hearing equal remuneration applications?

Were you surprised that the ACTU rejected the use of work value as a means of demonstrating that the work was of equal value?

Did the disparity and complexity in the overaward payments at HPM provide an unwanted level of complexity in the case? (Follow up: Did this complexity arise because there was little employer documentation to substantiate the basis of the overaward payments?)

How did the Commonwealth reconcile its submission that the Commission should think carefully about its involvement in the regulation of overaward payments and the definition of remuneration that is carried forward by the Convention?

At the outset of the case was it the Commonwealth’s expectation that the AIRC would adopt the definitions of discrimination that were contained in the Sex Discrimination Act (rather than those considered in s.150A proceedings)?

In its final submissions the applicants argued the application of the onus of proof legislative provisions of the Sex Discrimination Act? How problematic was this application for the Commonwealth?

Did the Commonwealth contemplate that the reference in the Equal Remuneration Convention to discrimination was a prospective one? i.e., that the AIRC simply needed to ensure that the rates of remuneration were free of discrimination based on sex.
How did you view Commissioner Simmonds’ original decision? Were you surprised that the applicants appealed and what were your expectations about the second set of proceedings?

Was there any conscious shift in the Commonwealth’s position during the subsequent application?

Why has there been such low utilisation of the provisions?
Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry? (Follow up: What factors contributed to the Labor Council’s initial opposition to the Inquiry? How would you characterise the position of the Labor Council towards pay equity?)

Did the Labor Council have input to the drafting of the terms of reference?

How would you describe the attitude of the Labor Council to the participation of the Women’s Organisation in the Inquiry?

Did the Inquiry deviate from its expected course?

What prompted the shift in the Labor Council’s positioning in the early stages of the Inquiry?

Were any of the case studies of particular significance in the shaping of the final recommendations?

How pivotal was the role of Counsel Assisting to the course of the Inquiry? (Follow up: How pivotal was the Inquiry process itself as distinct from proceedings that stemmed from an industrial dispute or application lodged by an industrial party?)

What were the areas of investigation in the Inquiry that in your view proved pivotal to the shape of the final recommendations?

The Labor Council’s final submission contained provision for an Equal Pay Adjustment. What were the factors that prompted this inclusion?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with recommendations that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

What petitions did the Labor Council make to the state government concerning the legislative amendments recommended by the Inquiry? (Follow up: How were the recommendations of the Inquiry viewed within senior levels of the government? Why were the amendments opposed by the Cabinet? Were the recommendations weakened by the forecast departure of the Minister for Industrial Relations?)

Did you anticipate the Full Bench’s position (in the Equal Remuneration Principle Case) on the status of the recommendations of the Inquiry?

What were the factors that prompted the Labor Council to alter its position during the Equal Remuneration Principle proceedings? (Follow up: What importance can be attributed to the changes at that time within the Executive of the Labor Council?)

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?
What advantages do you see arising for gender pay equity in NSW as a result of the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way?
**Metal Trades Industries Association, Australian Chamber of Manufactures (Anthony Britt)**

Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry? (Follow up: What factors contributed to the MTIA/ACM’s initial opposition to the Inquiry?)

Did Australian Business have input to the drafting of the terms of reference for the Inquiry?

Did the Inquiry deviate from its expected course?

Were any of the case studies of particular significance in the shaping of the final recommendations?

How pivotal was the role of Counsel Assisting to the course of the Inquiry? (Follow up: Why did MTIA/ACM oppose the role of Counsel Assisting? How pivotal was the Inquiry process itself as distinct from proceedings that stemmed from an industrial dispute or application lodged by an industrial party?)

What were the areas of investigation in the Inquiry that in your view proved pivotal to the shape of the final recommendations?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with recommendations that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

The final submission of MTIA/ACM was arguably more progressive than that of the Employers’ Federation of NSW. Do you think this was instrumental to the Inquiry’s final recommendations?

What petitions did MTIA/ACM make to the state government concerning the legislative amendments recommended by the Inquiry?

Did you anticipate the Full Bench’s (in the Equal Remuneration Principle Case) position on the status of the recommendations of the Inquiry?

What were the factors that prompted MTIA/ACM (then the AIG) to alter its position during the Equal Remuneration Principle proceedings so that a consensus position could be presented to the Full Bench?

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?

What advantages do you see arising for gender pay equity in NSW arising from the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way?
Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry?

What parties had input to the drafting of the terms of reference for the Inquiry? (Follow up: Were there any areas of political tension concerning these terms?)

What was the nature of the advisory group that briefed the Crown’s advocate for the Inquiry? (Follow up: What, if any, tensions existed within that group)

Did the Inquiry deviate from its expected course?

Were any of the case studies of particular significance in the shaping of the final recommendations?

How pivotal was the role of Counsel Assisting to the course of the Inquiry?

What were the areas of investigation in the Inquiry that in your view proved pivotal to the shape of the final recommendations?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with recommendations that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

Following the Inquiry what processes were implemented to consider the recommendations of the Inquiry? (Follow up: What factors were instrumental in the Government not taking up the recommendations of the Inquiry concerning legislative amendments? Was there an anticipated timetable both prior to, and after the March 1999 election? How influential was the forthcoming retirement of the Minister?)

Did you anticipate the Full Bench’s (in the Equal Remuneration Principle Case) position on the status of the Inquiry report?

What were the factors that prompted the Crown to alter its position on a wide number of issues during the Equal Remuneration Principle proceedings? (Follow up: Was the process for briefing the Crown’s advocate during the Equal Remuneration Principle proceedings altered from that which was in place for the Inquiry? What consideration was given to the advice that would be provided from witnesses from the Treasury?)

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?

What advantages do you see arising for gender pay equity in NSW arising from the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way? (Follow up – Does the principle invalidate the prospect of equal pay adjustments?)
Crown Working Party (Richard Cox)

Would you outline your role in both cases?

What was the nature of the brief given to Treasury for the research undertaken for the Inquiry?

What assumptions underpinned the modelling used for this research?

Please provide a brief overview of the research and its central findings.

How much discussion was generated during Treasury through the course of the Inquiry?

What were the areas of investigation in the Inquiry that in your view proved pivotal to the shape of the final recommendations?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with recommendations that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

What was the reaction within Treasury concerning the Inquiry? (Follow up: Was their any concern within Treasury at the use to which the Treasury’s evidence was put?)

The Treasury was also required to present evidence to the Equal Remuneration Principles case. Was their any change in the brief given to Treasury in comparison to the Inquiry?

Were you surprised at the interpretation of the Treasury’s evidence by the Full Bench, particularly about overaward payments?

More generally what are some of the difficulties in presenting economic evidence concerning gender pay equity in industrial proceedings?
Minister for Industrial Relations and Attorney General (Jeff Shaw)

Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry? (Follow up: The industrial parties initially opposed the Inquiry. In the face of this opposition what was your preferred course of action?)

What factors shaped the Terms of Reference for the Inquiry, and the appointment of Leonie Glynn and Michael Walton?

Did the Inquiry deviate from its expected course? (Follow up: the length of the inquiry, the scale of investigations, the development of the concept of undervaluation.)

Was there active petitioning through the Inquiry concerning its likely impact?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with circumstances that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

Can you outline the nature of the opposition, within the Cabinet, to the legislative amendments recommended by the Inquiry?

Why weren't the legislative amendments pursued?

Did the debate about the legislative amendments invoke issues that were raised at the time of the drafting of the original legislation?

Did you anticipate the Full Bench’s position (in the Equal Remuneration Principle Case) on the status of the recommendations of the Inquiry?

The ‘brief’ for the Crown Working Party appeared to shift during the Equal Remuneration Principle. Was this the case and if so what prompted this change?

What were the factors that you think prompted the major industrial parties to alter their positions during the Equal Remuneration Principle proceedings?

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?

What advantages do you see arising for gender pay equity in NSW arising from the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way?
National Pay Equity Coalition (Fran Hayes)

Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry? (Follow up: The industrial parties initially opposed the Inquiry. In the face of this opposition what steps were taken by the Women's Organisations to ensure that the Inquiry proceeded?)

Did the Women's Organisations (individually or as a collective) have input to the drafting of the terms of reference for the Inquiry?

Did the Inquiry deviate from its expected course?

Were any of the case studies of particular significance in the shaping of the final recommendations?

How pivotal was the role of Counsel Assisting to the course of the Inquiry?

What were the areas of investigation in the Inquiry that in your view proved pivotal to the shape of the final recommendations?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with circumstances that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

The Women's Organisations’ final submission contained provision for an Equal Pay Adjustment. What were the factors that prompted this inclusion?

How would you characterise the views of the industrial parties towards the involvement of the Women's Organisations in the Inquiry?

What petitions did the Women's Organisations make to the state government concerning the legislative amendments recommended by the Inquiry?

Did you anticipate the Full Bench’s position (in the Equal Remuneration Principle Case) on the status of the recommendations of the Inquiry?

What were the factors that you think prompted the major industrial parties to alter their positions during the Equal Remuneration Principle proceedings?

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?

What advantages do you see arising for gender pay equity in NSW arising from the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way?
National Pay Equity Coalition (Meredith Burgmann)

Would you outline your role in both cases?

What were the circumstances that preceded the Ministerial reference concerning the Inquiry? (Follow up: What representations did you make to the Minister - Jeff Shaw - when it became evident that the industrial parties were opposing the Inquiry?)

Were you consulted over the drafting of the Terms of Reference and the appointment of Leonie Glynn and Michael Walton?

How would you characterise the views of the industrial parties towards the involvement of the Women’s Organisations, prior to and at the outset of the Inquiry?

How did the Women’s Organisations organise their representation and preparation of submissions?

Did the Inquiry deviate from its expected course?

There is some conjecture that a particular set of circumstances enabled the Inquiry to emerge with circumstances that surprised the government or that were not well anticipated by the government. Do you agree with this assessment and if so how did this occur? (Follow up: How would you characterise these circumstances?)

The Women’s Organisations’ final submission contained provision for an Equal Pay Adjustment. What were the factors that prompted this inclusion?

What petitions did you make to Jeff Shaw concerning the legislative amendments recommended by the Inquiry?

Can you outline the nature of the division within the state government concerning the legislative amendments recommended by the Inquiry?

Why weren’t the legislative amendments pursued?

Did you anticipate the Full Bench’s (in the Equal Remuneration Principle Case) position on the status of the recommendations of the Inquiry?

What were the factors that you think prompted the major industrial parties to alter their positions during the Equal Remuneration Principle proceedings?

The decision of the Full Bench and the terms of the Equal Remuneration Principle are arguably more conservative than the recommendations of the Inquiry. What factors prompted this narrowing of the equal remuneration measures available to the industrial parties?

What advantages do you see arising for gender pay equity in NSW arising from the Equal Remuneration Principle?

Is the Equal Remuneration Principle limited in any way?
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CHAPTER ONE: INTRODUCTION

Gender relations in Australia have altered. This can be assessed through obvious marker points: the weakening of the breadwinner ideology of wage determination; the increased participation of women in the labour market and formal education; and, the greater visibility of women in the state. Less clear cut but nevertheless emergent is women’s growing economic and social independence. In broad terms, women enter the realm of paid work empowered through increased education and facing fewer institutional and cultural barriers. Women in waged labour are thus growing in their economic and social importance, but in this more modern environment how well are questions of pay relativities resolved?

My own interest in these questions stems from a background of pay equity activism and involvement in labour law proceedings about pay equity. The removal of blatant sex discrimination in wage determination was not easily gained, but in procedural terms its application was relatively straightforward. More challenging questions emerged for activists in its wake; particularly about the valuation of feminised work and how the entry points of women to waged labour affected the valuation of their market worth.

Through this experience a central theme for me has been the elusive nature of effective reform in a more modern labour market. There have also been unforgiving reminders that the institutional grounds on which pay equity matters are settled are by no means fixed and guaranteed. The proposals for reform have been thwarted: at times because they were deficient; at times because they were highly contested; and in other instances because the ground rules had changed. From my perspective these circumstances were at odds with a state apparatus that is nominally sophisticated and favourably disposed to gender pay equity. The initial advances in Australia relative to other countries suggest that local policy and legislation does and can matter, but a key question for me centred on why current and more recent phases of gender equity reform have not opened up more discursive opportunities for women?
What needs to happen to develop the industrial infrastructure in the federal jurisdiction to advance gender pay equity in Australia beyond the breakthroughs of the 1970s? From the end of the long post-war boom there have been three stages in pay equity reform in Australia. The first comprised the adoption of equal pay principles in 1969 and 1972 by the then Australian Conciliation and Arbitration Commission (ACAC). The second involved a legislative entitlement to equal remuneration, introduced to federal labour law in 1993 and retained by the *Workplace Relations Act 1996* (Cth). Despite the availability of such legislative provisions they remain under-utilised; since their inception one case has proceeded to arbitration. The third stage involved distinct initiatives in gender pay equity reform developed in two significant state industrial jurisdictions in Australia, initiatives that were proscribed by federal labour law amendments in 2005.

Within this period improvements in gender pay equity ratios have stalled and the equal remuneration provisions in federal labour law have been seemingly powerless to deal with this inertia. This thesis assesses whether there is anything in the design of federal labour law, and its interpretation by the Australian Industrial Relations Commission, that can enhance the effective use of its equal remuneration principles.

In assessing this question I recognise that in comparative terms the available public policy and legislative measures have provided Australia’s working women with superior pay equity ratios to those in the majority of industrialised countries. Additionally, feminist agency has left its mark on modern gender relations. This is evident in higher levels of labour market participation, the removal of institutionalised sexism, and the creation of agencies within the state designed to improve the social and economic status of women.

Other social factors, beyond those contained in industrial principles and legislation, impact on gender pay equity ratios. As an example, women’s dominant contribution to the social reproduction of labour remains largely unpaid, even in the ‘advanced’ liberal democracies, and this sexual division of labour affects the capacity of women to pursue paid work. And of course, women’s wages like those of men are subject to the operation of the market. The general rise in the bargaining position of capital
relative to labour throughout the ‘Western’ world over the last thirty years may limit the potential for bold advances in labour market equity.

On that score, the entitlement to equal remuneration has swum against a tide of labour market ‘reform’ designed to encourage market flexibility. The Australian labour market has historically been mediated by state sponsored regulatory measures administered by industrial tribunals. These measures were the basis of centralised wage fixing and a set of industry awards, an infrastructure that has recently been eroded by a policy commitment to enterprise and individual bargaining. This commitment has undermined the importance of centralised wage fixing and awards to the protection of women’s earnings, particularly those women in part-time, private sector employment. In these circumstances it is not surprising that employers have used precarious employment to fragment work, exploiting working women while appearing to offer flexibility to solve the dilemmas of work and family and participation in paid work.

**Structure of the Thesis**

To set the scene the thesis places the examination of local labour law in a wider theoretical context. Chapter Two reviews the sociological thinking about gender pay equity and provides some insights to how gender pay equity might be understood. This review is prefaced by international measures of gender pay equity as this data invites questions as to whether national systems of labour law carry a distinctive influence on the gender pay equity gap. This is followed by a review of the explanations for the relation of women’s earnings relative to men’s. This review includes orthodox explanations, including human capital theory and early iterations of labour market segmentation theory, prior to canvassing feminist critiques of gender pay equity. This final discussion within this chapter provides contrasting perspectives on the contribution of particular sets of social relations to shaping gender pay equity.

Chapter Three reviews social thinking concerning labour market regulation; it begins by examining the contested concept of the state in sociological theorising. The issue of the state and the interests it serves is important as it raises questions about the capacity of labour market regulation to remedy
gender pay inequity. To what extent do the social assumptions embedded in legislative form actually reflect the dynamics of the modern labour market and the position of women in it? These debates bring to the foreground the account of the development of international initiatives that shaped the inclusion in national regulation of the right to equal remuneration. Whether this right is capable of challenging the gender pay gap is a matter of significant debate in feminist theorising. This debate arises because some accounts hold that the mere right to equal remuneration, as an exemplar of a rights-based discourse, fails to contest the structural inequalities in the labour market, and also because the effectiveness of labour market regulation is compromised by the reformulation of class and gender relations in a post-industrial economy.

Chapter Four contextualises the examination of contemporary gender pay equity reform by reviewing the development of Australian labour law in the area of gender pay equity, a review that underlines the importance of national law and context to the shaping of local equal remuneration provisions. The distinctiveness of the gender pay equity jurisprudence in Australia is then contrasted with current measures in New Zealand, the United Kingdom, the United States and Canada. The relevance of this material is that it demonstrates the capacity for legislative and regulatory developments at the local level to instigate effective improvements in gender pay equity. This chapter concludes with an examination of the impact of emerging conservative political hegemony on Australian federal labour law, evident in a range of reforms that have privileged workplace and individual wage settlements and diminished the powers of industrial tribunals.

Chapter Five details the research propositions tested by this thesis and provides an outline of its research methods and strategy and of the sources from which the data is drawn. This outline is positioned against a review of questions of ontology and epistemology and in doing so provides an assessment of the support that can be given legitimately to the research findings of this thesis. The inquiry in this thesis is advanced by case study. Three particular cases in industrial tribunals in Australia provide distinctive insights to each of the three stages of gender pay equity reform outlined at the beginning of this chapter. They contribute to an understanding of the institutional
arrangements that influence or impede gender pay equity reform, as well as the complex terrain on which pay equity questions are settled.

Chapter Six comprises the first of these case studies and examines the 1986 comparable worth case, an important milestone in the application of the 1972 equal pay for work of equal value principle. This principle nominally provided that equal pay applied to men and women engaged in work that was different but was assessed to be of equal value. The 1986 case arose from an application for wage increases for nurses employed under the Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972. The applicant unions, the Royal Australian Nursing Federation (RANF) and the Hospital Employees Federation of Australia (HEF), supported by the Australian Council of Trade Unions (ACTU), sought a series of rulings from the Australian Conciliation and Arbitration Commission (ACAC), including one that the Commission apply the 1972 principle via the concept of comparable worth. Organised labour had identified comparable worth as the concept that would advance the application of the 1972 principle by allowing female-dominated work to be assessed against completely different male-dominated jobs. The application was refused and following direction from the Commission the applicants pursued the case through the anomalies and inequities provisions of the prevailing wage fixing principles, proceedings that are also examined within this chapter.

Chapter Seven features the only case to be taken to final arbitration under the legislative right to equal remuneration introduced in federal labour law in 1993. Reflecting the linkages of these provisions to international conventions, they reference the ILO Equal Remuneration Convention which requires that rates of remuneration be established without discrimination based on sex. The proceedings, detailed in this chapter, concern an application made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) concerning process workers and packers employed at HPM Industries, a Sydney based electrical component manufacturer. The claim on HPM

1 National Wage and Equal Pay Cases 1972 (1972) 147 CAR 172.
2 Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972 (1972) 145 CAR 700.
4 Otherwise known as the Australian Manufacturing Workers’ Union.
Industries demanded that process workers and packers at HPM Industries Darlinghurst, Sydney site receive the same rate of pay as employees classified as storemen or general hands. The application was refused and a subsequent application settled without recourse to final arbitration. A key contributor to the tribunal’s refusal of the application was that the applicant unions were unable to demonstrate that the difference in earnings had a discriminatory course, the threshold test invoked by the Australian Industrial Relations Commission (AIRC) in its interpretation of the legislative provisions. The chapter examines the AIRC’s strategy in interpreting the equal remuneration provisions and assesses whether this strategy was subsequently confirmed by subsequent applications for equal remuneration orders, applications that did not proceed to final arbitration.

Chapter Eight examines the outcomes from two of the more recent institutional developments in pay equity, the New South Wales Pay Equity Inquiry and the determination of a new equal remuneration principle. Both of these cases were conducted in the Industrial Relations Commission of New South Wales, and covered workers employed under state awards. The developments in New South Wales were mirrored to a significant extent by initiatives in Queensland. The developments in New South Wales followed a two stage process, commencing with a wide ranging Pay Equity Inquiry that sought to investigate the determinants of inequity. The Inquiry was followed by an application to a Full Bench of the Industrial Relations Commission of New South Wales by the Labor Council of New South Wales for a new equal remuneration principle. The terms of the application reflected the findings of the preceding Pay Equity Inquiry. Although the principle was narrower in scope than that envisaged by the Inquiry, the newly developed equal remuneration principle in New South Wales provided for the pursuit of claims of gender-based undervaluation, thereby rejecting the viability of a test based on sex discrimination as the means of assessing claims for equal remuneration.

The thesis concludes with a discussion of its research findings; the latter are set against the research propositions established in Chapter Five. The findings evaluate the effectiveness of the institutional arrangements that define each of the three stages of gender pay equity reform and also assesses the

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6 IRC 6320 of 1997, Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the *Industrial Relations Act 1996* (NSW).
impact of shifts in social, economic and gender relations on initiatives in gender pay equity jurisprudence. These findings in turn provide the basis of recommendations concerning further research.

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CHAPTER TWO: THEORISING GENDER PAY EQUITY

2.1 INTRODUCTION

This thesis examines whether labour market regulation can promote gender pay equity, and if it can, what is the optimal design for such regulation. The task of this chapter is to review the sociological thinking about gender pay equity: what it is, and how it is measured. Confined to the paid labour market, gender pay equity can be thought of as equal remuneration for work of equal value, measured by the ratio of female to male earnings. This leaves the question of where women’s earnings stand relative to men’s and what are the explanations for differences in this relation. This chapter initially addresses international measures of gender pay equity, as this data opens up the issue of whether national regulation exerts a difference on gender pay equity outcomes. Then follows a review of orthodox explanations, including human capital theory, for earning differences between men and women. The chapter canvasses feminist critiques of gender pay equity, a discussion which provides contrasting perspectives on the contribution of particular sets of social relations to shaping gender pay equity.

2.2 INTERNATIONAL MEASURES OF GENDER PAY EQUITY

To address the question of gender pay equity, I will review initially the available international data on gender pay equity, measured here as the ratio of female to male earnings in the paid labour market. This earnings data enables an initial assessment of whether gender pay equity ratios vary between nation states. This data therefore sets the platform for analysis of the impact of different systems of national law, and the optimal design of labour market regulation directed to the objective of gender pay equity.

Organisation for Economic Cooperation and Development (OECD) data, for full-time wage and salary earners, is shown in Table 2.1. This data is based on hourly earnings and has been harmonised to account, to the extent possible, for differences in the collection methods and
categories of analysis used by individual nation states\textsuperscript{1}. The data in Tables 2.1 and 2.2 uses the cross country comparison methods relied on by the OECD. The data indicates distinct national differences in gender pay equity ratios, exemplified by the United States ratio of 79 per cent and 91 per cent for Australia relative to the OECD weighted average of 84 per cent. If part-time workers are included (Table 2.2), the United States ratio is 78 per cent, that for Australia 89 per cent while the OECD average remains at 84 per cent\textsuperscript{2}. Both median and mean measures of hourly earnings are provided in Tables 2.1 and 2.2. Median measures are not influenced by extreme values at the outlying ends of the earnings' distribution which will influence the mean average measure (OECD 2002: 97). Median measures are often preferred by some analysts, particularly where the earnings distribution in individual nation states is characterised by extreme values. Tables 2.1 and 2.2 include two additional measures of the earnings gap: the ratio of hourly earnings of women's to men's at the 20\textsuperscript{th} and 80\textsuperscript{th} percentiles of earnings distributions, where at the 20\textsuperscript{th} percentile, 1 in 5 workers receives wages lower than that level, and 4 in 5 receive higher wages; and at the 80\textsuperscript{th} percentile, where the proportions are reversed, with 4 in 5 workers being paid at rates below that level, and 1 in 5 at rates higher. Where the gender pay gap is significantly smaller at the 20\textsuperscript{th} than at the 80\textsuperscript{th} percentile, this means that equity between the sexes is greatest at low rates of pay, and inequity widens among higher-paid workers.

\textsuperscript{1} A more complete account of the methods relied on by the OECD is provided in Chapter Five.

\textsuperscript{2} Utilising the measure of the mean.
Table 2.1: Gender Pay Ratios (Hourly Earnings), Full-Time Wage and Salary Employees, Cross National Comparisons, 1998

<table>
<thead>
<tr>
<th>Country</th>
<th>Ratio of means</th>
<th>Ratio of medians</th>
<th>Ratio of the 20th percentile</th>
<th>Ratio of the 80th percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (2000)</td>
<td>91</td>
<td>92</td>
<td>96</td>
<td>87</td>
</tr>
<tr>
<td>Austria</td>
<td>79</td>
<td>80</td>
<td>76</td>
<td>80</td>
</tr>
<tr>
<td>Belgium</td>
<td>91</td>
<td>94</td>
<td>91</td>
<td>91</td>
</tr>
<tr>
<td>Canada (2000)</td>
<td>82</td>
<td>81</td>
<td>81</td>
<td>86</td>
</tr>
<tr>
<td>Denmark</td>
<td>89</td>
<td>93</td>
<td>96</td>
<td>87</td>
</tr>
<tr>
<td>Finland</td>
<td>82</td>
<td>87</td>
<td>92</td>
<td>77</td>
</tr>
<tr>
<td>France</td>
<td>87</td>
<td>93</td>
<td>89</td>
<td>89</td>
</tr>
<tr>
<td>Germany</td>
<td>80</td>
<td>83</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>Greece</td>
<td>80</td>
<td>80</td>
<td>84</td>
<td>82</td>
</tr>
<tr>
<td>Ireland</td>
<td>81</td>
<td>81</td>
<td>80</td>
<td>83</td>
</tr>
<tr>
<td>Italy</td>
<td>85</td>
<td>91</td>
<td>90</td>
<td>87</td>
</tr>
<tr>
<td>Netherlands</td>
<td>80</td>
<td>86</td>
<td>85</td>
<td>80</td>
</tr>
<tr>
<td>New Zealand (2001)</td>
<td>86</td>
<td>91</td>
<td>92</td>
<td>85</td>
</tr>
<tr>
<td>Portugal</td>
<td>92</td>
<td>85</td>
<td>89</td>
<td>95</td>
</tr>
<tr>
<td>Spain</td>
<td>88</td>
<td>93</td>
<td>86</td>
<td>95</td>
</tr>
<tr>
<td>Sweden (2000)</td>
<td>86</td>
<td>90</td>
<td>92</td>
<td>84</td>
</tr>
<tr>
<td>Switzerland</td>
<td>76</td>
<td>79</td>
<td>74</td>
<td>78</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>80</td>
<td>85</td>
<td>85</td>
<td>80</td>
</tr>
<tr>
<td>United States (1999)</td>
<td>79</td>
<td>79</td>
<td>83</td>
<td>78</td>
</tr>
<tr>
<td>OECD unweighted average</td>
<td>84</td>
<td>86</td>
<td>86</td>
<td>85</td>
</tr>
</tbody>
</table>


The different gender pay equity outcomes for individual nation states reflect a number of influences. Thus the similarity in results for Denmark and Portugal in Table 2.1 cannot automatically be attributed to each of these countries having similar institutional or regulatory arrangements. Rubery, Grimshaw and Figueiredo (2002: 50) observed that there is a need for more disaggregated analysis that includes assessment of systems of wage regulation and patterns of wage dispersion. This analysis should encompass the earnings patterns of men as well as women, part-timers and well as full-timers, young workers as well as ‘prime age’ as well as older wage workers, well educated and less educated workers, and public sector and private sector workers. The OECD (2002) and the European Commission (2002, 2006) also observe the need to examine the influence of the participation rate of women in paid work on labour market composition.

3 Unadjusted indicators of wage and salary employees aged 20 to 64 years, excepting Australia, Canada, New Zealand, Sweden, 18-64 years and Switzerland, 15 to 64 years.
Table 2.2: Gender Pay Ratios (Hourly Earnings), All Wage and Salary Employees, Cross National Comparisons, 1998

<table>
<thead>
<tr>
<th>Country (Year)</th>
<th>Ratio of means</th>
<th>Ratio of medians</th>
<th>Ratio of the 20th percentile</th>
<th>Ratio of the 80th percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (2000)</td>
<td>89</td>
<td>90</td>
<td>96</td>
<td>85</td>
</tr>
<tr>
<td>Austria</td>
<td>79</td>
<td>79</td>
<td>76</td>
<td>80</td>
</tr>
<tr>
<td>Belgium</td>
<td>93</td>
<td>93</td>
<td>91</td>
<td>92</td>
</tr>
<tr>
<td>Canada (2000)</td>
<td>81</td>
<td>78</td>
<td>81</td>
<td>81</td>
</tr>
<tr>
<td>Denmark</td>
<td>89</td>
<td>92</td>
<td>95</td>
<td>88</td>
</tr>
<tr>
<td>Finland</td>
<td>82</td>
<td>87</td>
<td>92</td>
<td>77</td>
</tr>
<tr>
<td>France</td>
<td>89</td>
<td>93</td>
<td>90</td>
<td>91</td>
</tr>
<tr>
<td>Germany</td>
<td>81</td>
<td>83</td>
<td>78</td>
<td>80</td>
</tr>
<tr>
<td>Greece</td>
<td>87</td>
<td>82</td>
<td>85</td>
<td>88</td>
</tr>
<tr>
<td>Ireland</td>
<td>79</td>
<td>76</td>
<td>75</td>
<td>82</td>
</tr>
<tr>
<td>Italy</td>
<td>91</td>
<td>93</td>
<td>91</td>
<td>93</td>
</tr>
<tr>
<td>Netherlands</td>
<td>79</td>
<td>87</td>
<td>86</td>
<td>81</td>
</tr>
<tr>
<td>New Zealand (2001)</td>
<td>84</td>
<td>87</td>
<td>93</td>
<td>83</td>
</tr>
<tr>
<td>Portugal</td>
<td>95</td>
<td>85</td>
<td>89</td>
<td>98</td>
</tr>
<tr>
<td>Spain</td>
<td>86</td>
<td>88</td>
<td>84</td>
<td>91</td>
</tr>
<tr>
<td>Sweden (2000)</td>
<td>83</td>
<td>88</td>
<td>91</td>
<td>81</td>
</tr>
<tr>
<td>Switzerland</td>
<td>78</td>
<td>80</td>
<td>74</td>
<td>77</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>75</td>
<td>79</td>
<td>79</td>
<td>76</td>
</tr>
<tr>
<td>United States (1999)</td>
<td>78</td>
<td>76</td>
<td>82</td>
<td>78</td>
</tr>
<tr>
<td>OECD unweighted average</td>
<td>84</td>
<td>85</td>
<td>86</td>
<td>84</td>
</tr>
</tbody>
</table>


Given the differences between the gender pay equity ratios for full-time wage and salary earners and all wage and salary earners the distribution of women and men across full-time and part-time employment may be of some consequence. Organisation for Economic Cooperation and Development (OECD) data indicating the share of women in part-time work for those nation states represented in Tables 2.1 and 2.2 is shown in Table 2.3. This data represents part-time employment shares as at 2000 and is proximate, on the indicator of time period, to the data presented in Tables 2.1 and 2.2. There is considerable variation across nation states and there is no consistent association between overall employment rates and the incidence of part-time work. These observations noted, the available data indicates that the majority of part-time work is undertaken by women even though the incidence of part-time work will relate to labour market regulation and organisation and also to gender

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4 Unadjusted indicators of wage and salary employees aged 20 to 64 years, excepting Australia, Canada, New Zealand, Sweden, 18-64 years and Switzerland, 15 to 64 years.
relations and social values (OECD, 2002: 68). An assessment of the data in Table 2.3 against that presented in Tables 2.1 and 2.2 indicates also that there is an uneven relationship between the gender pay equity ratios presented in Tables 2.1 and 2.2 and women’s representation in part-time employment. As an example the gender pay equity ratios presented for Australia are significantly higher than those for the United Kingdom and the United States. Yet women in Australia and the United Kingdom are engaged in part-time employment to a similar extent, 44.6 per cent and 40.2 per cent respectively, compared to the United States, 19.4 per cent. These differences suggest that similarity in gender pay equity outcomes cannot be automatically be attributed to the level of women’s engagement in part-time work. A wider range of factors bear investigation including the valuation of part-time employment.

Table 2.3: Women and Part-time Work, Cross National Comparisons, 2000

<table>
<thead>
<tr>
<th>Country</th>
<th>Incidence of part-time work</th>
<th>Female share</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Women</td>
<td>Men</td>
<td>Full-time work</td>
</tr>
<tr>
<td>Australia</td>
<td>44.6</td>
<td>12.6</td>
<td>33.1</td>
</tr>
<tr>
<td>Austria</td>
<td>24.3</td>
<td>2.3</td>
<td>37.9</td>
</tr>
<tr>
<td>Belgium</td>
<td>34.4</td>
<td>6.9</td>
<td>35.1</td>
</tr>
<tr>
<td>Canada</td>
<td>27.0</td>
<td>9.8</td>
<td>41.0</td>
</tr>
<tr>
<td>Denmark</td>
<td>23.9</td>
<td>8.6</td>
<td>42.4</td>
</tr>
<tr>
<td>Finland</td>
<td>13.5</td>
<td>6.6</td>
<td>45.7</td>
</tr>
<tr>
<td>France</td>
<td>24.8</td>
<td>5.3</td>
<td>39.2</td>
</tr>
<tr>
<td>Germany</td>
<td>33.7</td>
<td>4.4</td>
<td>35.2</td>
</tr>
<tr>
<td>Greece</td>
<td>9.2</td>
<td>2.9</td>
<td>36.4</td>
</tr>
<tr>
<td>Ireland</td>
<td>32.9</td>
<td>7.5</td>
<td>33.6</td>
</tr>
<tr>
<td>Italy</td>
<td>23.4</td>
<td>5.5</td>
<td>32.3</td>
</tr>
<tr>
<td>Netherlands</td>
<td>57.1</td>
<td>13.0</td>
<td>27.1</td>
</tr>
<tr>
<td>New Zealand</td>
<td>35.4</td>
<td>10.6</td>
<td>37.7</td>
</tr>
<tr>
<td>Portugal</td>
<td>12.6</td>
<td>3.0</td>
<td>42.7</td>
</tr>
<tr>
<td>Spain</td>
<td>16.4</td>
<td>2.5</td>
<td>33.8</td>
</tr>
<tr>
<td>Sweden</td>
<td>22.6</td>
<td>7.6</td>
<td>43.8</td>
</tr>
<tr>
<td>Switzerland</td>
<td>45.8</td>
<td>8.4</td>
<td>31.9</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>40.2</td>
<td>7.6</td>
<td>34.6</td>
</tr>
<tr>
<td>United States</td>
<td>19.4</td>
<td>7.3</td>
<td>43.1</td>
</tr>
<tr>
<td>OECD unweighted average</td>
<td>25.8</td>
<td>6.5</td>
<td>37.1</td>
</tr>
</tbody>
</table>


5 For persons aged 15 to 64 years.
6 Percentage of women (men) working part-time in total female (male) employment.
7 Percentage of women in total employment by category of employment.
The data presented in Tables 2.1 and 2.2, although published in 2002, represents data as at 1998. More recent comparative data is available both through the OECD and other sources, but this data is not available at the level of hourly earnings, is not published for both full-time and all wage and salary employees, and is not adjusted to take account of extreme values. OECD data of this nature is presented in Table 2.4. This data is based on gross earnings for full-time wage and salary employees and has not been harmonised to account for differences in the collection methods and categories of analysis used by individual nation states. Data is presented for 1995 and 2006 and for the reasons outlined above is not directly comparable with the data presented in Tables 2.1 and 2.2.

Notwithstanding these cautionary observations, the difference in gender pay equity between national jurisdictions is of interest to this thesis. The contrasting gender pay equity ratios evident in the data in Tables 2.1, 2.2 and 2.4 suggests that states may have adopted different regulatory regimes, and that the particular design of the regulatory measures adopted to address gender pay equity might have some consequence. These issues are taken up in Chapters Three and Four, in relation to a broader debate within sociological theorising of the state between functionalist explanations for state action and those accounts that acknowledge greater autonomy and differentiation between nation states.

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Table 2.4: Gender Pay Ratios (Total Earnings), Full-Time Wage and Salary Employees, Cross National Comparisons, 2005

<table>
<thead>
<tr>
<th>Total earnings, full-time wage and salary employees</th>
<th>1995</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>86</td>
<td>84</td>
</tr>
<tr>
<td>Austria</td>
<td>74</td>
<td>79</td>
</tr>
<tr>
<td>Canada</td>
<td>74</td>
<td>79</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>78</td>
<td>82</td>
</tr>
<tr>
<td>Denmark</td>
<td>86</td>
<td>88</td>
</tr>
<tr>
<td>Finland</td>
<td>78</td>
<td>80</td>
</tr>
<tr>
<td>France</td>
<td>90</td>
<td>89</td>
</tr>
<tr>
<td>Germany</td>
<td>77</td>
<td>76</td>
</tr>
<tr>
<td>Hungary</td>
<td>84</td>
<td>96</td>
</tr>
<tr>
<td>Ireland</td>
<td>76</td>
<td>82</td>
</tr>
<tr>
<td>Japan</td>
<td>63</td>
<td>69</td>
</tr>
<tr>
<td>Korea</td>
<td>57</td>
<td>61</td>
</tr>
<tr>
<td>Netherlands</td>
<td>77</td>
<td>80</td>
</tr>
<tr>
<td>New Zealand</td>
<td>85</td>
<td>91</td>
</tr>
<tr>
<td>Poland</td>
<td>80</td>
<td>89</td>
</tr>
<tr>
<td>Spain</td>
<td>71</td>
<td>83</td>
</tr>
<tr>
<td>Sweden</td>
<td>81</td>
<td>85</td>
</tr>
<tr>
<td>Switzerland</td>
<td>75</td>
<td>78</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>73</td>
<td>79</td>
</tr>
<tr>
<td>United States</td>
<td>75</td>
<td>81</td>
</tr>
<tr>
<td>OECD unweighted average</td>
<td>77</td>
<td>82</td>
</tr>
</tbody>
</table>


2.3 ORTHODOX EXPLANATIONS FOR WOMEN’S LOWER EARNINGS

Putting to one side for the moment the question of whether different national regulatory arrangements influence gender pay equity ratios, consistently lower rates of income for women in the paid workforce throughout the OECD are undeniable. How are these differences in earnings between men and women explained? Orthodox explanations are derived from liberal economics and focus on human capital theory. A critique of this has emerged from both labour market segmentation theory and feminist theorising.

2.3.1 HUMAN CAPITAL THEORY

The central proposition of human capital theory, as advanced by Becker, one of its foremost advocates, is that the acquisition of skills constitutes an investment that will generate future
labour market benefits (Becker, 1972: 781). Labour markets thus merely reflect differences in human capital brought to them by women and men. This approach is premised on a direct and positive relationship between investment and human capital and earnings. It assumes, consistent with neoclassical theory, that rational decisions at the level of the individual are made with a view to maximising income. Wages will approximate the marginal productivity of each employee, which in turn is a function of the level of investment in human capital that each employee has made. Decisions by individuals to invest less in training will be due to that individual having lower scholastic ability, expecting to spend less time in the labour market or being affected unduly in their propensity to invest by cultural and institutional factors (Mumford, 1978: 69). Consequently the human capital model clearly encompasses a supply side perspective which assumes that the demand for skills and labour will be determined and allocated by a perfectly competitive labour market.

On this reasoning, women's lower earnings reflect, and are an objective measure of, their lower level of investment in their own education, training and workforce participation. The labour market position of women is therefore 'rational' to the extent that they receive fewer 'returns' (wages and benefits) because of the fewer resources they have chosen to invest in training and work experience. This lower level of investment is explicable on the basis that women engage in 'non-market' domestic work, primarily household production (Mincer, 1962: 70, 93). Becker (1965: 512; 1981: 21) carried this analysis further to argue that the centre of decision making shifts from the individual to include the family. Decisions contemplate the allocation of time and returns received from market work, non-market work and leisure so as to optimise both the individual’s and the family’s returns. From this standpoint, issues of comparative advantage arise, given that women have a comparative advantage in non-market, domestic labour skills (Mincer and Polachek, 1974: S86, S101). Using the concept of rational choice, Mincer and Polachek observed that women often choose to engage in low paid employment with low levels of training so as to maximise their earnings in the short-
term on the expectation that they will disengage from market work (Mincer and Polachek, 1974: S80).

Becker (1957: 76, 157) contemplated the prospect of discrimination by modelling the range of ‘tastes’ and preferences that determine labour market choices by both employers and employees. There is an explicit acknowledgement that even with equal educational credentials, there will be employment ‘instances’ where women receive less wages than men (and black workers less than white workers). This discriminatory behaviour is possible even in a perfect competitive society because of the ‘taste’ for discrimination that exists in both individual employees and employers. Becker argued that discriminatory behaviour brings its own costs both in lower productivity for employers and lower wages for employees. As such it is uncompetitive. Yet tastes for discrimination continue to affect market relationships by causing market discrimination and market segregation. The potential determinants of such discrimination was taken up by Matthaei (1982) who combined a human capital perspective with an analysis of the ideologies of masculinity and femininity. These constructs have mediated historically the relations between the family and women’s position in paid work, and affects any attempt to breakdown the sex-typing of jobs. The different entry pathways to the labour market, men as primary wage earners and as heads of households, and women as homemakers seeking earnings to supplement family income, impact differently on the wage bargain and shape the exchange between employer and worker (Matthaei, 1982: 214).

Faced with evidence that shows wide wage variations within narrowly defined occupational, industrial and geographical market segments, orthodox labour market economists accounted for such wage variations in a number of ways. These explanations included differences between jobs and differences between individuals, described as differences in human capital (Becker, 1972) and the absence of perfect information about the potential of job applicants and of job content. The final obstacle to the efficient operation of the labour market lies in institutional impediments, including the operation of trade unions and the support of the state
by way of regulation of collective labour organisation. More current human capital theorists offer explicit accounts of both the supply of and demand for labour of different kinds. The level of occupational earnings is explained as reflecting the costs to the employer in terms of education, training and responsibility. A worker’s wage reflects the contribution of specific aptitudes, investment in their own education and training and hence their contribution to productive efficiency (Hyman and Brough, 1975: 137).

2.3.2 HUMAN CAPITAL THEORY - CRITIQUES

Human capital approaches have been criticised for a number of reasons. These include their unproblematic approach to the concept of choice, the inconsistency of data on women’s earnings in paid employment and their assumptions concerning the operation of a perfect competitive labour market. Recent international research into women’s pay has tested the efficacy of human capital propositions. This research relies on regression analysis which is employed to decompose the difference in earnings between men and women into three components – that due to individual characteristics, that due to productivity and that due to labour market discrimination (Rubery, Grimshaw and Figueiredo 2002: 51).

Most of this research starts by measuring the impact of those components of the wage gap that theorists believe can be explained by differences in human capital endowments, such as qualifications, experience; demographics, such as age, sex, race; and work characteristics, such as workplace size, occupation and industry, geography, union membership, product markets and labour markets. This combination of human capital endowments, demographics and work characteristics has been described as the ‘vector of productivity characteristics’. The contribution of these characteristics to earning differences is termed frequently the ‘explained’ or ‘justified’ components of the wage gap. What cannot be explained by these components is entitled the ‘adjusted’, ‘unexplained’ or ‘residual’ component of the earnings gap. It is this adjusted, unexplained or residual component of the earnings gap that provides a measure of discrimination in earnings allocation.
Some researchers also suggest, by implication, that regression analysis may understate the disadvantage endured by working women, because the data that goes into such research embodies social assumptions that may themselves be biased. Rubery, Grimshaw and Figueiredo (2002: 5-7) recently reviewed gender pay equity research and neatly summarised two of the questionable assumptions that underpin the use of regression analysis. The first assumption is that individual characteristics and work experience – level of education, qualifications, length of service, occupation - are the result of free choices made by men and women. As an example of the limitations of this assumption, they note that women’s lower length of workforce experience may reflect greater household responsibilities. The acquisition of education, the length and form of workforce experience and the choice of occupation may also reflect systemic labour market discrimination. The second assumption is that individual characteristics are taken as approximate measures of productivity and reward. Olsen and Walby (2004: 30) note in a similar vein that women may face systemic disadvantage in the acquisition of human capital and that the dichotomy that is frequently made in regression analysis between factors that are associated with either human capital or discrimination may be overdrawn. On these grounds purely quantitative research such as regression analysis is unable to incorporate fully the management and social dimensions of the labour market. Such dimensions include the institutional arrangements for gender wage determination, the integration or co-ordination of wage setting systems, the resilience of gendered norms and valuations in collective bargaining systems, minimum wage systems and job gradings and the social norms and values influencing changes in wage rates and wage systems (Rubery, Grimshaw and Figueiredo 2002: 91; Organisation of Economic Cooperation and Development, 2002: 113).

2.3.3 DOES HUMAN CAPITAL THEORY EXPLAIN EARNING DIFFERENCES BETWEEN WOMEN AND MEN?
The review of national studies of gender pay differences across fifteen European Union (EU) member states by Rubery, Grimshaw and Figueiredo (2002) is directed particularly to a cross-national study of the components of gender earning differences. Their overall assessment is that adjusting for gender differences in individual characteristics and workforce experience narrows but does not fully explain all of the gender pay gap. This finding is consistent with research across OECD members which concluded that women continue to earn less than men, even after controlling for observable characteristics that influence productivity (Organisation of Economic Cooperation and Development, 2002: 108).

Research commissioned by the World Bank across eight EU member states and Hungary\(^9\) was controlled for measured human capital and job characteristics and examined, among a number of factors, the impact of national wage structures on gender wage earning differences (Rice, 1999: 15, 19, 21). The research therefore measured the extent to which women face unequal treatment in the labour market, either because of women’s lower return on observable characteristics compared to men, or because they are regarded as having lower productivity due to characteristics that are unobservable (Rubery, Grimshaw and Figueiredo, 2002: 62). Relative to their human capital, women were distributed across lower paying areas in terms of occupation, industry and workplace size more than their male counterparts (Rice 1999: 25-27, 32). A wider gender pay gap was strongly associated with women’s lower position in the wage distribution. In all eight EU countries, half of all women were ranked below the 34\(^{th}\) percentile of male wage distribution - this after controlling for differences in individual characteristics between women and men (Rice 1999: 44).

The work of Rice is consistent with other international research which indicates that measured human capital endowments do not explain cross country differences in men’s and women’s earnings (Blau and Kahn 1992; Blau and Kahn 1996; Blau and Kahn 1997). A

\(^9\) Denmark, France, Germany, Greece, Italy, Spain, Portugal and the United Kingdom, as European Union (EU) member states in addition to Hungary.
significant contribution arises from cross country differences in wage structures. Blau and Kahn considered the performance of the United States compared to eight other countries. They observed that what they termed the level of wage inequality in the United States, measured through different returns on observed characteristics and the wage penalty associated with women’s position in the labour market, widened the gender pay gap in the United States relative to other countries (Blau and Kahn, 1992).

A similar result was found by Rubery, Grimshaw and Figueiredo (2002: 65) who sought to identify the factors which might offer insights to differences in earnings given the weakened explanatory power of observable characteristics. Using the data gathered by the OECD (2002) and using the EU average as a benchmark, these researchers tested the impact of women’s lower relative position in the residual wage distribution and the impact of systems of wage determination. They observed that adjusting for cross-country differences in observed personal and job characteristics, prices for these characteristics and the overall dispersion of the wage structures led to different results. In the United Kingdom, Finland, Greece, Germany and Ireland the gender pay gap narrowed after adjusting for changes in the wage structure. Alternatively in the Netherlands, which has a narrow wage dispersion, Portugal and Italy the gap widened after adjusting for the difference in wage dispersion. This data is shown in Table 2.5.

**Table 2.5: Impact on the Unadjusted Gender Pay Equity Ratio of Adjusting for Wage Structure, European Union Member States**

<table>
<thead>
<tr>
<th></th>
<th>Unadjusted pay gap</th>
<th>Gender pay gap adjusted for difference in wage structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>23.1</td>
<td>24.6</td>
</tr>
<tr>
<td>Belgium</td>
<td>12.0</td>
<td>12.4</td>
</tr>
<tr>
<td>Denmark</td>
<td>13.8</td>
<td>15.4</td>
</tr>
<tr>
<td>Finland</td>
<td>18.9</td>
<td>18.0</td>
</tr>
<tr>
<td>France</td>
<td>20.0</td>
<td>19.5</td>
</tr>
<tr>
<td>Germany</td>
<td>20.4</td>
<td>19.7</td>
</tr>
<tr>
<td>Greece</td>
<td>14.8</td>
<td>12.4</td>
</tr>
<tr>
<td>Ireland</td>
<td>18.1</td>
<td>16.2</td>
</tr>
<tr>
<td>Italy</td>
<td>7.6</td>
<td>10.4</td>
</tr>
<tr>
<td>Netherlands</td>
<td>20.0</td>
<td>25.4</td>
</tr>
<tr>
<td>Portugal</td>
<td>12.3</td>
<td>18.8</td>
</tr>
</tbody>
</table>

10 Benchmark country represented by EU 13 country average.
This observation has not been diminished in more recent research published by the European Commission and including a review of thirty European countries (European Commission, 2006). This review assessed that institutional factors, including wage formation systems, remain pivotal to the gender pay gap, and that a less compressed wage system and one which gives primacy to decentralised and individual forms of wage setting is more likely to impact the gender wage gap in a negative way (European Commission, 2006: 6, 30-34).

2.3.4 BEYOND HUMAN CAPITAL

The critique of human capital approaches and the findings of broadly based labour market research suggest that there are a number of factors that influence earning differences between men and women. These include differences in education and workforce experience between women and men, the higher returns received by men for commensurate education and work experience and the valuation attached to jobs and skills associated with female and male labour. The manner of women’s engagement with the paid labour market also bears some impact as women’s lower engagement with full-time work and segregation into lower paying industries and occupations yield lower earnings (Jacobsen, 2007: 285-289). As the occupation group becomes more feminised, the value that an employer attaches to the work may decline, generating an undervaluation of women’s work (Rubery and Grimshaw, 2001: 45). This arises in part because of gendered norms and valuations concerning masculinised and feminised work remain embedded in minimum wage systems, collective bargaining systems and individual pay setting arrangements and job gradings at an individual workplace (Rubery, Grimshaw and Figueiredo 2002: 97-98).
This cross-national quantitative research also holds that the wage structures and patterns of earning dispersion, the level of coordination of the wages determination system and women’s representation in collective bargaining systems will influence women’s pay position relative to men’s. Weaknesses in the collective bargaining system arise not only from women’s lower representation within collective bargaining agreements but also the level of wages negotiated and the content of collective bargaining. Women are more likely to be concentrated in jobs affected by minimum wage regulation where there is a limited scope for collective bargaining and where the regulation of minimum wage systems is weak (Rubery, Grimshaw and Figueiredo 2002: 94, 100-102). The evidence suggests that the greater the degree of decentralisation the wider the gender pay gap. Studies of this dimension caution, however, that the contours of this relationship need to be carefully monitored, given that the trend across a number of industrialised nations has been towards workplace and individual level wage determination. There are also uneven outcomes among women and men. This requirement for caution arises also because the movement towards decentralisation has taken place within ‘very different contexts in relations to gender equality issues’ (Rubery, Grimshaw and Figueiredo 2002: 96).

The research testing the proposition of human capital theory indicates that some part of the earnings gap between women and men is explicable, because across the workforce men have greater amounts of human capital and career experience and lower incidence of career interruption. Yet increasingly, studies indicate that the full extent of earnings disparities cannot be explained by factors of human capital, quite apart from whether access to education and continuous careers is gender-neutral. The critique of human capital demonstrates that women receive lower returns on the same level of human capital endowments - experience and qualifications - than men. Yet human capital does provide some advantages for feminist analysis. It provides an analytical framework and an increasingly sophisticated econometric analysis, whereby the quantum dimensions of the unexplained differences in earnings can be identified. Human capital theory, however, lacks
the cultural and political critique to explore unexplained wage differentials and thus advance this analysis further.

2.3.5 LABOUR MARKET SEGMENTATION THEORY

The critiques of the human capital approach primarily question the perfect competition motif that lies at the centre of the theory. Rather than assuming labour markets that strive to ensure full competitiveness between their component parts, alternative models introduce the ideas of multiple labour markets and uneven economic development. Labour market segmentation theory comprises analysis that focuses, to varying degrees, on the operation of a series of labour markets, each attended by differentiated terms of employment and sex segregated employment. A key point of distinction in these accounts is whether the division of labour within the paid labour market is constructed neutrally or, alternatively, serves particular interests. This point initially produced two broad forms of theorising (O'Donnell, 1984: 157). The first delineated different forms of labour market organisation as arising from the imperative for continuous capital accumulation, while the second looked to explain why particular workers, including women, occupy ‘secondary’ labour markets, which are characterised by precarious employment and lower wages and conditions. More recent theorists have acknowledged the nuances within this second area of theorising by identifying five generations of segmentation theory. This diversification acknowledged both the absence of a single institutional dynamic in the labour market and the complexity of women’s role in the labour market (Peck, 1996: 57-70; Jenkins, 2004: 2)

Early segmentation work by Kerr (1954: 101-102) used a matrix consisting of open, guild, and manorial labour markets to analyse a series of market structures defined by geographic, occupational and institutional factors. Mobility is limited between particular labour markets and the degree of labour market attachment, level of training and points of entry between employer and worker differ between particular structures. Markets defined by greater levels of structure are more likely to be characterised by a set of institutional arrangements which
establish the terms of employment, conditions of entry and career opportunities for those working in the sector.

A more decisive characterisation of the labour market, dual labour market theory, was presented by Averitt (1968: 7, 86) who proposed that the labour market comprised both centre and peripheral forms of organisation. These market segments were differentiated on the basis of size, type of integration, degree of product diversification, use of and access to technology and geographic dispersion. Conditions varied markedly between centre and peripheral firms. Centre firms were attended by well organised trade unions whose industrial strength, when combined with the market strength and position of centre firms, provided for gains in employment conditions that were not available in peripheral firms.

The work of Doeringer (1967) and Doeringer and Piore (1971) is clearly aligned to dual labour market theory, although the impetus for Doeringer and Piore's (1971) work was a comprehensive description of United States labour markets rather than the development of a set of theoretical propositions. That said, their dichotomy of primary and secondary labour market sectors has formed the basis of much subsequent labour market research. The distinction between primary and secondary firms carries many of the distinguishing features previously nominated by Kerr and Averitt, with the major contribution being the provision of further detail about the type of jobs that characterise the primary and secondary sector, and the identification of the operation of internal labour markets presented by firms in particular market segments (Doeringer and Piore, 1971: 41-63). Employment opportunities within internal labour markets are filled primarily by internal promotion, a dynamic that both protects these workers from external competition and provides for stability of employment. This practice assists both workers, by virtue of greater job security, and employers, through reduced labour turnover and higher returns on the investment in worker training (Doeringer and Piore, 1971: 29). The structures in an industrial internal labour market are initially a function of the technology of production process, the quantitative and qualitative changes in product demand and the availability of particular labour skills in the external labour market.
The secondary market operates as a low-wage market comprising a significant share of part-time, casual and other forms of precarious employment. Yet Doeringer and Piore offered little analysis of why men typically occupy jobs in the primary sector and women in the secondary, nor do they account for inconsistencies in the matching of workers in particular labour market segments (Humphries and Rubery, 1984: 340). They simply observed that employers do not differentiate between secondary workers on the basis of sex or physical strength (Doeringer and Piore, 1971: 168).

### 2.3.6 DEBATES WITHIN SEGMENTATION THEORY

Following Doeringer and Piore’s contribution, explanations for the representation of women in secondary labour markets began to exert a divisive influence in segmentation theorising. Barron and Norris (1976: 49) drew explanatory value from structures of the labour market, and constructed a primary and secondary dichotomy characterised by high and low wage jobs, restricted mobility across this fundamental division, and greater career opportunities and job stability available in the primary sector. Unlike Doeringer and Piore, Barron and Norris indicated that women are predisposed to be secondary workers, given their primary role in domestic labour and the financial support received from male breadwinners. Women are predominantly secondary workers due to a number of characteristics: dispensability; clearly visible social differences; little interest in acquiring training; low economism and lack of solidarity (Barron and Norris, 1976: 54-64). Aside from the normative nature of this characterisation, Barron and Norris’ work drew criticism for its failure to specify the type of economic conditions that generate particular jobs, or question why particular high-skill jobs such as teaching and nursing are undertaken primarily by women (O’Donnell, 1984: 157).

A similar neglect of power and gender is present in functionalist theories of social stratification, that classify the most highly paid jobs as those which require the greatest skills (Parkin, 1972). This approach ignores the social construction of skill, a construction that is reflected in classification, grading and pay structures. Such an approach bears some
relationship to structural functional accounts that explain women’s lesser involvement in paid work as a result of their primary position as caregivers, following the work of Parsons (1954) and Parsons and Bales (1956). Thus the division and differentiation in social roles and income, shown by women’s disproportionate exclusion from the labour market, is viewed as being in the interests of the family and indeed society as a whole, not one of power and inequality. Thus the exclusion of gender is systemic for those theorists who rely on the family as a unit in their analysis of stratification; for functionalists who do not attribute inequality to gender roles they are defined as different but ultimately equal. Moreover, the uncritical elevation of the nuclear family is criticised by feminists for its normative assumptions concerning gender and for its lack of attention to the economic value of women’s domestic labour and women’s wage labour (Beechey, 1978: 164).

The gendered nature of the secondary market and its purpose in capital accumulation was the basis of debate within the segmentation school, and with Marxist and feminist theorists. Within a Marxist framework, segmentation or stratification within the labour market is viewed as providing political and economic benefit to capital rather than being a neutral or innocent by-product of capital accumulation (Braverman, 1974: 175-178). Edwards, Reich and Gordon (1973: xii), defined segmentation as a clear and deliberate strategy by capital, most clearly present in the third epoch of capital development, capital accumulation. Recognising the threat of unified and organised labour, capital develops market structures with the clear aim of dividing the labour force. Segmentation occurs both within the primary and secondary sectors and along the lines of education levels, social background, race and sex through the allocation of each group to separate career structures with divergent wages, conditions, career opportunities and social status (Edwards, Reich and Gordon, 1973: xiii). In a Marxist analysis, these social arrangements benefit capital by fragmenting working class unity.

Selected features of segmentation theory have been used to repudiate human capital approaches, and to argue that the wage differentiation between primary and secondary segments of the labour market arises, in part, from the sexual division of labour. The
rationale for women's disproportionate representation in secondary segments of the labour market arises, therefore, from relations in the family and from women's primary responsibility for domestic labour, in addition to organised opposition in the labour market (Craig, Rubery, Tarling and Wilkinson, 1982: 88-95; Power, 1975: 24-27). This division of domestic responsibilities and its consequent impact on labour market participation is the basis of some division within feminist critiques. Hakim controversially asserted that part-time time forms of employment can be distinguished from full-time modes of employment, not only on the basis of terms and conditions, but also on the score of a lower commitment to employment. On this account women who are in part-time employment have a lesser commitment to paid employment in the labour market than their full-time counterparts (Hakim, 1991: 114-115; Hakim, 1993: 116). Other feminist writers dismiss the Hakim critique, noting that part-time employment is a distinctive form of employment and represents a restructuring of employment relations, not only for women but also for men (Walby, 1996, 12; Walby, 1997: 7, 34).

Although this debate potentially provides a more nuanced, although controversial, account than social stratification, the concept of power is still approached in an undifferentiated way (Grimshaw and Rubery, 2003: 61-62). Capital, labour, men and women are treated as homogenous categories, an approach that fails to account for divided interests and differing degrees of power. An alternative explanation of women's place in the labour market should ideally contemplate differing degrees of power possessed by capital across different industry sectors, and the degrees of power held by different groups of women and men in paid work. What was required was also an understanding that women's position in the labour market could only be understood if it was acknowledged that the spheres of paid work and domestic work interpenetrate and condition each other (Jenkins, 2004: 17).

Segmentation theory has responded to these demands for a more nuanced approach. In part this reflects greater empirical diversity within and between labour markets, in addition to the increased labour market participation of women. More recent analysis of work, working time
and labour market division is informed by a recast approach, stripped of its functionality and specificity (Rubery and Grimshaw, 2003: 40-43). Employment is understood as an institutional phenomenon, not one primarily determined by exogenous market forces. Within this approach, conflicts and contradictions are an inherent component of the employment relationship and are embedded in institutional arrangements. Inequalities arise from the mutual interplay of segmentation processes on the demand and supply side of the labour market and there is a requirement to investigate the structures and dynamics of local labour supply (Jenkins, 2004: 19). Demand for labour reflects uneven development and variations in market strategies and rates of return between organisations, which in turn shape the conditions of employment offered by organisations. On the supply side, division by class, gender, rate of skill and qualification, and social organisation leads to the development of segmented or non-competing groups (Rubery, 2005a: 261-263). This interplay of segmentation processes is reflected in contrasting workplace agreements within and across industry sectors, the disproportionate concentration of part-time and casual forms of employment in particular industry sectors, differing rates of annual average wage increases across industries, an acceleration of earnings for higher wage earners and a stagnation or plateau in earnings growth for lower wage earners.

### 2.4 FEMINIST APPROACHES TO GENDER PAY EQUITY

Working from the critique of human capital explanations and aspects of labour market segmentation theory, feminist approaches provide alternative and competing assessments as to why the distribution of labour market opportunities and earnings is gendered. A number of strands characterise feminist theorising in this regard; they are reviewed here to assess their insights on gender pay equity. Liberal feminism identified women’s disadvantage as an unconscious aberration but one that required redress through regulation and education. Two contrasting perspectives initially emerged in response: one influenced by Marxist theorising, that argued that the sexual division of labour existed as a function of capital or class; and secondly, radical feminist perspectives that argued women’s subordination was a function of
patriarchy or gender. These were followed by a number of perspectives which sought, in various forms, to theorise the relationship between two sets of relations – capitalism and patriarchy, relations of production and relations of reproduction, class and gender (Connell, 1983: 64).

In more recent times, and influenced by postmodern theorising, feminist analysis has increasingly questioned the rigidities and dichotomies in previous analytical formations, including a tendency to taxonomic, structuralist and universal categorisations (Pollert, 1996: 539). In the context of this thesis, a key question is whether postmodernism provides value with respect to the limitations of claims to universality, the self-identification of women and the contingency of claims regarding identity and power relations.

2.4.1 LIBERAL FEMINIST PERSPECTIVES

From the standpoint of liberal feminism, women’s subordination stems, not from overarching or meta social structures but the cumulative and additive impact of numerous small scale deprivations, including gender stereotyping. Liberal feminist perspectives place an emphasis on cultural pressures and organisational features that lead to less success among women than among men in reaching the highest paid positions in those organisations (Kanter, 1977). The remedies to the labour market disadvantages faced by women lie not in social change, but in the realisation of particular freedoms by individual women and broad state commitments to fairness and equality. These comprise a strategy of equal rights aiming to include women in political forums from which they are excluded (Squires, 1999: 3). A limitation within such approaches is its inattention to broader social relations, including class, as explanations for the situation of women. This limitation translates to the remedial action advocated by liberal feminism. Insofar as they suggest that inequity can be resolved through the mechanism of individual rights, they offer an approach that fails to address the collective interests of women, and the basis of their collective oppression. While the granting of individual rights
nominally restores citizenship to women, this fails to recognise how the model of citizenship coheres around male norms and attributes. Such approaches are therefore relatively unquestioning of the factors, including the relations of unpaid work, that prevent the full exercise of rights.

2.4.2 MARXIST FEMINIST PERSPECTIVES

Class relations are a pivotal theme in Marxism. Yet the treatment of gender within Marxism is a matter of some conjecture, given that Marxist analysis primarily precluded the study of women’s oppression other than as an epiphenomenon of a determined superstructure (Fine, 1992: 2). The specific deficiencies of Marxist analysis also include the divide between the labour process and the social relations of production and the exclusion of female wage labour from mainstream Marxist analysis (Beechey, 1979: 78; Hyman, 1980: 48-49).

Mainstream Marxist analysis asserts that gender inequality derives from capital’s domination of labour, not from an independent system of patriarchy. In varying degrees, Marxist feminism seeks to merge a Marxist analysis with a feminist critique and analyse the relationship between the oppression of women and the organisation of the various modes of production. The extent to which this synthesis is achieved remains an issue of debate within feminist studies and the key point of distinction between Marxist feminist analysis and other forms of feminist theorising that give greater analytical weight to patriarchy. From the perspective of radical feminists, the crucial problem within Marxist feminism is the privileging of production, over gender, within a Marxist analysis of production (Franzway, Court and Connell, 1989: 20).

One of the central premises within Marxism is that it locates domestic labour and the industrial reserve army as key elements within capitalism, although Marxists differ as to the weight afforded to each of these elements. As a starting point, domestic labour is work necessary to reproduce labour power both on a daily and a generational basis. Less
agreement exists among Marxist analysts as to whether domestic labour should be articulated as production, consumption or reproduction and whether this labour produces value and surplus value (Walby, 1986: 16-20).

The industrial reserve army was proposed as a concept to explain the continual impoverishment of the working class, by ensuring a depressing influence on wage levels. It originates in Marx from the proposition that labour never has returned to it the full value of work. However, utilised to reconcile women’s increasing labour market participation with their secondary labour market position, the reserve army of labour thesis proposes that a reserve or buffer pool of unemployed exists as a result of labour being displaced by technology and the need of capital to draw upon reserves of labour. Simeral (1978) built on Braverman’s critique (1974) of the increasingly pervasive marketisation of social relations to explain women’s entry into service industries. The tenuous nature of women’s employment was underscored by women’s central role in reproduction and domestic labour. Yet Simeral acknowledged that the cyclical nature of women’s labour market participation, between employment, unemployment and underemployment, has slowed as they enter industries with increased shares of stable employment.

Criticism of the reserve army thesis led to the substitution hypothesis, a proposition that women’s labour market participation will increase through women displacing men by accepting lower wages (Fine, 1992: 68). Milkman (1976: 89, 92) argued that any impact of this nature is mediated by occupational segregation; men were not easily displaced by women. This critique of reserve army theories was extended to examine the impact on women’s labour market participation of the shifting sectoral composition of employment, primarily the shift from manufacturing to service employment. Compositional effects have had a greater explanatory purchase than either the buffer or substitution effect in explaining increases in women’s employment in the United Kingdom (Humphries and Rubery, 1988: 89).
Beechey (1977) extended mainstream Marxist analysis to include a feminist critique by linking the organisation of the capitalist labour process to the sexual division of the labour. Beechey’s analysis is that a purely Marxist approach is incomplete unless it includes both the sexual division of labour that consigns women to the family and its underlying patriarchal ideology. Thus Marxist analysis that considers the family-production relationship to be central to an understanding of capital relations is able to explain the vertical, but not the horizontal, division of labour. The reproduction of commodity labour power is retained by Beechey as a key unit of analysis. There are, however, two elements to this process. Generational reproduction involves biological reproduction, the regulation of sexuality and the socialisation of children. Day to day reproduction involves the tasks of domestic labour. The family is involved in the reproduction of the social relations of capitalist production which comprise both class and gender relations and is a key focal point of consumption. The relationship between production, reproduction and consumption is altered by the mode of production, and thus has a material basis (Beechey, 1978: 194; Beechey, 1979: 78-79; Rowbotham, 1981: 76-77). Analysis such as that provided by Beechey sought to address the neglect of gender within mainstream Marxist analysis. What remained at issue within this early Marxist-feminist theorising is whether it sufficiently privileges gender, and whether it addresses the dynamic between class and gender in a way that captures shifts in class and gender relations, including the increased labour market participation of women.

2.4.3 RADICAL FEMINIST PERSPECTIVES

In contrast to Marxist analysis, patriarchy and gender relations lie at the cornerstone of radical feminist explanations for gender inequality. Central to this school, which is critical of what it holds to be the class reductionism of Marxist accounts, is the concept of patriarchy, broadly defined as the systematic oppression of women by men (Bradley, 1999: 20). Prominence is given to human reproductive biology, sexuality, child bearing and child rearing as both sites of patriarchy and explanations for it. Sexual relations between men and women
are defined by the dominance of men and subordination of women and the domination of younger men by older men (Millett, 1970: 24-25). Patriarchy imbues all aspects of social life: the family, violence, economy, socialism, religion, sexuality and psychology. This domination brings with it material advantage. Men are the main beneficiaries of sex-subordination, a system of domination that is self-sustaining and does not derive from other systems of social inequality (Walby, 1990: 3).

Mackinnon (1982: 17) put priority on the role of social processes, primarily sexuality, rather than biology. Sexuality is defined as the 'social process which creates, organises, expresses and directs desire, creating the social beings we know as women and men. Sexuality comprises a form of organised expropriation whereby heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalised to social persona, reproduction a consequence and control its issue' (Mackinnon, 1982: 2). On this construction gender inequality is expressed through sexuality and it is through sexuality that gender and ultimately patriarchy is constructed rather than the reverse (MacKinnon, 1982: 17, 19). For Mackinnon this provided the basis of the construction of male and female identities, and also institutionalised the basis of male dominance, not only evident in the sphere of employment but also through culture and violence. Radical feminism provided a direct purchase on the concept of patriarchy as a form of male power, and as a means of understanding the common experiences among women. What was at issue with such explanations was whether such accounts were over-generalised and ahistorical (Bryson, 2003: 170). In such endeavours radical feminists ran the risk of universalising women’s experiences around sexual oppression and concealing other forms of oppression, including that by class and race.

2.4.4 CAPITALIST/PATRIARCHY AND DUAL SYSTEMS ANALYSTS

A number of feminist approaches to gender combine class and patriarchy as analytical concepts. In part this theoretical interweaving of capital and patriarchy arose from concerns that a narrow but casual reliance on a single system or structure exemplified 'an excess of
theoretical centralism’ (Connell, 1983: 45-47; 56). Such a combination was inspired also by a
critique of Marxist feminism, most obviously its singular preoccupation with class and a
concentration on the relationship of domestic labour to capitalism. Criticism of this singular
approach to class analysis focused on a range of limitations. This included a failure to address
the number of women who live outside nuclear family arrangements and the growing
numbers of women in paid employment. Elsewhere an exclusive focus on inequity arising
from waged labour in a post-industrial labour market was assessed as failing to acknowledge
the gender inequality that predates capitalism (Walby, 1986: 20; Tilly and Scott, 1987: 6-8).

Capitalist patriarchy, as a concept, was utilised to ‘emphasise the mutually reinforcing
dialectical relationship between capital class structures and hierarchal sexual structuring’
(Eisenstein, 1979: 5; Sen, 1980). In such formulations class and gender were described as
mutual reinforcements in the production of distinctions between the public and private
sphere, work and home, productive and non-productive labour, or paid and unpaid work
(Baldock, 1988: 20). This form of analysis provided the bridge between feminist political
practice, and the wider socialist objective of transforming capitalist institutions and relations
(Young, 1981: 64). Such theory views gender and class as a dynamic inter-relation, made up
of both material and ideological dimensions (Acker, 1989: 200).

Analysts from this tradition seek not to distinguish a greater influence for capitalism or
patriarchy, but argue that the relationship between these sets of relations is both
independent and dependent. The interconnection of patriarchy and capitalism arises because
both structures operate within the sexual division of labour and society rather than within the
family (Eisenstein, 1979: 27). It is the sexual division of labour, on the basis of biological sex,
that lies at the base of patriarchy and capitalism and structures duties both within the family
and the economy. Mies (1998), in her analysis of recent rounds of capital restructuring and
the intersection of those relations with gender and race, used the term ‘capitalist patriarchy’
but theorised capitalism as the most recent expression of patriarchy. This formulation derived
from the priority afforded by Mies to patriarchy, on the basis that it predates capitalism, yet patriarchy also evolves with changes in production and class relations. Capitalism cannot function without patriarchy. A never-ending process of capital accumulation cannot be achieved unless ‘patriarchal relations are maintained and newly created’ - thus capital development embraces a very specific and exploitative social and sexual division of labour (Mies, 1998: 38).

Other theorists (Mitchell, 1971; Delphy, 1984; Hartmann, 1979, 1981; Walby, 1986, 1990) frequently described as dual system theorists, developed a more acute articulation of patriarchy and capitalism. This division of theorising comprises analysts such as Mitchell (1971), who allocate different spheres of society to the determination of either patriarchal or capital relations which are delineated as autonomous spheres. This enabled researchers to analyse those structures that jointly comprise women’s powerlessness, status and function; these were production, reproduction, sexuality and the socialisation of children. In this form of analysis, patriarchy and family were largely non-material, meaning that notwithstanding changes in the mode of production, bio-social and ideological aspects of oppression would remain (Mitchell, 1971: 116-117; 1974). In a similar tradition Delphy (1984) argued that in modern capitalism there are two modes of production; the industrial mode of production, the arena of capitalist exploitation, and the domestic mode of production. Women’s exploitation stems from men’s control over both production and reproductive functions within the household and the lack of return received by women for domestic labour (Delphy, 1984: 154-174).

The approach of Mitchell and Delphy can be contrasted with those dual system analysts who see capitalism and patriarchy as articulating at all social levels (Hartmann, 1979, 1981; Walby, 1986, 1990). Hartmann primarily defined patriarchy as a system of social structures or social relations (Hartmann, 1981: 18), an implicit rejection of biological determinism and the notion that every individual man is in a dominant position and every individual woman is in a
Job segregation by sex and the family wage are emblematic of the ways in which capitalism and patriarchy interact. Men organise together to control women’s labour power, excluding women from paid work primarily through occupational segregation, thus lowering the wages of jobs that remain open to women. Such organisation assists to shape women’s economic dependence on men. Hence occupational segregation is the key explanation of women’s status and the result of a long process of interaction between patriarchy and capitalism (Hartmann, 1979: 230-231). The sexual division of labour is a defining feature of capitalism that corresponds to social divisions that are characteristic of capitalism: public/private, work/non work, production/consumption (Game and Pringle, 1983: 14-15).

Walby (1986, 1990) distinguished more clearly the distinctive features of the social relations of patriarchy and capitalism. It is these features, in addition to the mode of exploitation, which most starkly distinguish the two systems. Thus ‘patriarchy is distinctive in being a system of interrelated structures through which men exploit women while capitalism is a system in which capital expropriates wage labourers’ (Walby, 1986: 46). Patriarchy is marked by the social relations which enable men to exploit women, while in capitalism it is the social relations which enable capital to expropriate labour. These social relations operate at all levels of the social formation; economic, political and ideological or as economy, civil society and the state. In this view patriarchy is not homologous in its internal structures to capitalism and the system of patriarchy comprises six structures: patriarchal mode of production; patriarchal relations in paid work; patriarchal relations in the state; male violence; patriarchal relations in sexuality; patriarchal relations in cultural institutions (Walby, 1990: 20). When patriarchy is in articulation with a capitalist mode of production then patriarchal relations in domestic production and paid work are of primary importance.

A distinctive element of the dual systems theorising articulated by Walby is the analysis that social relations in domestic work be classified as a patriarchal mode of production, thus
establishing a basis for patriarchal relations which is analytically independent from capitalism. More recently this theorising has been informed by different levels of abstraction, to capture different patterns of gender relations. Thus the concept of the ‘system of patriarchy’ has been joined with ‘gender regime’. This development did not represent an admission that ‘systematic gender inequality of patriarchy is over’, but provided a means of analysing the diversity of gender relations and gender inequality (Walby, 1997: 6).

This review of feminist theorising provides an indication that the precise relationship between capital and patriarchy, class and gender has been a key area of debate. More recently, feminist theorising has eschewed ranking or delineating capitalism and patriarchy, but theorises this dynamic as one of interconnected reinforcement. This provides for a concept of patriarchy that is dynamic and evolves with changes in production and class relations, but which still retains some purchase as a means of understanding the recurrent patterns nature of gender inequality (Bryson, 1999b: 320; Bryson, 2003: 211). This construction also recognises that in contemporary times it requires a greater recognition that gender relations constitute a key element of the material basis of society rather than simply an ideological reflection of the same (Bryson, 2004: 28). This approach follows loosely in the tradition of capitalist patriarchy although the utility of patriarchy as an analytical tool remains an issue of division. More recently, Pollert (1996: 648) conceptualised ‘a fused system of gender and class relations’ as the process of ‘gendering takes place within class relations’ (Pollert, 1996: 640) as class relations are ‘infused with gender, race, and other modes of social differentiation from the start’ (Pollert, 1996: 646). This framework assists a dialectical way of seeing the world as the mutual interaction of class and gender (Pollert, 1996: 653) and which recognises the pervasiveness of gender and its intertwining with other social realms (Martin, 2004: 1266). Patriarchy is not defined by Pollert as a ‘system’, given that there is no material basis or intrinsic motor or dynamic which can explain its self-perpetuation. In contrast, capitalism has an internal dynamic – the self expansion of capital through the dynamic of profit - which drives the system of capital accumulation premised on a particular set of social relations, those being the class relations of capital and labour (Pollert, 1996: 642-643).
Pollert’s approach locates modern class and gender relations within the dictates of the market economy, but arguably avoids the structuralism and centralism of other accounts, through an analysis that does not privilege class or gender but sees them in dynamic inter-relation.

2.4.5 POSTMODERN FEMINIST PERSPECTIVES

Postmodern and poststructuralism represent more recent and also engaging themes in feminist writing. There is some imprecision attached to any attempt to ascribe to each position a homogenous theoretical identity, or to speak generally of ‘postmodernist theorising’ or ‘poststructuralist theorising’. Butler (1992: 4) neatly captured the divergent strands within both postmodern and poststructuralist approaches and the differences between each area of theorising. This caution observed there is coalescence between both approaches (Butler 1992: 5-6). This is an understandable relation if we think of postmodernism as an approach which is sceptical of any universal claim to insistence with a corresponding insistence that there are always ‘subjugated knowledges’ (Squires, 1999: 90). Correspondingly, poststructuralism rests on a methodology which is directed to the ‘deconstruction of dichotomies, revealing the ways in which each side of a binary division implies and reflects the other’ (Squires, 1999: 126). The relevance of both postmodernism and poststructuralism arises here because both of these perspectives argue that concepts such as class, patriarchy, woman and man presume a coherence over time and culture and suffer from essentialism.

Feminist approaches influenced by postmodernist and poststructuralist theorising, such as those carried forward by Scott (1990), Butler (1992), Squires (1999) and Weedon (1997, 1999), criticise the feminist approaches previously reviewed in this chapter as relying on universal and grand narratives. Scott (1990) asserted that there are other discourses of femininities and masculinities that are historically and culturally variable. The subject of feminism, ‘woman’ and ‘women’, suffered from the problems inherent in a reliance on universal subjects, and postmodern feminists question those unitary, universal categories and historical concepts that have been treated conventionally as natural or absolute. ‘Women’ is
viewed as too internally differentiated a concept to be utilised as a significant unitary and
analytical concept (Scott, 1990: 134). Thus the position of able-bodied, white, middle-class,
First World women is distinguished from women of colour, working class-women and Third
World women. Postmodern feminism’s position in these matters can be traced to
postmodernism’s broader rejection of the grand universal narrative (Harvey, 1989: 45-49) as
the search of certainty and an all-encompassing theory is misguided, and truth, on
postmodernism’s account, can only be provisional (Bryson, 2003: 233).

Caine and Pringle (1995) observed that there are important distinctions within seemingly
homogenous cultures. Distinguishing factors include the level of educational qualifications,
age, ethnicity, the level of economic activity, engagement with full-time and part-time work
and spatial differences connected with occupational and industrial segregation. Also at issue
is the utility in targeting particular institutions and practices as major sites of oppression
(Caine and Pringle, 1995: ix), or the presumption that that the cause of oppression could be
specified, or that causal weight could be attributed to any particular site or source (Barrett

Weedon’s approach, while sharing some of these concerns, is more consciously
poststructuralist. Weedon’s interest is directed to the social and cultural practices which
constitute, reproduce and contest gender power relations, but through a framework which
examines the relations between language, subjectivity, social organisation and power
(Weedon, 1997: 12). Weedon’s approach can be traced to poststructuralist theorists such as
Derrida (1997) who hold that reality cannot be apprehended without the intervention of
language. As such it prioritises the study of language and discourse - over material analysis -
and holds that reality is limited to a series of discourses rather than an external and
underlying reality (Bradley, 1999: 21).

Both Weedon (1997) and Butler (1990, 1992) draw critical attention to liberalism’s belief in a
rational consciousness, radical feminism’s appeal to constructs of womanhood and Marxism’s
belief in an Enlightenment project to restore humanity. Weedon promotes the search for solutions to gender power relations that are not available within existing grand narratives that emphasise essentialist constructs, most particularly a universal human subject (Weedon, 1997: 32-34). Weedon’s approach and that also of Butler rest on the rejection of the concept of an unproblematic identity for women. ‘Woman’ and ‘women’ do not comprise an identity. To do so relies on problematic assumptions about women’s nature or biology and ‘simultaneously work(s) to limit and constrain the cultural possibilities that feminism is supposed to open up’ (Butler 1990: 142-145, 147). Identity so constructed has served as a basis for the solidarity of a feminist political movement, given that the politics of identity provoked resistance, exclusion and factionalism (Butler, 1992: 15). However, there are diverse and varying identities of women that are constructed through language and discourse (Pringle and Watson, 1992: 64-65). Butler (1990: 30-32) and Squires (1999) espouse a strategy of displacement which ‘seeks to deconstruct those discursive regimes that engender the subject’ (Squires, 1999: 3). This approach extends beyond strategies of inclusion (gender-neutrality) or reversal (recognition of a specifically gendered identity) (Squires, 1999: 3).

From this critique it is clear that feminist writers influenced by postmodernism and poststructuralism, broadly defined, promote an interpretive strategy, one that reflects its literary and philosophical connections, that provides no privileged reading of text or grand narratives nor unitary solutions. From this relativist position there is no automatic acceptance that the position of women is one of oppression and inferiority and thus one to be transcended. Postmodernism rejects narratives that axiomatically subsume and relegate women to a secondary place. Such narratives are only realised insofar as women are similar to, different from or complementary to men. Such a construct served to make ‘women and their interests virtually unrepresentable except in relation to a masculine norm’ (Pringle and Watson, 1992: 68). Alternatively, postmodernists look beyond oppression and inferiority and focus on the plurality and diversity within women, as ‘equality rests on differences - differences that confound, disrupt and render ambiguous the meaning of any fixed binary opposition’ (Scott, 1990: 166). In this tradition the category of ‘women’ needs to be recast, to
confront ‘what the mythology of femininity in turn threatens and promises’ and direct it to the
diverse range of possibilities that may be open to women (Lattas, 1991: 102).

2.4.6 A NEW AGENDA FOR FEMINISM

The influence of these more recent developments in feminist theorising has served as a new
intellectual and political agenda for feminism. There has been in comparative terms a
departure from monocausal accounts and attempts to theorise patriarchy as ‘both less total
and less coherent’ (Barrett and Phillips, 1992: 6). Theorising is more directed to recognising
different modes in the operation of power and is both historically specific and able to
recognise historic shifts in patriarchy (Pringle, 1995: 202). A number of theorists retain
explanatory prominence for class and gender as well as race, referring to various sets of lived
relationships as ‘dynamics’ rather than structures or self sustaining systems which may be
described as capitalism or patriarchy. This shift in theorising presents social relationships in a
way that enables adequate explanation of change and variety (Bradley, 1999: 24). Connell
argues that a theory of gender relations can be coherent even without a key, core, central
relation and suggests three structures of gender relations; labour, power and cathexis. The
unity between the three structures is not systemic unity, but alternatively one of historical
composition and institutional context (Connell, 1987: 116). This proposition would encompass
the division of labour within and between paid and unpaid work, the differential distribution
of social power between men and women as well as different modes in the operation of
power, and a conscious and unconscious attachment to ideas of what men and women do.
The relation between these structures is not fixed, thus notions of women in paid work may
have altered, but their engagement with paid work is still impacted by assumptions about the
type of work and the valuation of work undertaken by women. While Connell’s work retains
the problematic language of ‘structures’, it nevertheless acknowledges the complexity of
gender relations and is capable of capturing changes in such relations.
Other areas of feminist theorising, while sympathetic to postmodernist theorising, remain concerned by what is viewed as the neglect in postmodern theorising of the social context of power relations. Such an approach, it is argued, weakens the analysis of power, given that it ‘conceptualise(s) power as highly dispersed rather than concentrated in identifiable places or groups’ (Walby, 1992: 48). Postmodernism’s account of power, as evident in the work of Weedon (1987), Alcoff (1988) and Fraser and Nicholson (1990), is thus found to be ill-suited to the analysis of social divisions because of its refusal to accept that power has a subject or that it operates to further the interests of particular individuals or groups (Walby, 1992: 35; Bell and Klein, 1996: Bradley, 1999: 32). This perceived limitation of the postmodern approach extends to its failure to address the partiality of gender norms. Gender norms constrain the actions of both men and women, although it is men who largely benefit from their implicit constraints, as it is men who occupy the position of neutral social actor (Gatens, 1998: 4). Fragmenting the category of women also potentially denies women’s social reality and undermines the recourse to social change and the political means for it (Franzway, Court and Connell, 1989: 24; Walby, 1992: 48-49; Mackinnon, 2006: 57). In short how does feminism articulate and advance plans to achieve gender pay equity for women, if conceiving claims around the category of ‘women’ is problematic?

Partially in response to such criticisms, Squires (1999: 74-75) has argued, following the arguments of Butler (1990), that postmodern strategies do not necessarily preclude the self-identification of women; however, postmodern analysis remains crucial to understanding the contingency of claims concerning group identity and the power relations fundamental to the construction of that identity. Constructing a gulf between modernist and postmodernist theorising may also be at odds with postmodernism’s aversion to dichotomous thought and dualisms (Zalewski, 2000: 139). From the perspective of postmodern theorising, the profound ambiguity within feminism is that its challenge to modernist epistemology is located within the emancipatory impulses of modernity. This necessitates a place for modern real world politics and the realm of creative intellectual practices inspired by postmodernism (Zalewski, 2000: 140-141). Yet while Zalewski identifies the basis of the political landscape, the means
through which postmodernism’s practices may advance claims for ‘women’ within this landscape, remain an issue of some uncertainty.

Is there viable ground between modernist style explanations and postmodernism? While postmodernism’s inherent reflection on differences among women is productive, two problematic alternatives, suggested by postmodernism, should be avoided. Firstly postmodernism’s tendency to relativism should not mean that capitalist democracies become exempt from social criticism; secondly postmodernism’s concerns with identity should not obscure the locations of feminist struggle which will continue to be the grounds created by the universalistic struggles of modernity (Benhabib, 1995a: 29; Benhabib, 1995b: 118). Thus while any pretensions to a universal truth or universal humanity warrant criticism, some aspiration towards universality is necessary for feminism. To identify only for difference and against universality is to deny the dynamic that transcends immediate and specific difference, a dynamic necessary to the project of radical transformation (Phillips, 1993: 71). A politics with a generalised focus on difference, rather than on women, poses particular challenges for feminist theorising. While the analysis of gender differences becomes one of the prototypes of many ‘axes of difference’, the ‘unravelling of group identity’ makes it increasingly difficult to speak of women as a distinct and unified group. (Phillips, 2002: 26). The fluidity and flexibility in theorising that is claimed by postmodernism therefore poses a distinct challenge to the feminist commitment to women’s agency and equality, as the dismantling of group identity weakens the articulation of reform for women as a distinct and unified group.

The position advanced here is that in advancing claims for equality feminism requires an approach that is capable of assessing the operation of power in identifiable groups and places (Walby, 1992). Clearly this is a perspective open to question given postmodernism’s concerns about identity politics, but as Squires (1999) suggested, such a position is tenable so long as the contingency of such claims are recognised in addition to the power relations that forge group identity.
2.5 CONCLUSION

The foregoing discussion provides a theoretical perspective on gender pay equity. What insights does it provide to how gender pay equity might be understood?

Human capital theory measures the failure of the market economy to equitably reward the human capital of women. Differences in the human capital of women and men are unable to account for the full extent of earning differences between women and men. Yet human capital theory, while providing useful quantitative tools, lacks an analytical framework to progress a more detailed understanding of these remaining earnings differences. In this regard labour market segmentation provides some insights, identifying market segmentation as a vehicle of disadvantage for women. Labour segmentation theorists highlight the operation of a series of labour markets and the disproportionate representation of women in secondary labour markets. These theories focus on the low pay and limited career progression contours of these markets, a focus that has also underlined the gendered nature of part-time and casual employment.

Labour segmentation theory does not, however, assess sufficiently the congenial nature of this segmentation for capital, or for some women. Marxism takes up this issue, albeit tangentially. Unlike orthodox and liberal accounts it generates insights into the consequences, for women, of the primacy of capital and the exploitation of labour that arises in market-based economies. Marxism’s weakness is its theoretical centralism and relative silence on gender, and to this end Marxist feminism provides an analytical framework that includes the economic relations of capitalism, the division of labour in waged work and the division between wage labour and domestic labour. More contemporary Marxist feminists have thus usefully inscribed onto Marxism an analysis that is more overtly informed by feminism, following Pollert (1996) and Bradley (1999) recognising that class relations are infused by gender.
What then of postmodernism? As it has in other sociological fields, postmodernism is instructive because of its interest in difference, here among women, and the contingency it enters against power relations and identity. Thus informed by postmodernism, the analysis carried forward in this thesis is not a structuralist, taxonomic one, but one that recognises class and gender as modes, at times complex and contradictory, in the operation of power. Similarly, the framework recognises the diversity of social relations, the influence of historical composition and institutional context, and the specificity and variability of women’s experiences. Yet postmodernism’s key limitation is its denial of group identity and universal claim, exclusions that undermine the emancipatory ideals of feminism. Following Benhabib, feminist struggle, including that directed to labour market analysis and reform, occurs on grounds that continue to be shaped by modernity, and warrants some direction to universality, even one confined to specific institutional contexts. Speaking of women as a distinct group, is a key aspect of carrying forward that struggle.

These issues of group identity and universal claim are taken up in the following chapter, which, within a discussion of labour market regulation, assesses the state’s response to evidence of gender pay inequity in the paid labour market. What role (if any) does the state play in the class and gender relations that shape gender pay equity, and is the state capable of promoting gender pay equity? The discussion of group identity in this chapter also serves as the basis of an analysis of the claims on the state, initiated by feminist agency, and the construction of gender pay equity measures within labour market regulation. Do such claims and regulatory measures rest on a problematic group identity which is nonetheless critical to advancing feminist struggle?
CHAPTER THREE: LABOUR MARKET REGULATION AND GENDER PAY EQUITY

3.1 INTRODUCTION

The previous chapter reviewed the theoretical debate over gender pay equity. The task of this chapter is to review accounts of labour market regulation. What is labour market regulation, and by whom is it constructed? Put simplistically, labour market regulation is an act of law-making by the state, dealing with the terms by which paid work is organised in a capitalist labour market. However, the concept of the state is a contested one in sociology, a debate that revolves particularly around the social interests that it serves. This issue of the state and its interests is pivotal to my study because it touches on whether labour market regulation can promote gender pay equity. The political rise of women, and the growing intellectual challenge to the inequality of women in the paid labour market, led to international and national regulation that provided at least a nominal right to equal remuneration for work of equal value. Whether this nominal right resulted in actual improvements for women is disputed hotly in feminist literature, because the effectiveness of labour market regulation has been, in some accounts, confounded by the reformulation of gender relations in a globalising economy.

To address the question of labour market regulation I initially outline the operation of the capitalist labour market. This is followed by a review of sociological theorising that addresses state identity and its engagement in labour market regulation. The chapter is organised so that each school of thinking concerning the state will be followed by the equivalent school of labour market regulation theorising. These schools include unitarist, pluralist and Marxist/radical accounts, although I note here as does Kelly (1998: 135), that such schools reflect a disciplinary amalgam, encompassing approaches by the state to regulation and management attitudes to industrial relations.
The various students of the state canvassed here are interested in dealing with the alienation of industrial society, but most are men, and do not consider whether this alienation might be gendered. Consequently this chapter reviews feminist theorising of the state which is critical of sociological theorising for its silence on gender and the autonomy and neutrality that is ascribed to the state. Following this account of feminist theorising of the state I examine the means of labour market regulation, and the impact of feminist agency on labour market regulation. In what ways has labour market regulation responded to feminist claims for regulatory measures to promote gender pay equity and what debates attend the effectiveness of these measures? The chapter closes by considering the impact of changing gender and social relations, social changes that include increasing interest by the state in deregulating labour markets.

3.2 DEFINING LABOUR MARKET REGULATION

3.2.1 THE CAPITALIST LABOUR MARKET

Although the capitalist labour market operates somewhat differently from commodity markets it does, from the perspective of neoclassical economics, have the same role and function. Thus in a market economy the forces of supply and demand for labour determine the jobs that will be available and how much workers will be paid to do them (Blau, Ferber and Winker, 2006: 5). In orthodox economics the level of wages and employment will be determined by its marginal productivity and the intersection of demand and supply in a given labour market. On this reasoning an organisation’s marginal revenue product is the additional product revenue, that is product multiplied by the price at which the employer can sell the product, that each unit of labour or new employee will generate. The employer makes rational decisions about what additional revenue will accrue to the organisation through the recruitment of additional labour. A key premise is that the profit-maximising firm will employ labour until the extra revenue generated from the hiring of the extra units of labour is outpaced by the additional wage costs.
Classical market theory also works from the proposition that competitive forces of demand and supply will generate pressures towards an equilibrium wage. The price of labour reflects both what employers are willing to pay and what employees are willing to accept, and forms the basis of an implicit employment contract between capital and labour. Thus under competitive conditions a system of relative wages transpires such that the advantages and disadvantages of particular forms of employment will be equal or tending to equality (Smith, 1937: 84-86; 110-111). Equilibrium arises because unequal remuneration in particular sections of the labour market attracts an increased supply of labour and reduces labour supply in low paid occupations until equilibrium is restored (Smith, 1937: 114-118; Smith, 1986: 151-158). This approach presupposes a highly specific model of rational economic activity, based on a model of more or less perfect competition (Hyman & Brough, 1975: 11).

The neutral allocative efficiency implied by orthodox economics is contested by Marxist theorising, primarily because labour markets do not necessarily fulfil the conditions assumed by neoclassical economics. Within a Marxist critique the labour market is viewed as critical to capital production and capital’s appropriation of labour. The imbalance of power within the employment relationship is fundamental to Marxist analysis of capitalist production, in particular the distinction between labour and labour power. The worker undertakes to supply a given quantity of labour power but works under the direction of the employer (Marx, 1944: 63-67). Thus within a capitalist political economy, employment is at the same time an economic relationship and one of control. Such a duality is in turn deeply associated with the interdependence of wealth and the ownership of the productive system, a structural foundation that underpins the distribution of social power. The unequal power that is concentrated in the hands of the owners of capital ensures that workers are paid less than the value of their contribution, with such exploitation central to the employment of labour (Hyman and Brough, 1975: 4, 112).
Marxist theorising of the labour market shapes the perspective of the labour market taken within this chapter. This perspective arises because Marxist approaches more acutely conceptualise the conflict and power imbalances inherent in the social relations of production, that is, the requirement on some to offer their labour for purchase by others. Such a perspective is also consistent with the understanding of gender pay equity reached in Chapter Two. In that chapter I proposed that our understanding of gender pay equity is framed by the primacy of capital and the exploitation of labour that arises in market-based economies – in short the economic relations of capitalism. I also proposed that a perspective that only acknowledged class relations was insufficient, given that class relations are infused with gender relations. Accordingly the insights to be gained within this chapter, as to whether labour market regulation can promote gender pay equity, start from a position that within a market economy the labour market is characterised by conflict and power imbalances which have both class and gender dimensions.

3.2.2 WHY DOES THE STATE REGULATE LABOUR MARKETS?

The failure of the labour market to perform in the manner anticipated by neoclassical economics, and in particular, the irregularity with which a free labour market ‘cleared’ unemployment at a socially acceptable wage level, gave rise to the regulatory institutions established by the state. Regulation may involve the imposition of restraints on the actions of employers and/or their workers – the shape of such regulation does, however, vary with the intellectual, ethical and political climate of the time (Richardson, 1999: 5). Hence it is also important within this thesis to have a detailed understanding of the state: what is it and why does it undertake the task of labour market regulation? This issue is a longstanding theme in sociology, encompassing utilitarian theories of the state in the liberal tradition, the economic functionalism in Marxism, the increasingly nuanced accounts of the state in neo-Marxist theorising, the critique of the state as a gendered institution mounted by feminist theory, and the challenge to all of these by postmodern theorising. The competing explanations of state legitimacy and purpose provide a bridge to unitarist, pluralist and radical perspectives on
labour market regulation, accounts that largely turn on whom they respectively nominate as the beneficiaries of such regulation.

**Social Contract Theory, Liberal Concepts of the State**

Classical liberal approaches to defining a purpose for the state, including those by Hobbes (1968) and Mill (1910), were a response to a new economic and political order, represented by civil society, one that followed the disappearance of feudal society. New ways of organising production and distribution contributed to the formation and reproduction of civil society, while political developments opened up more space for the market-based economy. The operation of civil society required new institutions – rules and agencies for maintaining a private sphere of free competition and exchange – and ideological conditions comprising new modes of thought and evaluation (Gamble, 1981: 29-30).

Philosophers quickly set out to theorise the new social order, and much of their effort went to reconciling the new individual liberties with the powers of the state. Hobbes’ theorising of the state utilised the notion of social contract theory. The pivotal motif of the Hobbesian social contract is that individual citizens cede certain rights in return for protection from an unceasing competition and quarrelling among *men* (Hobbes, 1968: 183-192). Hobbes used the concept of *laws of nature* to describe the process whereby humankind reasons that it cannot survive under the conditions of continued competition and therefore seeks a solution in this social contract. The power for which individuals cede their rights was a mercantile absolutist form of state in the form of a strong sovereign or authoritarian state (Hobbes, 1968: 183, 192). The social pact or contract was a solution to potential disorder whereby individual interests can be defended and protected (Rousseau, 1973: 173-175). The protection offered by the state to an individual’s right to life, health and freedom was taken up by Locke (1946), who viewed the state as a superior power or ‘community’ required to address those instances where an individual’s rights were infringed. Through an understanding of the ‘indifferent rules and men authorised by the community for their execution’, the state ‘decides all the differences that may happen between any members of
that society concerning any matter of right and punishes those of which any member hath
committed against the society with such penalties as established’ (Locke, 1946: 43).
Important to this theorising is the form of the social contract, where natural rights are
exchanged for the security provided by a political structure that secures an individual’s
enjoyment of their freedom and property. This concept of community extended to legislative
power, a key distinction from the work of Hobbes, and one which implied specific
responsibility and limitations, being the ‘preservation of society and, (as far as will consist
with the public good), of every person in it’ (Locke, 1946: 66). The use of the term
‘community’ as a foundation base for civil society served as the basis of his writing on
consent – ultimately the working of the state through the legislature requires the consent of
the population (Locke, 1946: 73-74).

The development of industrial capitalism provided the basis for the further development of
the liberal concept of the state. Hobbes and Locke viewed the state as an essential protector
of order within civil society. As industrial capitalism advanced, the concepts of liberal
democracy and universal suffrage emerged in the work of Bentham (1891) and Mill (1910), in
which liberal democracy was associated with a ‘political apparatus that would ensure the
accountability of the governors to the governed’, where democratic government would
provide the ‘satisfactory means for choosing, authorising and controlling political decisions
commensurate with the public interest’ (Held, 1983: 15). Bentham introduced the principle of
utilitarianism, whereby the objective of the state was to maximise the total sum of
satisfaction for the greatest number of people (Bentham, 1891: 214-219). Within this
framework, Bentham retained the key tenets of liberal thinking. The state was not to work
against the interests of the people, and, further to this objective, the state was to provide the
conditions required for individuals to pursue and maximise their interests and wealth.

Mill’s work extended Bentham’s work on utilitarianism and introduced the basis of a form of
codification whereby state actions could be assessed against a set of utilitarian rules. This
extension of the utilitarian approach reflected the emergence of a market-based civil society increasingly divided by class and proposed a more positive and potentially proactive role for the state. The state was a social arbiter able to redress injustice. Access to the state was given by citizenship. The state, primarily through education, contributed to the participation of the populace in liberal democracy. Civil society’s ultimate controlling power rested with the electoral basis of representative government (Mill, 1910: 175). Although cognisant of the dangers for liberal democracy and equity that would arise from the operation of what Mill termed class legislation (Mill, 1910: 256) – governments legislating for the benefit of the dominant class - he provided little detail as how to reconcile a concept of a fully liberal democratic state with the inequalities endemic to a market society (Macpherson 1983: 275).

Early liberal theorising remains an intellectual bedrock for contemporary liberal democracy, but feminists criticise its exponents for their gender blindness. The language and concepts of Hobbes and Locke referred primarily to men and their accounts were largely silent on gender. In contrast, the concept of universal suffrage, particularly as advocated by Mill, did recognise that women were subordinated, a process that arose from social pressures and the lack of opportunities and political rights (Mill, 1983: 38, 52). Yet Mill also saw women and men playing different roles in society, a division that has served as the basis of feminist criticism (Bryson, 2003: 47). For some feminists this division of roles, in addition to Mill’s sympathy with utilitarianism, weakens his credentials in terms of equal rights. If laws were to be judged on whether or not they increase the sum of total happiness, and if it could be shown that sex equality was not the means to total happiness, then the project of equal rights could be abandoned (Bryson, 2003: 50; Coole, 1993: 115).

Feminist research has provided an extensive critique of liberal theorising on the social contract that underpins the legitimacy of the state apparatus. Such a contract was thought to exist independently of private sexual relations and domestic life. Yet the social contract that was so prevalent to classical liberal thinking was fraternal; designed by men and fundamental
to establishing the patriarchal rights of the fraternity. It created a modern patriarchal order whereby civil society was the realm of men or the 'individual', while the private world was one of particularity, love and emotion in which men also ruled. Thus Western political theory presupposed male supremacy and the patriarchal family (Pateman 1989: 3, 43).

Unitarist Perspectives on Labour Market Regulation

Unitarist perspectives on labour market regulation are informed by liberal theorising and view the state as the neutral guardian of a superordinate national interest, with the state both entrusted and trusted to act in the best and agreed interests of the populace. At the level of the workplace a unitary structure implies common objectives that unite all participants and a 'unified structure of authority, leadership, and loyalty, with full managerial prerogative legitimised by all members of the organisation' (Fox, 1974: 249). Such explanations imply that power is equally shared in the labour market, a view not even shared by classical economists, including Smith, who held that the distribution of risk within the labour market relationship was not symmetrical, given that labour power cannot be stored and is therefore perishable (Deakin and Wilkinson, 1999: 12; Hyman and Brough, 1975: 111). The dynamics of this relationship accounts for the level of wages given that the contract between the employers and workers is structured by the superior power of the employer (Smith 1937: 66-67; 114-118). Smith's critique suggests that unitarist perspectives on labour market regulation do not capture accurately the power and risk asymmetry in the labour market. If we are to understand labour market regulation, we need theorising that recognises that capital and labour have divergent interests.

Functionalist Perspectives of the State

Functionalist conceptions of the state view society as a collective organism, in which the state undertakes a number of functions and activities for the social organism as a whole, in a manner that unorganised individuals cannot do. Durkheim, for example, contends that society
is not 'a mere sum of individuals'; rather 'the system formed by their association represents a specific reality which has its own characteristics' (Durkheim, 1933: 28). In forming this view, Durkheim rejected the classic liberal concept of the social contract (Durkheim, 1938: 103). The state, rather than operating in the role of an umpire somewhat outside civil society, is integrated organically into a larger social system and administers 'co-operative law' and juridical rules which arise from both a 'similitude of consciences' and the 'division of labour' (Durkheim, 1933: 147, 226). On this account, the specialisation of labour, a feature of a market-based economy, becomes the basis of division and conflict, generating an ‘anomie’ for individuals, which can be dealt with only by the ordering of the social body through government (Durkheim, 1933: 226-228). The maintenance of order and the exercise of social control by the ‘whole upon its parts’ was key to the objective of human development, a necessary prerequisite for social progress. The confidence by the populace, in this framework, becomes a condition that 'belongs to all modes of social existence' (Comte, 1875: 120).

Durkheim’s notion of ‘anomie’, the sense of alienation and disconnection of the individual from modern society, emerged from the increasing division of labour in the industrialised age. The collective consciousness and consensus that characterised preindustrial society was conceptualised as mechanical solidarity (Durkheim, 1933: 70). Assisted by a sameness in work and social activity there emerged ‘a set of collective beliefs and values upon which the continuity of social life’ depended (Giddens, 1986: 2). The capital mode of accumulation and the occupational specialisation that supported it, generated a new but more abstract form of social solidarity. Defined by Durkheim as organic solidarity, this cohesion derives from a shared moral code that requires individual and institutional interdependence (Durkheim, 1933: 111), in which individuals are involved in a ‘complex of obligations from which we have no right to free ourselves’ (Durkheim, 1933: 227).

This is a normative characterisation of the state, concerned as much with what the state should do as what it does in practice. The state is central to the cohesion of the social
system, which is challenged by the breakdown of the preindustrial moral code. For Durkheim it was the state, the organisation of officials exercising government authority, and the maintenance of a body of rules, rather than economic organisation or reorganisation, that would re-establish and maintain a system of moral authority and control appropriate for an advanced industrial society (Giddens, 1971: 99-100). The law, including legal rules, institutions and practices, was a form of external index which symbolised the nature of social solidarity (Johnstone, 1995: 72).

Within this normative scheme, inequality was unobjectionable because the division of labour had an objective basis in the abilities of individuals, and thus 'social inequalities exactly express natural inequalities' (Durkheim 1933: 377). Yet the state was also expected to play a key role in the regulation of the economy so that the material conditions of the poor were alleviated (Giddens, 1971: 99). Durkheim reasoned that occupational groups and industrial organisations were required to maintain communication between the state and individuals, and as a counterbalance to the abuse of state power. This counterbalance would shield the citizen from state excess, and also help to maintain a necessary buffer between civil society and thus ensure the social order 'does not lapse into the conservatism of an unreflective nation' (Giddens 1978: 60-61). This chapter turns to feminist critique of theories of the state at a later point, but it is worthy of observation at this stage that in effectively defending modernity, Durkheim provided limited insights into the implications for women of the spontaneous division of labour, or how the translation of natural inequalities to social inequalities impacted on women, or reflected women's standing in social relations.

Weber's assessment of the state is less normative than that of Durkheim, being more focused on the state 'as it is'. Weber's analysis addressed political relations more directly than Durkheim but like Durkheim, he referenced a form of moral authority for state action and, by implication, labour market regulation. The state acted 'as a human community that (successfully) claims the monopoly of legitimate use of physical force within a given territory' (Weber, 1948: 78). States are thus compulsory but also legitimate associations that exercise
their control over territories and society and comprise administrative, legal and coercive organisations (Weber, 1978: 333-337; 941-955). The basis of the state’s legitimacy varied between social systems, but ultimately the operation of the state reflected dominant political relations because the state as an institution ‘is a relation of men dominating men’ (Weber, 1948: 78). This Weberian capturing of political relations coincided with Weber’s reflections on status, market position and political power, which indicated a plurality of forms of dominance and spheres of action and a concern for ideal types of political leadership (Weber, 1948: 192-195). Reflecting the influence of liberal, particularly utilitarian thinking on Weber, the citizens of modernity need bureaucracy, justice, legality and administration (Giddens, 1971: 179).

The legitimacy of state action is further taken up by structural functional theory. Parsons linked the role of the state and the legitimacy of state institutions, including the government, to his core notion of value consensus. In this advanced version of social contract theory, those in the social order who are in positions of dominance derive legitimacy from society’s collective goals, which underpin in turn the support and endorsement of those who are subordinate to their power. Common values are treated as the primary basis of social relations and social order. The unequal distribution of power, deprivations and material advantage is a derivative of consensually defined social goals and a natural form of stratification, which included, on Parsons’ account, women’s position related to their primary role as caregivers (Parsons, 1954). On this account, inequality is treated as functional and ultimately advantageous to the social system. The state is defined as a social institution which exists because it contributes to the setting and attainment of the goals of society, the preservation of a common value system, a process and a set of interactions that Parsons regarded as a necessary feature of a self maintaining system.

Following Hobbes, Parsons viewed the state as a necessary response to the ‘inherent potential for conflict and disorganisation’ through its role in securing solutions to the problem of order (Parsons, 1969: 8). The state is a focal point for the generation and allocation of
power in a society and acts as a 'set of structures and processes, a subsystem parallel to the
economy' where the focus is clearly the government (Parsons, 1969: 207). Society is reified
to the extent that interests, values and goals are all in agreement and social resources are
mobilised in support of collective goals (Parsons, 1960: 181). State power is defined in highly
abstract form as 'the generalised capacity of a social system to get things done in the
interests of collective goals’ (Parsons, 1960: 181), with such goals deriving from the 'values of
society’ which define the ‘main framework of attitudes towards the attainment of collective
goals’ (Parsons, 1960: 187).

**Pluralist Perspectives on Labour Market Regulation**

Pluralist perspectives on labour market regulation reflect the influence of Durkheim, Weber
and Parsons. They conceive of the state as heterogenous, operating a complex set of
institutions with separate spheres of power responding to different external pressures.
Pluralism is an approach that combines features of both the classical and functionalist
analysis favoured by Durkheim and Comte, in that conflict is viewed as an essential and
inevitable feature of social existence. The state is not directed at eliminating conflict but
legitimating and also ordering social conflict for the purpose of social harmony. Dunlop’s
characterisation of industrial relations, including its regulatory aspects, as an analytical
subsystem of industrial society with its own process of rule making and administration,
reflects the influence of Parsons. This characterisation implies a unity and common purpose
to industrial relations, as the system contains a series of processes including rule making and
administration to restore balance in the face of disturbance (Dunlop, 1958: 16, 27).

Consensus is fundamental to the industrial relations pluralism of writers like Flanders and Fox.
Although their work departs from Parsons in some ways, it does contain the notion of a
Parsonian system of rules, as well as a study of norms in the fashion of Durkheim (Marsden,
1982: 236; Hyman, 1980: 40). The value consensus of Parsonian thinking is replaced by an
acknowledgement of conflicting aims and preferences of social actors, but both are
predicated on an underlying balance of power and interests, a form of negotiated order and a
belief that compromises can be reached. Indeed Flanders classifies industrial relations as a 'system of rules', and progresses to describe the discipline of industrial relations as a study of the institutions of job regulation. The state as one of the institutions involved in job regulation has an interest, therefore, in controlling and regulating industrial conflict and maintaining social and industrial order rather than addressing its underlying causes (Flanders 1970: 69, 86).

Flanders and Fox's reference to an underlying and necessary requirement for rules and rule makers and the construction of a normative order, drew directly from the work of Durkheim's concept of anomie (Durkheim, 1933: 366). Flanders and Fox utilised Durkheim to define the anomic situation as one where regulation, the particular sorting of rights and duties which is established by usage and becomes obligatory, does not exist (Flanders and Fox, 1970: 258). Working from the requirement for rules, Flanders and Fox (1970: 247) defined industrial relations as a normative system regulating employment relations. Substantive norms included standard wage rates, hours and leave arrangements. Capital and labour acted as joint creators of substantive and procedural norms and the state may lay down further norms either directly or through a public agency. The accepted normative system provided 'a framework of comparison and constraints within which otherwise unlimited aspirations can be shaped with some concern for social proportion' (Flanders and Fox, 1970: 249). The absence of rules, the anomic situation, was prejudicial to the reconstruction of normative order. Rules were required to address the disorder that arose from the competitive struggle between groups under full employment, and to manage the impact of disorder on the institutions of collective bargaining (Flanders and Fox, 1970: 255-259).

The use of Durkheim by Flanders and Fox was selective. Hyman and Brough (1975: 175) observe that Flanders and Fox omitted Durkheim's further proposition, that normative order is not a sufficient condition of stability and integration in industrial life, by neglecting his comments on a balance of power, an 'absolute equality in the external conditions of conflict'
(Durkheim, 1933: 377). This exclusion has two consequences: firstly, it fails to follow Durkheim in relating the problem of anomie to the problem of inequality; secondly it reproduces a principal flaw in Durkheim’s analysis, that being his failure to recognise that the inequalities that he castigates as being abnormal are integral to capitalist market relations (Hyman and Brough, 1975: 175-176). Similarly, Dunlop’s model of an industrial relations system negates the analysis of the system’s role in assisting capital in its productive and profitable exploitation of labour (Hyman, 1980: 39).

A pluralist ideology defines labour market regulation as being chiefly concerned with the regulation of social power irrespective of the share which the law itself had in establishing it. The principal purpose of labour law is to regulate, to support and to restrain the power of management and labour, where management and labour are abstractions, activities of planning and regulating production and distribution and coordinating capital and labour on the one hand, the activity of producing and distributing on the other (Davies and Freedland, 1983: 14, 18). The objective of labour law is to address and counteract the competing interests that are inherent to the employment relationship. Although competing and divergent interests are acknowledged it does not follow that the ‘interests of managers and workers are identical’ (Deakin and Wilkinson, 2005: 349).

These criticisms of industrial pluralism highlight its limitations, quite apart from whether this school has a robust understanding of gender, and suggest that a more acute analysis of labour market regulation is required.

**Economic Determinism, Politics and Ideology: Marxist and Neo-Marxist Perspectives of the State**

A very different conception of the state is provided by Marxism. Marx’s work on this question began with a critique of Hegel’s theorising of the state, and introduced a sense of
functionalism to its operations. Hegel effectively divided modern society into three realms of human existence – the family, civil society and the state. The state featured as the key expression of human existence, as Hegel reasoned that it represented the interests of all and the fulfilment of the duties of individuals to humanity and to society as a whole (Avineri, 1972: 181).

Marx rejected Hegel’s idyllic capturing of society and together with Engels went on to subject the state to a materialist analysis, which held that the state served to protect sectional economic power. In this schema, the state and its structures help reproduce the relations of production, that is the private ownership of the means of production, and thereby preserve the fundamental inequalities of class society. According to Marx and Engels the state was the institutional form through which the holders of capital – the ruling class - asserted their common interest and power (Marx and Engels, 1970: 80). Even in democratic forms of the market-oriented modern state, capital retains political dominance and thus ‘the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie’ (Marx and Engels, 1952: 52). It follows from this reasoning that the state’s efforts to regulate the labour market are designed to favour the interests of capital.

In guaranteeing the relations of capitalist production the state exercises a direct authority (Blackburn, 1977: 38; Colletti, 1977: 70). This idea reflected Marx’s concept of base and superstructure, the base being the economic structure of society and the superstructure being an amalgam of politics, law, ideology and culture. While the bourgeois state may differ in form, every state enshrines its class interests through four components, some institutional and some ideological: the coercive apparatus used by the ruling class for the oppression of the exploited class; a political organisation of society to manage irreconcilable class conflicts; a mechanism of social cooperation, in which the rulers and the ruled have common interests, and a government machine, a social actor separated from the civil society through the social division of labour (Selucky, 1979: 56-57). Liberalism, with its ideology of a national interest
that transcends sectional conflicts of interest, merely obscures class conflict and thereby deflects any challenge to the structure of power relations (Marx and Engels 1970: 64). Thus an appeal to the national interest is merely a socially reproduced belief which legitimates an unequal distribution of power and unequal rewards. The legitimation of inequality derives from and in turn reinforces the unequal distribution of power and privilege (Hyman and Brough, 1975: 191).

What then constitutes these processes of legitimation? Later Marxists explored this question in great detail, beginning with Gramsci in the 1920s and the structuralist approaches of Althusser and Poulantzas in the 1960s and 1970s. These approaches sought to broaden a Marxist approach to the state beyond the realm of economic functionalism. Gramsci’s analysis of the modern state rejected the position that Marxist analysis simply correlated the state to the needs of the dominant mode of economic production (Gramsci 1971: 407). Nevertheless this analysis extended Marxist analysis to be more inclusive of the role of politics and ideology. Regulation was directed increasingly at a wide range of social life, including the production of a citizen functional to the state (Gramsci, 1971: 258-260), although the gendered dimensions of this capturing of citizenship remained under-explored in Marxist accounts.

Notwithstanding this relative silence on gender, the analysis of politics and ideology and with it human agency provided the necessary analytical antidote to economic determinism. It offered a conceptual framework that in the context of labour market regulation provided the analytical opening to examine the processes of interaction and agency as they inform consensus. Hegemony, the ideological and cultural control by one class over another, was exercised through the control of consciousness and knowledge. Gramsci was interested in the way in which the modern state educated the majority to consensus in its rule, and termed a system of rule based on produced or educated consensus in the state as ‘hegemonic’. Thus
the modern state encompassed a hegemonic system that perpetually struggled to absorb antagonistic opposition (Gramsci 1971: 12-13).

Gramsci distinguished different modes of domination and control by capital including state control. Such an approach expanded previous understandings of the Marx’s concept of superstructure and located two levels within the superstructure – civil society and political society. Civil society was the ‘ensemble of organisms commonly called private’, while political society equated to what was traditionally viewed as the state. These ‘two levels correspond on the one hand to the function of hegemony which the dominant group exercises throughout society and on the other hand to that of direct domination or command exercised through the state and juridical government’ (Gramsci, 1971: 12). This explanation of the state underpinned Gramsci’s broad definition of the state as ‘the entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance, but manages to maintain the active consent of those over whom it rules’ (Gramsci 1971: 244). While this approach clearly asserted a clear relationship between the dominance of capital and the role of the state, the precise nature of the relationship between class and state structures was not predetermined and needed to be understood within each national context. Such a context was mediated by internal forces, their relation to international factors and each nation’s geo-political position (Gramsci, 1971: 115-116).

Althusser’s approach was a response to the perceived economic determinism of Marxist accounts where Althusser attempted to locate the state’s role in ensuring the continued dominance of capitalist relations within a framework of ideological and social reproduction. This elevated the study of the ideologies and belief systems of capitalism and its agencies and thus Althusser’s realm of the state apparatus encompassed religious, educational, family, legal, political, trade union, communications and cultural institutions (Althusser 1971: 136-139). Althusserian Marxism viewed the state as an apparatus of social regulation, but one where regulatory mechanisms and modes of regulation initiated by the state are the basis of
transformations that reinforce and underpin capitalism’s survival, where the state in addition to being an object of struggle, is itself a terrain of struggle (Charles, 2000: 16).

Poulantzas’ work carried Althusser’s influence and carried forward aspects of the functionalism present in Marx and Engels formulations; within a capitalist mode of production the state ‘had the function of constituting the factor of cohesion between the levels of social formation’ whereby social class is a social formation with economic, ideological and political determinants (Poulantzas, 1973: 44-45). Given that this cohesion is a prerequisite for the continuation of the dominant relations of production, this role ensures that the state is no neutral mediator of conflict but acts as a regulating factor to ensure capital’s ‘global equilibrium as a system’ (Poulantzas, 1973: 44-45). The heterogeneous nature of the dominant class was acknowledged, a diversity which included the possibility that the state may act in some instances against particular interests or fractions within the dominant class (Poulantzas, 1973: 255-256, 318-319). State autonomy was observed, although the precise degree of autonomy could be precisely understood only within the analysis of a specific social formation and state forms (Poulantzas 1973: 317-321).

The prospect of state autonomy which is opened up by Marxist theorising is taken up by state centred theorists, including Skocpol (1985), but within a different theoretical framework. Skocpol rejects functional analysis and ascribes to Marxist accounts, in particular, a deeply embedded inhibition to doubt that states are shaped by class struggle and function to preserve and expand modes of production. Alternatively Skocpol acknowledges the potential for autonomous state action in pursuit of state interests and goals which includes autonomous state contributions to social policy making (Skocpol, 1985: 12). This opens up conceptually the space for an independence in state policy and law making as it concerns labour market regulation. State autonomy is not theorised as a fixed structural feature of any governmental system but transitional (Skocpol, 1985: 14). It operates in two ways. The first is that states are organisations through which ‘official collectivities’ pursue distinctive goals which may be realised more or less effectively ‘given the available state resources in relation
to social settings’ (Skocpol, 1985: 27). The second is that states are configurations of organisation and action that ‘influence the meanings and methods of politics for all groups and classes in society’ (Skocpol, 1985: 28).

**Radical Perspectives on Labour Market Regulation**

Radical perspectives on labour market regulation which derive from Marxism can be distinguished from unitarist and pluralist approaches through their refusal to accept that law is essentially a ‘benign, neutral and autonomous institution that operates on the basis of abstract rationality and universal application’ (Simpson and Charlesworth, 1995: 96). In short they reject liberalism’s claim that the law reflects value consensus, is value neutral and is committed to equality (Hunt, 1981: 96). Such a perspective challenges the commonality of interests that lies at the bottom of pluralism, by arguing that the structure of ownership and control within a market economy generates an irreconcilable conflict that remains undisturbed by state regulation. Such accounts highlight the necessity of the state to the protection of capital’s interests and the stability of the capital economy. State intervention is required also to curb the dysfunctional consequences of a system of economic interests based on competitive private capital. Intervention, by the state, is predicated on the centrality of profit as a continuing underlying social dynamic and works within the structure of class domination (Blackburn, 1972: 183; 1977: 42-46; Hyman, 1975: 125).

Labour market regulation therefore exists as a structure of class interests (Crouch, 1977: 10, 173). State intervention, through regulation that controls labour costs, makes transparent the interdependence of economic and political power in society (Hyman and Brough, 1975: 251). Hyman (1980: 51), however, notes that the role of the state cannot simply be ‘read off’ from a generalised characterisation of political and economic relations or as a mechanical integration of capital, ideology and the state, but equally it cannot be understood except against this background (Hyman, 1975: 129). Nation states intervene to manage the capital-
labour relation in ways constrained, but not determined, by this relation. The relations between capital and labour and the state are played out within an economic system which is intrinsically unstable and dynamic, which in turn shapes the identifiable system of labour regulation (Elgar and Edwards, 1999: 40). The specific nature of the capital labour relation across nation states, in addition to the conditions of historical development, generates different types of state regimes (Esping-Anderson, 1990). The mode of regulation present in any particular national setting will derive from specific institutional arrangements, modes of conduct and normative rules (Jessop, 1990; 309-310).

Regulation through law is also important as a means of legitimation and ideological justification of the capitalist order. Reflecting the influence of Gramsci, Hyman traced the relationship between the role of social, economic and cultural institutions in supporting capital's dominance and the consent provided by the population to this dominance. Legal regulation can act effectively to legitimate the practices of capitalism by creating a climate of consensus. In industrial relations this particular giving of consent arises in the belief that there is an overriding national interest which transcends conflict of interests or that economic life represents a free exchange between individuals (Hyman, 1975: 127-128).

This process of legitimation also incorporates a degree of relative autonomy for the law because the system of law develops its own internal logic independent of the capitalist system. Law thus seeks to adopt standards of neutrality and generality, so that its perceived position of independence is not threatened. At times the law delivers on its promises of fairness and impartiality (Thompson, 1977: 259). This relative autonomy arises because there is some degree of institutional separation between the relations of production within the economy and the legal apparatus. However, the needs of capitalism are maintained through the form of law (Balbus, 1977: 585). Thus the legal system allocates to individuals an 'abstract formally equal legal personality' regardless of economic and social means. Thus in the context of regulation as it concerns gender pay equity, a doctrine of equal pay may
represent the legal rhetoric while the absence of substantive equality represents the reality (Simpson and Charlesworth, 1995: 96).

**Postmodern Theorising**

The long traditions of liberal and Marxist thinking about the state came under fundamental challenge in the second half of the twentieth century thanks to the interventions of postmodern and poststructural critics. Foremost among these was Foucault, who criticised both liberal and Marxist assumptions of an unproblematic functionalism and unity to the state (Dean, 1999: 25-26). On the contrary, Foucault argued that the ‘state does not have this unity, this individuality, this rigorous functionality’ (Foucault, 1991: 103), but rather the state might operate on a logic of its own, a ‘discourse’ that defined meaning to its work. This he located in the project of ‘ordering’ a population. This was governmentality - the rationality of government, a position then informed by an analysis of the multiple mechanisms of power and domination in contemporary society (Foucault, 1980: 90-92). This provides an ‘analytics of government’ which views practices of government in their complex and variable relations to the different ways truth is produced in social, cultural and political practices (Dean, 1999: 18). Moreover it is the multiple operations of government which ‘make possible the continual definition and redefinition of what is within the competence of the state’ (Foucault, 1991: 103).

Foucault recognised that the ordering of the population was necessary to capital accumulation. In observing this mutual dependence he observed, ‘it would not have been possible to solve the problem of accumulation of men without the growth of an apparatus of production capable of both sustaining them and using them; conversely, the techniques that made the cumulative multiplicity of men useful accelerated the accumulation of capital’ (Foucault, 1977: 221). For Foucault the growth of the capital economy gave rise to a specific form of ordering – a particular form of disciplinary power located in a division and
organisation of labour, a form of economy and order, so that the worker is reduced at a
'political force at the least cost and maximised as a useful force' (Foucault, 1977: 221). Yet
postmodernism cautions against a 'monotonous, uninterrupted, and omnipresent genealogy
of capital' that provides a decontextualised account, and explanation for all oppression and
alienation (Pasquino, 1991: 106). Additionally, state power does not arise from a monolithic
object and embraces multiple regimes of governmentality and distinct modes of pluralisation
involving a range of government tasks, functions and agencies (Gordon, 1991: 36).

Using the framework provided by Foucault, government for postmodernism is a more or less
calculated and rational activity, undertaken by a multiplicity of authorities and agencies. It
employs a variety of techniques and forms of knowledge that are increasingly efficient and
seek to shape conduct by working through our desires, aspirations, interests and beliefs, for
definite but shifting ends, with diverse sets of relatively unpredictable consequences, effects
and outcomes (Rabinow, 1984: 61; Dean, 1999: 11). In a related tradition Latour, using a
translation model of power to analyse methods of association, argued that government is
achieved through multiple actors and agencies and a series of associations rather than a

**Postmodern Perspectives on Labour Market Regulation**

Postmodernism’s contribution to labour market regulation lies in its concept of
governmentality. If we view governmentality as a concept that embraces the ordering of the
population, labour market regulation is therefore a finely grained effort to codify, categorise
and order labour, ready for the process of production on the one hand, and on the other to
enmesh it in a system of discipline and power.

Postmodernism acknowledges the power of the legal discourse but also assesses that law is a
‘complex of practices, discourses and institutions’ (Hunt and Wickham, 1994: 39) which is
both complex and partial (Foucault, 1980: 141). The law which mediates between state and
the civil society and between the state and the individual is, however, only one complex
instrument of power. Power is diffused through numerous normalising practices, ‘systems of
micro-power that are essentially non-egalitarian and asymmetrical’ (Foucault, 1977: 222).
Exploring the space opened up by this nuanced approach, postmodernism critiqued early
twentieth century regulation as the operation of a juridical discourse which intersected with
two entities in the partition of production.

The social stands on the side of the attribution of rights, of resistance to the logic of
production. It sets up the status of the worker against the profits of the employer,
satisfaction through wages and leisure against the frustration of work. The economic
stands on the side of the distribution of forces for the sake of productivity, the
rationalisation in the name of profit, the intensification of work in the interest of
increased production (Donzelot, 1991: 257).

Yet postmodernism rejects the assumption that regulation in a post–industrial economy
resolves these entities in a binary manner, one against the other, or consistent with
postmodernism’s decentring of the state that all ordering occurs by way of regulation initiated
by the state. Alternatively the relationship between the two discourses is increasingly complex
and intersecting. Donzelot highlights the way in which the state may work to increase
workforce participation and control social expenditure by way of training and retraining
initiatives. This may in turn break down a worker’s resistance to the logic of production and
lead to the acceptance of conditions at the workplace according to their economic pertinence
for capital (Donzelot, 1991: 279).

Postmodernism further contends that the relationships and interests that are embedded in
unitarist, pluralist and radical perspectives are at odds with social transformation. This
critique reflects postmodernism’s capturing of social change, in particular the transition from
industrialism to post-industrialism, the change from Fordist to post-Fordist production
methods, changes in social movement politics, increased workforce diversity and the rise of
consumerism (Rose, 2004: 40). These transformations challenge previous constructions of
interest and identity and with it the meta-narratives that underpin industrial relations. On a
postmodern reading, as employers will value the contribution of increasingly skilled and flexible employees, conflict will diminish, and class interests and industrial arrangements will become both less well-defined and also more fragmented (Kelly, 1998: 116).

In this landscape ordering by the state does not operate simply as a set of direct regulatory mechanisms. Foucault’s acknowledgement of the ‘counter-law’ or the ‘underside of law’ (Foucault, 1977: 223) encompasses the manner in which state regulation in the early to mid twentieth century enabled or facilitated management control of the quality and intensity of work activity at the workplace (Hunt and Wickham, 1994: 65-66). The more contemporary equivalent of this critique identifies the state nominally vacating its more overt role in labour market regulation, but simultaneously enabling the growth of more internal forms of control and ordering at the workplace. This is evident through the rise of Human Resource Management, including authoritarian regimes within corporations that simultaneously both immerse employees in the logic of the market and invite employees to understand that their identification with market and corporate values and practices ensures their autonomy (Willmott, 1993: 519-526). Such critiques draw on Foucault to identify a movement towards enterprise and organisational culture as a particular form of governmental rationality. This movement cannot be completely reduced to a single political realm but has occurred through a series of redefinitions and institutional reforms that have enlarged the territory of the market and private enterprise (du Gay and Salaman, 1992: 618-628). Smith suggested this development in regulatory scholarship as referencing the evolution of a new regulatory state that ‘does more steering and less rowing’ and which looks beyond law as the only means of ‘regulating behaviour – seeing regulation as something more akin to all mechanisms of social control or governance’ (Smith, 2006: 106).

Whether such positions operate as a postmodern critique of the frailties of competing perspectives to address the flux, fragmentation, and uncertainty in the conditions and relations of production (Eldridge, 2003: 335), or alternatively a normative position on the part
of postmodernism, is itself the subject of some debate. Eldridge for one observes that postmodernism acts as both the cultural form of late capitalism and in capitalism’s interest, given ‘it accommodates all of its tendencies’ while at the same disparaging it. Accordingly it is a critique that does more to preserve the dictates of late capitalism and neoliberalism than challenge any of their ideals (Eldridge, 2003: 331-332). Kelly (1998: 117) similarly acknowledged that the strength of the postmodernism in this arena lies in its recognition of the reorganisation of work, the diversity of employment and regulatory relationships, the decline in union membership and the growth of new social movements. Kelly does not pre-empt Eldridge by claiming that postmodernism acts in capital interests, but locates his critique in postmodernism’s own grand narrative – primarily its uncritical joining of a high skill workforce and low levels of class conflict without sufficient attention to the complexities of social relations, including the ‘new found power of the employer’ (Kelly, 1998: 125).

What we can draw from postmodernism is its attention to a myriad of ways in which regulation is used to regulate the labour market. This diversity of regulatory relationships is increasingly acknowledged by perspectives other than postmodernism. More recently Gahan and Brosnan, (2006: 127, 145) have acknowledged a significantly wider repertoire of labour market regulation including direct and indirect measures by state agencies as well as by private actors. Similarly Mitchell and Arup acknowledged that contemporary state initiated regulation can involve a complex combination of ‘detailed prescriptions in certain areas of regulation coupled with complete withdrawals from other areas’ (Mitchell and Arup, 2006: 11). This does not necessarily reduce the ‘amount’ of regulation. A return to more market driven or private arrangements can involve a marked increase in ‘regulatory instruments, norms and agencies’ to facilitate these outcomes (Johnstone and Mitchell, 2004: 118).

**Remedying the Silence on Gender: Feminist Accounts of the State**
Despite key differences there is an underlying commonality of interests among theorists of the state. These theories are grappling with the consequences of the industrial economy that arise in the paid labour market. For liberal theorists the key task is to construct a social contract to properly frame individual liberties, while functional theorists such as Durkheim addressed the ‘anomie’ that arises from the division of labour in industrial society. Alternatively, Marx focused on the alienation of labour power, Gramsci the system of hegemonic rule, while Foucault’s key concern with the labour market was the operation of discipline and order. In this debate about the consequences of paid labour, some approaches are normative (Durkheim) and some are revolutionary (Marx). Yet there is this common interest in identifying a course of action, or ‘what to do’ with the labour market, even if we acknowledge that postmodernism’s key concern lies in an increased understanding of the fragmentation of social relations and the diffuse forms of state power. A key issue for this thesis is whether this interest is gender inclusive or gender blind. Do these approaches work from the proposition that women and men experience paid work and labour market regulation in the same way?

While feminism as a broad church shares a criticism of ‘male’ sociology, there is no ‘one’ feminism but instead a range of viewpoints, some of them making use of established sociological traditions. These include liberal, Marxist and postmodern feminisms, while radical feminism eschews more conventional approaches.

Liberal feminism views patriarchy, and in turn discrimination on the basis of sex, as an aberration, a ‘distortion of the rational efficient workings of the market’ (Wajcman: 1999: 13), one that requires regulatory redress by the state. Once redress occurs, the state can be properly neutral towards women. Diminished liberty and autonomy for women is viewed as a dysfunction of the system, one that is located within the social system’s value and belief system as expressed in stereotyped attitudes and expectations (Jaggar, 1983). The state arises, however, as the legitimate authority and the neutral arbiter to remedy that
dysfunction through legal reforms that change sexist values, norms and ideas and address what is viewed as discrimination against women; as the structural features of the capitalist economic system are viewed as sound, reform is not directed to overthrow of that system. State action can include specific institutions directed to women's rights although there are variations between these institutions which are partially structured by differences in social and political formation (McBride-Stetson and Mazur, 1995b: 281). The distinction between the public and the private, in liberal theorising, is the distinction between the state and civil society. Politics equates to the public power of the state and freedom is associated with individual freedom from state constraints. Civil society is 'cast as that sphere of life in which individuals are allowed to pursue their own conception of the good' without interference from the state. Yet the liberal concept of civil society excludes the 'personal, intimate or familial', thereby eliminating a role for the family in structuring public and private life (Squires, 1999: 26-27).

Within a Marxist-feminist analysis, a very conscious role for state activity is acknowledged and understood in relation to the capitalist mode of production (McIntosh, 1978: 260). This transpires not as direct oppression of women but as support for a concept of household in which women are oppressed. Accordingly this analysis allocates a particular importance to the role of the household in addition to wage labour within capitalist economic relations. The state acts to support the family constituted in patriarchal form and this support plays a part in the producing and reproducing the conditions for capital accumulation, including the reproduction of labour power (McIntosh, 1978: 258-260).

What is called radical feminism criticises this attempt to reconcile class and gender as an unsatisfactory attempt to simply graft a feminist analysis of social reproduction onto an account of the capitalist state. Its foremost proponent, MacKinnon, is critical also of the neglect of women in accounts that articulate a 'reciprocal constitution of state and society', or alternatively cast the state as 'relatively autonomous' (MacKinnon, 1987: 138-139). MacKinnon presses for a specifically feminist account of the state, arguing that 'feminism
stands in relation to Marxism as Marxism does to classical political economy, its final conclusion and ultimate critique’ (MacKinnon, 1982: 30). The state is patriarchal and through regulation, institutionalises male power over women. The state’s first act ‘is to see women from the standpoint of male dominance; its next act is to treat them that way. . . . However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimised, and epistemic, it is the regime’ (Mackinnon, 1989: 169-170).

Here we find an acute issue in feminism – whether analytical primacy is afforded to class or gender or some combination of the two. In grappling with this issue in relation to the state, one complication is that the state engages with political forces that are themselves gendered and which have gender-differentiated effects (Walby, 1990: 150). Some autonomy might be ascribed to the state because its actions ‘should not be read off from the interests or the logic of the system; rather there is a degree of autonomy of the political struggle from the material base of patriarchy and of capitalism’ (Walby, 1990: 159). This caution against functionalism is also evident in the accounts of feminists influenced by neo-Marxism. In these, women’s oppression cannot be reduced immediately or automatically to the needs of capital as patriarchy was a pre-existing gender ideology, but one which was of great utility to capital. The state then supports and reinforces the patriarchal family, the division of labour in wage labour, and between wage labour and domestic labour, through particular conditions, institutions and regulations. It is these constellations, including ideologies that revolve around them, that assist the reproduction of the mode of production (Barrett, 1980: 25-29, 239; Barrett, 1984). The extent to which the state facilitates women’s independent access to the economy is theorised as an outcome of the struggle over the distribution of reproductive tasks between the state, market and the family (Charles, 2000: 19), although such theorising may be problematically predicated on a triangular relationship between the family, workplace and the state (Franzway, Court and Connell, 1989: 22). Other approaches more usefully adopt a more dialectical approach and see the state facilitating capitalist social relations through multiple mechanisms including the formal structures and cultural practice of
management and organised labour (Wajcman, 2000: 196). These perspectives are accordingly critical of some aspects of Marxist-feminism and dual systems approaches for a tendency to rigid, structuralist understandings of the state (Burton, 1985: 114-115). The state is still pivotal to legitimising capitalist social relations but it is not as a monolithic entity. Rather ‘it is a complex of relationships embodying a certain form of power operating through various institutional arrangements’ (Burton, 1985: 104-105).

Feminist theorists influenced by the work of Foucault and postmodernism and poststructuralism more broadly, acknowledge the state to be a focus of power but naturally afford the state no singular unity. Their approach is to assess the techniques and tactics which ‘constitute the complex forms of power exercised over individuals and populations’ (Smart, 1995: 130). Thus a fixed or coherent character cannot be attributed to state structures (Brown, 1992: 12). Alternatively, they are erratic and disconnected and there are local, regional and national specificities that require observation (Pringle and Watson, 1992: 63-64). The authority of law as one site of state action and regulation stems from its appropriation of power as opposed to nature, reason, legitimacy or democracy. Law exercises power not only ‘in its material effects (Judgements) but also in its ability to disqualify other knowledges and experiences’ (Smart, 1990: 5), although legal forms of power in the form of rules are only one site of power. Diffuse sites of power acknowledged, some areas of postmodern theorising nevertheless acknowledge the impact of the state upon women. In an era of greater prominence of women in the public sphere, the state’s masculinist powers can be both subtle and diffuse, and telling and persuasive (Brown, 1992: 28). Thus while the state is neither hegemonic nor monolithic, ‘it mediates and deploys almost all the powers shaping women’s lives: physical, economic, sexual, reproductive and political’ (Brown, 1995: 194). Brown’s critique reminds us that while postmodernism decentres the state and precludes any fixed hegemonic identity for the state it nonetheless recognises the significance of the state for women’s lives – albeit that state influence occurs through multiple sites of power.
While neo-Marxist accounts open up new ideas about states being sites of struggle, feminist theorists influenced by postmodernism and poststructuralism are nevertheless critical of such accounts for their failure to acknowledge adequately the plurality and proliferation of claims on the state (Yeatman, 1990: 17, 68, 171). As observed in Chapter Two, there is some imprecision in ascribing a seamless position to feminist theorists influenced by postmodernism and poststructuralism. This noted, feminist theory influenced by postmodernism and poststructuralism shares a presumption against coherence which emphasises the need to recognise the significance of fragmentation of political structures. Thus politics within the state is structured in part by ‘advocacy on behalf of interests, groups and movements in civil society’ (Yeatman, 1990: 171). With specific reference to the Australian state, Watson describes the Australian state as ‘a complex set of institutions and areas which cannot be assumed to act as a coherent or uncontradictory beast’. The ability of feminists to influence the political agenda and to achieve reforms is inevitably a result of ‘specific political and economic relations, of the composition of bureaucratic and political players, or localised powers and resistances and of the strength of feminisms within and outside the political structures’ (Watson, 1990: 19). These insights from postmodernism are valuable as they caution against any fixed and automatic reading of the relations between state, class and gender. Importantly though for the analysis being explored by this thesis, such accounts do not preclude the significance of state action for women, but counsel that any analysis should be tied to specific sets of social relations both across and within nation states.

Assessing Labour Market Regulation by the State

What are the implications of this review of why the state regulates labour markets? Liberal and pluralist approaches to this regulatory function are vulnerable because they ascribe an unproblematic neutrality to the role of the state in maintaining social cohesion, or alternatively they see the consensus on which state control rests as universal and seamless. This was the line of attack for Marxism. The state is functional to the interests of capital and
fundamental to the economic dominance of capital relations which shape labour market regulation in the interests of capital. Yet the functional rigidity of early Marxist theorising limited its contribution in relation to the role of politics and ideology in shaping the consent of citizens to a system of economic and political dominance. Later Marxist accounts provide a way past this rigidity, given their focus on the role of the state in ensuring the dominance by capital, with greater attention to the ideological apparatus employed for this purpose. These accounts provide some theoretical space for state autonomy and the impact of human agency, as well as complex and contradictory applications of state power. This theme of autonomy is also taken up by postmodernism, which completely detaches the state from economic functionalism, contending the state has a rationality of its own, but this is just one of the mechanisms of power and domination in society.

Each of these schools is interested in the relationship between the state and the paid labour market, and for that reason, practitioners of most can be found in the specific discipline of industrial relations. Whether the state and its regulatory work are gendered phenomena is less well developed, a point taken up by the various strands of feminism. A threshold conceptual issue in feminism is whether class or gender takes primacy in debates over power. Informed by contemporary neo-Marxist feminist theorising of the state, the position taken here is that the state protects the interests of capital through both class and gender relations. Consistent with the conclusions reached in Chapter Two, the analysis advanced is not a structuralist one; hence class and gender are identified as dynamics within the operation of power. While the state is diverse and fragmented it legitimises capitalist social relations, inclusive of gender. This process of legitimation may comprise a complex set of relationships where power is diffused through different institutional arrangements. However, postmodernism’s aversion to any form of theoretical coherence concerning the state is rejected because, following Brown (1995), the state does mediate and deploy a number of the powers that shape women’s relation to paid work. This may be through reinforcing divisions in wage labour and between wage labour and domestic labour.
3.2.3 HOW DOES THE STATE REGULATE LABOUR MARKETS?

The overview of the capitalist labour market at the outset of this chapter identified regulation by the state as one of the key features of the labour market. How is the regulation undertaken? Is the shape of the state's interventions in the labour market a political venue in its own right? If regulatory arrangements differ according to national context, what does this suggest for our earlier review of the 'autonomy' of the state, or its governmentality?

This assessment of the means of labour market regulation initially carries a historical dimension to examine what promoted the initial efforts, by the state, to ameliorate the operation of the market. Marxist analysis indicates that the capitalist labour market was constructed by the state – this initially, by the enclosure movement in the United Kingdom at the end of the feudal era, denying the peasantry independent access to the land, the means of production, and compelling the poor to work. This was achieved through a combination of statutory regulation of wages and anti-vagrancy laws which forced labourers into an atomistic labour market (Philips, 1980: 41). Clearly state intervention to regulate labour did not coincide with the onset of capitalism. Even in pre-capitalist Britain the state adopted legislative means to guarantee labour supply in times of labour shortage, while wage regulation was established as a function of labour legislation from the late medieval period (Creighton and Stewart, 2000: 28; Ewing, 2003: 138; Deakin and Wilkinson, 2005: 106).

The state for a long time also enforced the law of contract against labour organisation, by enforcing a doctrine which treated industrial relations as matters of private contract between workers and employers and therefore ostensibly outside the sphere of government. This indicated a 'notional disinterestedness' on the part of the state (Curthoys, 2004: 4-5). Yet the withdrawal of labour and collective organisation either by way of guilds or friendly societies was discouraged, not only by means of the common law but also by statute evident in the United Kingdom's Combination Acts of 1799 and 1800.
Why did these measures change? How do we view legislative measures in the United Kingdom which introduced a limit of ten hours per day for women and children (1847) or freed trade unions from the civil and criminal penalties for restraint of trade action (1871). Deakin and Wilkinson (2005: 108) view such measures optimistically, citing them as the beginnings of a contractual model between capital and labour based ‘on the recognition of reciprocal rights and obligations and the sharing of economic risk’. This is not to deny Deakin and Wilkinson’s acknowledgement of the extent to which voluntary collective bargaining was contested by capital at various times, only for this to be settled through a combination of resistance on the part of organised labour and state action, or the extent to which state action was directed to stabilising employment (Deakin and Wilkinson, 2005: 272, 343).

Neo-Marxist analysis views state action in less benign terms. The state adroitly combined both legislative intervention, and also deliberate non-intervention, to ensure the stability of traditional productive relationships or maintain the balance of an unequal market exchange (Hyman, 1975: 131-132; Crouch, 1977: 8). This included efforts to secure for ‘capitalist industry a regular and flexible labour supply, and to assist employers to maintain or to restore an industrial peace which enables them to extract the maximum profit from industry with the minimum of disturbance in the form of strikes, lock-outs, go slow movements’ (Harvey and Hood, 1958: 218). Thus while the legislation such as that enacted in the United Kingdom, in 1871, to ‘allow’ collective organisation might be viewed as progressive, no use could be made of the law to ‘redress any imbalance in the power of the opposing social forces’ (Brodie, 2003: 25). State measures also moved in line with the demands of the market; while master and servant type legislation aimed to provide labour discipline, such legislation was less useful to industrial capital which required mobility and flexibility (Creighton and Stewart, 2000: 33). State intervention also acted as a means of controlling sectionalism and division within capitalism – such as between monopolists or small business, financiers or industrialists, consumer or investment goods producers, domestic market or export market manufacturers
(Hyman, 1975: 130). Consistent with the position adopted earlier in this chapter, such action was enabled because it resided in an ideology that state action was independent and autonomous and arose from an overriding national interest. The state was careful not to appear to act too decisively in the interests of capital, but at the same time it consigned legitimacy in a capitalist social order (Hyman, 1975: 128).

This historical dimension is not to suggest that the experiences of the British state are simply transplanted to other nation states – the state as a set of social relations cannot be immediately duplicated or replicated, it has to be ‘constructed or reconstructed in new conditions’ (Connell and Irving 1980: 32). This is evident in the voluntarism and laissez faire orientation of the British capitalist state compared to the more overt forms of state intervention adopted by the Australian state in the immediate post-Federation period. Such differences can be traced to particular complexities in national conditions, and the divergent development of social democratic forces (Bennett, 1993: 17-18). This assists to explain differences in labour law regimes and the type of services provided by the state to capital to assist growth and stability. Nevertheless to differing degrees such state action is directed to integrating the working class and garnering its consent to capital accumulation (Connell and Irving, 1980: 305).

**The Specific Forms of Labour Market Regulation**

What then are the specific features of labour market regulation? Deakin and Wilkinson (1999: 2) view labour market regulation as a type of regulation of the employment relationship which derives principally from the state, in the form of social legislation and of private law, and from sources, such as collective agreements or arbitral awards. More recently these sources more routinely include individual agreements formalised by apparatus regulated by the state. Such regulation operates within what Weber would describe as a system of formally rational law, comprising a ‘systemised elaboration of law and the professionalised
administration of justice by persons trained in law in a learned and formally logical manner, giving rise to rational justice’ (Johnstone, 1995: 76). As observed previously in this chapter in our discussion of postmodern perspectives on labour market regulation, Ewing (2003: 138-139) observes some transition in how we define the scope of labour law. Traditionally labour law was concerned with how statute and common law regulated three relationships – between the employer and the employee, between the employer and the trade union, and between the trade union and the worker. More recently this scope has broadened to include the variety of ways in which the state regulates the labour market other than by the direct regulation of the employment relationship.

Deakin and Wilkinson nominate labour law as a distinctive form of regulation, compared to the private law of property, contract and tort, in that it comprises labour standards, defined by Deakin and Wilkinson (1999: 3, 8-9) as being substantive, procedural and promotional (see also Flanders, 1970: 86, 94-98; Davies and Freedland, 1983: 52-55). Substantive standards are those which directly regulate the employment relationship through such mechanisms as minimum wages and other regulated ‘floor of rights’. Procedural standards are more indirect in nature and do not govern directly the terms under which labour is contracted, but provide an underlying legal foundation to assist collective negotiation. These standards would include laws which enable the arbitration and/or conciliation of industrial disputes. Promotional standards are directed to facilitating and enhancing labour market opportunities through training and job creation programs, including subsidies to employers and other forms of targeted expenditure which may include adjustments to taxation and social security systems (Deakin and Wilkinson, 1999: 3-4).

The sources of substantive and procedural standards include legislation and the law of the courts and tribunals. These sources may draw their legitimacy from international conventions, such as conventions from the International Labour Organisation (ILO), or the United Nations, where a nation state ratifies conventions. The ILO, which has played a particularly formative
role in developing labour standards, was founded in 1919 as part of the Treaty of Versailles which established the League of Nations. It survived the demise of the League of Nations and became the first specialised agency of the United Nations in 1946 (Blanpain and Colucci, 2004: 10; Maupain, 2005: 88). The ILO through its General Conference, which comprises representatives of governments, organised labour and employers, formulates and adopts international instruments. These do not translate automatically into national law and only do so once a nation state ratifies a convention (Landau, 1990: 4-6). Conventions may, however, exercise an influence on national law and practice regardless of whether they have been formally ratified (Landau, 1990: 4-6). Once a member state has advised ratification the ILO establishes a supervisory system that includes ongoing reporting to demonstrate compliance with the labour standard (National Research Council, 2004: 17), although the ILO has limited powers of enforcement (Davies, 2004: 55).

Courts and tribunals play a key role in interpreting statutes and applying the law and in interpreting the regulation of normal behaviour in relations between employers and workers (Davies and Freedland, 1983: 31). The latter is mainly in the form of collective agreements that establish conditions such as scales of pay, periods of sick leave. Statutes vary in their function. Legislation can be used as a means of directly laying down the rules of employment, such as minimum periods of annual leave, or occupational health and safety standards. Alternatively legislation can establish a framework of rights, whereby the means of implementing those rights falls to a combination of the interpretation of courts and tribunals and the terms of collective agreements, which of themselves impose compulsory and enforceable obligations on employers and employees. The legislation may also direct the operation of the courts and tribunals, whose functions include the interpretation of their enabling legislation.

While it may be relatively straightforward to identify the potential forms of labour market regulation, its form and will vary across nation states. As identified earlier in the chapter the
specific nature of the capital labour relation across nation states leads to the development of
different types of state regimes (Esping-Anderson, 1990; 1999; Lewis, 1992. This diversity
can include differing degrees of support for the male breadwinner model of employment
(Lewis, 1992), and the degree to which state regulation provides for strong constraints on
employers and emphasises equality, or alternatively emphasises market opportunity (Esping-

The ambit of state intervention also includes the construction of state apparatus, including
industrial tribunals, insulated to an extent from parliamentarianism and popular democratic
struggles (Schmitter, 1974: 111). This aspect of state intervention enables institutions
created by the state, as instruments of state power, to take on a lawful, objective form. This
assists in the social acceptance of these institutions and the shaping of consent to the power
exercised by them. The operation of state apparatuses can invoke a contradiction between
the operation of courts and tribunals, and the parliament (Wedderburn, 1971), but the terms
of operation of courts and tribunals may still be subject ultimately to the broad direction of
the parliament (Hyman, 1974: 106, 111-113). State regulation, through state apparatuses,
may also include the institutional incorporation of the leaderships of capital and organised
labour into co-operation with the state to facilitate their control over their memberships
(Hyman, 1974: 120-122). The opportunities for such incorporation, as too its degree, will be
shaped by national context given national differences in the countervailing forces to those
factors which generate industrial conflict (Hyman, 1972: 104).

The absence of direct and systematic state intervention in the organised relationship between
capital and labour is itself a form of involvement and permits the working out within industrial
relations of a particular balance of class forces within civil society (Hyman, 1975: 132; 1980:
49). The modes of state intervention can also be contradictory and the type of state
intervention can be transitional, reflecting changes in the type of state regime. The context
for the development of modes of intervention, political representation and control of the
Institutions of industrial relations is framed by the state’s organisation of the conditions for capital accumulation as it is affected by class and political struggles (Crouch, 1977; Panitch, 1977). This includes ostensibly neutral functions of mediation, conciliation and arbitration as embraced by independent industrial tribunals, established through state regulation, or state control of wages through incomes policies (Hyman, 1975: 137-140).

The form and focus of labour market regulation varies across nation states, and is transitional in nature. This variation is evident in the apparatus established by the state and the content of procedural or substantive standards. This diversity also includes variations in the manner and degree of the state’s intervention in capital labour relations. Feminist claims on the state concerning gender pay equity therefore confront different regulatory regimes across different nation states.

3.3 THE IMPACT OF FEMINIST AGENCY ON LABOUR MARKET REGULATION

The foregoing material provided a brief overview of early measures of state regulation in capitalist market economies. What was not apparent from that review was the gendered nature of early state regulation. While variations were evident across nation states, state regulation was largely designed to legitimise and incorporate male unionism and also privilege male breadwinners at the expense of women’s access to independent income. These measures included the exclusion of women and girls from particular areas of work, barriers to women and girls entering particular types of apprenticeships and guild training, differences in the regulation of hours of work as they applied to women and men, and sex differentiated wages (Ranald, 1982; Cockburn, 1983; Gregory, 1987; Fraser, 1999). These inequities sat alongside broader social inequities in social citizenship, including the lack of voting rights, the negligible property rights of married women and women’s lack of sovereignty over their bodies (Lake, 1999: 19). As noted in Chapter Two feminist theory is divided as to the motivation for these exclusions. Radical feminist theory cited women’s exclusion from paid
labour and from higher paid areas of work as arising from a wider patriarchy. Alternatively, Marxist-feminism cited a convenient fragmentation of the working class in the interests of capital, while a synthesis of these positions acknowledged both class and gender relations.

The gendered nature of early state regulation and the gendered distribution of labour market opportunities and earnings would in time provide the intellectual and political foundation for feminist campaigns for gender pay equity and labour market reform directed to that purpose. In this section of the chapter, I briefly review the development of feminist agency directed to equal pay, and then examine the international basis of the regulatory measures adopted in national jurisdictions to address gender pay equity. This in turn provides a platform to assess the adequacy of these regulatory measures and the state’s interest in resolving questions of gender pay equity. In the last section of this chapter these debates are contextualised by canvassing the issues for labour market regulation that arise in an era when relations in the paid and unpaid labour markets are undergoing rapid change.

An initial rallying point for feminist agency came with the suffragette movement, although women realised very different outcomes, across nation states. Women in New Zealand and Australia won the right to vote in 1893 and 1902 respectively. It wasn’t until 1918 that this right was afforded to British women aged over 30 and Canadian women, while in the United States the right wasn’t guaranteed until 1920. Lake (1999: 49) cites the winning of political rights, in the form of the right to vote, as the base of Australian feminist campaigns to shape the emerging welfare state. In the period prior to the Second World War the programs were distinctively local. In Australia, in contrast to the campaigns of United States feminists, the immediate task of post suffragist feminists was the advent of a maternalist welfare state, one where women could be better protected from violence and desertion, and where women’s ‘distinctive work as mothers would be valued and appropriately rewarded’ (Lake, 1999: 173). In the 1930s feminist agency in Australia began to increasingly incorporate a right to market work. This change which was consistent with international feminist agency would emphasise
the ‘sameness of women and men as human beings, as workers and as citizens’. This highlighted a difficulty for feminists as aspects of women’s experiences that were specific to women - childbirth, birth control, sexual violation - would pose something of a political difficulty given that the rights agenda ‘was defined in terms of the masculine condition’ (Lake, 1999: 174). This rights discourse at an international level would come to embrace three female subjectivities: wife and mother requiring protection during times of war and peace; women as being formally equal to men in the public sphere; and, women as victims particularly in the realm of sexual violence (Otto, 2005: 106). Accordingly such subjectivities would constitute both measures to protect women (through protective legislation) and those directed to promoting women’s equality (Whitworth, 1994: 8-11), outcomes that recognised the previous schism in feminism between protection and full citizenship (Offen, 2001: 245).

The campaigns to erode inequities in access to work and higher wages in the period between the first and second world wars were not uniform across nations or industries and occupations. Union support for political agitation by feminists, particularly over wages, was also uneven (Ryan and Conlon, 1975: 114; Bremner, 1982: 294; Ranald, 1982: 277). The influx of women into paid work during the Second World War in a number of western industrialised nations provided the platform for equal pay debates both during wartime and in its immediate aftermath. Although there were increases to women’s wages as a means of attracting women to essential work, their wages remained significantly lower than men’s and in Australia, as an example, remained pegged at a proportion of men’s (Beaton, 1982: 90). Similarly in Britain the War did not disrupt the inferior worker status of women workers, particularly in the private sector. The key consequence of the war was that the subject of equal pay for women became more prevalent, notwithstanding the idea that ‘women who entered the labour force were of less value’ was carried into the post-war industrial workplace (Fraser, 1999: 148-149).
A key international starting point for gender pay equity reform was provided by the ILO’s adoption in 1951 of Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Hoskyns, 1996: 49; Fraser, 2002: 43-45). A commitment to the principle that ‘men and women should receive equal remuneration for work of equal value’ had originally appeared in a draft preamble to the ILO Convention in 1919, although such wording did not survive the drafting process. This omission was remedied in 1946, a process which in turn led to the adoption of the 1951 Convention (Betten, 1993: 266). The Convention embraced a deeper commitment than simply equal pay for equal work, and in doing so potentially recognised a more systemic notion of equality and the differences between men’s and women’s work (Cornish, Faraday and Verma, 2006: 383).

The design of Convention 100 is classified in feminist theorising as an example of a ‘rights-based’ legal discourse. Rights-based discourses are consistent with a form of rights-based liberalism, exemplified in Rawls’ theory of justice, whereby individual civil and political rights are enshrined (Rawls, 1973). Consistent with the liberal conception of equality likes must be treated alike (Barnard and Hepple, 2000: 562). Such discourses seek to extend the rights of men to include women and admit women to spheres of public life from which they have been excluded (Pateman, 1988), delivering such civil and political rights through new legal concepts like non-discrimination and equality (Palmer, 2002: 91-92). Rights can be formulated at both an international and at a national level and can be written at high levels of abstraction, a design feature which provides for different levels of interpretation and meaning (Palmer, 2002: 101).

There is variation in rights traditions and the implications of rights-based discourses (Walby, 2005: 459). They can be expressed in broadly based human rights legislation, discrimination rights legislation, or embedded in other forms of more specifically directed legislation, including labour law. How then do such rights intersect with labour market regulation and

1 The Convention came into force 23 May 1953.
what is their utility? Feminist legal theorising has naturally devoted a good deal of energy to
this question. This theorising addresses utility of law reform per se, in addition to debating
how concepts of sameness/difference, sex/gender and identity are addressed in regulatory
terms.

3.3.1 THE UTILITY OF LAW REFORM

Certainly feminist legal scholarship sees the potential of using the law as a means to address
social inequality and to harness political demands for progressive change (Palmer, 2002: 97).
Liberal feminism, exemplified by the work of Wollstonecraft, identified state activity as a
means to lift regulatory exclusions on women’s participation in full citizenship (Coole, 1993:
122, 234). Rights-based discourses are consistent with an underlying liberal formulation of
rights, in which there should be nothing excluding women specifically from general rights and
obligations of citizenship. More broadly, rights-based discourses have had an impact in the
form of women’s suffrage and greater access to public policy decision making and the liberal
democratic concept of citizenship rights can be used by women to claim a whole series of
previously denied rights. This model of equal treatment favoured by liberal feminism includes
regulation that formalises equal access to education and paid employment.

However the frailties in law reform have led to concern about whether the law could ever be
deployed in the interests of women, and thus whether a feminist jurisprudence was possible.
For Armstrong (2004: 43) this has shaped a division between sceptical reformers, and those
who advocate abstention from, or a different engagement with the law. Among the sceptical
reformers there is doubtless a normative and instrumental aspect to their politics. An
overriding ‘sense of wrongfulness’ (Conaghan, 2000: 375) informs a view that law should
respond to the inequalities and inequities women experience (Armstrong, 2004: 53). Sceptics,
however, acknowledge deficiencies in the law. Thus while liberal democratic reform may be
directed to ensuring that women have the same legal rights and obligations as men – a kind
of formal equality - substantive equality is yet to be realised. For feminists who continue to advocate a form of feminist postliberalism, this implicit critique of liberalism is misplaced because liberalism has never fully belonged to women (Baer, 1999: 177-178). Within this analysis equal pay doctrines fundamentally critique the nature of social relations but struggle against the ‘dominant ideologies that pervade systems of wage setting’ (Kainer, 1995: 467).

The perspectives that question the utility of law reform focus 'not just on law as a reform mechanism, or even as (part of) a system of capitalist and/or patriarchal oppression, but also as a body of knowledge that can be explored, dissected and subjected to close critical scrutiny’ (Conaghan, 2000: 360). These approaches, which bear the influence of postmodernism, highlight the different ways in which gender is replicated and constructed in legal discourse. This includes the way in which gender neutral laws can impact upon women and men differently, and the manner in which legal concepts can be gendered, not only in their application, but also in their meaning and scope. Hence while the legal subject is interpreted as the bearer of individual rights, the ‘rights themselves and that reasoning that underpins them is culturally marked as masculine or inimical to women’s interests or both’ (Lacey, 2002: 124). In this tradition, regulation still contains an explicit sexing of the 'legal person'. This process is embedded in rights-based approaches – such as the right to equal pay – or the right to equal opportunity in employment – given that equality for women is equated as equality to men; this test serves as the benchmark for comparison and the means to assess success or failure (Palmer, 2002: 94). Thus inequity can be ‘occluded by layers of rationalisation’ that render it immune from viable challenge. This conceptualisation of right provides no purchase for women who cannot compete as individuals because their economic power is economically interchangeable or because there is inadequate recognition of their skill or work value (Franzway, Court and Connell, 1989: 14, 17). Similarly nebulous rights-based approaches can accommodate both a claim to egalitarianism and acts that are non egalitarian in nature, such as the cutting of real wages or the dismantling of structures that disproportionately and negatively impact low paid workers, including women (Thornton,
Thus in the area of wages, while the liberal right to equal remuneration may be encompassed by state sponsored regulation, such a principle fails to address the substantive wage disparity between jobs that are performed by a predominantly female workforce and those performed by a predominantly male workforce (Thornton, 1990: 64-65). For the sceptics then, gender pay equity before the law is a contradiction in terms.

Not all abstentionists reject law reform together; rather, they see the legal domain as less a site for achieving law reforms than as a site for contesting and deconstructing the meanings about gender that are propounded by the law (Smart, 1989: 165; Smart, 1995: 213). This latter approach relies on the idea of the law as a discourse constructing certain types of meaning which exclude the feminine. It resists the notion of a unity between the state and the law, and claims to a false universalism on behalf of all women (Smart, 1995: 6). Law is viewed as a practice which has material consequences for women. For law to be effective it needs to ‘destabilise the masculine universal and work against organising gender as a hierarchy’ (Otto, 2005: 110). What is required in response is practical engagement and counter practice rather than simply theoretical practice (Smart, 2002: 29).

3.3.2 REGULATING SEX/GENDER, SAMENESS/DIFFERENCE

In addition to the theoretical divisions over the utility of reform, a number of conceptual differences divide feminist approaches to regulation. The first concerns the use of the terms ‘sex’ and ‘gender’ and their application to the law. Nominally, sex in legal terms is a ground that has a fundamentally biological basis, while gender represents a social, cultural and psychological construction. Legislation that effectively seeks to outlaw discrimination against women includes provisions that allow gender to be equated with sex, through provisions that take into account culturally constructed attributions (to a sex). For some theorists, however, there is a conflation between the terms. ‘Sex’ is not a totally neutral and objective concept, and both sex and gender are cultural concepts. Yet it is common for some to classify what is
biological as more real and tangible than what is social (Connell 1987: 38). The bifurcation of the categories of sex and gender leads to uncertainty in discrimination rights jurisprudence (Thornton, 1990: 55-61). Gender differentiation is typically understood to be a binary opposition between the masculine and the feminine and as such gender will mirror sex, and cast doubt as to whether the sex/gender distinction is sustainable (Young, 2002: 6; Butler, 1990: 23).

The use of the terms ‘sex’ and ‘gender’ also represents cumulative but also contested stages of reflection in feminist writing: the first stage is captured by the phrase, the law is sexist – whereby the law is differentiated between women and men; the second stage views the law as male because masculinity is embedded in values and practices; the third stage – the law is gendered – does not entail a rejection of the masculinist underpinnings of legal values and practices, but does not share the relentless assumption that the law necessarily exploits women and serves men (Smart, 2002: 30-33).

A related point of differentiation concerns the conceptualisation of ‘sameness’ and ‘difference’. Is gender equality best achieved by treating women and men in exactly the same way - or at best, subject to a ‘differences’ approach, that is gender equality will be achieved if men and women are treated differently when they are different (Graycar and Morgan, 2004: 23)? In conceptualising and measuring sameness the male norm is accepted ‘more implicitly than explicit’ but in claiming sameness women run the risk of ignoring obvious differences such as pregnancy. Risk also characterises charting the alternative strategy where to claim differences or a special benefit rule jeopardises the chance of equality (Cossman and Fudge, 2002: 406; Mackinnon 2006: 73). The questions posed by the sameness/difference dilemma pose particular problems for feminists as there is a perceived need to be treated the same on some occasions but differently on other occasions (Thornton, 1990: 2). Thus radical approaches eschew equality in terms of sameness or difference. Alternatively, legal regulation
should support freedom from systematic repression ‘because of sex, rather than freedom from being treated without regard to sex’ (Simpson and Charlesworth, 1995: 117).

From this perspective, the passage of discrimination rights or equal treatment laws merely reproduces patriarchal relations. Such laws view equality and gender as issues of sameness and difference, where ‘equality is an equivalence not a distinction, and gender is a distinction not an equivalence’ (Mackinnon 1989: 216). While socially, women are viewed as different from men, a woman is only recognised as being legally discriminated against, on the basis of sex, when she is assessed as being the same as a man. Mackinnon observes that this bears the application of liberalism to women:

Sex is a natural difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine conforms normative rules to empirical reality by granting women access to what men have: to the extent women are no different from men, women deserve what men have. The differences branch, which is generally regarded as patronising and unprincipled but necessary to avoid absurdity, exists to value or compensate women for what they are or have distinctively as women-by which is meant, unlike men, or to leave women as ‘different’ as equality law finds them (MacKinnon, 1989: 220).

Thus sex equality law is fundamentally flawed, because it fails to recognise that men do not have to demonstrate sameness to anyone in order to be entitled to benefits, and it fails to recognise that the qualities that distinguish men from women are ‘already affirmatively compensated in society’s organisation and values, so that it implicitly defines the standards it neutrally applies’ (MacKinnon, 1989: 224). Yet acknowledging gender differences as a baseline for policy development may not in itself be enough because it is absent of a dynamic that draws attention to the unequal power relations between men and women (Eveline and Bacchi, 2005: 503). While the sameness/difference dilemma is a marker point in feminist theorising its exposition can obscure the work done by feminist activists in a number of jurisdictions, which has been directed to disrupting the male standard against which feminised work is judged or valued, or ‘replacing the segregated standards and institutions associated with masculinity and femininity’ (Walby, 2005: 456). These efforts, with different
degrees of success, have sought to acknowledge women’s differences without compromising the right to equality or equal value (Wajcman, 1999: 15)

### 3.3.3 REGULATING IDENTITY

What is the potential of any feminist legal strategy that is organised around a universal category of ‘woman’? This question takes up and extends a debate within feminist theorising initially raised in Chapter Two. The universal subject of the legal world may be constructed on the basis of male attributes with the feminine situated as the ‘other’. Yet any reformist strategy aimed at constructing a universal woman as ‘subject’ will be diminished and partial because it fails to embrace differences of race, class, ethnicity, age and sexual orientation (Braidotti, 1994: 241-243). The legal system has legitimised certain representations of women and suppressed others, thus circumscribing the scope of women’s claims before the law. According to the critique of deconstruction, the unproblematic categorisation of women in feminist discourse also brings with it regulatory and coercive consequences (Hunter, 1996a: 160; Butler, 1990: 71-72).

Feminist theorising concerning the sexual division of labour provides a further dimension of this critique, which turns on the scope of labour market regulation. Labour market regulation presupposes the existence of a paid labour market. Yet the paid labour market is itself a social and political construct as it does not encompass all of the work done by women. The sexual division of labour provides that women also perform a large, unpaid component of work which structures women’s access to the paid economy (Bryson, 2003: 207). Rights-based discourses as they apply to labour market regulation fail to address the structural inequalities that arise from this sexual division of labour (Smart, 1989: 143). The idea of the individual rights bearer which nominally rests on the concept of the ‘autonomous person’ fails to deal with the legal and moral dilemmas that are posed by pregnancy and reproduction and lacks application to the private sphere (Thornton, 1990: 38; Palmer, 2002: 96). Through such
exclusions the law constructs gender by invoking images of ‘women’ which reflect particular
gendered concepts of the social world (Conaghan, 2000: 360-361).

3.3.4 GENDER MAINSTREAMING

Prior to assessing the implications of the feminist critique of law reform I turn briefly to the
concept of gender mainstreaming. A significant component of the foregoing critique is
directed to rights-based discourses. Feminist theorising in acknowledging that rights based
discourses may be ‘translated’ in many ways also observed that there are equality models
that potentially extend beyond rights-based discourses (Rubery, 2005b: 2). Consistent with
this viewpoint some areas within feminist theorising saw the passage of ILO Convention 100
as a starting point (Prugl and Meyer, 1999: 10) or precursor for gender mainstreaming
(Walby, 2002: 538). While the term gender mainstreaming itself attracts different definitions,
a platform is provided by Walby, whose definition encompassed both its consequences for
feminism and its projected scope of activity. Thus Walby’s definition embraced both ‘a turn of
feminist activity from autonomous separatist groups towards their mainstreaming within civil
society and a requirement that ‘all policy areas are re-examined using a gender lens,
assessing the implications of all policies for all women and men and also by broadening the
political strategies from equal opportunities into more varied ways of engaging with gendered
inequalities’ (Walby, 2002: 533, 538). In policy terms, the principle of gender mainstreaming
was adopted by the United Nations in 1995\(^2\) and by the European Union in 1997 (Walby,
2005: 453-454)\(^3\).

Is there a defined boundary between rights-based approaches and those that are more

\(^2\) Identified in Item 38 of the Declaration of the Fourth World Conference on Women, Beijing 1995. Gender
mainstreaming as it related to gender pay equity was addressed at item 164 in the associated Platform of Action
(United Nations, 1995).

\(^3\) The definition adopted by the Council of Europe states: Gender mainstreaming is the (re)organisation,
improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated
in all policies at all levels and at all staged, by the actors normally involved in policy-making. Cited in Rubery (2005b:
2).
different progressions of gender equality models within a broader critique of gender mainstreaming in Europe, a critique that extended to a range of regulatory measures that includes equal remuneration in addition to a range of other feminist sites of reform. The first model explicitly aligned equality with sameness and facilitated women entering domains that were previously male in both conceptual and practical terms. The second more explicitly identified the group disadvantage of women, and identified more prominently the requirement for the equal valuation of the different contributions of men and women. The third model, one that Rees identified as consistent with the objectives of gender mainstreaming, embraced a transformation of gender relations because it sought to address the systems and structures that infringe rights and perpetrate disadvantage. Reform is engaged by ‘embedding gender equality in systems, processes, policies and institutions’ (Rees: 2005: 558).

Described in this way gender mainstreaming offers a potential way forward. There remains an ambiguity as to the interpretation of gender and it is not surprising that Eveline and Bacchi (2005: 497) observed in a discussion of gender mainstreaming that ‘different understandings of gender are attached to different reform approaches’. The cohesion and accessibility of the institutional apparatus is also a key issue given the criticisms previously registered against rights-based approaches. The proponents of gender mainstreaming suggest that the weakness of equal treatment approaches can be overcome through approaches that investigate gendered processes and outcomes and move beyond ‘accepting the male, or rather a dominant version of masculinity as the norm’ thereby ‘challenging systems and structures that privilege this dominant version’ (Rees, 2005:559). This objective, as measured by policy development and implementation, is however, uneven across nation states (Mosesdottir and Erlingsdottir, 2005; 527-528; Rubery, 2005b: 20-21; Walby, 2005: 467). Referring specifically to the application of gender mainstreaming approaches to equal remuneration policy in the European Union, Rubery, Grimshaw and Figueiredo (2005) noted that such approaches have tended to focus on the supply-side characteristics of the workers,
with little attention paid to issues of minimum wage determination and the coordination of wage determination systems. This comparative neglect ignored the way in which gender pay inequity is embedded in wage structures ‘both internal to the organisation and in systems of occupational, organisational, sectoral and contractual differentials’ (Rubery, Grimshaw and Figueiredo, 2005: 208). Some caution is also provided by Bacchi and Eveline (2003) who observed that to acclaim uncritically the mere adoption of gender mainstreaming ignores the contested terrain on which gender mainstreaming is carried out (Bacchi and Eveline, 2003: 113). Regulatory approaches remain characterised by a rights-based, equal treatment approach and as yet there are only sporadic and unsustained examples of gender relations being ‘transformed’. This outcome suggests that while the potential for national exemplars exists, the development of gender equality policy, even within a nominal policy era of gender mainstreaming, remains shaped by the underlying class and gender relations and also the national political context.

### 3.3.5 ASSESSING LAW REFORM

The divisions in feminist theorising concerning how we conceive and respond to concepts of ‘sameness’ and ‘difference’, ‘sex’ and ‘gender’ and ‘identity’ ground feminist debates concerning the utility of regulation to reorder power relations. On these accounts the law is a formalised site of power struggle and any appeal to law on the basis of rights is no less than an appeal to the state to reorder power relations. Critics of rights-based discourses suggest that regulation, embedded in an equality of rights framework, oversimplifies complex power relations and has the effect of falsely proclaiming that the problem of women’s inequality has been solved (Smart, 1989: 139-140). The utility of a rights-based discourse is diminished because women are given access to a world that is already constituted around male attributes – largely because of the implicit sexing of the legal person as male (Naffine, 2002: 81). On this account law’s promised objectivity masks the privileging of the male perspective such that once formal equality has been attained gender is no longer perceived as a problem or challenge.
Formal equality in the law – evident in rights-based measures – effectively dismantles gender as a category of political decision and distribution (Palmer, 2002: 94). While the state may respond positively to those demands framed in the discourse of liberalism, such concessions can also mute the feminist challenge (Franzway, Court and Connell, 1989: 53; Charles, 2000: 26). The weakness of the equal rights doctrine is exacerbated by the way in which it can be countered by a resort to competing rights and the individual claimant style of those rights, where the onus rests on the individual to prove that her rights have been violated (Smart, 1989: 141-145). The limitation of equal treatment approaches is that they fail to recognise the different starting points of women and men or their socially situated differences and how gender operates as a systemic form of discrimination (Jacobs, 1995: 110, 114; Mackinnon, 2006: 73). Postmodern theorists including Smart (1989) and Palmer (2002) offer a further and effective critique of legal reform because they identify the law as a discourse where certain kinds of meaning are constructed which either exclude women, or embrace a problematic universal category of ‘women’ which fails to embrace differences among women. Yet it is unclear what political program postmodernism proposes in lieu of legal reform. If the law by definition cannot help, because meaning has already been ascribed in the discourse of the law to prevent the emergence of the feminine, what happens then?

The challenge for feminism contains two related parts. The first part of the challenge concerns how to embrace the concept of ‘woman’ for mobilising political purposes and to acknowledge that there may be a range of ‘women’ that encompasses differences of race, class, ethnicity and sexual orientation. This challenge is complex given that the postmodern imperative in favour of multiple identities, as a response to the deficiencies of essentialism, has rendered engagement with law and law reform more difficult (Thornton, 2004: 21). The second part of the challenge concerns how the law should accommodate the feminine given that a legal personality ‘displays the masculinist bias typical of the universal’ (Thornton, 2004: 14). Key to this challenge is the recognition that both sex and gender are cultural constructs
and that the conception of equality must recognise the limitations of sameness/difference legal discourses.

How then do we resolve these issues of identity given the position adopted here, namely that feminist politics is diminished or evaporates without some conception of women as a social collective. Viewed closely postmodernism does not eschew entirely the self-identification of women. Contingent to any acceptance is an awareness of the ‘power relations that produce the conditions of identity’ (Squires, 1999: 74) alongside a recognition of legal discourse as a continuing site of political struggle over sex identity and differences (Frug, 1995: 8). These are contingencies that can be accommodated within the position advocated here. ‘Women’ can be a reasonable social category, expressing a form of social unity, so long as gender is conceived as a serial collectivity (Young, 2002: 9, 18). Thus with the limitations of essentialism and the shaping of legal identity noted, it remains important to acknowledge the commonality of experiences among women. Finding common ground is also important for strategic purposes because the ‘state and the law tend to be more responsive to claims that are categorical and simplistic’ (Armstrong, 2004: 61). It requires, however, a rethinking of the universal and a recognition of both the politics of distribution as well as the politics of recognition (Mullally, 2006: 223).

3.3.6 LABOUR MARKET REGULATION IN A CHANGING WORLD

While feminists grapple with the theoretical possibilities of using the law as a political instrument of advancement, the feasibility of that project is further complicated by changes in the material experience of paid work by women. Feminist interventions in the state have occurred while economic and social relations have undergone profound change. This includes women’s increased labour market participation, the rise of capital relative to labour and the operation of what McBride-Stetson and Mazur (1995a: 1) define as state feminism, the
constitution of government structures ‘formally charged with furthering women’s status and rights’.

What challenge does this provide for women? Walby (1990: 24) argued that the chief site of feminist struggle has moved from the household to paid employment and the state. The relocation of the site of the struggle is the product of two main forces for change. The first is a demand for cheaper labour by employers within a capitalist labour market. Women constitute a cheaper labour force to a masculinised labour force, a process that is both enforced and complicated by different rounds of capital restructuring. The second major observable change is that feminist struggle has helped undermine patriarchal exclusionary strategies, including those maintained by the state and trade unions (Walby, 1990: 59). Yet reform by the state has effectively facilitated women’s entry to paid work, but this success has also generated new complexities. Women’s movement from the private to the public spheres has lessened women’s dependence on their husbands but increased their dependence on the state. Thus changes in the gender order have been accompanied by shifts in state forms and norms (Cossman and Fudge, 2002: 404). While legal reforms have facilitated women’s entry to the public sphere there has been less effective reform to improve women’s position within the public sphere, as more recent rounds of gender restructuring have given rise to new forms of oppression and inequality (Walby, 1990: 171; Walby, 1997: 65). While organised labour is responding to groups, including women, that had been marginalised historically, externally they are being challenged by neoliberalism and the forces of global restructuring (Ledwith and Colgan, 2002: 9).

At the same time, what has been called the ‘deregulation’ of markets of all kinds has involved a ‘rolling back of the state from any attempts to impose national constraints on the deployment of capital’ (Coates, 2000: 251). In fact, this deregulation often requires processes of reregulation or new regulation. These activities invoked a climate of ‘free enterprise’ and involved the law in a ‘shift in power relations that requires the state to intervene in social
reproduction on new terms’ (Fudge and Cossman, 2002: 33, 30). State policy shifted to market-based growth and the market is an incomplete substitute for the state provision of services. The household is also incapable of compensating fully for any shortfall in the state provision of social reproductive services (Warnecke, 2006: 181). Within this environment women, particularly those in non-professional occupational groups, have proven to be very ‘flexible’ employees, open to part-time work on the assumption that their paid work is secondary somehow to that of their husband’s (Crouch, 1999: 182, 192, 215). The growing prevalence of service work has coincided with the diminishing power of the nation-state to protect labour (Gregory, 1987: 148-149; Rubery, 2005a: 261). Feminised sectors of work are at the core of post-industrial economies, reflected in structural changes to employment as well as changes in employment shares (Standing, 1989). Standing’s concept of ‘global feminization through flexible labour’ encompassed three aspects: the direct substitution of women for men within jobs; the expansion of traditionally female-intensive sectors of employment; and the expansion of forms of employment associated with women, including part-time, casual, temporary, contingent and informal work.

On these terms the contemporary labour market comprises an increasingly internationalised capitalist elite, a large and heterogeneous service class, a service proletariat and a shrinking manual proletariat (Bradley, 1999: 25). The changing nature of a consumerised global capitalism has led to a shift away from industrial employment to service work. The types of jobs created by this class dynamic have been stamped by the dynamic of gender as ‘suitable for women’. This is because earlier processes of gender segregation had led to women being employed in jobs involving caring, servicing and communication. As these jobs were characterised female they were assigned lower social and economic value and were offered part-time (Bradley, 1989: 221). This work is often invisible or scantly recognised in work valuation processes. Such invisibility is actively produced and is an ideological process grounded in the material reality of class and gender, with clear material consequences for women and men (Acker, 1989: 213).
The place of women in the post-industrial economy figures prominently in contemporary labour process debates— the theorising of the social relations where the capacity to work is utilised as a means of producing value, a set of relations which rests on the 'capacity of capital to transform labour power into labour for profitable production' (Thompson, 1989: 242). Prominent in these debates is capital's demand for emotional labour – initially defined by Hochschild (1983) as the management of human feeling during social interaction within the labour process, as shaped by the dictates of capital accumulation, and further developed by Korczynski (2003) with particular reference to the collective nature of emotional labour in service related work. Emotional labour is viewed as being distinctly gendered and thus socially constructed (Filby, 1992: 36-38; Swan, 1994: 90-91). Taylor argued that the analysis of the gendering of emotional labour and the production of sexual difference can be informed by the core propositions of labour process theory as espoused by Thompson (Taylor, 1998: 99).

Thompson’s propositions concerning the contemporary labour market are fourfold. The first is that the employer-employee relationship necessarily privileges the relations of material exploitation and the extraction of surplus value (Thompson, 1989: 242). The second proposition derives from the ‘logic of accumulation’ in the capitalist labour process which requires capital to constantly update and revolutionise the production process (1989: 243). These first two propositions inform the third proposition, namely the control imperative in the relation between capital and labour, necessary because market mechanisms alone cannot control the labour process. The fourth proposition holds that social relations between capital and labour are underpinned by a structured, although not necessarily manifest, antagonism (1989: 244). Taylor (1998: 99-100) argued that the first, second and third of these propositions drive the material implementation of discourses stressing the importance of employee/customer interactions to the creation of ‘surplus value and capital accumulation in the light of competitive pressures in this sector [customer service in the airline industry] of the economy’. Taylor, using Pollert’s critique of patriarchy (1996), argued that these structural properties of the labour process both shape and are shaped by gender power relations (Taylor, 1998: 100).
Questions of gender pay equity must therefore be analysed in the context of a winding back of welfare-state provisions in favour of neo-liberal economic policies, the growing interest of post-industrial capital in the employment of women (Hunter, 2002: 53; Thornton, 2004: 7) and the growth of rights-based equality discourses. This provides a contradiction between the impact of feminist agency on state regulation and a changing environment. Figart and Kahn (1997: 19, 158-160) observe, with particular application to pay equity reform in the United States that the drive towards improved pay equity occurred within a contradictory context. While social and political developments generated the pay equity movement, business was expanding its use of relatively inexpensive women’s labour in a changed economic environment. Explicit pay measures are viewed as being inconsistent with an increasingly competitive labour market and one which increasingly favours privatisation and contracting out initiatives, skill diversification and functional flexibility.

3.4 CONCLUSION

Within a market economy the state legitimises the dominance of capitalist social relations. This process of legitimation is complex and variable but involves the exercise of power through different institutional arrangements, including labour market regulation.

Feminist agency was instrumental to the instigation of an international covenant of the right to equal remuneration for work of equal value, an example of a rights-based legal discourse which seeks to extend the rights of men to include women. Rights based discourses can be expressed and interpreted in different ways, including within national formulations of labour market regulation. Their effectiveness is questioned because they presume a coherence in the category of ‘women’, a construction that is rejected by postmodernism, which proposes a generalised focus on difference rather than women. Yet, following the framework outlined in Chapter Two, feminism needs some acceptable way of capturing claims that address the commonality of experiences among women. Allowing for differences between national
jurisdictions, the formal right to equal remuneration has served to improve women’s position in the labour market and harness feminist demands.

Yet while rights-based discourses provide a basis for harnessing political demands on the state and the market, such approaches carry limitations. They privilege women claiming equality on the basis of a male form, fail to contest structural inequalities across paid and unpaid labour and potentially fragment gender as a further site of political activity and change. These questions confront pay equity reform in an era of rapidly evolving economic and social relations, where regulation is increasingly under pressure from a globalising economy and conservative political hegemony. Women are entering increasingly the public sphere of employment at the same time as labour market regulation is being shaped by neo-liberal economic relations.

This would suggest a contradictory nexus between state support for capitalist social relations and state receptiveness to feminist agency. The state supports capitalist socialist relations, but feminist agency has also left its mark. Women have won the right to equal remuneration for work of equal value; however, the right carries key limitations that lack redress within a period of neo-liberal hegemony. Yet the review of state also observed that while the state is a key institution in labour market regulation, the shape of state activity is variable and varies across nation states. The data on gender pay equity ratios introduced in Chapter Two also suggested different regulatory measures across nation states. These observations suggest two things. Firstly, that the precise incorporation of women’s right to *equal remuneration for work of equal value*, within labour market regulation, will vary with national context; secondly, that particular construction of gender pay equity rights reflects the interest of the state reordering power relations, but also the contested nature of claims upon the state. This raises issues concerning the differences in the technical design of gender pay equity measures and the impact of contrasting forms of jurisprudence. Are particular constructions
more effective than others, and in the context of this thesis what is the particular construction and direction of the state regulation in Australia?
CHAPTER FOUR: REGULATORY REFORM AND LOCAL POLITICS

4.1 INTRODUCTION

The previous chapters reviewed and dissected the concepts of gender pay equity and labour market regulation, and established that theoretical space and empirical evidence exists to suggest that national legislation can improve the position of women in the paid labour market. National law and context are important. If local politics matters, how is it shaped? For the purpose of my thesis, which is based on three case studies of gender pay equity reforms in Australia, understanding the history of labour law, and the latter-day pressures upon it for ‘reform’ in a globalising world, are an essential framework.

This chapter commences with a review of Australia’s labour law, beginning with an analysis of its initial social compact which was designed to support a market economy. This will be followed by an analysis, chronologically arranged, of developments in institutional gender pay equity reform in Australia leading to the 1969 and 1972 federal equal pay principles and 1993 federal legislative amendments. Current gender pay equity measures in New Zealand, the United Kingdom, the United States and Canada will then be assessed to appraise whether and how such arrangements are distinct from those that exist in Australia. The chapter concludes with a review of the impact on local regulation of growing conservative political hegemony evident in wide ranging legislative reform introduced in 1996 and 2005, which have moved the focus of wage setting to the workplace and curtailed the powers of industrial tribunals.

4.2 THE TRADITION OF AUSTRALIAN LABOUR LAW

With a few exceptions the Australian state, in the form of the federal government, lacks the constitutional power to fix directly the working conditions of employees. Yet the state has the power through legislation to establish independent industrial tribunals for this purpose. The legislation extends beyond the simplicity of enabling legislation to that which both directs and
circumscribes industrial tribunals in their operation. Industrial tribunals at a federal level have been directed by three pieces of legislation since 1904: the *Conciliation and Arbitration Act 1904* (Cth), the *Industrial Relations Act 1988* (Cth), and the *Workplace Relations Act 1996* (Cth).

The tradition of Australian labour law has rested historically on a system of compulsory conciliation and arbitration. This system of conciliation and arbitration was the means by which industrial tribunals were empowered to resolve disputes by making awards. Such awards governed the terms and conditions of union members and non-union members alike and the system provided both a preference for the collective representation of workers and employers and the regulation of both unions and employer organisations. The system of conciliation and arbitration embodied a notion of the living wage, one predicated on the support required to raise a family and a construct that became a fundamental orthodoxy of Australian public policy (Macintyre, 1985: 34). The system came to embrace three tiers. A basic living wage supplemented by margins for skill was delivered in a series of industry awards negotiated by trade unions and employer organisations, subject to arbitration by industrial tribunals established by the state. A third tier comprised overaward payments negotiated at workplaces on a collective basis. In combination the system was a ‘living and popular expression of Australia’s distinctive policy pattern’ (Castles, 1989: 48) and one that had application to the great majority of Australian workers, in contrast to the complaint-based tribunals and courts established by other Western democracies.

Given Australia’s system of federal and state governance, analysis cannot be directed only to the federal sphere of government. The presence of both federal and state levels of government indicates that the nature of the state in Australia is layered, as is the specificity of the institutions and the distinctive nature of the public service that constitutes its form (Watson, 1990: 12-13). At each level of state government, there has been capacity for government to legislate in the area of industrial relations, although such rights were
significantly weakened in 2006. In each Australian state this initial capacity provided the basis for the establishment of state-based industrial relations tribunals. There are a number of key differences between state and federal industrial systems. Constitutional differences are more resolute and provide that state governments have direct industrial relations powers so that state tribunals have judicial powers in contrast to the arbitral powers of federal tribunals. Additional differences between state and federal systems, at a particular point in time, reflect differences in political regimes. The state in Australia is therefore multi-dimensional, involving a complex set of relationships operating through various institutional arrangements (Burton, 1985: 104-105).

4.3 AUSTRALIA’S SOCIAL SETTLEMENT AND WAGE EARNER SECURITY

The early Australian public policy that gave way to Australia’s early system of wage determination had distinctive national characteristics, consistent with that of a wage earners’ welfare state (Castles, 1985: 82, 102). The institutionalised conciliation and arbitration of industrial disputes formed one of three key elements of a social compact formed at the time of Australia’s federation, the other two being a commitment to a White Australia policy and tariff protection (Dowrick, 1991: 124; Berns, 2002a: 149-151). A White Australia policy was a bulwark to immigrants who threatened standards of living, while tariff protection diminished unemployment and maintained existing wage levels (Hagan, 1981: 14). This contributed to a policy mix labelled as ‘domestic defence’ (Castles, 1993: 7). Castles contrasts the policies of domestic compensation to that of domestic defence, having identified both policy sets as a potential response to external vulnerability shared by smaller economies. Both share some affinity: their pivotal institutions are arrangements to secure greater control of wages – through either corporatist wage agreements or conciliation and arbitration; both seek to promote high levels of government intervention – through either active labour market policy or tariffs; both seek to protect the individual against economic risk - through either individual transfers or minimum wage levels. Castles drew a parallel between the two responses to
external vulnerability and the two main strategies of social amelioration practised by
democratic social parties of advanced capitalism – social democracy and labourism. Social
democratic reformism is characterised as an attempt to compensate the poor for the
dislocation caused by the market economy, whereas labourism privileges the need to defend
the working man through the protection of his pay packet – hence the concept of wage
earner security for the employed worker rather than social security for the citizen (Castles,

The view of the state held by Australians also contributed to the regulatory system that
emerged. This perspective was fundamentally Benthamite and clearly distinct from the
notions of contemporary Liberalism or the mercantilism of idealistic authoritarianism (Castles,
1989). The form of state action comprised a type of ‘social liberalism’ with its direction to the
inequalities of state, equal opportunity and the ethical state, even if the concept of equal
opportunity differed from more modern adaptations (Sawer, 2002: 148). Against the
backdrop of white colonisation the state had been the creator of western civil society and
thus the state held a leverage that was not replicated in larger European States or the United
States of America (Butlin, Barnard and Pincus, 1982). The nature of this relationship would
contribute to the political culture of government intervention and Australian social policy
practice (Castles, 1985: 88). The position of the state, given the weakness of the industrial
arm of the working class, led the labour movement to rely on the state to achieve its goals
and to ‘stand guarantor of its implementation’ (Castles, 1989: 42). From the perspective of
the working class the acceptance of the class compromise would in turn constrain organised
labour from pressing government for further welfare reforms which would have cut across the
wage earner principles enshrined in the public policy settlement.

The distinctiveness of Australia’s social settlement constituted a form of class compromise.
While such compromises are usually outside of Marxist theorising of political action, Castles
identified these features of Australian policy as an exemplar of a class compromise which
rested on a temporary coincidence of class interests as a particular historical interval (Castles, 1989: 29). The compromise did not involve a modification or a direct challenge to the reward structures of capitalism, through the distributive mechanisms at the command of the state. Alternatively it involved a settlement that was squarely located within the primary distribution of income generated by capitalist market mechanisms. Capital’s commitment to the this system was moderate, with ultimate agreement achieved by the provision of industry assistance in the form of tariffs and the availability of sanctions, directed against unions, in the industrial relations legislation. The protection of domestic production was the quid pro quo for wage regulation as it was only the insulation from external competition that enabled employers to pay the wages determined by arbitration (Castles, 1985: 87).

Arbitration historically mediated the capacity of employers to depress the price of labour but was essentially designed to protect, rather than dismantle, the structures of a market economy in a settler society. Organised labour, with the exception of unions influenced by the Communist Party, accepted the basis of this settlement, and in doing so, directed their efforts to wage earner security (Castles, 1988: 120-122) to the exclusion of those outside of paid employment. The social compact was driven mainly by class relations but reflected the gender relations of their time. Women had particular rights of political citizenship which included the right to vote, but the extent of women’s citizenship was limited by a series of institutional measures that effectively defined women’s primary role - to support men’s participation in paid work and, through childbearing, to ensure the longevity of the settler society.

4.4 BREADWINNER IDEOLOGY OF WAGE DETERMINATION

The historic differences in the pay received by men and women in the paid workforce in Australia derive from decisions made by industrial tribunals, which in turn were influenced by wider social conceptions of men working full-time as family ‘bread winners’ (Ryan and Conlon,
1975: 90-93). The initial construction of the minimum or basic wage in 1907 was based on the average weekly expenditure of an unskilled male worker with a wife and three children\(^1\), and was the first concrete expression of a living wage in federal wage fixing (Buchanan, Watson and Meagher, 2004: 123). Men were expected to support the family and separate arrangements to ensure that a woman could and might have to maintain her income from her paid work were not contemplated, a patriarchal construct that effectively erected a barrier between men's and women's work (Macintyre, 1985: 57). The establishment of separate female rates of pay was promoted through two principles adopted by the Commonwealth Arbitration Court in 1912\(^2\). Under these principles, equal pay was granted to women only in those occupations where men's employment was at risk due to the use of 'cheaper' female labour. Where this risk did not exist, because of the inherent 'suitability' of women for the work at hand, women were granted a proportion of the male rate, as they were presumed not to have a family to support (Short, 1986: 316). Further support to this principle was provided in 1918 when the federal Arbitration Court fixed a lower minimum basic wage for women in the clothing industry based on the cost of living needs of women in the industry\(^3\).

The principles adopted by industrial tribunals were consistent broadly with the position advanced by organised labour. Generally, women's labour was identified as a threat to working men. Equal pay was endorsed only in principle where it would assist to mediate capital's requirement for cheaper labour. A rate of 54 per cent was for a considerable period the predominant benchmark for women, although female process workers were granted 66 per cent of the male rate. The application of these principles resulted in three models of female wages: jobs where equal pay was granted as male employment would be under threat by women earning lower wages; jobs where women earned between 54-75 per cent of the male rate on both the basic wage and the skill margin, where a margin applied; and jobs

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1 Ex Parte H V McKay (1907) 2 CAR 1.
2 Rural Workers' Union & Anor. and The Mildura Branch of the Australian Dried Fruits Association & Ors (The Fruit Pickers' Case) (1912) 6 CAR 61.
3 Federated Clothing Trades of the Commonwealth of Australia and J A Archer & Ors (1919) 13 CAR 647 at 709.
where women earned the same skill margin as men, but based on the concept of the family wage, a lower basic wage (Short, 1986: 316).

This particular form of wage fixing both determined and endorsed existing class and gender relations. Wage-fixing provided support for a form of household whereby women provided unpaid domestic services for men, thus maintaining the capitalist mode of production, in the interests of women’s continued dependency in the family and the labour market (McIntosh, 1978: 281). Through this construction, the family was the site of the reproduction of labour power (Watson, 1990: 6). Active support for this regime was provided by the practices of labour market and occupational exclusion. Occupational exclusion from higher paying work cannot be solely attributed to capitalism. Union organising was informed by a masculinist strategy to exclude women from the labour market altogether and then deny them recognition for that part of the labour process that was open to them. This occurred through sex-segregation in occupational distribution in the labour market, the latter assisted by constructing definitions of ‘skilled work’ around masculinised areas of work (Bryson, 1994: 181). Training arrangements, congealed in the apprenticeship system, were designed carefully to exclude women from the majority of trade occupations. This was a critical exclusion given the pivotal role of trade occupations in wage setting by Australian industrial tribunals. Large parts of the Australian workforce, in retail trade, accommodation, cafes and restaurants, and manufacturing production, had few or no entry points to structured training while many industrial awards defined work by the principles of scientific management. In these awards this led to a multitude of job classifications based on simple repetitive tasks. A clear outcome of this strategy has been an absence of skill-based classifications in feminised areas of work. Industrial campaigns, based around economic demands for increases in wages, typically benefited men as such increases have primarily flowed to ‘well-organised groups of skilled and hence mostly male workers’ (Curtin, 1999: 22).
Equal pay mechanisms were available but only in severely limited circumstances. In the New South Wales state jurisdiction, for example, legislative amendments in 1926 provided that industrial matters included 'any claim that the same wages shall be paid to persons of either sex performing the same work or producing the same return of profit or value to their employer'. However this provision was invoked rarely in the Industrial Commission of New South Wales’ jurisdiction. The application of a principle providing for equal reward of comparative skill did not disturb the disparate rates of pay within basic wages. In 1929, in setting rates for female hairdressers, the Industrial Commission of New South Wales had reiterated that the delineation of separate male and female basic wages did not apply to the setting of skill margins.

This wage results from following (as is the practice of all arbitration tribunals in Australia) the principle of the distinction contemplated by Parliament between the living wage for males and that for females and from applying after observing that basis of difference, the principle of equal pay for both sexes doing the same work, so far as the margin for skill at least is concerned.

Even within the same jurisdiction such templates were not always observed in practice. The Industrial Commission of New South Wales itself noted in 1957 that whatever the theory concerning equal margins might have been, the practice had developed along different lines; some awards provided for equal margins between male and female workers whilst others provided higher male margins than female margins.

The differentials between women’s and men’s wages in Australia were highly institutionalised. The state played a key role in gender wage setting and provided a legitimacy to the lower wages received by women. Ultimately the distinctive role of the state in Australian wage setting would shape subsequent gender pay equity regimes. This is because the apparatus established by the state opened up greater political space for women and men to contest gender wage setting and press the state to act.

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4 Re Clerks (State) Award and Other Awards (1959) 58 AR 470 at 474. The Industrial Commission of New South Wales was renamed the Industrial Relations Commission of New South Wales in 1996.
5 Re Hairdressers &c., Females (State) Award (1929) 28 AR 39.
6 Re Paint and Varnish Makers &c., (State) Award (1957) 56 AR 87 at 108.
4.5 THE EVOLUTION OF EQUAL PAY MEASURES

The issue of gender pay equity came under scrutiny through the period of the Second World War due to the impact of labour shortages. Authorities responded to these shortages by establishing a Women’s Employment Board, with powers to set aside federal or state awards if female labour was required and to set a rate of pay for that work. The Board was not permitted to reduce female rates of pay or award less than 60 per cent of the male rate. Given that industrial tribunals had routinely set female rates at 54 per cent, the new benchmark of 60 per cent ‘implied that the male future was to be protected by preventing women accepting low rates of pay’ (Butlin and Schedvin 1977: 33). The operation of the Board came under challenge both from the Senate of the Australian Parliament and employers and resulted in anomalies between those women in paid work who fell under the Board’s jurisdiction and those that remained outside it. The basis of wage determination also carried some distinctive features, including an emphasis on the productivity and efficiency of women’s work relative to that of men’s work, with application to both basic wages and margins (Ryan and Conlon, 1975: 125). The Board ultimately made 299 decisions concerning 548 applications and provided proportionate rates between 75 per cent and 100 per cent (Ryan and Conlon, 1975: 136 137).

In July 1944 the federal government passed the National Security (Female Minimum Wage) Regulations, which extended the jurisdiction of the Commonwealth Arbitration Court in fixing basic wages in industries considered vital in wartime (Ryan and Conlon, 1975: 133). Following a review completed in February 1945 the Court determined that women’s pay was not unnecessarily low, a measure of the dependency of war-time industries on cheap female labour. The legislature intervened in the form of new national security regulations and determined that women working in required vital industries would receive no less than 75 per cent of the male minimum (Curthoys, 1975: 94; Ryan and Conlon, 1975: 134). The effect of this series of institutional arrangements was that it dictated uneven wage arrangements for
women in paid work (Baldock, 1988: 37-38). With the demise of the Board in the post-War period the full powers of the federal tribunal were ultimately restored. Given the circumstances of wage determination during the war, the 1949-50 Basic Wage Inquiry was faced with an uneven pattern of wage determination. The Commonwealth Arbitration Court reverted to the breadwinner ideology of wage-fixing, but ultimately awarded women 75 per cent of the male basic wage (Ryan and Conlon, 1975: 140-141).

4.5.1 THE FAMILY WAGE

Despite the contradictions exposed by the feminisation of employment during the war, trade unions continued to support the concept of the family wage, support that lasted until 1971. Any nominal support for equal pay was mediated by the primary goal of protecting male employment and unions found willing allies to their cause in the 'patriarchal welfare idealism' practised by industrial tribunals (Ryan and Rowse, 1975: 20). Wage increases were sought for women in female-dominated occupations but always at levels below that of the prevailing male rate. It was only in male-dominated industries that equal rates were sought, to preclude the possibility that employers would hire cheaper labour at the expense of male members. Skill margins that were available as payments in excess of the basic wage were predominantly sought and won for male workers and the nominal principle of equality in the level of skill margins was unevenly applied given the difficulties faced by women in winning a definition of ‘skilled’ for their work (Pocock, 1997: 10). These strategies and the absence of on-going challenge to the gendered construction of the basic wage provided a form of protectionism for male workers (Ryan and Conlon 1975; O'Donnell and Hall 1988).

The family wage carried some advantages, through the protection provided to the breadwinner and particularly to those families containing a male breadwinner (Curthoys, 1988: 131). Its relative longevity represented the successful struggle of the working class for a family wage against the opposition of capital (Humphries, 1977: 244). This struggle
increased the price of labour and while this potentially disadvantaged individual working class women, through their absence from the labour market, it assisted working class women as a whole by virtue of the class nature of the action (Curthoys, 1988: 245). There were unsuccessful equal pay campaigns advanced by clerical and clothing trade unions (Fieldes, 1997: 188-191) in the inter-war period, yet the Australian labour movement as a whole did not contest the principle of the family wage, or more importantly the ideal behind it, ‘that women had a secondary right to work, subject to the economic situation’ (Ryan and Rowse, 1975: 21).

Any sustained impetus to equal pay by trade unions, through formalised measures, can be traced to 1937 where a conference comprising both unionists and feminists was held, leading to the formation of the Council for Action on Equal Pay (CAEP). The leader of the CAEP, Muriel Heagney, was both a feminist and unionist, who sought to distinguish between the weaker claim of equal pay for equal work and equal pay for the sexes (Thomson and Pocock, 1997: 72). Heagney’s ties to the union movement were pivotal to the mobilisation of union resources, but also placed her at odds with union officialdom and constrained her efforts to mobilise women (Bremner, 1982: 297). The opposition to the measures advocated by the CAEP was exemplified by the debate over women’s wages through the Second World War. The context of wartime labour shortages and the onset of special government powers, such as the Women’s Employment Board, provided the basis of some anticipation of progress in pay equity. Yet this objective was undermined by an absence of support in 1942 within the peak body for organised labour, the Australian Council of Trade Unions (ACTU). This internal division was also shaped by divisions within and between two organisations; the CAEP and the more conservative United Associations of Women (UA) (Ryan and Rowse, 1975: 21; Ranald, 1982: 282).

In the immediate post-war period, the threat of wage-cuts was clearly due to the anticipated expiry of wartime legislative regulations. Despite an absence of support from the ACTU, the
Metal Trades Unions lodged equal pay claims in 1948, claims founded on the twin objectives of wage justice and the protection of employment. The application was unsuccessful, an outcome which led the Sheet Metal Workers Union to pronounce that industrial action, not recourse through the tribunals, was the means by which equal pay would be won. The subsequent industrial action was however sporadic and isolated and unions continued to seek redress, unsuccessfully, through industrial tribunals (Curthoys, 1988: 136). Following the demise of the Women’s Employment Board, the ACTU claimed equal pay in the 1949-50 Basic Wage Inquiry. This strategy was to be unsuccessful as the ACTU’s claim rested on a self defeating strategy of continuation of the family wage concept and the setting of a female basic wage at the same level as the male counterpart (Ryan and Conlon, 1975: 141).

Notwithstanding wartime measures the next significant impetus to gender pay equity measures was provided by the International Labour Organisation’s adoption in 1951 of Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. Following this measure unions, at a federal level, lodged a further equal pay claim in 1952, a claim that was countered by employer claims for a 44-hour week, a lower basic wage and for women to receive 60 per cent of the male rate. The case highlighted divisions amongst women’s organisations, highlighted by the opposition of the communist-led Union of Australian Women (UAW) to the Federation of Business and Professional Women's Clubs’ claim for a unit wage plus allowances. In its decision the federal tribunal maintained its reliance on the needs principle as justifying the difference between male and female basic wages, although it rejected the employer’s claim for a reduction in the basic wage, on the basis that the existing rate of 75 per cent had not contributed to increased unemployment or significantly higher wage costs (Curthoys, 1988: 138).

In response to the new ILO Convention a number of states ultimately amended their industrial legislation to provide for equal pay. New South Wales was the first state to pass legislation, the Female Rates (Amendment) Act 1958 (NSW) which required the Industrial Commission of New South Wales and conciliation committees, in certain specified
circumstances, to insert provisions for equal pay as between the sexes in awards and industrial agreements. Other states followed, although not in quick succession. Western Australia did not pass legislation until 1968 and Victoria did not introduce legislation until 1969 although particular wages boards had moved to implement equal pay beforehand (Short, 1986: 318).

The passage of the 1958 legislative amendments in New South Wales led a number of unions to file applications to vary awards. In light of these applications a Full Bench of the Industrial Commission of New South Wales was convened to hear applications specifically relating to a number of clerical awards, but also to provide clear direction on the interpretation of the 1958 legislation. The differences in the positions of organised labour and capital in these proceedings were to set the parameters for current debates in pay equity. Central to the position of the employer groups was the contention that the ambit of comparisons of work be tightly restricted, limited to work at a single workplace and that value be held to be value to the employer. The Industrial Commission of New South Wales held that the 'specified circumstances' nominated by the legislation meant that work be of a similar or like nature, be of equal value and be work for which rates are fixed by a particular award or agreement. 'Value' was interpreted as being the value of the work as determined by tribunals as opposed to that which the employer placed on the work\(^7\). The contention that the term 'work' refer to particular work done at a particular establishment, an argument submitted by employer organisations, was also specifically rejected\(^8\). The narrow interpretation of the legislative provisions was sharpened further through the scope of the work value comparisons that the tribunal determined were enabled by the provisions. The type of comparisons accepted by the Commission were restricted to 'a comparison of the work performed by a group of female employees for whom an award or industrial agreement fixes rates with the work performed by a group of male employees for whom that award or industrial agreement fixes rates'\(^9\).

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\(^7\) *Re Clerks (State) Award and Other Awards* (1959) 58 AR 470 at 470-471.

\(^8\) *Re Clerks (State) Award and Other Awards* (1959) 58 AR 470 at 494.

\(^9\) *Re Clerks (State) Award and Other Awards* (1959) 58 AR 470 at 494.
4.6 EQUAL PAY MEASURES

The preceding review of the development of Australian labour law highlighted both the distinctive nature of Australia's social settlement and the institutional sexism that underlined the setting of wage rates. This section of the chapter outlines the measures that were implemented to address the gendered disparity in wage determination. These are characterised in this thesis as three key stages in gender pay equity reform in Australia: the 1969 and 1972 equal pay principle decisions of the federal Commission, the 1993 federal equal remuneration for work of equal value legislative amendments, and the new equal remuneration principles developed in the state jurisdictions of NSW, Queensland and Tasmania between 1999 to 2001. This review also charts the development of counter-tensions that coincided with these reforms. In Chapter Three I identified the rolling back of welfare-state provisions in favour of neo-liberal economic policies as a pressure on gender pay equity regulation. In Australia this was reflected initially in the gradual erosion of centralised wage determination.

4.6.1 EQUAL PAY FOR EQUAL WORK, EQUAL PAY FOR WORK OF EQUAL VALUE

A key set of equal pay reforms in federal wage fixation took place between 1969 and 1974 and together with the abolition of legal barriers to the employment of married women weakened that part of Australia's social settlement that privileged the male breadwinner family and the family wage (Berns, 2002a: 150). State-based legislative initiatives and the federal tribunal's own observations concerning disparate rates of pay in the 1967 Total Wage Case (Ryan and Conlon, 1975) provided the impetus for an application for equal pay in the federal jurisdiction in 1969. In Australia, centralised wage determination was determined in national hearings, where organised labour and capital were represented by peak
organisations. These cases were titled Basic Wage Cases, National Wage Cases and in time would be called Safety Net Adjustment hearings or Living Wage Cases.

In 1967 the Commission had abandoned the basic wage and skills margins method of wage determination in favour of the total wage. Support for equal pay within the union movement was still uneven and fragmented. Hence the key institutional improvements that were achieved from 1969 onwards were due to pressure outside the union movement, including the campaigns of feminists and socially progressive sympathies within state apparatus, rather than a ‘groundswell of activism’ from male unionists (Thomson and Pocock, 1997: 76). This pattern of mobilisation underlined the multiplication of claims on the state that arose from new contests that challenged the traditional institutions of political compromise between capital and labour. Yet while there was a degree of recognition of feminist politics, the forms of this acceptance would still prove to be marginal to the traditional tripartite structures of capital, labour and state (Yeatman, 1990: 115-118).

In the 1969 equal pay case the ACTU argued that the needs method of wage determination was anachronistic, as was the practice of unequal pay given women’s growing labour market participation. The ACTU also submitted that capacity to pay arguments, which it anticipated forming a key element in employer submissions, were no longer relevant given the climate of economic prosperity and relatively low levels of unemployment. However, initially, the exemplar provided by the various state legislative provisions in addition to their interpretation did constrain the ambit of the 1969 decision. The Commission adopted the principle of equal pay for equal work\(^{10}\) which rested on a narrow interpretation of equal pay. Similar to the implicit constraint in state-based legislation, the decision only applied to situations where ‘work performed by men and women was of the same or a like nature’\(^{11}\). A specific exclusion applied to work predominantly undertaken by women. This construction limited the remedies that flowed from the decision to women who worked in identical jobs to men where there were separate and disparate male and female rates of pay. As a result of the restrictions in

\(^{10}\) Equal Pay Cases (1969) 127 CAR 1142. Terms of the principle are replicated in full at Appendix One.

\(^{11}\) Equal Pay Cases (1969) 127 CAR 1142 at 1158.
the 1969 principle only eighteen per cent of women in the workforce received equal pay (Scutt, 1992: 278).

The restricted nature of the measures available under the 1969 decision soon became apparent and led to further applications as part of proceedings for the 1972 National Wage Case. As a result of the 1972 proceedings, the effective exclusion of female dominated industries from the ambit of the 1969 decision was lifted\(^\text{12}\), through the introduction of the broader principle of 'equal pay for work of equal value'. The Commission noted that '[i]n our view the concept of "equal pay for equal work" is too narrow in today's world and we think the time has come to enlarge the concept to "equal pay for work of equal value"\(^\text{13}\). This means that award rates for all work should be considered without regard to the sex of the employee\(^\text{14}\). The decision provided the opportunity for the Commission to make comparisons between different classifications of work in awards. While the Commission thought that comparisons would be constructed mainly between classifications in the same award, the Commission's decision, in the face of employer opposition, did provide nominally for comparisons across awards\(^\text{15}\). The 1972 decision was followed in 1974 by one which extended the concept of the male minimum wage to women\(^\text{16}\). The concept of a male minimum wage had its origins in 1966 and had been further enshrined in 1967 when the federal tribunal abandoned the practice of basic wages and margins and introduced the total wage. The decisions in combination provided an example of the discursive opportunities that aspects of Australia's original social settlement, evident in the centralised system of conciliation and arbitration, provided for feminists (Sawer, 2002: 148, 152).

The wider ambit of the 1972 federal decision was soon to have application for workers covered by state awards. For example, the Industrial Commission of New South Wales

\(^{12}\) *National Wage and Equal Pay Cases* (1972) 147 CAR 172.

\(^{13}\) Terms of the principle are replicated in full at Appendix Two.

\(^{14}\) *National Wage and Equal Pay Cases* (1972) 147 CAR 172 at 178.

\(^{15}\) *National Wage and Equal Pay Cases* (1972) 147 CAR 172 at 180.

adopted without amendment the principle of ‘equal pay for work of equal value’ in 1973\textsuperscript{17}.

Thus following the decisions by federal and state industrial tribunals in the early 1970s Australia had a set of institutional measures, unmatched in other national jurisdictions, to address gender pay equity. Yet the theoretical equality in pay rates was not entirely matched in practice (Gaudron and Bosworth, 1979: 169). The plateau in gender pay equity ratios following the anticipated surge in women’s wages in the wake of the 1972 decision (Kidd and Meng, 1995: 25) reflected a failure to comprehensively address more endemic work value issues and the lack of impetus across the union movement to formulate and campaign around contested pay equity claims. This failure continued a long history of assumptions of women’s work being semi-skilled or unskilled and the difficulty that industrial tribunals have had in properly valuing the ‘skills, exhibited, acquired and used by women in traditional occupations’ (Scutt, 1992: 282). Union strategy employed arguments about women’s equivalence to men through a ‘sameness’ in job structures and work effort.

This thinking was reflected in the limited work value applications lodged by unions in the wake of the 1972 decision, where women’s work was routinely compared against male dominated classifications or benchmarks. Such a strategy did not address the segregated nature of the labour market and was incapable of addressing the subtle, structural barriers to the industrial recognition of work value. It excluded consideration of problems concerning the reward of skill and career progression in feminised industries and jobs and career progression, and the effects of maternity and parenting on labour market participation. The remedy provided by such strategies all too often focused on women gaining equality through matching the ideals and attributes of a masculinist standard, a set of politics that ‘directed

\textsuperscript{17} State Equal Pay Case (1973) 73 AR 425. The proceedings in the state arena differed a little from their federal counterpart as the tribunal was required to consider the application of the principle against the scope of the existing equal remuneration provisions in the relevant statute, the \textit{Industrial Arbitration Act 1940} (NSW) (s.88D). Additionally, the Industrial Commission of New South Wales was required to consider the application of the principle to the system of basic wages and skill margins still operational within the NSW jurisdiction. The Industrial Commission of New South Wales held that the principle applied only to basic wages. The tribunal acknowledged that the application of equal margins had been uneven, but the decision effectively held that it should be assumed that existing skill margins represented the true value of the work, having being fixed without regard to sex. However, it was open to the parties to demonstrate that margins had not been so determined.
energies to the spheres that are occupied by men, while the predominantly female activities around housework or child-care remain obscured as always from view’ (Phillips, 1987a: 19).

The commitment of organised labour to take up the challenge of pay equity reform was uneven and confirmed that the social and political relations that gave rise to the campaign for equal pay were not yet intrinsic to organised labour. It was not until 1986 that the ACTU formally tested the 1972 principle through a case which featured as its key issue the comparability of the work value of nurses, proceedings that are reviewed in detail in Chapter Six. The ACTU case, as too that of women’s organisations, was hampered both technically and politically. In seeking to import a comparable worth doctrine that was practised most visibly in the United States, the ACTU argued for a remedy that was external to domestic wage-fixing practice and the assessment of work value.

Subsequent shifts in feminist campaigns around women’s industrial rights included the revaluation of women’s skills and increased rights to maternity and parenting leave (Thomson and Pocock, 1997: 78). The limitations of union strategy should be viewed alongside the opposition of employers and the character of wage-fixing as practised by Australian industrial tribunals, whereby an appeal to equity and justice runs secondary to market pragmatism. While male trade unionists have been implicit in entrenching male privilege, the analysis of pay inequity must also address the interactions of class and changing economic, social and political formations. To regard ‘gender as part of the explanation for union tactics is not to suggest that equal pay was easily at hand for unionists: that it was only want of campaigning that stood in its way’ (Thomson and Pocock, 1997: 76-77).

4.6.2 AWARD RESTRUCTURING

The period following the immediate implementation of the 1969 and 1972 equal pay principles highlights a contradictory pattern of pay equity reform. Australia’s system of
centralised wage-fixing and industry awards, a mechanism that provided a level of minimum wages and conditions across industries and occupations, came under increasing challenge from the mid 1980s. Support for this departure came from an increasingly well organised opposition by capital, which was buttressed ultimately by both the state and organised labour. The consequences of this policy shift carried some complexities for women given the gendered features of the history of wage fixing and industrial organisation. Yet these features also left women, primarily those in lower paid industries and occupations, poorly placed to compete on these newly cast terms of engagement. In this section of the chapter I review features this contradictory pattern of reform in the period 1987 to 1995, a theme to which I return at the conclusion of this chapter.

The early momentum in this shift from centralised wage fixing emerged in the 1987 National Wage Case where the AIRC, with tacit support from the ACTU, departed from a universal reliance on centralised wage determinations and moved to a two-tier system of wage fixing. The first tier would flow to the workforce in the way of previous centralised wage increases. Access to the second tier wage increase was dependent on enterprise level negotiations (Dabscheck, 1995: 24). The 1988 and 1989 National Wage Case hearings were the focal point for debates over employer demands for increased flexibility and a ‘freeing-up’ of awards. At this stage there was a contest between a system of national awards and training standards advocated by collective labour, and enterprise bargaining over skills, training and wages outside industry awards adopted most prominently by the Business Council of Australia and the Confederation of Australian Industry (Business Council of Australia, 1989). This contest was reflected in the structural efficiency\(^{18}\) and minimum rates adjustment\(^{19}\) principles that flowed from the 1988 and 1989 National Wage Cases.

In 1988 the AIRC allowed wage increases for unions prepared to commit themselves to a review of awards and in 1989 largely adopted a union blueprint for restructuring to provide for consistency in wages and skill levels across minimum rates awards (Australian Council of Trade Unions, 1989). A commitment to award reform was potentially advantageous for working women given the dependence of women on award rates of pay and the absence of classification structures providing for career progression in feminised areas of work (Short, 1986: 319). The campaign to standardise classification systems across industrial awards was held by organised labour and policy makers to be the gateway to a wide array of equity advances, including improved pay, the revaluation of women’s work and as a result improved career progression. The increased participation of women in the labour force had forced a change in union strategy articulated by a stronger expression of women’s political interests. Unions engaged in three gender specific strategies: the representation of women by women to redress male dominance of men in union leadership positions; the construction of separate spaces for women as a means of promoting women’s agency and providing women with political space within trade unions; and gendered labour market and legislative strategies (Curtin, 1999: 30-34). Feminists had sought reform of the union movement, recognising that women have interests both as workers and as women, and trade unions as class-based organisations are theoretically well placed to advance these interests (Phillips, 1987b: 156-161; Shute, 1994: 167; Curtin, 1999: 35).

The structural efficiency and minimum rates adjustment rates principles provided for the comparison of work within and across awards so that there was a proper relationship between awards, their classifications and their rates of pay. State industrial tribunals adopted principles that were similar, although not identical, to their federal counterpart20. While a number of federal awards proceeded with minimum rates adjustments these were predominantly processed as consent matters and did not involve comprehensive assessments.

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20 For example, the structural efficiency principle was adopted by the New South Wales Industrial Commission in 1989 - State Wage Case 1989 (1989) 30 IR 107. Consideration of the minimum rates adjustment was adjourned from that hearing but a guarded provision for a gradual application of the minimum rates adjustment principle was determined in subsequent proceedings - State Wage Case August 1989, Re Minimum Rates Adjustment (1989) 35 IR 183.
across awards, occupations and industries. Union strategy was still constrained through a reliance on equality through sameness, a direction that ignores the different worker skills and strengths of women. The impact of award restructuring mirrored that of claims lodged under the terms of the 1972 principle. Women in feminised industries and jobs received increases in pay. Yet progress was uneven and the extent of increases potentially to hand for women limited by the scope of comparisons available through the award restructuring process. There was an absence of systematic gender neutral work value assessments during rounds of award restructuring; in industries such as accommodation, cafes and restaurants and the retail trade, award restructuring contributed to the shift from permanent to casual employment. Cases in industrial tribunals over particular features of award restructuring, such as skill recognition, industry-wide classification and training have highlighted both the strength of employer opposition to these changes but also low levels of unionisation and an absence of effective union campaigns (Pocock 1995: 119).

In practice, however, award restructuring was designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward women’s work. Work value comparisons continued to be grounded by a male standard, that being the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson. In these areas employer support for award restructuring, which was ultimately beneficial to union applications before industrial tribunals, was shaped by a desire to reduce the number of classifications and develop classification structures that would facilitate multiskilling and reduce job demarcations (Probert, 1992: 448). The challenge in feminised areas of work centred not on a requirement for a reduction in the number of available classifications but a process that would ‘unpack and differentiate diverse levels of skill, and to better reward their range and value’ (Thomson and Pocock, 1997: 80).
4.6.3 ENTERPRISE BARGAINING

Employer opposition to centralised wage fixing intensified from the mid 1980s onwards. The Business Council of Australia argued that the award restructuring process did not generate sufficient flexibility and that workplace negotiations were the best mechanism to define the working arrangements needed for competitive success. Employer opposition to centralised wage fixing drew heavily on neoclassical theory in asserting that intervention by the state, in the pursuit of equity objectives, distorts the rational allocation of returns based on human capital attributes or the optimal allocation to market activity determined within family units. Such logic formed a convenient alliance with arguments that assert that international competitiveness is compromised by state led intervention. Within such an agenda prominence is afforded to deregulation, privatisation, and reducing the size of the public sector, and interventionist structures are removed so that the market is held to operate on a ‘level playing field’.

New industrial relations legislation, in the shape of the Industrial Relations Act, reflected this agenda and provided for the certification of workplace agreements as an alternative to the traditional industry award. Employer organisations continued to press for a more dramatic overhaul of the industrial relations system. In this endeavour they would ultimately be joined by organised labour and the federal government. In submissions to the April 1991 National Wage Case, all three parties, requested that the Commission determine a new enterprise bargaining principle. The Commission was to initially refuse such submissions, in part on equity grounds, but by October 1991, an enterprise bargaining principle was the central feature of the Commission’s wage fixing principles. Enterprise bargaining became the primary means through which wage increases could be achieved, while wage increases in collective industry awards would be limited to a series of safety net adjustments for those workers who had not secured wage increases by way of enterprise bargaining. The

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commitment to enterprise bargaining was given further strength in 1992 by amendments to the *Industrial Relations Act* that circumscribed the Commission’s ability to scrutinise a particular subset of agreements (s.134), by way of a public interest test. Effectively, award rates of pay became quarantined from movements in collective enterprise agreements (Buchanan, Watson, Meagher, 2004: 133).

At the outset women’s organisations questioned whether women’s labour market position would be advanced by a more decentralised industrial relations system. Gender equity would be compromised by the weakening of the institutional and legal framework that had afforded women some protection, notwithstanding the institutionalised inequity arising from gendered constructions of the living wage (Bennett, 1994; Henry and Franzway, 1993; Thornton, 1995: 6). Submissions by women’s organisations at the 1991 National Wage Case noted that there would be little impetus for the creation of new national standards or improvements to existing industrial benchmarks. These concerns were informed by the evidence on the structure of the labour market. Segmented into poorly paid occupations and industries, nominally in positions of low skill, women have had little access to bargaining power, a limited representation in bargaining structures and minimal access to over-award payments. More substantially the disproportionate location of women in white collar, service industries rendered the focus on productivity-based bargaining problematic for women, given the long standing difficulties with the measurement and reward of productivity in these areas (Junor, Barlow and Patterson, 1993). The pattern of women’s employment indicated that they would remain reliant on the award system. This reliance would not assist the revaluation of women’s work as awards would now act simply as a ‘safety net’, providing workers with a minimum set of standards for their working conditions and rates of pay.

There were early, albeit limited, policy responses to the concern that enterprise bargaining outcomes would be gendered. In 1992, amendments to the *Industrial Relations Act* stipulated that agreements not disadvantage workers when set against the ‘context of the terms and conditions of employment considered as a whole’. In 1993 the objectives of the *Industrial Relations Act* were amended to address discrimination and the AIRC was required also to
determine whether agreements were discriminatory and to appraise the consultation and information services provided to particular employment groups, including women, whose interests may not have been considered in the negotiation of the agreement. Enterprise bargaining provisions were also introduced in state jurisdictions with the scale of the commitment to enterprise bargaining usually a function of a political regime. The most dramatic change occurred in the state jurisdiction of Victoria where the state industrial relations system was largely dismantled and responsibility for industrial matters transferred to the Commonwealth.

4.6.4 EQUAL REMUNERATION FOR WORK OF EQUAL VALUE

The persistence of gender pay inequity was a contributory factor to the introduction of federal legislative amendments in 1993-94 which enshrined the objective of equal remuneration for men and women. The background to these amendments is detailed more extensively in Chapter Seven which provides an account of the only case taken to final arbitration under these amendments. In summary, the legislative commitment to equal remuneration had not been included previously in federal legislation as the Constitution effectively excluded the federal Parliament from fixing conditions of employment. The inclusion was made possible by the federal government’s reliance on its external affairs powers and its status as signatory to a suite of international anti-discrimination conventions. At the same time the federal government introduced a range of what it termed minimum entitlement provisions in the areas of minimum wages, termination of employment and parental leave, all of which drew their legitimacy from Australia being a signatory to a number of ILO Conventions (Williams, 1998: 66-70).

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23 By way of the Industrial Relations (Reform) Act 1993 (Cth) which amended the Industrial Relations Act 1988 (Cth).
24 Consistent with s.51 (xxix) of the Commonwealth of Australia Constitution Act 1901 (UK).
25 When introduced the relevant provisions in the Industrial Relations Act 1988 (Cth) were as follows: Minimum Wages (Part VIA, Division 1); Equal Remuneration (Part VIA, Division 2); Termination of Employment (Part VIA, Division 3), Right to Take Industrial Action (Part VIB, Division 4); Parental Leave (Part VIA, Division 5).
The international anti-discrimination conventions included the 1951 International Labour Organisation (ILO) Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, the United Nations Convention on the Elimination of all Forms of Discrimination against Women, the 1958 ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation and Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights) and 1951 ILO Recommendation 90 Equal Remuneration Recommendation. The belated acknowledgement of ILO Convention 100 arose because the federal government used its external affairs powers to include the terms of the Convention in the legislation. The federal government had only ratified the Convention in December 1974, some twenty three years after its passage through the ILO. Notwithstanding these delays a legislative commitment to equal remuneration had not previously been included in federal industrial relations legislation because such a legislative direction to equal remuneration had been considered unconstitutional.

The High Court was asked to consider a constitutional challenge to the Commonwealth's use of its external affairs powers. The High Court largely upheld the 1993-1994 legislative amendments, and in doing so construed the Commonwealth's external affairs powers broadly finding that equal remuneration amendments closely matched the relevant international instruments. As such they were appropriate to give effect to Australia’s obligations under those instruments (Williams and Simpson, 1997: 224)

The effect of these amendments was to give the AIRC power to issue equal remuneration orders, effectively increases in pay so that the test of equal remuneration was satisfied. Such amendments were to demonstrate the complex and contradictory nature of the state’s stewardship of pay equity reform. Ostensibly the amendments offered three key aspects of pay equity reform. The concept of equal pay embedded in the 1972 principle was widened to equal remuneration, the link between pay inequity and direct and indirect discrimination was acknowledged more explicitly through reference to a set of international anti-discrimination

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conventions and the legislation placed no explicit restriction on the type of work value comparisons that could be made.\(^{27}\)

The legislation’s reference to ‘equal remuneration’ as opposed to ‘equal pay’ implied a wider ambit for tribunal intervention. This was significant as women generally had a greater reliance on award earnings than men, who received a higher level of overaward earnings. There was some precedent for industrial tribunals involving themselves in the regulation of overaward payments. This was demonstrated by the then Conciliation and Arbitration Commission recommending indexation of overaward payments between 1975 and 1976 and between 1985 to 1991. In 1978 the Commission awarded supplementary payments in the Metal Industry Award 1971\(^{28}\) to compensate those workers who were not in receipt of overaward payments. However, the Commission had not contemplated overaward payments in the 1969 and 1972 federal equal pay decisions, a point acknowledged by the federal Commission in its rejection of the principle of comparable worth in 1986.\(^{29}\)

Casting the right to equal remuneration in this way altered the shape of gender pay equity regulation. Although the right remained within Australia’s principal instrument of labour law the right was far more external to the system of wage determination and industrial awards than that provided in 1969 and 1972.

### 4.6.5 EQUAL REMUNERATION MEASURES IN STATE JURISDICTIONS

Following the 1993 federal legislative amendments the only distinctive changes that have been made to equal remuneration measures in labour law have occurred in state jurisdictions. These measures, primarily those enacted in New South Wales, form the subject of detailed analysis in Chapter Eight.

\(^{27}\) Legislative terms are replicated in full at Appendix Four.

\(^{28}\) Re Metal Industry Award 1971 (Australian Conciliation and Arbitration Commission, Moore J, Williams, J, Heagney C, 1 September 1978, Print D8263).

The reforms followed government-initiated pay equity inquiries in five states, New South Wales, Queensland, Tasmania, Western Australia and Victoria. New South Wales was the first state to conduct an inquiry, where the impetus for the Inquiry arose not only from the plateau in gender pay equity ratios but also the significance of the state system of industrial awards for women in paid work in that state (McCallum, 1998). The inquiries in New South Wales, Queensland and Tasmania were conducted through the industrial tribunals of those states and led to new equal remuneration principles in those jurisdictions\(^\text{30}\). The principles are distinct from the provisions in the federal *Workplace Relations Act* in that they implicitly reject the test of discrimination as the threshold for an equal remuneration claim. The principles establish a test of undervaluation as the basis of equal remuneration applications and there is no presumption that proper assessments have been conducted in previous assessments of the work at the subject of the application. Nor is there any requirement in these principles for comparators - comparisons may be utilised but are not a necessary precondition for an application to proceed.

### 4.6.6 ANTI-DISCRIMINATION AND EQUAL OPPORTUNITY LEGISLATION

It is through industrial relations legislation and industrial tribunals that the Australian state has exercised its most direct influence on gender pay equity. However, there are parts of the state apparatus that can regulate pay equity, other than the industrial relations domain. The nature of this apparatus reflects the impact of feminist interventions from the 1970s onwards. These interventions reflected the need to remove those barriers to women’s participation in the labour market and to remove discrimination in the workplace. At a federal level, discrimination rights legislation such as the *Sex Discrimination Act 1984* (Cth) represented such an approach and this direction was replicated at a state level through anti-discrimination

The approach to discrimination bears some reflection, given the relationship between the equal remuneration legislative amendments introduced in 1993 and the international Anti-Discrimination Conventions.

Equal opportunity measures primarily comprise complaint-based legislative models, which prohibit discrimination in the areas of employment opportunity and wages and conditions of employment. Within Australia anti-discrimination legislation has generally encompassed both direct and indirect discrimination. Direct discrimination measures have followed typically a model of equal treatment with biological exceptions. Direct discrimination provisions within sex discrimination legislation have prohibited employers from ‘treating any person less favourably than in the same or similar circumstances they treat or would treat a person of the opposite sex’ (Hunter, 1992: 4). Indirect discrimination measures have addressed more structural forms of discrimination that arise because ‘organisational norms rules and procedures, used to determine the allocation of positions and benefits, have generally been designed whether deliberately or unreflectively, around the behaviour patterns and attributes of the historically dominant group in public life. Thus criteria for advancement in employment and access to higher wages and conditions might reflect primarily male attributes (Hunter, 1992: 5-6). The limitations of the equal treatment model in addressing the application of dominant norms has led to a model of substantive equality and indirect discrimination provisions within sex discrimination legislation.

Such legislative initiatives are directed largely to ensuring equal access to employment, by women, whether by way of altered recruitment practices, improved training opportunities and recast appraisal and career development opportunities. These models are effectively accessed by individual complainants and lack the provision for collective remedy. These legislative schemes were a starting point in equity reforms (Burton, 1991; Eisenstein, 1996; Franzway, Court and Connell. 1989), but were limited by an underlying liberalism and constrained by an

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31 For example the Anti Discrimination Act 1977 (NSW).
ethos of individualism albeit while endorsing a 'rhetoric of distributive justice' (Thornton 1990: 244). The initial construction of the test of indirect discrimination, exemplified in the original provisions in the Sex Discrimination Act, was particularly problematic. It provided 'a set of Herculean obstacles to be overcome by intrepid complainants in order to challenge a discriminatory practice in a particular workplace' (Thornton, 1990: 192) and lacked the capacity to initiate substantive reform as they were predicated on the assumption that women would continue to fulfil the role of unpaid domestic labourer (Pateman, 1981; Pateman, 1983; Thornton, 1985). These definitions were amended in 1995, as discussed in further detail in Chapter Seven, although the apparatus remains complaint-based in nature.

Industrial awards and agreements were formerly exempt from the provisions of federal sex discrimination legislation (Hunter, 2002: 55), an exclusion which reflected the parlous commitment of a number of governments to the non-discrimination principle (Thornton, 1990: 41). Federal anti-discrimination legislation [Human Rights and Equal Opportunity Commission Act 1996 (Cth)] currently provides that if the President of the Human Rights and Equal Opportunity Commission (HREOC) receives a complaint to the effect that an industrial instrument is discriminatory, the President of the HREOC may refer the matter to the Australian Industrial Relations Commission (s.46PW)\textsuperscript{32}. This power continues to be recognised in the Workplace Relations Act which provides that the AIRC must convene a hearing at which the Sex Discrimination Commissioner may be a party to the proceedings (s.554). At the subsequent hearings the Commission has the power to vary an award or workplace agreement (s.831). Beyond these powers of referral, in a decentralised environment where the industrial tribunals were losing their powers, sex discrimination legislation, in particular the indirect discrimination provisions, gained potentially wider coverage over employment matters, although such powers have not been exploited (Redman and O’Connell, 2000: 113-115). Yet the contemporary relevance of these provisions has also come under pressure, as

\textsuperscript{32} Following the passage of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth), the Human Rights and Equal Opportunity Commission Act 1996 (Cth) was amended so that industrial instruments now include a collective agreement, an award or a variation or order affecting an award, a transitional award or a variation or order affecting a transitional award; a pre-reform certified agreement; a Preserved State Agreement; a notional agreement preserving State awards.
the legislation itself introduced to meet changing social and economic conditions, has been
overtaken rapidly by further changes in those conditions (Smart, 1995: 150). Thus while the
objects of sex discrimination legislation may have matched the goals of the liberal state in the
early 1980s, the 'neo-liberal state of the 1990s and 2000s positions the SDA [Sex

Another form of equal opportunities legislation, affirmative action, was enacted in 1986 and
applied to private sector employers with over 100 employees and all higher education
institutions [Affirmative Action (Equal Opportunity for Women) Act (Cth)]. Organisations
falling within the scope of the legislation were required to report annually to a statutory
authority established by the legislation, the Affirmative Action Agency. The basis of the report
was the implementation and progress of their Affirmative Action Program. The legislation
defined an affirmative action program as one designed to ensure that: appropriate action is
taken to eliminate discrimination by the relevant employer against women in relation to
employment matters; and measures are taken by the relevant employer to promote equal
opportunity for women in relation to employment matters.

Further direction to the requirements of a program was provided by the Agency that provided
an eight-step process for complying organisations to follow. In 1992 the scope of the
legislation was widened to include community organisations, non-government schools, unions
and group training companies with more than 100 employees. Legislative change at this time
also provided that the Director of the Affirmative Action Agency had the discretion to waive
particular reporting requirements for those organisations that had achieved a particular
standard in their quality of their programs and reports. The legislation was reviewed by the
conservative Coalition Government in 1998 with the review process required specifically to
examine the costs of the legislation to business and the community (Sinclair, 2000). The
review resulted in a weakening of the reporting process, a diminution of the compliance
requirements and a focus on individual business requirements (Andrades, 2000: 175). The
legislation was also amended in name to the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) as was the administering agency, now known as the Equal Opportunity for Women in the Workplace Agency. The Agency itself reports that such changes have not diminished its capacity to effectively resource organisations to address pay equity, pointing specifically to its development of an on-line pay equity tool that assists organisations to identify gender pay inequity within their workplace (Equal Opportunity for Women in the Workplace Agency, 2005: 8).

The original affirmative action legislation was limited both in its scope and its capacity to bring substantive change. Its focus on workplaces with over 100 employees excluded a significant proportion of women in paid work. Its primary objective was to assist women to achieve career progression within existing structures rather than to question the basis of those structures. This constraint reduced its capacity to address the ‘processes by which institutional power is claimed and distributed’ (Wajcman, 1999: 19). The 1999 legislative amendments coincided with the increased prominence of ‘diversity management’ that can be contrasted both to earlier affirmative action measures and equal opportunity approaches more broadly. Such approaches are routinely bureaucratic in that they establish rules for managers and workplaces to follow.

In contrast, diversity management claims to recognise differences in the workplace. The responsibility, however, shifts to the individual to demonstrate involvement and commitment and take advantage of the opportunities provided by a modern, empowering organisation (Wajcman, 1999: 21). Although features of the 1986 legislation remain unamended by the 1999 legislative changes, this shift undermines efforts to bring accountability to employment policy, particularly those attempts at a renegotiation of the relationship between the public and private spheres (Bacchi, 1996: 86; 1999: 101-102). Therefore one of the weaknesses of the Equal Employment Opportunity regime was that the support structures essential to reconciling work and family were characterised as external and as family policy, not as
fundamental labour market issues. Indeed it became viewed as a barrier to competitiveness and an undesirable bulwark against competitive market forces. Alongside the partial collapse of compulsory conciliation and arbitration something of an ‘unencumbered worker’ emerged – such a worker while ‘ostensibly androgenous, had neither financial responsibility for partners and children nor care work obligations. Workers were detached from their family circumstances [and] from the reality of their lived experiences’ (Berns, 2002a: 161).

4.7 GENDER PAY EQUITY RATIOS IN AUSTRALIA

What has been the effect of these measures? Table 4.1 measures Australia’s gender pay equity performance, through a series of gender pay equity ratios, from 1967 to 2007. Gender pay equity ratios typically express women’s earnings as a proportion of men’s. In the following table four ratios are displayed:

- Gender pay equity ratios for all adult full time employees on the measure of ordinary time weekly earnings (1981-2007). This measure excludes overtime earnings;
- Gender pay equity ratios for all adult full time employees on the measure of total weekly earnings (1981-2007). This measure includes overtime earnings;
- Gender pay equity ratios for all private sector, non-managerial, adult full time employees on the measure of total hourly earnings (1967-2006). This measure includes overtime earnings and hours;
- Gender pay equity ratios for all non-managerial, adult full time employees on the measure of total hourly earnings (1974-2006). This measure includes overtime earnings and hours;

The measures evident in the first two columns in Table 4.1 are aggregate in nature and do not account for differences in the number of hours worked by men and women. The measures in columns four and five are based on a measure of hourly earnings and do account for differences in hours worked by men and women, although they provide no insights as to why men and women engage in overtime in different ways. All of the measures presented are incapable of addressing the earnings position of men and women in part-time employment, confined as they are to earnings data for full-time employees. While acknowledging these limitations the data provides some insight into the trajectory of gender
pay ratios in Australia since 1967. The hourly earnings data for private sector, non-managerial, adult full time employees reveals a steep improvement in gender pay equity ratios between 1967 (which was prior to the 1969 equal pay for equal work decision) and 1980, eight years following the determination of the 1972 equal pay for work of equal value principle. When handing down the 1972 principle the ACAC indicated that implementation of the principle should be completed by June 1975, but the decision also recognised that special circumstances may extend the implementation program beyond this time period\(^{33}\).

Since 1980 the improvement in gender pay equity ratios has been far less obvious but also subject to fluctuation. Using full-time adult non-managerial employees in the private sector as a guide, the gender pay equity ratio increased from 64 per cent in 1967 to 80.1 per cent in 1980 – an increase of 16.1 percentage points over a thirteen year period. In the period 1980-2006 the ratio increased only 5.0 percentage points – from 80.1 per cent to 85.1 per cent, although the ratio peaked at 88.9 per cent in 1994 and displayed higher ratios in 2000, 2002 and 2004 than that recorded for 2006. The data in column five takes into account the public sector but only for the period 1975-2006. On this measure gender pay equity ratios in the public sector are higher than that for the private sector as the all sector ratio is consistently higher than that recorded for the private sector alone.

The rate of progression for full-time adult non-managerial employees in the private sector, between 1980-2006, is paralleled in the other measures included in the table. On the measure of ordinary time weekly earnings for all full-time adult employees the pay equity ratio increased from 81.4 per cent in 1981 to 83.5 per cent in 2007 – an increase of 2.1 percentage points. On the measure of total weekly earnings for all full-time adult employees the pay equity ratio increased from 77.2 per cent in 1981 to 80.5 per cent in 2007 – an increase of 3.3 percentage points. These two measures also show evidence of fluctuation, both peaking in 2004, prior to falling back in recent years.

\(^{33}\) *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172 at 173.
Table 4.1: Gender Pay Equity Ratios Australia, 1967-2007

<table>
<thead>
<tr>
<th>Year</th>
<th>All employees (public and private sectors)</th>
<th>Private sector non-managerial employees</th>
<th>All non-managerial employees</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Full-time adult ordinary time weekly earnings</td>
<td>Full-time adult total weekly earnings</td>
<td>Full-time adult total hourly earnings</td>
</tr>
<tr>
<td>1967</td>
<td>64.0</td>
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<td>1968</td>
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<td>1970</td>
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<td>1971</td>
<td>66.7</td>
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<td>1972</td>
<td>69.2</td>
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<td>1974</td>
<td>75.5</td>
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<td>1975</td>
<td>80.3</td>
<td>83.2</td>
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<td>1976</td>
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<tr>
<td>1984</td>
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Source: Columns 2 & 3

Survey not conducted in years where data is not provided. In column 5 data for the public sector was not collected in the period 1967-1972. The data for 1974 in column five was drawn from historical data released by the Australian Bureau of Statistics (ABS) in 1979 and included in ABS (1979) Earnings and Hours of Employees, Distribution and Composition, Cat no. 6306.0.
4.8 COMPARATIVE GENDER PAY EQUITY RATIOS

Despite the recent plateau in Australia’s gender pay equity ratios, Australian gender pay equity ratios compare favourably to international standards. Harmonised Organisation for Economic Cooperation and Development (OECD) data for wage and salary earners was presented in Chapter Two (Tables 2.1 and 2.2) and provided an international and comparative perspective of female/male earnings ratios in industrialised nation states. The data in those tables differs from that data presented in Table 4.1 due to the cross comparison methods relied on by the OECD and differences in the timing of data collection. The data presented in Chapter Two indicated that Australia’s gender pay equity ratio for full-time wage and salary earners stood at 91 per cent compared to the OECD weighted average of 84 per cent (Table 2.1). If part-time wage and salary earners are included (Table 2.2), the Australian ratio falls to 89 per cent relative to the OECD average, which remains at 84 per cent.

The data in Table 4.1 suggests that Australia’s favourable gender pay equity performance, as measured by the data in Chapter Two, is not a recent phenomenon. Gregory and Duncan assert that the improvements in Australia’s gender pay equity ratios in the period 1970-1980 could only be sourced to the institutional measures introduced in 1969 and 1972, as they extended far beyond the relative wage decisions in the market (Gregory and Duncan, 1981: 426). Similarly, the improvement in Australia’s gender pay equity ratio arose from changes in legislation and the wage determinations of industrial tribunals rather than sudden and differential improvements in the human capital among men and women in a short period of time (Gregory, 1999: 277). These findings are consistent with broader research, reviewed in the previous chapter, which indicates that measured human capital endowments do not explain cross country differences in men’s and women’s earnings.
4.9 GENDER PAY EQUITY REFORM IN INTERNATIONAL JURISDICTIONS

Can the differences in gender pay equity ratio between different national jurisdictions be understood through different systems of labour market regulation as they concern gender pay equity? In this section of the chapter institutional pay equity reform in the United Kingdom, the United States, Canada and New Zealand will be reviewed, recognising that there is a diversity of pay equity models (Chicha, 2006: 9-13). The nation states reviewed here locate their gender pay equity measures in a variety of mechanisms, including human rights law, labour law and explicit pay equity legislation. The review will also assess systems of wage determination. The research material in the previous chapter suggested that national systems of wage determination and collective bargaining and approaches to wage fixing shape gender pay equity. Equal pay legislation is not of itself sufficient to address pay inequity given that inequity is strongly associated with the extent of income dispersion and income inequality across the labour market (McColgan, 1996: 244). A fundamental problem arises when equity measures are ‘external to systems of labour law and industrial relations’ (Bennett, 1994: 137). Rights-based gender equity legislation only ever enshrines a ‘gender neutral allocation of inequality’, which is indifferent to the stratification of the labour market and where the level of wages is irrelevant (Bennett, 1994: 140-141). In contrast, centralised systems of industrial relations carry a commitment to adequate minimum entitlements and the extension of gains to weaker and vulnerable groups. Policy change that individualises or privatises work relations exacerbates gender inequities in the workplace (Bennett, 1994: 137, 140). The key task is to assess the distinctiveness of institutional developments in Australia as they relate to gender pay equity and to assess whether the contrasting institutional features of gender pay equity reform and of industrial relations in international jurisdictions exercise a decisive impact on the trajectories of gender pay equity ratios.
4.9.1 NEW ZEALAND

Prior to the decentralisation of industrial relations in New Zealand in 1991, New Zealand carried a system of centralised arbitration and wage fixing that bore similarities to that operating in Australia. This applied also to the regulation of institutionalised sex discrimination and then pay equity reform. The available measures initially resided in labour law provisions and to a lesser extent human rights legislation. The policy shift away from centralised wage fixing has weakened or removed previous equal pay provisions and as a result, human rights legislation currently remains the primary means through which pay equity claims can be lodged. In terms of our knowledge of the gender pay equity gap in New Zealand the gender pay equity data presented in Chapter Two indicated a ratio of 86 per cent for New Zealand relative to the OECD average of 84 per cent (for full-time workers). If part-time workers are included, the ratio was 84 per cent, relative to the OECD average which remained at 84 per cent

Key decisions of New Zealand's Arbitration Court in 1922 and 1936 set important precedents in case law and established two principles: that the support of the family falls to a husband, a set of social relations that entitled the male labourer to a family wage; and differential and higher basic rates were to be awarded to adult men on the basis of its sufficiency to support himself, a wife and three children. Although there were exceptions, a minimum wage for women was not set until 1936 and then at 47 per cent of the basic male rate, increasing to 66 per cent in 1947 (Hyman, 2004: 140).

Equal pay legislation was first passed in 1960 in partial response to ILO Convention 100, but applied only to employees in public sector employment. Its focus was a narrow one, that women should receive equal pay to men where they do equal work under equal conditions, yet it contained explicit provisions where the work in question was performed exclusively by

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35 Utilising the measure of the mean.
women. Legislation passed in 1972 extended a legislative right to equal pay to private sector employees to be implemented by 1977 and effectively outlawed separate provisions for women and men workers\textsuperscript{37}. The legislation extended to all remuneration and thus extended to actual as opposed to minimum rates of pay established by awards and agreements, and the pivotal test provided by the legislation was that rates of pay were to contain no differentiation based on the sex of the worker. In the five year implementation period provided by the legislation (1972-1977), the gender pay equity ratio increased from 72 per cent to 78 per cent (Hyman, 1994: 84).

While the provisions applied to actual rates of pay, the provisions favoured an application to women and men doing substantially similar work. The application to areas of feminised work was less clear, although the legislation nominally carried the principle of equal pay for work of equal value rather than just equal pay for identical work (Hyman, 1994: 85). Although the legislation provided powers to the then New Zealand Arbitration Court to oversee the implementation of the provisions and provide guidance to the parties, these powers were not substantially exercised (Hyman, 1994: 84). This lack of intervention narrowed the scope of the comparisons that were made, a failing that when coupled with the limiting nature of the provisions meant that the legislation was better designed to prevent sex-based discrimination in rates of pay, but was not successful in implementing any prospective principle of equal pay for work of equal value.

The success of pay equity measures in New Zealand also needs to be read against New Zealand’s system of wage-fixing. At the time of the introduction of equal pay legislation, New Zealand had a system of centralised, minimum rates occupational and industry awards, largely set by the Arbitration Court, which was supplemented at the workplace by overaward bargaining. From 1987 a process of decentralisation commenced, through legislation

\textsuperscript{37} Equal Pay Act 1972 (NZ).
introduced by the then Labor government\textsuperscript{38}. These measures were motivated by a belief that New Zealand’s centralised system of wage determination rendered the labour market particularly inflexible, with an absence of wage flexibility impeding economic and employment growth (Hyman, 1994: 112). The measures removed compulsory arbitration and underpinned a shift from national occupational awards to industry and collective bargaining, and provided the means where employees could initiate an employee ballot for the right to negotiate an enterprise agreement\textsuperscript{39}.

It was in this environment of industrial relations decentralisation that further pay equity measures were introduced by way of the \textit{Employment Equity Act 1990} (NZ). The impetus for these measures included the equal pay for equal work principle underpinning the 1972 equal pay provisions and further restrictive caveats to the 1972 provisions disclosed by subsequent law. While the terms of the 1972 legislation applied nominally to occupational and industry awards, the New Zealand Arbitration Court in 1986\textsuperscript{40} ruled that an award made in the period 1972-1977 would be assumed to have incorporated provisions on equal pay, a decision that gave effective legitimacy to the limited potential of the legislation. It was open to the parties to bring equal pay claims to the Court, but only on the basis that the claims were agreed by the parties. The pay equity provisions within the \textit{Employment Equity Act} incorporated the principle of equal pay for work of equal value and required unions representing a feminised occupation (60 per cent or more) to apply to the Employment Equity Commissioner for a pay equity assessment, one resting on a comparator-based methodology and requiring two male-based comparators. Based on the assessment unions could then lodge a pay equity claim in the relevant award or agreement. If conciliation was not successful the matter would proceed to final offer arbitration before the New Zealand Arbitration Commission.

\textsuperscript{38} \textit{Labour Relations Act 1987} (NZ), \textit{State Sector Act 1988} (NZ).

\textsuperscript{39} \textit{Labour Relations Amendment Act 1990} (NZ).

\textsuperscript{40} \textit{New Zealand Clerical Workers IAOW v. Farmers Trading Co. Ltd} (1986) 86 ACJ 203.
These new pay equity provisions were, however, short-lived as a newly elected conservative government (1990) repealed the Employment Equity Act in 1991 (Hill, 2004: 8). One of a number of legislative changes introduced at this time included amendments to the Human Rights Commission Act 1977 (NZ) and the foreshadowed introduction of the Human Rights Act 1993 (NZ). Until 1991 a potential complaint of sex discrimination involving rates of pay [15(2)] was not processed under the human rights legislation, but was alternatively referred to the Department of Labour for consideration under the provisions of the Equal Pay Act 1972 (NZ). This restriction was removed in 1991 and the Human Rights Commission could then hear complaints on equal pay.

The major legislative change at this time did not concern changes to equal pay provisions. The introduction of the Employment Contracts Act 1991 (NZ) removed the system of occupational awards, abolished the New Zealand Arbitration Commission and removed any reference to trade unions in enabling industrial relations legislation (Harbridge and Thickett, 2003: 76). The Employment Contracts Act also introduced provisions which prohibited discrimination on the basis of sex, with complaints of sex-based discrimination to be pursued as a grievance before a newly created Employment Tribunal. The Equal Pay Act was amended to stipulate that all employment contracts must provide for equal pay for equal work (Hyman, 1994: 128). The difficulty posed by the further decentralisation of industrial relations was that the equal pay provisions relied on establishing a case of differentiation based on sex. The basis of such differentiation and establishing what is identical work became matters of contention given the dismantling of the system of industrial awards, and the fragmentation of enterprise agreements and employment contracts. The decentralisation of industrial relations has also been held to have an impact on greater polarisation of earnings, with such polarisation having both gender and ethnic dimensions (Hyman, 2004: 138). Yet the impact of the 1991 legislative change also bears careful analysis. By 1995 women were as likely as men to be as covered by a collective employment agreement,

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although this outcome was impacted by women’s disproportionate representation in large generally public sector agreements. Women and men enjoyed a near identical access to wage increases although the gender pay equity gap widened in low paid occupations, and men retained higher levels of penalty payments, including shift allowances and overtime (Harbridge and Thickett, 2003: 77).

Although the New Zealand Arbitration Court had passed wage determinations from 1908 as part of industry and occupational wage determinations, there was no legislated minimum wage until 1946. The minimum wage continues to be set by the Parliament and became incorporated into a minimum code, introduced at the time of the dismantling of the New Zealand arbitration system, which also include annual leave, statutory holidays, sick leave and parental leave (Hyman, 2004: 148). The system of minimum wages must be reviewed annually, although there is no requirement for the New Zealand Parliament to increase the rate.

With the election of a Labour government in 1999 there has more recently been a partial recentralisation of industrial relations. The Employment Contracts Act was repealed and replaced with the Employment Relations Act 2000 (NZ)\(^{42}\). The changes initiated by the Labor government provided a framework for ‘good faith’ bargaining between employers, employees and unions for individual, collective or multi-employer wage agreements. Unions were recognised formally in the legislation, and the legislation provided the framework for the powers of the Employment Relations Authority and the Employment Relations Court. The legislation did not reintroduce industry and occupational awards as they existed prior to 1990. The Act continued to include personal grievance provisions on discrimination (s.103, s.105, s.119) that broadly mirrored the provisions of the Human Rights Act.

Despite these changes and the continuation of the Equal Pay Act, pay equity measures in the New Zealand bargaining environment do not provide the means to deliver pay equity

remedies across occupational and industry labour markets, and are restricted to comparisons with men involved in similar jobs and in the same workplace (Hill, 2004: 7-8). The available data at June 2002 indicated that women fared better under collective bargaining agreements than other forms of industrial instruments. At the level of minimum wages this approximated to a gender pay gap of 4 per cent under collective wage agreements compared to a gap of 16 per cent across the labour market as a whole (Harbridge and Thickett, 2003: 88).

Beyond these measures New Zealand’s legislative attention to pay equity resides in broadly cast anti-discrimination measures, although in 2002 an additional Human Rights Commissioner was appointed with responsibility for equal opportunities, including pay equity (Hill, 2004: 1). The New Zealand Bill of Rights Act 1990 [s.19(1)] affirms the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act. The State Sector Act 1988 (NZ) also provides general principles for state sector employment. These include requirements that Departments in their employment policies and practices comply with the ‘the principle of being a good employer’. These include the requirement for an equal employment opportunities program.

More recent reform indicates that the focal point of pay equity reform will initially be outside industrial relations legislation and the wage fixing system. In 2004 the New Zealand government announced a five year Pay and Employment Equity Plan of Action, an initiative consistent with the introduction of mainstreaming and gender analysis in New Zealand equality policy (Bacchi and Eveline, 2003: 98). The central feature of this plan was organisation and sector reviews of pay and employment equity, and investigations of pay in female dominated occupations. Detailed investigative and diagnostic tools have been developed by state agencies to enable the conduct of the reviews. Reviews are carried out by committees of employers, employees and unions. Pay investigations can be initiated through a review response plan instigated by employers, or through collective bargaining. Implementation of the plan thus far has focused on the New Zealand Public Service, public
health and public education with Cabinet to consider the extension to the private sector in 2009 (Hall, 2007: 2).

4.9.2 THE EUROPEAN UNION – UNITED KINGDOM

Equal pay measures in the United Kingdom are largely embedded in discrimination rights and human rights legislation and bear the influence of international conventions, including ILO Convention 100, but more particularly the United Kingdom’s membership of the European Union. European Union (EU) law forms part of domestic law in EU member states. Members of the European Union, as part of the European Employment Strategy (EES) are required to achieve, with a view to its elimination, substantial reductions in the gender pay gap by 2010 (Rubery, Grimshaw, Figueiredo, 2005: 184). The EES was adopted by the EU following the EU’s 1997 commitment to implement a gender mainstreaming approach in employment policy (Rubery, 2005b: 1). The practical implication of these measures is that courts and tribunals in member states must interpret their domestic laws in accordance with EU law. Where EU law has direct effect, it takes precedence over domestic law and claimants can rely on EU law where domestic law does not provide an appropriate remedy. The precise intersection of United Kingdom domestic law and EU law is still, however, characterised by some ambiguity, an ambiguity that has acted to constrain access to potential equal remuneration measures. On balance the focus of the United Kingdom’s pay equity measures resides in human rights legislation, although there are limited opportunities to pursue pay equity reform through labour law regulation.

Prior to detailing the specific equal pay measures in the United Kingdom I will briefly review the framework provided by European law. This comprises a number of constituent components\(^{43}\). The most prominent of these is Article 141 of the Treaty of Amsterdam.

(formerly Article 119, Treaty of Rome 1957\textsuperscript{44}) and the Equal Pay Directive 75/117\textsuperscript{45}. The key change brought about by the passage of Article 141 was that it included formally the concept of equal pay for work of equal value. The Treaty of Rome had rested on the narrower construction of equal pay for equal work, although this had been amended through the passage of the Equal Pay Directive in 1975. In framing the terms of these arrangements the European Union, through its antecedents, was influenced incrementally by the terms of key ILO Conventions, particularly the Equal Remuneration Convention which, since its inception, carried the commitment to equal pay for work of equal value (Hoskyns, 1996: 53; Novitz, 2005: 221).

United Kingdom labour law contains limited equal pay measures, a reflection of the nature of pay determination in Great Britain. Wages are not centrally determined and comprise collective industry agreements, workplace agreements and individual agreements. Collective industry agreements can be augmented by local workplace collective agreements. Prior to the onset of equal pay legislation in the United Kingdom, differential pay rates in areas of similar work largely reflected the alignment of male rates with the concept of the family wage. This was not promoted through the vehicle of national minimum wages – until 1999 there was no national minimum wage regulation in the United Kingdom – but through the regulation of wages provided by industry Trades Boards, later to be Wages Councils. Trades Boards were initially established in 1909 to set mandatory minimum wages, wages that were viewed as a bulwark to the prevalence of ‘poverty wages’. This regulatory framework was widened in 1945 to include questions of wages, hours of work and holiday leave (Deakin and Wilkinson, 2005: 243).

Until 1976 Trades Boards and Wages Councils actively promoted the concept of the family wage – setting women’s wage rates as a proportion of men’s although the rate afforded

\textsuperscript{44}Treaty establishing the European Community.
\textsuperscript{45}Terms of the Equal Pay Directive replicated in full at Appendix Seven. Cases taken to the European Court of Justice (ECJ) prior to 1997 were taken under Article 119.
women’s wages differed between Boards and Councils. Rates of pay were largely an amalgam of industry-based minimum wages and collective bargaining and the practice of differential rates in minimum rate setting was reflected in collective industry agreements (McColgan, 1996: 234). In 1986 legislation passed by the conservative government excluded from the scope of Wage Councils, all workers under 21 years of age, and limited wage setting to a single minimum and single premium rate. In 1993 Wage Councils were abolished in all sectors bar agriculture (Grimshaw, 2004: 107). At the time of their abolition in 1993, Wages Councils covered 17 per cent of the workforce, a disproportionate share of which were women (McColgan, 1997: 370). The capacity of Wages Councils to influence women’s wages was limited by the ‘relative poverty’ of the rates that were set and the exclusion of a number of low paid workers from the control of Wages Councils (McColgan, 1997: 374).

Minimum wage regulation through the National Minimum Wage was not established until 1999 with increases to adult and development rates of pay\(^{46}\) made following government consideration of recommendations of a Low Pay Commission, itself established in 1997 (Grimshaw, 2004: 108). The level of minimum wage is low and between April 1999 and October 2004 the minimum wage hovered between 40 per cent of male full time ordinary earnings (Grimshaw, 2004: 109-110). The Low Pay Commission, in making recommendations about increases takes into account women’s average pay as a benchmark, but such benchmarking fails to assess the embedded undervaluation of feminised work and problems of gender discrimination in the workplace (Grimshaw, 2004: 110).

In terms of explicit equal pay measures, equal pay legislation in the United Kingdom was introduced in 1970 - *Equal Pay Act 1970* (United Kingdom); employers were given five years to implement equal pay, thus the legislation only took effect from 1975. This followed a staged program of equal pay in the Civil Service commencing in 1955. The introduction of the

\(^{46}\) The National Minimum Wage excludes 16-17 year olds and apprentices. The development rate applies to adult workers for a maximum of six months where they are beginning a new job with accredited training.
legislation followed the United Kingdom ratifying ILO 100 in 1971 (Davies and Freedland, 1984: 371). The legislation was initially confined to those instances where women and men working in the same organisation and undertaking broadly similar work received differential rates of pay. Even with its initial narrow focus the legislation had some immediate impact, in addressing differential rates for similar work, and lifting women’s wages to two-thirds of men’s (Zabalza and Tzannatos, 1985: 68).

Key developments in European law then had some effect. At the time of the United Kingdom’s entry to the European Economic Community (EEC) in 1972 the key European legislation with respect of equal pay was Article 119 of the 1957 Treaty of Rome (Rubenstein, 1984: 44). Article 119 was initially confined to equal pay for equal work, the European Community in 1957 explicitly rejecting the wider reference in ILO Convention 100 to ‘work of equal value’. Following the limited impact of Article 119 the passage of the 1975 Equal Pay Directive widened the provision to work to which equal value was attributed, effectively work of equal value (Hoskyns, 1996: 56, 60). By way of proceedings which asserted that the United Kingdom was failing to implement the Equal Pay Directive, the European Commission insisted that the United Kingdom change its domestic legislation to reflect the direction within the directive to equal pay for work of equal value (Davies and Freedland, 1984: 383; McColgan, 2005: 421). The circumstances of the widening of the legislation imparted a restrictive interpretation to the concept of equal value – as such it remained a subsidiary principle rather than a generic one (Hepple, 1984: 10).

This uncertain nexus between United Kingdom and European Union law is not confined to gender pay equity measures. McGlynn (2006: 72) observes with reference to family legislation the multi-layered nature of the governance that flows from this nexus, and the diversity and lack of cohesion in the law that follows. An inherent tension remains between

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47 By way of the Equal Pay (Amendment) Regulations 1983 (United Kingdom) under the European Communities Act 1972 (United Kingdom).
rights that are constitutional in nature and statutory rights (Hepple and Byre, 1989: 131; Hepple, 1990: 646-647; McColgan, 2000: 1-2). The Human Rights Act 1998 (United Kingdom) which ostensibly incorporates elements of the European Convention on Human Rights into United Kingdom law is an entrenched or constitutional right. Legislation such as the Equal Pay Act and the Sex Discrimination Act 1975 (United Kingdom) provide statutory rights and, while flawed, provides greater transformation options for women because of the specific nature of its provisions. The rights provided by the Human Rights Act are indirect in nature, because of an ambiguous relationship between the constitutional rights and domestic law. This relationship is one that is subject to judicial interpretation, and requires testing by applications, frequently filed by individual complainants (McColgan, 2000: 280, 283)

The United Kingdom’s equal pay legislation is narrowly focused. The legislation makes it unlawful to offer different pay and conditions where women and men are doing the same or like work, work related as equivalent in the same employment, or work of equal value. Although not stipulated by European law, the legislation is based on a comparator methodology, with female complainants required to identify a male comparator as being in the ‘same employment’ as she is (Davies, 2004: 148-150). This provision, together with the demise of collective remedies in the legislation, confines the application of the legislation to the workplace or that of a single employer. A male comparator is held to be in the ‘same employment’ as the women if he is ‘employed by her employer or any associated employer at the same establishment or at establishments within Great Britain which include the one at which common terms and conditions of employed are observed either generally or for employees of the relevant classes’ [s.1(6)]. For the purposes of the legislation two companies are held to be associated for the purposes if one is a company of which the other, directly or indirectly, has control.

The legislation is primarily, although not exclusively, directed to individual claimants and involving a single employer. Complaints are heard by the Employment Appeals Tribunal after
conciliation from the Advisory, Conciliation and Arbitration Service (ACAS). Initially it had been anticipated that there was provision for the elimination of differential male and female rates within collective agreements, with enforcement through the Central Arbitration Committee. The Central Arbitration Committee’s attempts to address differential rates of pay for areas of masculinised work and feminised work were short-lived, as upon legal challenge the Committee was ruled to have exceeded its jurisdiction and ultimately the powers of the Committee to amend collective agreements were repealed (Bourn and Whitmore, 1989: 10).

The legislation lacks any effective mechanism to address structural weaknesses in the value afforded to feminised work and provides no challenge to the pay differentials which can arise between feminised and masculinised workplaces. These weaknesses, as with other jurisdictions, stemmed from a family wage ideology buttressed by structural assumptions about the value of women’s work and their position in the workforce (McColgan, 1997: 140). Employers can argue that the differences in pay are not inequitable, but are genuinely due to a factor other than the difference in sex between the employees concerned, a line of defence that has been the basis of employers arguing that the higher male rates of pay are the result of market forces. Past practice has demonstrated the acceptance by the Employment Appeals Tribunal of the results of analytical job evaluations as evidence that work is rated as equivalent. However, claimants are not limited to the use of job evaluation, nor is the tribunal obliged to rely on the report of an independent expert to determine whether the jobs are of equal value. McColgan (1996: 246) observes that the individual focus of pay equity measures in the United Kingdom is one of its most limiting features. Even if a woman manages to prove absolute parity between herself and the nominated comparator her employer is under little obligation to pass that increase to other women in the workplace. Hence the available measures do little to remedy the underlying structural basis of underpayment and undervaluation.
The lack of collective mechanisms for the elimination of pay inequity and the inability of claimants to pursue cross-employer comparisons are the features that diminish the ability of the available measures to address pay inequity. Differential rates embedded in similarly skilled but different areas of work have remained resilient to change. The legal challenge to existing pay structures comes only from those ‘employees directly affected by them, and then only if they can tailor their challenge within the narrow legal framework of the equal pay claim’ (McGolgan, 1997: 5). There is no obligation upon both public and private sector employers to review pay structures for evidence of discrimination and, while some trade unions have been at the forefront of the struggle to improve women’s pay, there are limited legal mechanism for trade unions to advance campaigns capable of extracting collective remedies (McGolgan, 1997: 8-10). It is these limitations that lead analysts to question the extent to which the United Kingdom is moving away from liberal notions of anti-discrimination towards an approach that is primarily based on equality or equity (Barnard and Hepple, 2000: 562).

European constitutional law provides that cases that involve the interpretation of the equal pay directives can be referred by national jurisdictions to the European Court of Justice (ECJ), although there has been some reluctance by domestic tribunals to utilise this course of action (Hepple, 1997: 357), and scepticism persists concerning the powers of the European Union to promote compliance with collective labour rights on the part of member states (Davies, 2005: 192). The ECJ is the supreme judicial institution of the European Union and has made key rulings concerning burden of proof obligations in cases involving a claim for equal pay. The ECJ has ruled that when a pay system is characterised by a lack of transparency, and the average pay of female workers is lower than that of male workers, then the burden of proof is on the employer to show that the pay practice is not discriminatory. The ECJ has been very specific on the issues of the onus of proof and reinforced the requirement that where jobs are of equal value then it is the employer’s responsibility to demonstrate that earnings

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differentials are due to objective factors\textsuperscript{49}. The ECJ provided further guidance on what were objectively justifiable factors when ruling that the existence of separate negotiating structures was not sufficient to justify differences in pay\textsuperscript{50}(Singh, 1994). European law has extended the concept of equal pay to include not only pay and other terms and conditions such as piecework, performance-based payments and leave payments, but also redundancy payments, travel concessions and occupational pension benefits.

Although European law contains a number of formative precedents the precise relationship between EU law and domestic law still carries some ambiguity as to whether Article 141 operates to amend domestic legislation by way of implication or whether it confers an independent right. This ambiguity contributes to a prevailing legal ideology, one based on an individual employment relationship (Creighton, 1979: 238) and one which operates against the victims of discrimination (Gregory, 1987: 84). In part this rests on the appropriate mechanisms to be relied on if domestic law is not thought to provide a remedy, in keeping with EU law, and if domestic law is not interpreted in line with EU law. It is also open to member states to pursue compliance with European law through non-legislative means. An individual claimant can rely on Article 141 in equal pay cases and individual claimants bringing claims against an instrumentality of the state, including public sector employers, can rely on provisions of EU directives where provisions are: sufficiently clear and precise; unconditional and unqualified; and not subject to further implementing measures.

Explicit sex discrimination legislation was also passed in the United Kingdom in 1975. Sex discrimination legislation within the United Kingdom nominally seeks to influence the gender pay gap through prevention of discrimination in a number of areas including employment. Direct and indirect sex discrimination, as defined, is unlawful in employment, although there are exemptions in the legislation that prevent its application to those areas where the equal

\textsuperscript{49} Enderby and (1) Frenchay Health Authority v. (2) Secretary of State for Health (1993) 22 IRLR 591 at 595.

\textsuperscript{50} Enderby and (1) Frenchay Health Authority v. (2) Secretary of State for Health (1993) 22 IRLR 591 at 595-596.
The areas where the sex discrimination legislation prevails are where the contractual terms outlined in a complaint do not refer to money or where the money claimed is not connected with a contractual term. The legislation is assessed to have had a limited impact on patterns of occupational and industry segregation in addition to the conditions that attend part-time work (McGolgan, 1997: 212).

These dimensions of the available pay equity measures in the United Kingdom noted, the gender pay equity has been the subject of considerable policy focus in the period 1999 to 2006, with three separate policy-based investigations (Equal Pay Taskforce, 2001, Kingsmill, 2001, Women and Work Commission, 2006). The gender pay gap has narrowed in the United Kingdom between 1982 and 2006 although this improvement has been far more evident for full-time employees (from 72 per cent to 86.7 per cent) than part-time employees (from 56.8 per cent to 59.8 per cent)\(^5\)\(^1\) (Grimshaw and Rubery, 2007: 4)\(^5\)\(^2\). A separate examination based on adjusted earnings data also found significant differences between full-time and part-time employees, but also found that the improved performance for full-time employees was primarily attributable to improvements in women’s education and experience (Joshi, Makepeace, Dolton, 2007: 46-53). Grimshaw and Rubery (2007: 1) assert that the persistence of the gender pay gap in the United Kingdom suggests that policymakers have failed to address the contribution of the undervaluation of women’s work to the major causes of gender pay inequity in the United Kingdom – occupational segregation, discrimination and women’s unequal burden of family responsibilities.

The initial responses to these investigations were established within the Civil Service as part of *Modernising Government* initiatives. Central government departments and agencies were required to submit equal employment and pay reviews, a process that encompassed the

\(^{51}\) Based on hourly earnings. The full report details changes in data collection methods during this time period.  
\(^{52}\) These figures differ from those presented in Chapter Two due to different data collection methods. The data presented in Chapter Two indicted that for full-time employees the ratio stood at 80 per cent. With the inclusion of part-time employees the ratio stood at 75 per cent. The OECD average on both measures was 84 per cent.
development of Public Service Agreements and targets across the equality spectrum (Women and Equality Unit, Department of Trade and Industry, 2003b). Flowing from these initiatives the Equal Opportunities Commission (EOC) prepared a model for voluntary equal pay reviews (EPR) and a program for the monitoring of implementation of the reviews (Equal Opportunities Commission, 2002; Neathey, Dench and Thomson 2003; Brett and Millsome 2004: 18; Neathey, Willison, Akroyd, Regan, and Hill, 2005; Adams, Carter and Schafer, 2006). The review of progress on equal pay reviews in 2005 concluded that 12 per cent of employers had completed an EPR, 3 per cent were in the process of conducting one, and 9 per cent had plans to so within the next twelve months (Adams, Carter and Schafer, 2006: 15). Analysis of the equal pay reviews noted that despite some promising results, the fact that 43 per cent of large organisations, 74 per cent of medium sized businesses and 87 per cent of small employers registered no equal pay review activity was not encouraging (Adams, Carter and Schafer, 2006: 23). By far the most common reason provided by organisations for not conducting a review was a belief that equal pay was already in place within their organisation (Adams, Carter and Schafer, 2006: 142).

These uneven results concerning the efficacy of voluntarism shaped more recent legislative reform in the form of the Equality Act 2006 (United Kingdom). This legislation has led to the restructuring of a number of statutory agencies, including the EOC, and from an optimistic standpoint provides newly created opportunities to promote gender equality (Rees, 2006: 230). This restructuring was also shaped by a review into the enforcement of United Kingdom anti-discrimination legislation (Hepple, Coussey, Choudhury, 2000) which addressed the inadequacies of the patchwork of anti-discrimination laws in the United Kingdom, and the United Kingdom’s compliance with the European Union and international, human rights law (Harrington, 2001: 757). This review recommended a single equality act and concentration of

53 Small business defined in this research as 25-99 employees, medium as 100-499, large as over 500 employees.
54 85 per cent of all employers who had not conducted a review indicated that they though that their pay system was not discriminatory.
56 Commonly referred to as The Hepple Report.
policy agencies directed to the implementation and promotion of the United Kingdom’s regulatory framework.

Under the provisions introduced by the *Equality Act* all public authorities are required to meet the legal requirements of the gender equality duty. Authorities must have due regard to the need to eliminate unlawful discrimination, unlawful under the *Equal Pay Act*, and harassment, unlawful under the *Sex Discrimination Act*, and to promote equality of opportunity. A listed subset of public authorities, specified in the legislation, are required to comply with specific duties, including the preparation and publication of a gender equality scheme and ‘to consider the need to include objectives to address the causes of any gender pay gap’ identified in its review of gender equality (Equal Opportunities Commission, 2006: 6). The scope of pay inequity contemplated in any review is limited to the confines of the public authority undertaking that review, while the test of equal remuneration that authorities are required to comply with is that found under the *Equal Pay Act*. In this sense the requirement reinforces the narrow scope of those provisions in that these provisions have primarily been used in the assessment of equal remuneration within workplaces and organisations.

**4.9.3 UNITED STATES**

In the United States, ILO Convention 100 has not exercised a decisive impact on domestic pay equity reform as the United States is not a signatory to the Convention. The applicable measures comprise direct equal pay legislation and human rights legislation aimed at the prevention of discrimination. The available equal pay measures are set against weak minimum wage regulation (Reynolds, 2004: 69-70). There is no centralised wage fixing or centralised collective bargaining, thus the industrial relations system contains few centralised institutional measures to advance pay equity through the system of wage determination. Unlike the stipulation of the minimum wage in Australia and New Zealand, differential minimum wages were not established by way of federal or state legislation. The concept of
the family wage emerged in practice with private sector employers defending higher male wages on the basis of their breadwinner status (Department of Employment, Education and Training (1987: 36).

In terms of direct equal pay legislation, there are, as in Australia, applicable federal and state measures. Federal measures hold precedence, although state laws can enhance federal provisions. Direct statutory reform at a federal level was introduced in 1963 but this measure followed state minimum wage laws, the federal minimum wage introduced under the *Fair Labor Standards Act 1938* (US) and the National War Labor Board’s promotion of job evaluation and equal pay for equal work as a response to labour shortages during World War II. State legislatures determined the earliest examples of pay equity legislation, although there was significant variation in enforcement mechanisms, the extent of coverage, the basis for pay comparisons between jobs and the available exemptions. (Figart, Mutari and Power, 2002: 14, 74).

The *Equal Pay Act 1963* (US) bears similarities to the 1969 Australian equal pay for equal work principle but its application is not universal. Federal legislation was first brought to the Congress in 1945. Opposition to the legislation was reflected in the compromises that emerged from protracted negotiations in the United States Congress and the strength of employer resistance to the use of federal regulation to endorse the principle of equal pay. The legislation ultimately fell within the administration of the *Fair Labor Standards Act* legislation and did not extend to agriculture, hotels, motels, restaurants and laundries or to professional, managerial and administrative occupations. The provisions were only applicable to cases involving comparisons of rates of pay for women and men engaged in similar work. Equal pay could be sought for work involving equal skill, effort, responsibility and working conditions. The provisions could not be used where the applications sought to substantiate a claim of comparable worth and there was no mechanism within the legislation whereby

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federal agencies could proactively enforce the legislation; women would be required to bring
actions to federal courts to enforce the provisions. The legislation used comparator-based
methodology that largely relied on job evaluation, indeed the underlying premise of the
legislation, equal pay for equal work, prevailed ‘because the language drew upon the
precepts of job evaluation that, by the 1960s, had become standard practice for establishing
relative wages in large organisations’ (Figart, Mutari and Power, 2002: 144).

The development of an appropriate measure to advance pay equity measures across
dissimilar areas of work has proved to be something of a long standing campaign for United
States pay equity activists. Given the limitation in the 1963 equal pay legislation, activists
sought a separate legislative authority, the *Civil Rights Act 1964* (US), a broadly based
discrimination rights legislation. Title VII of this legislation outlaws all discrimination in
employment practices based on race, colour, religion, sex, or national origin, and establishes
the powers of the Equal Employment Opportunity Commission (EEOC) (Gibelman 2003). The
EEOC has the authority to investigate and conciliate charges of sex discrimination and after
initial investigation and conciliation, it may initiate an action in a federal district court. The
EEOC may also investigate and seek charges brought under the *Equal Pay Act* by federal
employees against the federal government (Christensen, 1988: 332-333). During the drafting
of the legislation the inclusion of sex discrimination was viewed as a measure that would
ultimately assist to defeat the legislation and so resist the introduction of race-based anti-
discrimination measures (Figart, Mutari and Power 2002: 164). While this particular strategy
by the legislation’s opponents was unsuccessful, a final amendment to the legislation
stipulated that it would not be unlawful for any employer to differentiate on the basis of sex
in determining wages if such an approach was lawful under the terms of the *Equal Pay Act*

The provisions of the *Civil Rights Act* were held to be more advantageous given that it applied
to women in any job (McCall, 2001: 180). Yet there was ambiguity as to whether the
provisions of the Civil Rights Act could be used to prosecute comparable worth claims and the prospect of comparable worth was the basis of considerable opposition, in part because it challenged the legitimacy of gender lines (Kessler-Harris, 1990, 125). Comparable worth had been held by United States pay equity activists as being capable of eradicating the gendered basis of wage setting evident in the relationship between the sex composition of a job and its rate of pay (England 1992: 345). Yet comparable worth as a principle drew significant criticism concerning its disruption to the dictates of a market economy. In broad terms critics of comparable worth have railed against the concept that value inheres in jobs, preferring a model whereby wages reflect the intersection of the market forces of demand and supply (Kessler-Harris, 1990: 117). Similarly, Rhoads observes that '[a]s fatal to comparable worth as the incomparable nature of job worth is the inability to reconcile the principles of pay equity with those of a market economy’ (Rhoads, 1993: 5). Additionally the principle drew criticism for its alleged failure to provide a ‘reliable way of identifying discrimination’ (Rhoads, 1993: 219) although this critique was embedded in a deeply held antagonism towards any non-market measure that would attempt to equate value between different areas of work.

In court proceedings in 1981 it was initially held that the Civil Rights Act could be utilised to hear claims involving comparisons of different work even though comparisons were precluded under the Equal Pay Act\textsuperscript{58}. In making this determination the United States Supreme Court did note that it was not explicitly endorsing comparable worth. Such judicial reasoning proved to be something of a prescient sentiment as the United States Court of Appeal would ultimately uphold appeals against a District Court ruling\textsuperscript{59} which was supportive of comparable worth. The basis of the appeal, lodged by the Reagan administration, the EEOC and the United States Civil Rights Commission, was that comparable worth as a concept was both unsound and unworkable (Gunderson 1994: 31). Since that time attempts to introduce legislation requiring employers to implement equal pay for jobs of comparable worth have been

\textsuperscript{59} American Federation of State, County and Municipal Employees v. The State of Washington 1985, 9\textsuperscript{th} Cir, 770 F. 2d. 1401, p. 9.
routinely unsuccessful\textsuperscript{60}. While there is provision for cases taken under Title VII to compare dissimilar work and some applications have been successfully filed, there remain significant impediments including the transmission of results from successful applications to other parts to the labour market. Difficulties have arisen in those cases where the applicant’s submissions have centred on the result of points factor job evaluation schemes. Hence, across the board, a judicial and bargaining approach to the implementation of comparable worth has failed (Johansen, 1984: 126).

In the United States the validity of market defence has been a key issue in shaping the available institutional measures, particularly at the federal level. Market defence effectively holds that disparate wages can be defended on the basis that higher rates are required in particularly in occupational markets to attract and retain labour. There have been varying interpretations of the scope of market defence, primarily, although not exclusively, dictated by the statute under which the case is being heard. Market defence has not been accepted in cases lodged under the \textit{Equal Pay Act} on the basis that the legislation was introduced specifically to strengthen women's position in the market\textsuperscript{61}. In cases under the \textit{Civil Rights Act}, market defence has continued to have been accepted. Tribunals have ruled that the employer does not create the market even if that perpetuates historic discrimination. While this aspect of the defence has been accepted by tribunals, they have stipulated that the market claim does need to be substantiated and that justifiable differences in pay can only be as much as can be demonstrated to be a market-based differential\textsuperscript{62} (Gaston, 1986: 15-16). This involves a demonstration that the market has been properly assessed and applied, including a review of the scope and validity of the methods used to assess the market.

Remedy through both the \textit{Equal Pay Act} and the \textit{Civil Rights Act} is primarily dependent on the filing of individual rather than collective claims.

\textsuperscript{60} Paycheck Fairness Bill 2001 (US) Fair Pay Bill 2001 (US).
This narrow view of equality in the *Equal Pay Act* was particularly problematic for women in feminised areas of work. The jobs in which most women were employed - for example hospitality, retail trade, cleaning - effectively fell outside the scope of the legislation because the legislative requirement for pay comparisons within similar areas of work did not address the problems that attended the valuation of the work *per se*. To an extent this forced pay equity reform back to individual state legislatures (Figart, Mutari and Power, 2002: 175), Within particular states, legislation was passed providing for comparable worth measures, primarily for those in state sector employment. It is primarily the application of these measures that has led to a debate in feminist literature about their efficacy. This is a debate that carries some complexity, because while comparable worth nominally challenges purely market-based definitions of value and deeply embedded cultural presumptions about the value of women’s labour, it also relies heavily on the bureaucratic state and on technocratic modes of implementation (Evans and Nelson, 1989: 164-165). Blum (1991: 160) observes that comparable worth contains a number of contradictory tendencies, namely the universalisation of women’s interest in comparable worth, the universalisation of a class-based interest in comparable worth, the reification of the legitimacy of occupational hierarchy, and the enhancement of technocratic control rather than grass-roots participation.

The mode of implementation of comparable worth, frequently a form of job evaluation, may simply apply to women’s jobs the same values that have been devised to rate masculinised work. This is indicative of the type of forces that are arrayed against the possibility of material transformation provided by comparable worth (Evans and Nelson, 1989: 170). Comparable worth may provide, if management controls the job evaluation process, the mechanism where management strengthens its power over labour in the process of wage setting. The conditions for management control of the process have been enhanced, given shift in power in favour of management (Acker, 1989: 202). This explains the way in which the politics of class and gender impacts on the implementation of comparable worth.

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management attempts to use comparable worth for its own objectives at the expense of women and of the interests of other employees who would not gain from the reform (Acker, 1989: 206). Ultimately then, comparable worth may not be an end itself but part of a process of disentangling and questioning the ‘ideologies of ruling and the technical tools that embody and implement the ideologies’ (Acker, 1989: 226). Despite its inadequacies, comparable worth has made a contribution to the political discourse because it provides a vocabulary to address class and gender inequality. Its concentration within the public sector may be advantageous ultimately because of the central role played by the state in organising class power and gender relations (Blum, 1991: 185). Yet analysis of analysis of comparable worth also needs to be set within the broader political and economic context, given that pay equity reform arrived on the ‘political agenda at a historical moment that combined generative forces and political blockages’ (Figart and Kahn, 1997: 25-27).

With these measures in place the gender pay equity ratio for full time workers\textsuperscript{64} in the United States increased from 59.4 per cent in 1970 to 76.5 per cent in 2003 (Blau, Ferber, Winkler, 2006: 148)\textsuperscript{65}. A significant contributor to women’s improved earnings has been increased education, although of some consequence is the fall in men’s inflation adjusted earnings (Blau, 1998; Bowler, 1999: 13). The remaining disparity in men’s and women’s earning is shaped by women’s disproportionate representation among low wage workers and wide income dispersion. Comparative studies of the gender pay equity gap in the United States and the European Union observe that greater pay inequity in the United States probably arises because of greater income dispersion rather than necessarily being higher levels of discrimination in the United States compared to Europe (Pissarides, Garibaldi, Olivetti, Petrongolo, Wasmer, 2005: 82). There are significant clusters of feminised employment in low paying, technical, sales and administrative support positions which reflect the lower returns on human capital received by women. A significant portion of the male-female wage

\textsuperscript{64} Aged over 16 years and comprising only year-round workers.

\textsuperscript{65} These figures differ from those presented in Chapter Two due to different data collection methods. The data presented in Chapter Two indicated that for full-time employees the ratio stood at 79 per cent. With the inclusion of part-time employees the ratio stood at 78 per cent. The OECD average on both measures was 84 per cent.
gap results from the concentration of women into lower-paying jobs rather than the differential compensation to men and women employed in identical work (Mitra, 2003: 1024). Part of this exclusion for women with professional qualifications arises from women's exclusion in gaining access to meaningful supervisory positions. Fifty per cent of women engaged in professional work are employed as teachers and nurses, two of the lowest paid professional occupations. Similarly, Gibelman (2003: 30) argues that the present discrimination-rights measures have been insufficient to remedy features of occupational and industrial segregation and work valuation, such that jobs available to women with significant human capital endowments are frequently at the lower paying end of the low-paying services sector.

The United States regulatory framework also provides other equal opportunity measures directed to remedying sex discrimination. Title VII of the Civil Rights Act and the Equal Pay Act provide that federal courts can impose remedies to eliminate the continuing effects of past discrimination. This authority has been the basis for federal courts, upon a finding of sex discrimination, to order that employers develop affirmative action programmes to establish recruitment objectives and schedules to address the effects of past sex discrimination (Christensen, 1988: 341). Additionally Title VII can be utilised against an employer who refuses to recruit a woman because of her sex, although the availability of such provisions has not brought about significant change in the pattern of occupational segregation (Christensen, 1988: 335-336).

4.9.4 CANADA

The Canadian Constitution, through the Canadian Charter of Rights and Freedoms, prohibits discrimination on the basis of sex and guarantees equality of Charter rights to men and women (MacKinnon, 2006: 77). Provinces are able to seek legislative exemption from this constitutional standard for a period of five years, such exemption being open to renewal
Beyond the broad constitutional commitment to equality, the constitution does not demand positive action by either the federal government or provincial governments to adopt specific and proactive pay equity measures (McColgan, 2000: 152). Within this framework, pay equity measures in Canada reside in two different categories of legislation, human rights legislation and labour standards legislation, notwithstanding considerable diversity between the measures in place federally and those available under provincial law and amongst provincial measures. Within a number of provinces there is a separate framework of human rights and labour relations legislation. Legislation at a provincial level in support of equal pay predated the passing of ILO Convention 100, although federal measures within human rights legislation have largely followed Canada’s support for the Convention; the Convention was formally ratified in 1972 (Armstrong and Cornish, 1997: 69). The gender pay equity data presented in Chapter Two indicated a ratio of 82 per cent for Canada relative to the OECD average of 84 per cent (for full-time employees). If part-time workers are included, the ratio for Canada is 81 per cent, relative to the OECD average of 84 per cent.

The major focus of pay equity reform has been directed at human rights legislation. The commitment to equal remuneration in Canada’s labour law legislation needs to be read against the style of Canadian wage fixing, the focal point of which is workplace or employer-based collective agreements. Equal pay can be taken up as an issue within collective bargaining negotiations but there is not the capacity for industry-wide resolutions of pay inequity, although the nature of public sector employment provides a greater capacity for collective remedial measures.

Notwithstanding this workplace focus, some underlying principles of equal pay have been pursued. In a similar vein to other jurisdictions, these first emerged as a consequence of

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66 Currently and respectively the Human Rights Act 1985 (Can) and the Canadian Labor Code 1985.
67 For example within Ontario the Labour Relations Act 1995 (Ontario) and the Human Rights Code 1990 (Ontario).
68 Utilising the measure of the mean.
labour shortages during a period of war (Armstrong and Cornish, 1997: 68). In the case of Canada the introduction of conscription in 1917 and the following shortages in male labour led to the Canadian Government determining a number of industrial relations principles and policies, including one that stipulated that women performing work ordinarily performed by men should be allowed equal pay for equal work.

Despite this principle the priority of the minimum wage, established in Canada by way of federal legislation, was a key factor in the trajectory of women’s wages in Canada. While the 1917 principles provided nominal support for the objective of equal pay the same principles aligned minimum rates for women to a cost of living budget for a single woman supporting herself. Alternatively the male minimum rate was aligned with a living wage that which was sufficient to support a family which comprised the male breadwinner, his wife and two to three children. After the war this privileging of the male breadwinner was consistent with the restoration of the social order in the wake of the social, political and labour unrest that followed World War I (Fudge, 2002: 89).

The pay equity provisions in human rights frameworks across federal and provincial jurisdictions are diverse and embrace both complaint-based and proactive models. Additionally the scope of the available provisions varies between those that cover both the public and private sectors and those that are inclusive only of the public sector. Canada ratified ILO Convention 100 in 1972 and it was applied legislatively through human rights legislation in 1978 (Fudge, 2002: 100). The federal human rights framework is a complaint-based model, largely predicated on the basis that pay inequity is the exception rather than the rule. These provisions, broadly consistent with other complaint-based models in Canada, hold that it is a discriminatory practice for an employer to establish or maintain differences in wages between women and men employees in the same establishment who are performing work of equal value. Job evaluation utilising a comparator methodology is relied upon as the method of work evaluation. This is limited in its utility given that the assessment of value is
'influenced by evaluators’ experience of a world in which work done primarily by women is under-rewarded, job evaluation tends to be supportive of existing hierarchies’ (McColgan, 1996: 248). The federal provisions do provide for retrospectivity in gender pay adjustments, a capacity borne out in 1999 when the federal government and the Public Service Alliance of Canada settled a fifteen year pay dispute (Sulzner, 2000: 90-91).69 At the federal level Canada has employment equity legislation in place which provides for federally regulated workplaces with more than 100 employees to identify and eliminate barriers to the employment of four designated groups - women, members of visible minorities, Aboriginal peoples and persons with disabilities.70 To this end, employers are required to develop and implement an employment equity plan containing goals for the recruitment and promotion of members of designated groups, including positive policies to address under-representation and to move towards a representative workforce.

At a provincial level, Ontario’s model [Pay Equity Act 1989 (Ontario)] is more proactive as it places a positive obligation on employers, with more than ten employees, to ensure that their remuneration practices are not discriminatory and provides methodological and procedural requirements for achieving a non-discriminatory wage structure. This model, which carries unique features because it is applicable to the private sector as well as the public sector (McDermott, 1999: 141), provides for the negotiation of pay equity plans with trade unions or with employees where trade unions are not represented. A number of agencies assist this process, including the Ontario Pay Equity Office and the Ontario Pay Equity Hearings Tribunal. The Quebec model [Pay Equity Act 1996 (Quebec)] is also proactive: it places an obligation on all employers with more than 50 employees to develop a formal pay equity plan and established the Quebec Pay Equity Commission to oversee the implementation of the legislation. As with the Ontario legislation an underlying presumption is that the objective of

69 This settlement arose from Public Service Alliance of Canada v. Canada Treasury Board (1991) 14 CHRR D/341.
70 Employment Equity Act 1985 (Can).
pay equity remains unmet. The prevailing legislation provides detailed stipulations as to level of consultation and input to the development of the plan. Organisations with more than 100 employees are required to have a pay equity committee, with specified levels of employee and female representation, to develop the plan. The legislation extends to all employees with more than 10 employees but employers with 10-49 employees are not required to submit a formal plan (Chicha, 2006: 12-13).

While the proactive nature of the Ontario model has widely been lauded some analysts have assessed that the model has had limited application to workplaces in feminised areas of employment, including smaller workplaces which are excluded from the legislation. At times during changes in the provincial government the appropriate funding has not been made available to fund pay equity increases in public sector workplaces (McDonald and Thornton, 1998: 201). The 1991 decision providing pay equity adjustments for public sector nurses in Ontario demonstrated very clearly the complexity of the processes required to ensure that job evaluation is carried out equitably and the very great demands that are placed on organisations in ensuring that the process occurs. The underlying methodological basis of the model has also posed interesting questions for pay equity activists. For an occupation to be classified as a ‘female job class’ and initiate the investigative processes implicit in the model it must meet a ‘gender predominance level of 60 per cent; the threshold for a male job class’ is 70 per cent. This stipulation, while useful to examining wage differentials between feminised and masculinised work, does ignore the pay equity issues that confront women working within male or female job categories. Moving beyond the issue of threshold criteria the next issue confronting applicants is its ‘sole reliance’ on a job evaluation methodology as a means of establishing equivalence, and also the requirement that each female job classes require comparison a with male comparator. This unyielding requirement for a sex-based

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71 The legislation extends to all employees with more than 10 employees but employers with 10-49 employees are not required to submit a formal plan.
comparative process in order to demonstrate inequity limits the number of ‘job classes’ that can be assessed (McDemott, 1999: 145).

While the impact of proactive models has been assessed as positive, such measures had a narrower scope than expected – both in the number of workplaces that responded to the legislation and in the average size of wage increases that resulted from the measures. The Ontario and Quebec models have also encountered a number of compliance issues, particularly among smaller and medium sized workplaces (Pay Equity Task Force, 2004: 138-140; Chicha, 2006: 14). The complaints-based model underpinning federal human rights legislation has also been the subject of criticism as an inadequate platform for Canada to meet its international and domestic obligations. Chief among its weaknesses was the lack of appropriate enforcement mechanisms in those instances where the educational and collaborative process was not sufficient to bring about change (Pay Equity Task Force, 2004, p. 418). One of the key limitations in both the complaint-based and proactive approaches is that they approach the problem of inequity by attempting to make the wage in highly feminised occupations equal to the market-determined wages earned by men in occupations of comparable worth. These approaches are thus predicated on the notion that the market should determine wages – yet these wages inevitably reflect the unequal starting positions of women in the workplace (Jacobs, 1995: 116).

Beyond this methodological limitation, the contemporary consideration of gender pay equity in Canada takes place in an environment where shifts in state policy elevates or re-elevates neoclassical theory ‘as a theory of faith’. Within this environment pay and employment equity measures, including measures directed at substantive equity are being wound back on the premise that they are too burdensome (Cossman and Fudge, 2002: 403; Fudge, 2002: 124). This places a burden on feminist agency. Pay equity matters taken to the tribunals have predominantly been taken by unions. While such an outcome is not unique across industrial jurisdictions, trade union interest in gender pay equity is not necessarily a given and requires
feminist activism within unions to ensure that the matter retains purchase in bargaining and with (male) union leadership (McDermott, 1999: 143).

4.10 ERODING THE WELFARE-STATE

As discussed previously, one of the problems facing pay equity reform was an increasing reluctance by the state to constrain the operation of capital in the labour market. This process did not necessarily involve a process of deregulation as conventionally understood, but could involve new regulation or reregulation to ensure that that this objective of minimal state intervention in the labour market was met. In this section of the chapter I assess the application of this critique to the Australian state. In charting the evolution of equal pay measures, I have already detailed the initial fracturing of Australia’s system of centralised wage fixing and compulsory conciliation and arbitration in the period 1987-1995 and the tensions this posed for gender pay equity. This section of the chapter renews its examination of developments in Australian labour law from 1996.

New industrial relations legislation, introduced by a newly elected Coalition government in 1996, built on the decentralisation theme of changes made under the federal Labor government comprising award restructuring and enterprise bargaining initiatives. The equal remuneration provisions were retained save for one amendment concerning the applicants’ pursuit of alternative remedies, but other sections of the legislation were more dramatically altered. Awards were reduced to a subset of allowable award matters and individual contracts, in the form of Australian Workplace Agreements (AWAs), were introduced. Matters removed from awards could only be taken up by parties at an enterprise level in the form of collective or individual agreements. The arbitral powers of the Commission were further altered, as were the criteria by which collective agreements were evaluated (Pittard, 1997: 73). Comprising the Liberal and National Parties.

74 Legislative provisions as amended replicated in full at Appendix Five. These provisions took effect 31 December 1996.
Within this more recent challenge to Australia’s social settlement, the state addressed its regulatory activities and the perceived impediment that this provided to economic competition. The thrust to deregulate the economy was grounded in distinctive aspects of Australia’s political economy, in particular the manifestation of statism in Australia which provided a set of coherent and consistent policies that were clearly distinguished from that in other democratic capitalist nations. Castles attributed the breakdown of the social settlement to a complex interaction of social, political and economic factors (Castles, 1993: 7-9). In this way the contract has become the spontaneous and organic form of law in the workplace and the rationale for the transformation of the political, social and legal institutions, including the law of work and the tribunals that formerly shaped institutional arrangements (Owens, 2002: 209-211).

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which amended the federal *Workplace Relations Act*, made further and comprehensive changes to the system of industrial relations. Evidence of the way in which statutory law can be used to radically revise relations between capital and labour, these amendments generated ‘a realm of private employer power, augmented where necessary with direct intervention by Executive government to ensure the old system does not re-emerge’ (Murray, 2006: 343). Similarly, Johnson observes that the changes continued a theme of legislative change directed to workers developing an entrepreneurial identity and identifying with their employers (Johnson, 2007: 203). By way of the legislative amendments, there is a new federal wage setting body known as the Australian Fair Pay Commission (AFPC). In short the amended *Workplace Relations Act* has fundamentally changed the wage determination process by removing the power from the AIRC to set award wages or to hear national wage cases, and setting minimum wages across industries and occupations.

The federal jurisdiction has been widened as the *Workplace Relations Act* now provides that all constitutional corporations fall within the scope of federal industrial relations legislation.
Minimum rates of pay, formerly established by federal and state industry awards, will be continued through a nationwide set of Australian Pay and Classification Scales, which will be reviewed periodically by the AFPC. In simple terms this comprises the removal of classification and wages clauses from awards and their preservation in an Australian Fair Pay and Conditions Standard. The legislation is silent on any right to engage in collective bargaining (Fenwick and Landau, 2006: 127) and the AIRC no longer certifies workplace agreements. When the amendments first passed through Parliament the only requirement for agreements was that they meet an Australian Fair Pay and Conditions Standard, which comprised a minimum standard in five areas; basic rates and casual loadings; hours of work; annual leave; personal leave; and parental leave (Owens, 2006: 161-164). Further changes were announced in 2007 whereby individual agreements are assessed by the Workplace Authority, the renamed Office of the Employment Advocate, against a Fairness Test. This Test will be applied to workers paid under $75,000 per year, and where an agreement has removed or modified any one of a set of protected award conditions, employees are to receive ‘fair compensation’. The protected award conditions include penalty rates, shift and overtime allowances, annual leave loadings and public holiday pay.

Despite the reduction of powers, functions and responsibilities of the AIRC under this new industrial relations regime, federal legislation continues to direct the AIRC to take into account the need to apply the principle of equal pay for work of equal value in the performance of its functions (section 104)\textsuperscript{75}. The 1993 equal remuneration provisions have been retained although their utility for collective and industry remedies is uncertain, given that the federal system of industrial regulation is increasingly disposed to workplace and individual agreement regulation. The provisions have been amended in two respects\textsuperscript{76}. Firstly the provisions now refer explicitly to a comparator group of employees, defined in the legislation as ‘the employees whom the applicant contends are performing work of equal

\textsuperscript{75} References to the \textit{Workplace Relations Act} in this section of the chapter differ from those in Chapter Seven given the passage of amendments to that legislation since the time of the HPM proceedings.

\textsuperscript{76} Legislative provisions are replicated in full at Appendix Six. These provisions took effect 27 March 2006.
value to the work performed by the employees to whom the application relates’ (section 622).
Secondly the AIRC is precluded from hearing an application if it relates to the basic periodic rates of pay, or basic piece rate of pay if the applicant employees(s) are entitled to a higher rate of pay than the rate of pay the group would be entitled to under the Australian Fair Pay and Conditions Standard, and the comparator group is entitled to a rate of pay equal to, but not higher than, the applicable guaranteed rate of pay under the Standard (section 622).

By way of the Work Choices amendments, federal legislation now directs the AFPC – modelled on Britain’s Low Pay Commission – to apply the principle that men and women should receive equal remuneration for work of equal value, in the performance of its functions (section 222). Consequently, on the basis of this provision and also the retention of the equal remuneration provisions, it could be argued that the new federal system pays significant attention to the issue of gender pay equity. However, section 16(1)(c) of the Workplace Relations Act now excludes the operation of ‘a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value’. In practical terms this substantially renders void equal remuneration principles developed by state industrial relations tribunals.

The ability of the Work Choices regime to advance notions of gender pay equity must also be seen in the context of the wider changes made to the federal award system, the reduced importance of state awards, and the newly constituted primacy of the federal legislation for the purposes of equal remuneration. The removal of the AIRC’s general award making powers, and the further weakening of the award system, disadvantages women more than it

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77 Defined by s.178 as a rate of pay for a period worked (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements.

78 Defined by s.178 as a rate of pay that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).

79 The ambiguities in this section of the legislation are reviewed further in Chapters Eight and Nine.

80 The developments are reviewed in detail in Chapter Eight.
does men. Simply put, the award system protected the wages of proportionally more women than men, given men’s greater engagement in enterprise bargaining (Whitehouse, 2001; Peetz, 2002; Preston, 2003). Allowing for the incursions to the award system that had already been made by way of enterprise bargaining, awards did still have a more prominent role in state jurisdictions, compared to the federal jurisdiction, particularly in those states where the coverage of workers under state awards has historically been high.

Under the new federal system the AIRC is highly constrained from issuing an equal remuneration order if it would be inconsistent with a decision of the AFPC. This limitation fails to address the means through which gender pay inequity can be embedded in systems of wage determination that appear, on the surface, to be fair and equal. For example, women are generally employed in different industries and occupations from men, thus making it difficult to nominate a male ‘comparator group’ to demonstrate an earnings inequity. Further to this underlying constraint the result of the legislative changes is to individualise remedies for pay inequities, as the AIRC is effectively restrained from making orders that remedy pay inequities on a collective basis. Moreover, the Workplace Relations Act after the Work Choices amendments not only lacks the means to ensure that Australia’s international obligations are met, but also removes, or excludes, equal remuneration provisions in state industrial relations systems from operation. Women’s access to the state jurisdictions, which have developed new and more sophisticated ways to tackle undervaluation of the work of state award workers, with adoption of equal remuneration principles, is denied.

4.10.1 MEASURING THE IMPACT OF DECENTRALISATION ON WOMEN’S EARNINGS

The impact of the decentralisation of wage fixing on gender pay equity ratios is not easily analysed, despite an increasing recognition of the role of labour market institutions as ‘determinants of the gender pay ratio’ (Gregory, 1999: 273). The weakening of unions and the prominence of decentralised wage fixing arrangements has resulted in less uniform
earning results among women. Improved earnings accruing to women in higher earning deciles were the main source of improvement in the gender pay ratio. Low paid women have made gains relative to low paid men, but are more likely to be adversely affected by changes in labour market institutions (Gregory 1999: 277). With evidence of growing income dispersion (or income inequality) for both women and men, which is especially striking for men, the average gender pay equity ratio is less useful than it once was as a measure of women’s economic progress or as an equity target (Gregory, 1999: 278). Similarly Rubery, Grimshaw and Figueiredo (2002: 5, 84) in their assessment of gender pay equity across EU member states observe that it is possible for women’s relative pay to improve due to falling pay among men.

A number of studies have identified growing earnings inequality in Australia (Borland, 1999; Norris and McLean, 1999; Watson, 2002). Widening earnings dispersion has resulted from earnings growth among high income earners and the falling position of low wage earners, particularly low earning men. The lower earnings end of the ‘male’ labour market has been impoverished by the movement of men into traditionally feminised sectors of employment (Watson, 2002). While the extent to which men and women experience changes in earning dispersion equally is assessed differently across different studies (Berns, 2002b; Pappas, 2001; Saunders, 2005), women remain disproportionately represented among the ranks of the low-paid.

Women’s access to more decentralised forms of wage fixing in the form of enterprise and individual agreements is more easily measured. In the period of decentralised wage setting that preceded the onset of the Work Choices amendments women remained more reliant than men on awards for the purposes of wage setting, a difference in access that was most apparent for women employed on a part-time, casual basis in the private sector (Whitehouse, 2001; Peetz, 2002; Preston, 2003). Higher wage outcomes were available from enterprise bargaining agreements than those available through awards (Preston, 2003) and in federally
registered collective agreements and individual agreements, men’s average hourly pay was higher than that available to women (Whitehouse and Frino, 2003: 582-584; Preston, Jefferson, and Guthrie, 2006: 20). Using the measure of average hourly ordinary time earnings, the gender wage gap was wider amongst employees covered by AWAs (84.9 per cent) in May 2006 compared to those covered by collective agreements (92 per cent) (Preston, Jefferson, and Guthrie, 2007: 16). Amongst those covered by collective agreements there were clear earnings premiums that accrued to those in full-time, and permanent employment. At May 2006, amongst those covered by collective agreements the part-time permanent/full-time permanent hourly earnings ratio stood at 85.6 per cent, while the ratio between casual and permanent full-time employees covered by registered individual agreements stood at 68.6 per cent (Preston, Jefferson, and Guthrie, 2007: 15). Government policy has entrenched this earnings advantage and women have been less likely to enjoy the comparatively higher earnings available through enterprise bargaining agreements because they occupied jobs more reliant on award movements in wages. Research suggested that the safety net adjustments and living wage decisions of the AIRC assisted award-based hourly rates of pay were not falling as fast as they would have in the absence of intervention. Yet non-wage aspects of employment, most visible in the growth of non-standard forms of employment and the conditions that attach to it, mean that such areas of work remain impoverished (Buchanan, Watson and Meagher, 2004: 132).

Since the commencement of the Work Choices amendments there has been a distinct contest as to the claims of its impact, particularly on lower earning employees (Preston, Jefferson, and Guthrie, 2006; Department of Employment and Workplace Relations, 2007; Preston, Jefferson, and Guthrie, 2007; Hockey, 2007). This contest was shaped by inadequacies in the data sources that inform this debate. Data was frequently unavailable at a level of disaggregation that addressed gender, differences in hours of work (full-time/part-time), employment status (permanent/casual), industry, occupation and form of bargaining instrument (Preston, Jefferson, and Seymour, 2006: viii-xi). These date deficiencies are
problematic in a labour market that is characterised by a number of co-existing, linked labour markets (Preston, Jefferson, and Seymour, 2006: 10), particularly when the available data suggested wide variations in the ‘social and economic circumstances of different women’ (Preston, Jefferson, and Seymour, 2006: 18) and where inequality in bargaining power was not uniform across the labour market (Van Wanrooy, Oxenbridge, Buchanan and Jakubauskas, 2007: ix). Aggregate earnings data is unable also to capture important changes in wages and working conditions such as the under-payment of minimum wages or increased uncertainty in working hours (Baird, Cooper and Oliver, 2007: 55).

What is clear, however, is that following the introduction of Work Choices, there has been an increase in the number of registered individual agreements (primarily AWAs), an unsurprising outcome given that the legislative amendments encourage the use of AWAs over collective agreements. The available data continues to suggest uneven earnings outcomes by industry and occupation. Industry sectors with the lowest ordinary time hourly earnings growth relative to the industry average, in the period 2006-2007 were Retail Trade, and Accommodations, Cafes and Restaurants, two highly feminised sectors. Poorly performing occupational groups included elementary clerical, sales and service workers, followed by labourers and related workers (Preston, Jefferson, and Guthrie, 2007: 13). In 2007 employees in low skilled jobs achieved higher earning outcomes by way of collective agreements compared to individual agreements, although higher skilled employees achieved relatively better outcomes by way of individual bargaining arrangements (Van Wanrooy, Oxenbridge, Buchanan and Jakubauskas, 2007: 45). In the period 2006-2007 full-time employees retained their earnings advantage over their part-time counterparts (Van Wanrooy, Oxenbridge, Buchanan and Jakubauskas, 2007: 58).

The impact of Australia’s most recent regulatory changes on gender wage ratios bears careful analysis. The data shows relative stability in the gender pay equity ratio amongst adults engaged in full-time employment in the period 1996-2007, although this stability is partially
underpinned by deterioration in the wage outcomes of men, particularly in private sector employment, as opposed to improvements in the earnings position of women (Preston, Jefferson, and Seymour, 2006: 34; Preston, Jefferson, and Guthrie, 2007: 11-12).

4.11 CONCLUSION

The review of labour law in this chapter shows that there are readily apparent differences in the way in which the right to equal remuneration is reflected in national law. In Australia the right was embedded initially in law by way of industrial principles that shaped the wage determination of industrial tribunals, and complemented Australia’s then centralised system of wage determination. In other jurisdictions the right was formulated as separate legislation or embedded within human rights law and discrimination rights law that have application to employment and the labour market. The review of national systems of legislation also identified differences in national systems as to whether regulation supported the right to equal remuneration for work of equal value, or the narrower construction of equal pay for equal work. There were other distinguishing characteristics across both forms of measures – labour law and human rights/discrimination rights law. These included whether systems were complainant-based or proactive in nature; who may seek remedies - individual, a group of individual complainants, a single workplace or employer, or industry and occupation; whether remedies can provide retrospective relief; the capacity to examine market rates of pay; and the voluntary or mandatory nature of proactive measures. The relevance of this material is that it demonstrates the capacity for legislative and regulatory developments at the local level to instigate effective improvements in gender pay equity. From 1907-1969 Australia was characterised by a dual labour market, divided by sex, where a worker’s sex was an explicit criterion in the wage setting process (Gregory and Duncan, 1981: 406). Australia’s measures to address the gendered dimensions of this system

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81 This stability includes some convergence in the gender pay equity ratio since 1996 (0.6 percentage points) and some deterioration in the ratio since February 2006, neither of which is statistically significant.
of wage determination were exceptional when compared with measures adopted in other ‘advanced’ liberal democracies, as they were embedded in the industrial relations system. The strength of these initial measures, introduced in 1969 and 1972, was grounded in the mechanism through which pay equity relief was granted. Pay increases were awarded through a centralised system, with increases in award wages being granted on an industry basis. Alternatively, in the other liberal democracies institutional arrangements were confined primarily to a series of human rights and discrimination rights measures less capable of extracting aggregate remedies. More recently, however, the measures of gender pay equity reform in Australia have altered and have confronted changes to the regulatory measures that have historically mediated the labour market, primarily through the operation of centralised wage fixing and industry awards.

Thus the shape of pay equity reform and that of wage fixing systems, in the context of the subordination of social policy to labour market flexibility, arises as a key challenge facing pay equity reform. Pay equity reform geared to extending the breadwinner standard of wage fixing to feminised industries has coincided with the unravelling of the family wage for men, undermined by the deindustrialisation process, global feminisation and feminist agency (Mutari and Figart, 1997: 128). While government restructuring of capital relations in Australia in the 1980s and 1990s coincided with a ‘politics of inclusion’ which provided some space for feminists to argue their agenda (Johnson, 1996: 103), the challenge provided by feminists was also constrained and not ever able to challenge the fundamentals of economic policy (Armstrong, 2004: 38). Aspects of that restructuring of capital relations including flexible employment, with wages and working conditions that were culturally gendered as female, offer a low standard of living and one ill-equipped to the support of a family – the challenge for pay equity reform is how to resist these aspects of economic restructuring without a return to the family wage and the ideology of separate spheres of paid work and reproductive life (Mutari and Figart, 1997: 129-130).
How then does the development and particular configuration of gender pay equity reform in Australia shape the research investigation of its utility? How do we match the particular distinctiveness of Australia’s measures against the recent intrusions of neoliberal policy on the character of the Australian welfare state. Such questions also need to be set against the understanding of gender pay equity and labour law drawn from earlier chapters. These areas for development are explored in the following chapter where I outline the research questions to be explored by this thesis and discuss the research methods and strategy that support this exploration.
CHAPTER FIVE: THEORISING RESEARCH INQUIRY

5.1 INTRODUCTION

This is a thesis concerned with the capacity of local labour market regulation to achieve gender pay equity. The preceding chapters have placed this examination within a wider theoretical and policy context. In what way has this sociological review informed the research questions to be examined by this thesis?

These chapters have revealed three distinct phases in efforts to achieve gender pay equity in Australia. Firstly, gender pay equity regulation in labour law, since the articulation of the 1969 equal pay for equal work and 1972 equal pay for work of equal value principles.

Secondly, women’s right to equal remuneration for work of equal value was given federal legislative foundation in 1993, and its legitimacy explicitly sourced to international law; most specifically the International Labour Organisation’s (ILO) *Equal Remuneration Convention*. Both in its form and its construction this represented a new expression of a rights-based legal discourse in Australian labour law. Subsequently, a number of state industrial jurisdictions initiated new investigations of gender pay inequity, and in turn developed new approaches within state labour law to address gender pay inequity. These approaches introduced a set of distinct institutional arrangements to support the right to equal remuneration.

The gains of feminist agency, in promoting more modern gender relations, have occurred in a contradictory era which has featured both the right to equal pay and the rise of neo-liberal reform. Changes to Australian federal labour law evident since 1996 have affected the development of Australia’s gender pay equity jurisprudence.

This experience suggests four key research questions.
Australia initiated a distinct method for addressing gender pay equity, via the 1972 equal pay for work of equal value principle. To what extent did this open a new door on gender pay equity?

Australia’s shift to a federal, statutory, rights-based discourse occurred in 1993. With what result?

State industrial relations jurisdictions have identified new ways of addressing gender pay equity. With what result?

In Australia pay equity reform made its first landmark advance at the end of the long post-war boom. Thereafter attempts to advance pay equity via arbitral institutions took place against a background of rapid shifts in social, economic and gender relations. How did these developments influence initiatives in pay equity jurisprudence?

What is it that we would ‘know’ from the research that ‘tests’ these questions? Would its findings be ‘true’? What methods would ‘prove’ that labour market regulation could - or could not – improve the position of women in the paid workforce? The response to these matters depends on one’s view about the nature of knowledge, as much as it does on specific research methods.

One approach begins with the ontological assumption that reality is able to be studied, captured and understood in similar manner to the study of physical phenomena (Hall, 1999: 11-12). This logic can be traced to the Enlightenment’s belief in human rationality and thought, as opposed to religion, mythology and culture, as the means of advancing both progress and social order. Such thinking, evident in the work of Descartes and Kant, embraced the ideals of individualism and universalism as integral to political and knowledge claim: it was ‘redetermining the power of reason and relocating it within the individual’ (Ward, 1997: 33). Critically the Enlightenment project included a reaction against
explanations that rested on subjectivity and irrationality, towards explanations grounded in objectivity, science and scientific knowledge.

Subsequently, Durkheim’s rules of sociological method were consistent with this approach. Durkheim’s interest was ‘social facts’ that were ‘external to the individual’ and ‘endowed with coercive power’; that could be observed, measured and treated as if they were constituted in a way similar to natural phenomena (Durkheim, 1938: 1). A process of observation, removed from the interference that may arise from the prejudices and perceptions of the observer, was able to generate objective data that served the basis of wider generalisations.

Durkheim’s method presumed that research findings could be insulated from the political perspectives of the researcher and that claims to an objective truth could transcend particular historical, social, cultural and locations. This presumption has been the subject of extensive critique, initially from interpretivist and critical theory perspectives, and tellingly from postmodernist approaches inspired by the work of Foucault (1971). These critiques present an alternative view of knowledge and argue for the constructed nature of reality. It then follows that knowledge claims cannot be divorced from the interest, partiality, or social relations of the observer, and dominant political relations within society at large.

What are the consequences of this challenge? Herta Nagl-Docekal observes that following postmodernity there has been a sea change in how we view the interaction between sensory experience and reason. We may not so readily refer to the way in which an empirical reality may appear to us but potentially look more to the genesis of things (ontology) or the way in which claims to knowledge are produced (epistemology). On such reasoning even seemingly natural conditions, like sex, can be traced back to a series of discursive practices (Nagl-Docekal, 2004: 28, 87). Given that we more readily admit to the processes of discursive construction, topics of research investigation invoke questions of ontology and epistemology.

This Chapter will review these questions and in doing so address issues of standpoint, and the support that can legitimately be given to research findings. This discussion will be
followed by an outline of the research strategy and methods, and of the sources from which the data is drawn.

5.2 QUESTIONS OF ONTOLOGY AND EPISTEMOLOGY

In Chapters Two and Three I reviewed social analysis of gender pay equity and labour market regulation. The position advanced in those chapters drew significantly on feminist theory, to explore explanations for gender pay inequity, and also the capacity and intention of the state, in a post-industrial economy, to facilitate gender pay equity reform. Feminist theory in these areas arose initially as a critique of the silence of sociological theorising about women, and then of the adequacy and coherence of theorising as it concerned women. Amid diverse and contested interpretations feminism has extended this project, as I do here, to question the masculinist definitions of truth and method embodied in the dominant modernist discourses of science and epistemology (Hekman, 1999: 46). This particular aspect of the feminist project rests on the linkages between the political and emancipatory ideals of feminism, including that of a less repressed society, and theorising alternative concepts of truth and knowledge. Philosophically this project extends to a critique of Western philosophy’s tendency to obliterate differences of gender as it shapes and structures the experience and subjectivity of the self. This critique involves confronting the hierarchical ordering of the sexes and the manner in which the concept of reason is connoted as masculine (Nagl-Docekal, 2004: 5). Clearly feminism remains sceptical of the claims of transcendent reason, as the subject of philosophy bears the ‘mark of the context’ out of which it emerges, including the social, economic and political constitution of gender relations (Benhabib, 1995a: 19).

Feminist approaches to theories of knowledge have been viewed as alien to a theory of knowledge as their critics consider feminism to be a form of politics as opposed to a schema in reason and observation. Feminist claims to comprising a form of knowledge, as opposed to a form of politics, is therefore a site of some controversy, particularly for sceptics of feminist thought (Alcoff and Potter, 1993: 1; Harding, 1991: 105-107, Butler, 2004: 242).
Three main feminist approaches towards the theory of knowledge have emerged, the identification and exposition of which is most clearly associated with the work of the feminist philosopher, Sandra Harding; feminist empiricism, feminist standpoint, and feminist postmodernism (Harding, 1983, Harding, 1986, Harding, 1991). Such a classification is transitional because of the absence of a singular feminist standpoint and due to the debates that question the modernist tendencies in standpoint approaches (Stanley and Wise, 1993: 187-191; Flax, 1990a: 56; Harding, 1991:106).

Feminist empiricism challenges scientific method because of the historic exclusion of women from the sciences themselves. Its objective may be thought of as rectifying ‘bad science’ – it does not necessarily eschew mainstream language and conceptual schemes and as such has a number of conservative attributes. It shares positivist assumptions although it undercuts traditional empiricism in a number of ways, primarily through its claim that the scientific method has been incompletely or poorly deployed and so has been insufficient to eliminate a number of social biases including androcentrism (Harding, 1991: 113-115). Yet feminist empiricism’s challenge to the norms of science and the logic of the research process and research explanation is a limited one; it leaves intact a number of traditional understandings of the principles of adequate scientific research (Harding, 1990: 92),

Standpoint feminist epistemology, as evident in the work of Smith (1987, 1990, 1999, 2005) and Hartsock (1987, 1996, 1998), identifies knowledge which can be used to identify otherwise obscured features of dominant institutions, cultures and practices and strengthens the standards against which they are judged. There is considerable diversity within what is loosely termed standpoint epistemology (Smith, 2005: 10) and there is some risk in referring broadly to standpoint theory as a general strand within feminist analysis (Hartsock, 1998: 227). These concerns observed, standpoint feminist epistemology works from a proposition that the experience and lives of women provide particular significant problems to be
explained and the grounds to criticise dominant knowledge claims. In turn this serves to identify the way in which women’s disadvantage and the production of knowledge have coconstituted each other (Harding, 1993: 50; Harding, 2001: 517-518). Women’s lives and experience are the ‘grounds’ and ‘sites’ for this knowledge, although these do not provide the foundations for knowledge in the conventional philosophical sense. Standpoint theory is thus distinguished from a form of ‘perspectivalism’ (Harding, 2004: 30) which simply starts and ends in women’s experience.

Standpoint feminism does not focus simply on the social location of individual women but also the social structures and institutions that shape the material conditions of their lives (Wylie, 2003: 29). Women’s experiences are simply the starting point for social inquiry and questioning – the answers to which are not necessarily to be found in those experiences or lives, ‘but elsewhere in the beliefs and activities of people at the centre who make policies and engage in social practices that shape marginal lives’ (Harding, 1991: 121; Harding, 1993: 54-6; Harding, 1997: 382; Harding, 2001: 518-519). As an example, the sexual division of labour comprises a starting point of inquiry (Hartsock, 1987: 165; Smith, 1987: 85), one that can lead to discovering the basis of ruling relations (Smith, 1999: 4). Thus standpoint is conscious of the epistemic effects of social location but also the emancipatory potential of standpoints that are ‘struggled for, achieved, by epistemic agents who are critically aware of the conditions under which knowledge is produced and authorised’ (Wylie, 2003: 31). This approach can be consistent with critical theory where women’s social location in a given society, detectable in measures such as the terms and means of income, provides the basis of key questions concerning the practices of power. Some overlap exists therefore between standpoint approaches and post-Marxian critical theory, given that feminist work within the latter is directed to reveal the ideological strategies used to design and justify the sex-gender system (Harding, 2004: 30).
Given this orientation the ontological basis of feminist standpoint bears some consideration. Does it for example reflect a Cartesian assumption of a single and unseamed social as well as physical reality and therefore ignore the grounding in interests, competencies, experiences and understanding of knowledge producers (Stanley and Wise, 1993: 189-191)? Standpoint feminist theorists such as Harding would argue that they, as with other strands of feminist theorising, have moved past problematic assumptions about truth and reality to acknowledge a reality that is constructed – there is no ‘static, eternally fixed state of affairs out there’ awaiting capture or measurement (Harding, 1997: 383).

These considerations lead to questions of epistemic privilege and whether the knowledge claims of feminists are less partial, less distorted than other claims?

Initially the consideration of these issues bore almost direct relation to early formations of critical theory, particularly Hegel’s work on the master-slave relationship and Marxist epistemology grounded in the proletarian standpoint (Lukac, 1985). Hartsock for one acknowledges that some of her earlier work retained problematic assumptions embedded in notions of social contract theory’s ‘rational man’ or critical theory’s proletarian standpoint (Hartsock, 1998: 228-230). Standpoint approaches, articulated in the early work of Harding, held that examining social relations from the perspective of the dispossessed would enable researchers to produce ‘theoretically better accounts than can be generated from the perspective of the dominant ideology which cannot see these conflicts and contradictions as clues to the possibility of better explanations of nature and social life’ (Harding, 1991: 133). Such claims were also defended in terms of having a ‘strong objectivity’ or assisting in the production of knowledge that was less distorted because it challenged the ‘assumptions and practices that appear natural or unremarkable from the perspective of lives of men in dominant groups’ (Harding, 1991: 150).
At the time of this claim Harding did not assert that only women could produce socially legitimate knowledge or that all claims to knowledge were equally plausible (Harding, 1991: 109), and more recently she has rejected the view that the standpoint theorists were primarily directing their efforts justifying the ‘truth’ of their claims (Harding, 1997: 382). Nevertheless standpoint epistemologies speak less of there being ‘one true story’ and more of there being ‘less false beliefs’. The defence of claims produced in feminist accounts is that it is neither essentialist or disembodied but is socially located. Knowledge is therefore socially situated, a way of thinking that informs the term ‘situated knowledges’ in such debates (Haraway, 1988: 11), although the extent to which knowledge is situated by culture and context remains a point of contention within feminist epistemology (Nicholson, 1995: 11).

Wylie (2003: 28) observes that in its present iteration feminist standpoint neither accepts an essentialist definition of the social category of women nor a thesis of automatic epistemic privilege. ‘Truth’ is not claimed; alternatively there are claims to knowledge that are less partial, less distorted, than the completing claims against which they have been tested (Harding, 2001: 522). Not all of feminism is convinced by this shift in positioning. Hekman argues that an emphasis on situated and perspectival knowledge still privileges essentialism and totality (Hekman, 1999: 30), while Walby resists a special or marginal status for knowledge about gender inequality (Walby, 2001: 504).

In defending its position feminist standpoint epistemology, in the tradition of Harding and Smith, directed also its arguments to what it terms the scientifically dysfunctional nature of truth. Conventional accounts carried limitations because they routinely ‘ignore the social context and status of knowers’ (Alcoff and Potter, 1993: 1), whereas the same kinds of social forces that shape objects of knowledge also shape knowers and their scientific projects (Harding, 1993: 64) and there is no concept, form of reasoning or research design that is immune to social influence (Harding, 2003: xiv). Freeing our thinking in this regard requires dispensing with the notion ‘that the process of knowing is universal’ and accepting as a starting point that knowing will substantially involve ‘the standpoint or social and historical
context of particular knowers’ (Alcoff and Potter, 1993: 5). Harding argued that this opens up the space within standpoint approaches to acknowledge that the subjects/agents of knowledge are multiple and diverse rather than typical and unitary (Harding, 1993: 64). Acknowledging divergent perspectives does not preclude but actually strengthens the possibility of discovery (Smith, 1999: 109).

These developments in feminist standpoint approaches towards situated and constructed knowledge reflect the influence of postmodernism and poststructuralism and in turn their impact on feminism. This tradition, exemplified by the work of Foucault, Derrida and Lacan, questions the coherence of a single, logical theory of knowledge. Derrida’s work, particularly influential to French feminists including Helene Cixous (1976), drew heavily on linguistics, including the work of de Saussure (1990). De Saussure held that within language there is a network of signifiers (words) that have no absolute properties but are defined only in terms of sound patterns uttered in speech. The meaning that is attached to the signifier is not ultimately defined until it has been delimited by that which is around it – through other signifiers (de Saussere, 1990: 67-68, 100-102). To this base Derrida added the concept of différance – which addressed the gap between the objects of perception and the meanings these have as symbols or representations. This enabled Derrida to examine both the unspoken and the unwritten and to propose that there always aspects of the text that may be reduced or suppressed (Derrida, 1997, 32-36, 61-64). Words then are understood only in terms of their relation to other words. Someone may be described as a woman but this may only be to distinguish her from a man. Such reference points may be hierarchically ordered as ‘man’ may be the standard against which ‘woman’ may be assessed. De Saussere’s work also influenced Lacan’s reorientation of psychoanalysis to his task of deciphering the ways in which the human subject is constructed within the terms of language (Lacan, 1968: 187-188, 209-228). This construction shapes the indeterminacy and shifting basis of meaning, and the arbitral relations between the signifier and the signified. Hence ‘reality’ is understood differently by different people, and there are only ever ‘particular, individual and ever-
changing subjectivities’ (Bryson, 2003: 234). Lacan’s interest to feminists lay in the application of his project to the construction of sexuality. Within the terms of language the subject forms an image of sexuality by identifying with others’ perception of it (Mitchell, 1982: 5).

Foucault’s work is relevant here because it highlighted the political impact of the way in which we think and talk of something – Foucault’s concept of discourse. Power is implicit in knowledge, culture and meaning, and mainstream approaches to inquiry involve discourses for categorising and framing the world, in determining the objects of discourse, and the truths that emerge from such discourses (Ferguson, 2000: 195). Such thinking shaped Foucault’s theorisation of the regimes of truth and then a theory of the relationship between truth and power. Discourse creates subjects as well as objects, and this provides for a profound ambiguity around the concept of ‘man’ and of subjectivity.

Western culture has constituted, under the name of man, a being who, by one and the same interplay of reasons, must be a positive domain of knowledge and cannot be an object of science (Foucault, 1971: 366).

The insights of Lacan, Derrida and Foucault opened up a number of possibilities and alliances for feminism that have been integral to disclosing that modernity’s ideal subject was primarily white, male, and heterosexual. The decentring of the subject and the celebration of the ‘Other’ assisted feminist political agency and addressed the previous silence concerning women’s experience. This was, however, only an initial point of challenge given that postmodernism extended this critique to dismantle further the concept of the subject and its identity.

Extending these themes postmodern feminism, particularly evident in the work of Butler (1990, 1995a, 2004), Hekman (1997a, 1999) and the later work of Flax (1990a, 1990b) questions claims to universal knowledge and the unity of categories, such as ‘women’ and ‘feminist’ that underpin feminist standpoint approaches. Knowledge that is framed and
produced by dichotomous and binary categories is eschewed. Deconstructionist approaches
criticised the template of gender for its 'fixed, binary structure of reality' and instead
emphasised a 'narrative ideal of ceaseless textual play' (Bordo, 2003: 217). Claims to
knowledge on behalf of women are limited by the fractured and divergent experiences of
women. The limitations of mainstream approaches can be initiated by given essentialisms in
the type of questions that form the starting points of social inquiry – these might concern, for
example, the means of women’s subjugation. Therefore the unity that is presumed for
women and constitutes the category of ‘women’ in feminist standpoint approaches does not
acknowledge differences in culture or history, or the multiple fragmentations and differences
between women and between women and men (Stanley and Wise, 1993: 204-219). On this
account feminism’s struggle is against any appropriation of the ‘Other’ that would deny her
difference and singularity (Cornell, 1995a: 78, 83). Against feminist standpoint’s embrace of
situated knowledges, Flax asserts that it is insufficient to view the subject as situated; rather
the subject is constituted, constructed and regulated through power/discourse formations.
Flax therefore questions any claim to have discovered ‘knowledge’, given that meaning is
inherently unstable, indeterminate and politicised (Flax, 1990b: 32). Hekman similarly argues
that claims to a situated knowledge fail to appreciate that the supposed lifeworld of women’s
experiences is discursively constituted (Hekman, 1997a: 348).

In this context paradigms subordinate and erase what they seek to explain (Butler, 1990;
Butler, 1995a: 37, 47). Thus the subject is constituted by gender, a discursive/cultural
process whereby a ‘sexed nature’ or a ‘natural sex’ is produced and established as
‘prediscursive’, a politically neutral surface on which culture acts (Butler, 1990: 7). Agency is
only possible if the category of women is freed from a fixed referent with its underlying
ontologies – a process of resignification in poststructuralist terms (Butler, 1995a: 50). This
then forms the basis of a broader theoretical disagreement as to how the normative
conceptions of gender can be undone, norms that have far-reaching consequences for how
we understand the ‘model of human entitled to rights or included in the participatory sphere of political deliberation’ (Butler, 2004: 2).

Given these considerations, to what extent is knowledge possible? How can knowledge be validated and then used, and correspondingly how is feminist agency possible? Does any claim to a form of situated knowledge limit the potential of feminist research given that feminism to some extent stands on some enlightenment ground however constituted (Harding, 1990: 99; Harding, 1991: 186)? Standpoint epistemology potentially suffers from a perception that it lacks normative claims and in turn does not challenge opposition claims (Longino, 1990: 12, 188-190; Bordo, 2003: 217-219). If feminism is considered to have emancipatory ideals that rest on claims to knowledge about a sex-gender system how do we reconcile the contingency or scepticism about claims to knowledge identified within more recent feminist theorising. This uncertainty arises from the limitations of situated knowledge as claimed to differing extents by strands within feminist epistemology, or the rejection of subjectivity and epistemology all together, as suggested by strands within feminist writing influenced by postmodern theorising.

### 5.2.1 BETWEEN FOUNDATIONALISM AND CONTEXTUALISM

More recently some renewed effort has been made to classify this debate in less dichotomous terms – the issue need not be cast as ‘perfectly absolute versus relative epistemic standards, or truths versus not rational basis for epistemic decisions’ (Harding, 2001: 523), or as a false antithesis between forms of critical theory and poststructuralism (Fraser, 1997: 209).

Some viable ground in this ‘impasse between forms of foundationalism and contextualism’ (Benhabib, 1986: 15) may be provided by critical theory, as theorised by Habermas. His *Theory of Communicative Action* captures the significance of argumentation and the power of reasoning in the development and improvement of knowledge under specific and historic
conditions (Walby, 2001: 497). Claims to validity are subject to critical examination and appeals to reason accepted as legitimate by way of community consensus. Thus norms can be validated by processes of argumentation and rational practical discourse. This process of argumentation is situated within actual historical contexts and remains an open process. Changes in historical conditions may well change what is accepted as sufficient justification or argument in support of a particular claim (Habermas, 1981: 305-306).

This concept of reason and argumentation was fundamental to how Habermas theorised modernity in late capitalist society. Habermas conceptualised modernity, an unfinished project, around a relationship of democracy and discourse. This represented Habermas’ ongoing insights into what he viewed as a central tension in modernity – between the instrumental rationality of capitalism and the communicative rationality of society. In Theory of Communicative Action Habermas developed further this analysis by conceiving society as comprising two worlds – the social, termed ‘lifeworld’ and the functional, identified as ‘system’ (Habermas, 1987: 355-357). The dysfunction of modernity concerned the spheres of the lifeworld being increasingly colonised and fragmented by the dictates of the system. Democracy can be restored and the ‘system’ challenged if claims to normative validity are consciously reflected upon (Habermas, 1981: 22-23). In this way the concept of communicative action can be used epistemically to underpin emancipatory projects.

Habermas’ approach potentially provides a way forward. Applied to debates within feminism, concerning the viability of knowledge and agency, communicative action provides a means of reconstructing values and norms that marginalise women’s citizenship. This position, one advanced by Seyla Benhabib, does not equate to some form of foundational given, or a subject that can be theorised as universal and absent of any contingencies of difference. Nevertheless some insistence on the criteria of validity can be made by way of non-foundationalist arguments, allowing that the subject is ‘historically and socially situated’ and
that postmodernism has made us aware of the cultural and ontological presuppositions that form the basis of our standpoint (Benhabib, 1986: 14-15; Benhabib, 1995a: 33).

The use of critical theory may initially pose some reservations, given that Habermas’ capturing of capitalism did not measure the extent to which the citizen’s role is gendered and that the citizen participating in debate and the forming of opinion is male (Fraser, 1995b: 52; Behabib, 1986: 192, 340-341; Nye, 2004: 129-131). Expressive relations were also relegated although Habermas did highlight the importance of the emancipatory ideals of feminism for modernity (Habermas, 1987: 393). Fraser is critical of feminist use of critical theory given her assertion that it relies on a metanarrative to ground that engagement (Fraser and Nicholson, 1990: 34; Fraser, 1995a: 72; Fraser, 1995b: 24, Fraser, 1997). Nevertheless this same critique acknowledges that Habermas’ concept of the public sphere enables distinctions to be made between state apparatuses, economic markets, and democratic associations. This provides a basis of understanding the limits of late-capitalist democracy although postmodern feminist theorists criticise the specific form in which Habermas elaborated his idea of the public sphere (Fraser, 1997: 71, 85).

Balancing these considerations, critical theory meets the need for an increasingly differentiated argumentation, not an abandonment of feminism (Nagl-Docekal, 2004: xvi). It is an approach that accommodates the process of constantly interpreting and reconstructing the principles and values that are part of the Habermas’ lifeworld (Benhabib, 1986: 244; Benhabib, 1995a: 27). It therefore offers the prospect that social norms remain discursively negotiable, recognising plurality and difference. In the context of this thesis these norms coalesce around the participation of women in paid work, the valuation of market work undertaken by women, and women’s right to equal remuneration for work of equal value.
5.3 ACKNOWLEDGING STANDPOINT

The tensions within feminist epistemology point to new and necessary obligations for the researcher. This has usefully forced an examination of how the subject is to be theorised. If claims to knowledge are to be made, some perspective needs to be acknowledged.

My approach draws from both feminist standpoint epistemology and critical theory, a recognition that in its articulation of what constitutes socially useful knowledge, feminist epistemology both borrows from and is in tension with other epistemologies (Harding, 1991).

Feminist standpoint enables the research project to commence from a starting point of gender pay inequity and examine the key conditions that shape this relation. Feminist standpoint encompasses not only the material condition of women’s lower pay – the standpoint of the research subject - but also the epistemic effects of my own critical awareness of gender pay inequity – the ontology of the social self that constitutes the researcher.

This standpoint declares an interest in the emancipation of women but there is also a requirement to locate an epistemology that enables this project. Postmodernism challenges the male construction of reality, but also undermines the subject of the 'woman'. Critical theory addresses this challenge by providing a way to critique the apparently 'objectively true' male world, but also retain a subject on which to build political action. This is because it reconciles the contingent existence of truth (its ontology) with a mechanism (argumentation) to challenge social norms concerning women’s social location.

This is a broad position of standpoint that can be contextualised within the parameters of this thesis by reference to the ontological condition of the statistical data that informs a series of questions for this thesis. In this section of the chapter I develop this position further by
reference to the knowledge claims that can be drawn viably about the labour market regulation that is examined within this thesis. At a further point within this chapter these questions are also assessed by reference to the means relied upon to advance the inquiry utilised by this thesis.

5.3.1 STATISTICAL DATA

In Chapter Two international unadjusted hourly earnings data was presented, purportedly measuring female earnings as a percentage of male earnings in a number of Organisation of Economic Cooperation and Development (OECD) member states. This data informed a starting position in this thesis - that gender pay inequity can be approximated and debated through and by statistical measures. The OECD data also informed the discussion in Chapter Four of local labour market regulation. In this chapter I also presented statistical data compiled from the Commonwealth Bureau of Census and Statistics (CBCS) and the Australian Bureau of Statistics (ABS)¹ for the period 1967 to 2007 (Table 4.1).

What knowledge does it claims to represent? Feminist standpoint epistemology would view this data, as I do, as a starting point for inquiry and questioning. Yet this earnings data, this aspect of women’s lives, is a socially constructed discursive formation (Harding, 1997: 388) and also one capable of generating a range of meanings. Theorists in a feminist standpoint-critical theory tradition may theorise statistics in ways that are different to masculinist policy makers.

The use of such statistics is not, however, unproblematic. Phenomenological and postmodern analysis has questioned the alleged neutrality and factual nature of statistics, as well as their characterisation as an ‘unobtrusive method’ (Bryman, 2001: 210). In this way postmodernism

¹ In 1974 the Commonwealth Bureau of Census and Statistics was abolished and the Australian Bureau of Statistics established in its place.
has provided a framework to theorise statistics. Such accounts chart the way in which ‘official’
statistics are shaped by categories of analysis, and judgements concerning the relevance or
irrelevance of particular data, the identification of particular samples and topics of statistical
investigation. Through such practices particular phenomena can either be celebrated through
statistical agencies or rendered invisible (Atkinson, 1978; Stanley, 1990). Statistics can also
be a means where the state through its administrative apparatus seeks to control
populations, forming part of the discourse that constructs practices of exclusion and inclusion,
and systems of power and control (Foucault, 1967).

How then is the OECD data understood and interrogated? While there are numerous
published national accounts of female/male earnings ratios, international and comparative
data is less frequently published. The OECD, the World Bank and the International Labour
Organisation have previously sponsored comparative nation state research examining
female/male earnings ratios although the publication of this research is irregular. This reflects
the challenges that confront cross-national data collection in addition to the resources that
are directed to explication of this project. The OECD 2002 data was used in this project as it
comprises one of the most recent studies of its kind and includes Australia as one of the
nation states under review.

The OECD data is collated and published by the OECD, in and around analytical categories
determined by the OECD. The data is unadjusted and takes no account of age, experience,
formal credentials, industry or occupation. The data is not published annually and the data is
confined to nineteen OECD member states and therefore excludes earnings data for non-
OECD nation states. It is therefore ‘representative’ of a small subset of the world’s population.
The raw hourly earnings data is supplied by national statistical agencies for each member
state represented, with each national agency relying on its own particular method for
collection and collating this data. The notes that append the publication of the data observe
that despite the OECD’s attempts to harmonise the date, there are a number of
inconsistencies in the earnings data that is supplied by national agencies (OECD, 2002: 114-116). These include differences in the definition and characterisation of full time and part time categories of employment, of wage and salary earners, and hours of employment. Some of the member states have supplied data for wage and salary employees aged 20 to 64 years, others 18 to 64 or 15 to 64 years. This data published in 2002 relies primarily on 1998 data, although some national agencies supplied data for different time periods. As acknowledged in Chapter Two, the OECD has published more recent gender pay equity data (OECD, 2007). However, this more recent data is not disaggregated at the level of hourly earnings nor has the OECD harmonised the data to address differences in data collection.

Issues of definition shape nominal meaning of the OECD data. Thus the applicable definition of wage and salary earners will shape the inclusion or otherwise of managerial earnings, and also earnings of casual employees. Beyond these issues of internal consistency the data is directed only to a measure of earnings, as differentially defined, for men and women engaged in paid employment. It therefore takes no account of those forces that influence men and women’s participation in the paid labour market.

Against these limitations what presence does the OECD data have? As Hall notes, a constructionist understanding of measurement and statistical data does not necessarily imply that such data represents a hopeless enterprise. Rather there needs to be a conscious acknowledgement of the socially constructed and historically embedded nature of this form of inquiry (Hall, 1999: 253). This acknowledgement has already been registered, and I have observed the limited scope of the data as well as its internal inconsistencies. I accept the data, with these limitations, as a starting point for inquiry, as it provides an international and comparative perspective of female/male earnings ratios, but one confined to paid employment in industrialised nation states. Consistent with the concept of argumentation as advanced by Habermas, the statistical data provides a means to examine the approximations of gender pay equity across these nation states. The statistical data then acts as a reference
point to an analysis of the impact and utility of particular and institutional measures on different levels of gender pay equity.

The CBCS and ABS statistical data used in Chapter Four (Table 4.1) also carries a number of limitations. This data is not drawn from a single survey or series. As the source notes to this table demonstrate, a number of series have contributed to the data compiled in this table. The gender pay equity ratios based on hourly earnings for full-time, adult employees (columns 4 and 5, Table 4.1) is drawn primarily from the ABS’ *Employee Earnings and Hours* series and predecessor series. It is this series that the OECD uses to compile the Australian table for the international comparative tables presented in Chapter Two. This particular ABS series is based on a survey of employers conducted presently on a biennial basis. The sample is taken from the ABS’ Business Register and is stratified by state/territory, sector (private/public), industry, and employment size. The ABS indicates that caution should accompany the use of this data as time series data due to changes in the methodology from one survey period to the next, and also between this series and predecessor series such as the *Survey of Weekly Earnings and Hours* (Commonwealth Bureau of Census and Statistics, Cat. 6.1) which supplied the data for the period 1967-1972 (Australian Bureau of Statistics, 2007b: 44). While noting this caution this series and its predecessors enabled the calculation of gender pay equity ratios, based on hourly earnings, for private sector non-managerial employees from 1967-2006. Ratios were also calculated that took account of public sector employees but only for the period 1974-2006 as data on public sector employees was not collected by the *Survey of Weekly Earnings and Hours*.

The ABS cautions also against a comparison between the data from the *Employee Earnings and Hours* series and that from the *Average Weekly Earnings, Australia* series. Data from this latter series, based on a smaller, quarterly survey of employers, was used to compile the gender pay equity ratios based on full-time adult ordinary time weekly earnings and full-time adult total weekly earnings (columns 1 and 2, Table 4.1). This data is only available from
1981. The *Average Weekly Earnings* series has been available in the public domain since 1977 but in the period 1977-1980 only published rates of pay for male employees. The two series use different sample design and survey methodologies. For example, the measures in the *Average Weekly Earnings* series are derived by dividing total gross earnings and the total number of employees. In contrast the survey for the *Employee Earnings and Hours* series collects information about weekly earnings of a sample of employees within the employer units selected. The *Average Weekly Earnings* data is inclusive of managerial employees and provides some perspective on gender pay equity ratios in those years where hourly earnings data was not available.

As with the OECD data the ABS data is organised about categories determined by the ABS. Pivotal definitions include those of full-time employment, ordinary-time earnings, total earnings, managerial and non-managerial employees, public and private sector. The data excludes consideration of pay relativities as they concern part-time employees. While the hourly earnings data does account for differences in hours worked, as noted in Chapter Four it does not account for the different access to overtime by men and women. Otherwise the data is unadjusted and therefore takes no account of differences in age, qualifications and workforce experience. I acknowledge the limitations of the ABS data but accept it as an approximation of the trajectory of gender pay equity ratios in Australia and as a starting point to an examination of the institutional measures that were extant during this period.

### 5.3.2 LABOUR MARKET REGULATION

The knowledge claims about labour market regulation primarily consist of statute law, as passed by democratically elected parliaments, and decisions and principles made by courts
and tribunals who draw their legitimacy from the state. This thesis requires clarity about ‘the law’ and how we gain knowledge about ‘the law’?

Legal philosophy has historically divided along the lines of natural law and legal positivism. Historically natural law comprised both early Greek and Roman contemplations of an ideal moral and political order, where we might think of the concept of natural law as one that was in accordance with reason. This gave way to the conceptual alignment of natural law with the interpretation of a Christian God’s view, or divine or eternal law, most evident in the work of Thomas Aquinas (1988). Natural law, in different ways, also informed the natural rights philosophies of Hobbes, Rousseau and Locke, as well as Kant’s doctrines of ‘right’ and virtue. Hobbes and Rousseau both constructed a balance between the laws of nature and particular natural rights, a balance which took its form in the social contract (Hobbes, 1968; Rousseau, 1973). Hobbes’ focus was the preservation of life while Locke more famously focused on the protection of property (Locke, 1948). Then, more broadly Kant grounded the legitimacy of rights and of equality and liberty in a universal principle of law drawn from the autonomy of practical moral reason. Unlike classical natural law theorists who located the basis for a principled ordering of society in the natural world or in theology, Kant located it in the moral self, with the concept of the social contract founded on this entity (Kant, 1991).

In contemporary times there has been a return in natural law theorising to a form of classical natural law, including its secular forms. Such a position takes law and morality to be intrinsically related and this relationship establishes inherent minimum requirements for what comprises a legal system (Fuller, 1964, 1981). Human experience identifies self-evident objectives of a sustaining human existence, for example, life and friendship. Natural law comprises the principles of what is required for these objectives to be sustained (Finnis, 1980), including principles of social order which are resolved by our communication with one another. As part of this process law is evaluated against a higher form of authority – such as respect for individual rights, freedoms, and the common good (Barnett, 1998: 92).
In contrast legal positivism is directed to identifying and defining the concept of valid human law, where law is distinguished from a moral or an ethical discourse. Kelsen sought to establish a science of law founded on observable, objective phenomenon as opposed to a politics of law, identifying through his emphasis on law’s normative validity a logical structure underlying an objective reality (Kelsen, 1967). More recently the focus of legal positivism has been less directed to a pure theory of law as it has been to an examination of law as it is rather than what it is meant to be; more simply what the law is cannot depend on what the law ought to be. It concentrates therefore on the obligations embedded in law, in Hart’s terms by way of a system of primary and secondary rules. Primary rules are those of obligation while secondary rules 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined' (Hart, 1961: 92). The legal system is thus a matter of fact rather than evaluation. Law is a form of rules, which, following Durkheim, takes the status of social facts, rules that are given authority by way of their source (Hart. 1961: 6-7, 13-15, 89-96). Law is capable of observation and measurement. What is law and what is not is a statement of social fact - it exists because it is practised and is capable of being described in value neutral terms (Raz, 1979). Legal norms arise from an empirical event – validated by their passage through legislatures or through the courts – not due to any moral desirability merit or demerit. Early positivists identified such authority as comprising a declarative sign of a sovereign (Austin, 1954). More recently constitutional legitimacy is found in laws passed by a democratically elected parliament, or in officials such as judges empowered to undertake this task.

Legal positivism’s view that legal and moral rights are logically distinct was challenged through the work of Dworkin which gave far greater weight to the interpretive nature of law and the argumentative character of legal reasoning. Although Dworkin clearly acknowledged the existence of legal rules, law also contained principles which were relied on in judicial
interpretations of the law. Judges, or other interpreters of the law, used principles that arose from the history and traditions of particular communities in the development of law. They sought the 'right' or 'best' answer – a form of principled legal reasoning and legal rationality that Dworkin described as integrity in decision making (Dworkin, 1986: 190-204).

The particularly distinctive feature of Dworkin’s work was its focus on a hermeneutical jurisprudence that went beyond positivism’s reservoir of rules to include values and principles and consequently a diversity of meanings. Dworkin’s work here reflected Gadamer’s influence. Gadamer’s *Truth and Method*, a foundation of modern hermeneutic theory, identified legal hermeneutics as a form of ongoing and evolving inquiry. Conditioned by contemporary situations the reader and interpreter of legal texts nevertheless seeks to identify the historical and social context of the text and of the text’s author (Dworkin, 1986: 420-422; Gadamer, 1984: 289-304). Dworkin grounded his account of law and adjudication by 'locating its normative foundation in the language, history and culture of specific communities’ (Berns, 1993: 9). Through this reliance on hermeneutics Dworkin essentially declared the 'search for absolute and objectively knowable grounds of morality and legitimacy’ to be untenable (Berns, 1993: 9).

Habermas famously termed the analysis and inquiry of modern law as a tension between facticity and validity – between social reality and reason. The distinction in Habermas’ argument was that this tension operates both internally and externally. Externally this tension operates in the way in which social relations and inequalities intrude upon and undercut the conditions for legitimate law making (Habermas, 1996: 10-11, 45-47). Habermas argued that such sociological perspectives are necessary if we are to understand the linkages between legitimate law and democratic discourse and the opportunity that law offers democracy to enact social change (Habermas, 1996: 447-449). Within feminist theorising, a perspective that simply provides an internal point of view imposes ‘premature closure’ on debates about the law, about the ‘community’ that the law speaks to or for, and of claims of objectivity and
of validity. Facts can be no more ‘self-announcing’ than rules, values, principles, and the community that is held to validate the law may be one fashioned around the demographics of those who ‘make’ and interpret the law (Berns, 1993: 4-6, 174-175).

Following this line of argument and the feminist standpoint-critical theory framework advanced earlier in this chapter I believe the specific instruments of labour market regulation studied in this thesis to be a socially constructed reality. Legislation and the principles and decisions of industrial tribunals and courts are historically contingent expressions of particular social and political formations – be they statutes passed by democratically elected federal or state parliament, the decisions and principles of institutions and officials formally charged with applying and interpreting the law, or the submissions and presentations of individuals and organisations that appear ‘before the law’. Gender pay equity law is therefore not understood as reality, in the way of positivism, but as an expression of how particular legal questions concerning gender pay equity are approached, interpreted and determined, in specific contexts. In the context of this thesis, gender pay equity law is a key location for examining how the state and industrial parties address gender pay equity and prosecute and defend claims for equal remuneration.

5.4 RESEARCH STRATEGY

What is at yet undisclosed is the relationship between the theoretical propositions and research questions outlined at the beginning of this chapter and the process of social inquiry disclosed by this chapter. Hall describes the resolution of this issue as a question of the ‘generalising practices of inquiry’ (Hall, 1999: 180), Blaikie, the task of determining a research strategy appropriate to the task (Blaikie, 1993: 131).
Blaikie provides some guidelines for this task. In outlining inductive, deductive, reductive and abductive strategies, Blaikie nominates the abductive research strategy as one associated with the hermeneutic tradition, and one closely identified with critical theory and feminism. Its initial appeal here over inductive and deductive approaches lies in its constructivist orientation – the expert knowledge required by social inquiry arises from everyday accounts. Conversely, inductive and deductive approaches, as described by Blaikie, assume that reality can be measured in a manner that either leads to theory (induction) or affirms or negates theoretical propositions (deduction). Alternatively the core task of abduction is the process of 'moving from lay descriptions of social life, to technical descriptions of that social life'. This process is charted by Blaikie (1993: 177) in the following way:

Every day concepts and meanings
provide the basis for
Social action/interaction
about which
Social actors can give accounts
from which
Social scientific descriptions can be made
from which OR and understood in terms of
Social theories can be generated Social theories or perspectives

At first sight this approach does not provide a perfect alignment with the research strategy evident in this thesis. The concept of every day concepts and meanings as outlined by Blaikie is applicable through the starting point of women’s earnings. This thesis also engages in the debate at the expert level, by way of interviews with practitioners and an examination of the documentary and institutional practices of the law in specific labour law proceedings. The proceedings of the industrial cases under review, in addition to the practitioner interviews, provide the basis of social actions [giving] accounts. As the review of Gadamer revealed, the interpretation of these accounts is not valueless. Giddens develops this analytic further by
way of the *double hermeneutic*, a concept that applies to the process through which *social scientific descriptions* and *social theories* arise from the accounts of social actors and institutions. On Giddens’ account there is a double process of translation or interpretation involved, because social actors and institutions are already constituted and because the language of social science can be replicated and absorbed by actors and institutions (Giddens, 1979: 258; Giddens 1984: 284). Some consideration of this process is required in this thesis – influenced by its practitioner focus, a number of the social actors involved in this research project were conscious of the ‘theories’ of gender pay equity.

Within the abductive research strategy this thesis employed the practices of dialogic social research to understand and interpret the phenomenon of gender pay equity provisions in Australian labour law. Dialogic research design is where respondents (agents) are actively involved in the construction and validation of meaning (Lather, 1991: 63). Their accounts are a starting point for further analysis and investigation and operate to correct ‘the investigator’s preconceptions about the subject’s life world and experiences’ (Comstock, 1982: 381). Dialogue is the process for understanding socially constructed reality where dialogue is also the means whereby the research immerses herself/himself into a shared framework of cultural meanings (Blaikie, 1993: 97) as part of a process of interpreting or making sense of social activity (Giddens, 1976: 96).

In the thesis these practices were the most evident through the practitioner interviews and the engagement with the text produced by the industrial proceedings analysed in the case studies. Within dialogic social research design, interviews are an exchange with an emphasis on the dialectic between the researcher and researched (Cook and Fonow, 1990: 68) and where the knowledge produced is the result of dialogue not simply spectator knowledge (Mies, 1993: 76). The practitioner interviews took the form of an ongoing dialogue where the practitioners (agents) and I engaged in a dialogue directed to the production of meaning and explanation concerning gender pay equity provisions in Australian labour law. This dialogue
provided the means whereby my preconceived understandings concerning the engagement of practitioners and the parties they represented in gender pay equity reform could be corrected but then form the basis of interpretation of these epochs in gender pay equity reform. This process of dialogue and interpretation was continued through with my engagement with the texts proceeded through the industrial proceedings. Within this chapter I identify hermeneutics as a constant dialogue between the interpreter and that to be interpreted. In this thesis this was demonstrated by my dialogue and engagement with documents and research subjects as a basis of understanding and interpreting the basis of social actors’ actions. Of itself this does not lead to any privileged interpretation but provides the basis for argumentation and developed reasoning.

Returning to the application of an adductive research strategy and beyond the concerns of alignment already observed, it is the final stage in Blaikie’s articulation of abduction that poses the most distinct challenge. Blaikie observes that social theories or perspectives arise or can be understood from the process of social scientific descriptions. There is less offered by Blaikie by way of how particular understandings or theories prevail over other competing claims. Outside of this process of debate or critical engagement what weight can be attributed to social inquiry constructed in this way?

Hall’s way of capturing forms of inquiry provides an initial way forward to these questions. Hall is less categorical than Blaikie about the delineation of research strategies, and does not identify inductive and deductive reasoning only within positivist or postpositivist frames. Hall argues that all forms of inquiry to some degree require forms of analytic induction or a deductive use of particular propositions. Hall’s acknowledgement is not a defence of what he terms a ‘strong deductive approach’ - following Miller (1987) an undue emphasis on deduction reduces the potential of explanation given that deductive theories ‘are likely to be most robust when causal factors are easy to identify, observe and measure’ (Hall, 1999: 149). What Hall points to, however, is the potential for connections between different forms
of inquiry. In the context of a debate about the relevance of theory and the absence of ‘pure reason’, Hall notes that ‘even the strongest critics draw on theory at least in some implicit way’ (Hall, 1999: 199). As an example Hall notes that historical inquiry is an approach ‘grounded in explanation and interpretation, articulated in relation to the discourses of values, narrative, and social theory’ (Hall, 1999: 220).

What we can draw from Hall is the potential for a deductive use of propositions outside a positivist frame – it is possible to use deductive reasoning without subscribing to belief in an objective truth or reality. In these terms it is possible to view the propositions that emerged from the sociological review as mediating my own frame of reference as I interpret the documentary and interview data generated through this thesis. This process is consistent with the feminist standpoint and critical theory approaches favoured in this thesis. Hall’s interpretation of a form of deduction that does not ascribe to a belief in an objective reality is consistent with contemporary feminist standpoint’s constructivist and situated understandings of social reality. Hall’s nomination of social inquiry as an ongoing process of explanation and interpretation that is shaped and mediated by social theory and discursive values and norms, is also accommodated by critical theory’s reliance on argumentation. The explanations claimed by way of this thesis follow a process of critical examination and discourse, involving reference to, and mediation by engagement with social theory.

5.4.1 CASE STUDIES

Having outlined the research strategy for this thesis how are the research questions about gender pay equity to be advanced? A case study approach provides an initial organising framework and one consistent with the feminist standpoint-critical theory framework asserted earlier in this chapter.
The case studies enable the research to start from a particular aspect of women’s experience – that being gender pay inequity and the development of gender pay equity provisions in Australian labour law. Each of the selected case studies represents a particular epoch of contested gender pay equity reform thus invoking a further dimensions of feminist standpoint – the critical awareness of aspects of women’s oppression. Within the case studies a dialectical method is relied upon to arrive at an adequate description and analysis of the development of these labour law provisions and the relations that underlie those provisions. Through the case studies an understanding is sought of a particular phenomenon – the capacity of gender pay equity provisions in Australian labour law to remedy gender pay inequity – with a view to drawing theoretical conclusions. Critical theory assists this objective – conclusions can be drawn from the case studies on the basis of deliberative reasoning, argumentation and critical scrutiny – enabling a temporary approximation of the ‘truth’ and the basis of an emancipatory project.

Typically case studies are not representative as the approach meets few of the sampling strictures identified for both quantitative and qualitative research. Its approach features one of intensive examination, to meet the objective of detailed understanding (Becker, 1970; Bryman, 2001). Case studies are not, however, homogenous and there are circumstances where the identified case studies approximate the total population in a given area.

Yin (1994: 40-43) suggested that the rationale for single case studies or a limited number of case studies might lie in the particular characteristic of the case study under review: critical – where a particular example of social life is identified as key to testing particular propositions; unique – where a singular and unique example is the means to examine propositions; representative or typical – where the case study is ‘typical’ of many others and thus able to capture the circumstances and conditions of many different projects or situations; revelatory – where a researcher has access to phenomenon where previously access was not possible; longitudinal – studying a single case at two or more occasions along a longitudinal scale.
The approach adopted here comprises aspects of the critical and unique classifications in the typology suggested by Yin. This alignment can be further explained by reference to the review of developments in Australian labour law in Chapter Four which suggested that gender pay equity reform in Australia has involved three stages.

The first comprised the adoption of equal pay for equal work, and equal pay for work of equal value principles in 1969 and 1972 by the then Australian Conciliation and Arbitration Commission (ACAC). The second involved a legislative entitlement to equal remuneration, introduced in 1993 and retained by the Workplace Relations Act 1996 (Cth). These legislative amendments relied on the federal government's external affairs powers, as the constitutional rationale for their inclusion was linked to Australia being a signatory to a suite of international anti-discrimination conventions, including ILO Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.

The third was prompted by the seemingly restricted opportunities provided by the federal legislative provisions - a renewed interest in pay equity reform in state industrial jurisdictions. At each level of state government in Australia there is the capacity for government to legislate in the area of industrial relations, a constitutional distinction which has provided the basis for the establishment of state-based industrial relations tribunals. State jurisdictions are particularly relevant to working women in Australia, as there has been a historically a higher rate of state award coverage among women than men. Hence state awards have been the formative instrument of industrial regulation in key feminised industries including retail trade, and accommodation, cafes and restaurants. As a result of the renewed interest in gender pay equity, new equal remuneration principles were introduced in three state jurisdictions, New South Wales, Queensland and Tasmania.
Three particular cases in industrial tribunals in Australia provide distinctive insights into each of these three stages of gender pay equity reform.

**Comparable Worth Proceedings**

In terms of the first stage, the determination of the 1969 and 1972 principles, the distinctive feature of the 1972 principle was its nominal recognition that the principle of *equal pay* applied to men and women engaged in work that was different but was assessed to be of *equal value*. While the application of the 1969 principle had been relatively straightforward for men and women engaged in identical work, the approach of industrial tribunals and industrial parties to testing the extent of the 1972 principle was far less certain. Fourteen years after the principle was determined the Australian Council of Trade Unions (ACTU) sought to test the application of the 1972 principle utilising the concept of comparable worth. The case arose from an application for wage increases for nurses employed under the *Private Hospitals' and Doctors' Nurses (ACT) Award 1972*\(^2\). The applicant unions, the Royal Australian Nursing Federation (RANF) and the Hospital Employees Federation of Australia (HEF), supported by the ACTU, sought a series of rulings from the Australian Conciliation and Arbitration Commission, including one that the ACAC apply the 1972 principle via the concept of comparable worth. The unions asserted that the application of the 1972 principle, in contested proceedings, reflected a particular pattern; namely that decisions to award wage increases had primarily relied on comparisons with male-dominated comparisons *within* industrial awards. The ACTU, RANF and the HEF argued that this interpretation of the principle was unlikely to assist nurses, and by extension other female dominated occupations, given the absence of appropriate comparators within the relevant award. Faced with this experience, organised labour identified comparable worth as the concept that would advance the application of the 1972 principle by allowing female-dominated work to be assessed against completely different male-dominated jobs. This case study can be read as both

critical and unique in that the proceedings were the only occasion where the comparative work value elements of the 1972 principle were examined by way of test case proceedings.

**HPM Proceedings**

The second stage of pay equity reform pivots on amendments to federal labour law to include, for the first time, a legislative commitment to equal remuneration for men and women workers for work of equal value. The provisions place a reliance on applicants meeting a test of discrimination, an inclusion that owes something to the underpinning philosophy of the international conventions that were the basis for the inclusion of the provisions. The legislative provisions also provide the Australian Industrial Relations Commission (AIRC) with the arbitral authority to determine equal remuneration orders providing for increases in pay. Despite the availability of these legislative provisions they remain under-utilised; since their inception only one case has proceeded to final arbitration. These proceedings featured an application made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) 3 concerning process workers and packers employed at HPM Industries, a Sydney-based electrical component manufacturer 4. The claim on HPM Industries demanded that process workers and packers at HPM Industries’ Darlinghurst, Sydney site receive the same rate of pay as employees classified as storemen or general hands. The unique aspect of this case study is that the HPM proceedings represent the only application taken under the equal remuneration legislative provision that has proceeded to arbitration and final determination.

**New South Wales Pay Equity Inquiry, Equal Remuneration Principle Proceedings**

The third stage involves the equal remuneration initiatives adopted by state industrial jurisdictions which involved a departure from the approach to equal remuneration adopted in

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3 Otherwise known as the Australian Manufacturing Workers’ Union.
the federal industrial jurisdiction. New South Wales was the first state jurisdiction to initiate a change in approach. This followed a two stage process commencing with a wide ranging Pay Equity Inquiry that sought to investigate the determinants of inquiry. The Inquiry was followed by an application to a Full Bench of the Industrial Relations Commission of New South Wales by the Labor Council of New South Wales for a new equal remuneration principle. The terms of the principle sought reflected the findings of the preceding Pay Equity Inquiry\(^5\). The principle improved the framework for institutional decision-making on pay equity matters for women workers employed in the state industrial jurisdiction in New South Wales and stands in positive contrast to the infrastructure that is available to women employed under federal awards and agreements. The proceedings in New South Wales are therefore *critical* in that they were at the forefront of initiatives taken in state industrial jurisdictions to advance institutional gender pay equity reform.

In summary, the details of the above cases are as follows:

- **the Comparable Worth Case** C No. 2219 of 1985. An application by the Royal Australian Nursing Federation to vary the rates of pay for nurses in the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972*.

- **the HPM Case** C No. 23933 of 1995. An application by the Automotive, Food, Metals Engineering, Printing and Kindred Industries Union for orders requiring equal remuneration for work of equal value at HPM Industries.

- **the New South Wales Pay Equity Inquiry** IRC No. 6320 of 1997. A reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the *Industrial Relations Act 1996* (NSW). This was followed by the *New South Wales Equal Remuneration Principle* IRC No. 1841 of 1999. An application for a state decision pursuant to Section 51 of the *Industrial Relations Act*, to address income and equal

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remuneration principles and consideration of national decision/s pursuant to Section 50 of the Act.

The critical and unique features of each of the above cases address one of the perceived limitations of the case study approach, a nominal inability to generalise from specific case studies findings, given that the case study is not assessed as representative in nature (Bryman, 2001; Silverman, 2000; Silverman, 2001). In the context of the Australian labour market there are highly limited examples of industrial proceedings that explicitly test the utility of gender pay equity reform. The total population of available cases is therefore a small and highly specific one. The absence of more widespread jurisprudence may itself be important but in the first instance it places some importance on examining the available proceedings to examine what they indicate about gender pay equity reform.

This case study approach provides the basis for the social inquiry and questioning that stems from women's lower earnings. It enables an analysis of the conditions that preceded each of the cases and the construction of the application(s) that were made to industrial tribunals. This assessment includes the approach by organised labour to exploiting the opportunities provided by new developments in gender pay equity reform. What factors shaped the submissions of trade unions and in what ways did they endeavour to carry forward the objective of equal remuneration? Similarly, how did employer organisations and employers approach these recast opportunities for increases in women's earnings? Was their approach one of total rebuttal or alternatively did employers choose to narrow the avenues through which increases in women's earnings could be won? Industrial cases in Australia, particularly that of a test case nature, often involve the intervention of the applicable government. In the federal jurisdiction, it is the Minister who seeks intervention, in state jurisdictions it is the Crown. In each of the three cases that form the focus of this thesis, the government sought

6 As in the Crown in the State of New South Wales, or the Crown in the State of Victoria.
and was granted intervention status. The state in the form of the government has a diverse role in industrial proceedings. They can appear in industrial proceedings in their role as an employer, in federal and public sector employment. The basis of their intervention in industrial proceedings is couched conventionally on the grounds of the public interest.

Additionally it is the government which drafts and seeks to pass legislation that shapes the role and functions of industrial tribunals.

Each of the case studies enables an analysis of the approach of government to equal remuneration. How did government interpret the equal pay principles and legislative principles that were available to the industrial parties? Similarly, what approach did the government nominate for industrial tribunals to follow in determining equal pay applications? The examination of these critical proceedings also enables an analysis of the role of the industrial tribunals in interpreting the principles and legislative provisions that were available to them. What considerations shaped the approach and decision making of tribunals? Finally an assessment of litmus cases such as those selected for this thesis enables an analysis of the strength and weaknesses of the industrial infrastructure that was available to the industrial parties. To what extent do the principles and legislative provisions facilitate equal remuneration and provide an effective remedy to the undervaluation of feminised work? To what extent is the right to equal remuneration compromised or countered by other rights and principles?

5.4.2 HERMENEUTICS

Three specific cases form the research focus of this thesis but questions remain as to the specific means of examination.

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7 Following the passage of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) the *Workplace Relations Act 1996* (Cth) contains some altered provisions concerning intervention generally. The legislation now provides that the Minister may, on behalf of the Commonwealth, by giving written notice to the Industrial Registrar, intervene in the public interest in a matter before a Full Bench. The Minister may also intervene in any matter that involves public sector employment (s.102). However, the legislation also provides that the Minister has a general right to intervention in other areas, such as award rationalisation (s.538) and award simplification (s.549).
Each of the case studies pivots on case proceedings in industrial tribunals. Such cases are shaped by, and produce different types of documents, examples of which include:

- documents required to initiate proceedings including the precise form of the application required by the prevailing legislation;
- correspondence between parties and members of the industrial tribunal;
- correspondence between members of the industrial tribunal;
- interim directions provided by the tribunal;
- written outline of submissions made by the parties;
- exhibits tabled by parties in support of their submissions, including witness statements;
- decisions of the tribunal;
- transcript of proceedings as transcribed by court reporting services;
- governing legislation and precedent case material; and,
- internal and published documents of parties involved in the proceedings.

This listing indicates that the 'law' produces many documents, whether it be the content of statute or the decisions of court and tribunals, or documents presented to the parliament that may inform the debate and passage of law, or to courts and tribunals in the process of determining particular cases. In examining these documents I understand that they are frequently organised by way of a series of conventions and rules. They are not unmediated and free of the need to interpret them, and the materials themselves reflect particular interpretations of social relations. Legal documents can be emeshed with other documents, or project a particular view, consistent with being either a applicant, respondent or intervener in case proceedings (Douzinas and Geary, 2005: 341).

Analysing and interpreting these documents is facilitated by hermeneutics, a 'way of understanding and seeing the world at a particular time and in a particular place within which
a text is written’ (Blaikie, 1993: 63). As acknowledged earlier in this chapter, Gadamer is the theorist most clearly associated with the contemporary tradition of hermeneutics, but Gadamer’s central task was not to provide the technical apparatus for a hermeneutic project. Thus he did not stipulate the means by which documents, or texts more broadly defined beyond the written, should be interpreted. Gadamer’s central interest lay in exposing the philosophical base of interpretation and his approach to interpretation does not rest on a naïve realism or objectivism. Gadamer retained scepticism towards modernity’s engagement with objective reason and similarly eschewed disengaged subjectivity, an epistemological viewpoint that retains a degree of harmony with the constructivist standpoint acknowledged previously.

Hermeneutics though as a system of epistemology and research method is important to the overall theoretical position - feminist standpoint-critical theory - advanced in this chapter. The concern with the text enables an investigation of an aspect of women’s experience – through the text produced by highly specific and critical instances of gender pay equity reform within Australian labour law. Critical theory provides the apparatus for conclusions to be drawn from a process of consistent dialogue with the text enabling the construction and validation of meaning.

The researcher undertakes interpretation shaped by pre-existing biases, boundaries and prejudices. These values form part of a dialogical process of engagement with the text that the researcher seeks to understand (Gadamer, 1984: 414). The text itself will also bear the imprint of social construction. As an example documents are ‘produced, shared and used in socially organised ways…construct[ing] particular kinds of representations using their own conventions’ (Atkinson and Coffey, 2004: 58). Documents also do not stand alone – they also frequently refer to, or bear relation to other documents – a form of intertextuality (Atkinson and Coffey, 2004: 67). The documents assessed through this thesis follow this pattern. As an example, documents lodged with industrial tribunals follow a convention stipulated by the
tribunals, as do decisions of the tribunals. The submissions of industrial parties frequently are a response to the submissions of other parties in the proceedings, or a response to directions posed by the industrial tribunals.

Gadamer termed the process of the researcher engaging in the process of interpretation as a fusion of horizons, a constant dialogue between the interpreter and that which is to be interpreted (Gadamer, 1984: 305-306). This process also involves a translation of languages – the language of the researcher and the text which is to be interpreted – a process of mediation that occurs through language (Gadamer, 1984: 345). Understanding is produced through this dialogue or mediation, not reproduced by the researcher and there is no singularly irrefutable interpretation that arises from this process (Schwandt, 2003: 302; Kincheloe and McLaren, 2003: 448). Gadamer’s approach therefore addresses the problems of understanding the past from the site of the present and provides some guide to the ongoing nature of historical inquiry. As Kilminster observes, ‘this is an unending process whereby we test out our preunderstandings, so changing our understanding of the past and ourselves is a continuous process’ (Kilminster, 1991: 104).

5.4.3 INTERVIEWS

Following Gadamer, understanding the text may require that the ‘tradition in which the text is located may have to be realised, or understood through other sources’ (Blaikie, 1993: 63). In this thesis this location of tradition required correlation with other documentary sources, both formally submitted in industrial proceedings, or constitutive of a particular party’s position on gender pay equity. For example, the understanding of parties’ submissions in industrial proceedings required an appreciation of a number of other sources: relevant legislative provisions; the content of industrial wage fixing principles; the claims and assertions made by other parties in the proceedings; and the particular circumstances of the case as represented
and understood. This documentary cross-checking also assisted the process of triangulation, in broad terms the use of different methods and sources to test findings (Denzin, 1978).

This understanding of ‘tradition’ was also facilitated by interviews with the practitioners involved in each of the cases. The definition of practitioners is a broad one and includes members of industrial tribunals, advocates for the parties, state bureaucrats in policy roles responsible for preparing submissions and briefing advocates, and Ministers whose portfolio includes industrial relations legislation. The documentary data identified the advocates for the principal organisations that appeared in case proceedings, and the members of industrial tribunals that presided over proceedings. By way of principal organisations, I take the standard approach adopted in proceedings in industrial tribunals, meaning organisations that appeared regularly through the proceedings and presented submissions in their own right.

The focus on practitioner interviews was designed to assess the approach of industrial parties and interveners to the opportunities offered by institutional pay equity reform. It enabled further investigation of questions raised by the available documentation and provided the basis of an ongoing dialogue and interpretation consistent with the principles of dialogic social research. Why did parties adopt a particular strategy? Why was an alternative strategy not pursued? Interviews were semi-structured in style with questions formed as a result of the documentary analysis. Thus some questions were common to the majority of interviews – for example, concerning the respondent’s participation or relation to the proceedings. Questions that were unique to particular respondents focused on the particular aspects of a party’s submission to, or strategy in those proceedings. At times during the interviews, respondents were shown exhibits or extracts from transcript from case proceedings and asked to comment on issues that stemmed from those aspects of the proceedings. In this regard, interviews were directed in style (Becker, 1970), because the researcher consciously put to the

8 The semi-structured interview schedules are reproduced at Appendix Sixteen.
respondent apparent contradictions between stated policy positions, and submissions and strategies before industrial tribunals.

The process of interviewing participants in the case identified contradictions between the documentary data and the interview data. These contradictions raised questions of what reliance could be placed on particular forms of data. Such contradictions were resolved, in the analysis of the data, not by considering one form of data to be 'more true' than the other, but by assessing the data in a process of argument. This involved examining the strengths of particular claims against the available material before me. For example, was the claim of an interview respondent that contradicted the documentary data, supported by other interview data, or by other aspects of the documentary material available to me? Was their claim coherent or viable, relative to the body of material examined for the thesis?

Flowing from this style of interviewing two related further issues require discussion – that of reactivity and interview bias. Reactivity is the effect of respondents being aware that they are participating in a research project. Interviewer bias is the influence that an interviewer may have the responses given in an interview situation. All but two of the respondents were personally known by me due to previous gender pay equity research or my involvement in equal remuneration proceedings. This involvement comprised assisting the Women's Organisations prepare their submissions for the HPM proceedings and the provision of witness evidence for the Crown in the New South Wales Pay Equity Inquiry and for the Labor Council of New South Wales in the equal remuneration principle proceedings. This involvement may have also influenced the decision of potential respondents to consent to be interviewed. All of the respondents were aware that they were involved in a research project as this was clearly stipulated in correspondence that formed the request for interview. These factors taken together may indicate that respondents were disposed to providing responses that were favourable to the objective of gender pay equity or which were self-protective in nature. While bias and reactivity can never be entirely discounted, the reference to explicit
aspects of case proceedings, enabled by the documentary analysis, assisted to mediate this process.

5.5 DATA SOURCES

Previously within this chapter I nominated the use of documentary interpretation and practitioner interviews and analysis as the methods that would be utilised within a case study approach. This section of the chapter details the data sources, specifically the sites of documentary analysis and the interviews that were conducted.

5.5.1 ARCHIVES

A number of archival sources were relied upon to research each of the selected case studies.

*Australian Industrial Registry/New South Wales Industrial Registry*

Case files for proceedings in industrial tribunals in Australia are maintained in archives that are supervised by Industrial Registrars. In the federal jurisdiction it is currently the role of the Australian Industrial Registry to maintain these archives. In the case of the New South Wales state jurisdiction it is the Industrial Registry of New South Wales. Case files can be significant in their size. In the case of the New South Wales Pay Equity Inquiry there were 459 exhibits tabled and 2,717 pages of transcript.

The Australian Industrial Registry and the New South Wales Registry serve administrative functions for the Australian Industrial Relations Commission and the Industrial Relations Commission of New South Wales. They act as a registry for their respective tribunals and provide administrative support to the tribunal and advice and assistance to organisations in relations to their rights and obligations. Archival files represent the culmination of the documents that are lodged with the registry by the industrial parties for each individual case. The files also include the documents retained on the case by presiding members of the
industrial tribunal. Registry staff endeavour to ensure that files contain all exhibits tabled, all file correspondence, and all pages of transcript are maintained in the case file. Registrars advise that files contain all the case material supplied and received. The comprehensive nature of files is a function of the Registry maintaining complete records and the receipt of case material from the presiding member of the tribunal. Even so, for both the Australian Industrial Registry and the Industrial Registry of New south Wales there is no faultless method in place to locate a missing document or a missing file. In part this is a function of the absence of individual indexing of individual items in the case files.

To access the necessary documents written requests were made to the relevant registry for access to the files which were made available for viewing at the premises of the Registry. Files are simply indexed through the case number assigned by the registry, as well as a short case title. Aids are not prepared to help access each file and no other descriptive aids in the form of indexes or archival lists are prepared by Registry staff. Files are not individually numbered but are grouped together as they are received and stored in a box which is allocated a sequential number. To access files relevant to the comparable worth proceedings and HPM proceedings a request was directed to the Australian Industrial Registry. To access files relevant to the New South Wales Pay Equity Inquiry and equal remuneration principle proceedings a request was directed to the New South Wales Industrial Registry.

For each of the selected cases, all the documents maintained by the Registry were examined. This initial examination provided the basis of the identification of further case files for examination.

Following the failure of the comparable worth application, the Royal Australian Nursing Federation lodged an application under the anomalies and inequities provisions of the wage
fixing principles as then constituted\(^9\). The relevant file was retrieved from the Australian Industrial Registry. The assessment of the HPM case file also required assessment of two other applications for equal remuneration orders that were lodged at the same time as the HPM application and considered initially by the Full Bench in conjunction with the HPM application\(^10\). Following the failure of the HPM application the AMWU lodged a new application for equal remuneration orders at HPM Industries. This file was also retrieved\(^11\). The federal equal remuneration provisions have been the subject of only a limited number of applications following the original HPM proceedings. Those cases which addressed the arbitral interpretation of the equal remuneration provisions were drawn therefore into the ambit of this research. This included two applications by the AMWU for equal remuneration orders at David Syme and Co Ltd\(^12\), an appeal by David Syme & Co Ltd against an interim directions order issued by Commissioner Whelan during those proceedings\(^13\), and an application by the Australian Services Union to vary the *Victorian Local Authorities Award*\(^14\).

In each of the cases reference was frequently made by advocates and by the presiding members of industrial tribunals to previous decisions of industrial tribunals and to the terms of industrial awards and industrial agreements. Where the decisions and awards and agreements were reported and available through legal reporting services such as *Commonwealth Arbitration Reports* or *Industrial Reports* or *Industrial Gazette*, these decisions and awards and agreements could be easily accessed and examined. Where decisions or

\(^9\) A No. 257 of 1986, Application by the Royal Australian Nursing Federation to vary the *Private Hospitals' and Doctors' Nurses (ACT) Award* 1972 re rates of pay for nurses.


\(^14\) C No. 2002/2620 Application by Australian, Municipal, Administrative, Clerical and Services Union to vary *Victorian Local Authorities Award* 2001.
orders were not reported outside industrial tribunals these were accessed with the assistance of library and registry staff at both the Australian Industrial Relations Commission and the Industrial Relations Commission of New South Wales.

In this thesis where reference is made to a document sourced from the Australian Industrial Registry, a short description of that document, including the case number allocated by the Registry, is provided in a footnote reference which is preceded with the acronym AIR – Australian Industrial Registry. Where reference is made to a document sourced from the Industrial Registry of New South Wales, a short description of that document, including the case number allocated by the Registry, is provided in a footnote reference which is preceded with the acronym IRNSW – Industrial Registry of New South Wales.

Noel Butlin Archive Centre, Australian National University

The archives of the Australian Industrial Registry and the New South Wales Industrial Registry were not the only archival data used. To assess the approach of organisations involved in either lodging or defending applications, or intervening in proceedings, access was sought to organisational documentation. This was undertaken primarily through the Noel Butlin Archive Centre (NBAC) at the Australian National University which collects the records of Australian companies, trade unions, employer and professional associations and industry bodies, and makes them available for research. Each holding maintained by the NBAC is provided with a unique code, and the boxes which contain files for each holding are numbered sequentially.

In the case of the comparable worth proceedings access to files of the Royal Australian Nursing Federation, the Australian Council of Trade Unions and the Confederation of

15 As an example: AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 43, 45-46.
16 As an example: IRNSW, IRC 6320 of 1997, Exhibit 55, p. 3.
Australian Industry was possible through the NBAC. Access was also sought to the files of the New South Wales Nurses’ Association, as the comparable worth proceedings occurred within a period of a significant contest between the RANF and the NSWNA as to award coverage and membership. Access to the papers of the NSWNA required a separate and additional approval of the NSWNA which was granted.

The NBAC supplied me with a series of finding aids compiled by the NBAC that provided in summary form an outline of the holdings, organised by box or series number, for each of the organisations. For the decision and policy making bodies of the relevant organisations including National Conferences, National Councils, or National Executives I concentrated on a ten year period preceding the comparable worth proceedings (1975-1985), to assess the development of organisation strategy in the period prior to the onset of the proceedings. I then researched the files through the course of the comparable worth proceedings and the anomalies and inequities proceedings that followed (1986-1990).

The arrangement of the files varied between each of the organisations. Each of the organisations had files arranged by decision making bodies as constituted within each organisation, for example, _Minutes of the RANF Executive_. The files were arranged predominantly chronologically. For the ACTU and the CAI separate files were also available for Committees organised by those organisations, for example _Minutes of the RANF Industrial Advisory Committee_. There were correspondence files, arranged chronologically, press and media release files and to a lesser extent subject or issue-based files, for example _RANF-ACT Branch Work Value Survey - Completed Returns_. A preliminary investigation indicated that the organisation documents relevant to the comparable worth proceedings were not centrally organised but were located across a number of different files, including policy making bodies, correspondence and press release files. I therefore sought access to all files of this nature for each organisation. My nomination of subject files was more selective. For the two nursing unions, I broadened my analysis of union policy to the period 1958-1975, to assess the
approach of the two unions to equal pay in the wake of the equal pay legislative amendments available in the NSW state jurisdiction in 1958 (see Chapter Four) and the federal equal pay decisions in 1969 and 1972.

For the HPM proceedings, a similar approach was adopted. The AMWU has deposited files for the period 1977-2003\textsuperscript{17}. The finding aid compiled by the NBAC indicated that the majority of files were organised by policy and decision making bodies of the union, including National Conference and National Council. I concentrated on the period 1993-1999. This period encompassed the passage of the equal remuneration amendments and the original HPM proceedings and the additional claim that did not proceed to arbitration. The files of the ACTU that have been deposited with the NBAC date from 1927-1989 and thus precede the passage of the 1993 amendments and the HPM proceedings. HPM Industries have not deposited files with the NBAC.

For the New South Wales Pay Equity Inquiry and equal remuneration principle proceedings, their timing has lessened the likelihood that organisations have yet placed their records in archives collections. Both the Labor Council of New South Wales (1871 + ) and the Employers Federation of New South Wales (1902 + ) use the services of the NBAC to maintain their archives. Neither organisation has lodged files for the period relevant to these proceedings.

In this thesis where reference is made to a document sourced from the NBAC, a footnote reference is provided which follows the sequence, NBAC, name of the applicable organisation, NBAC holding code, box number, short description or title of the document\textsuperscript{18}.

\textsuperscript{17} Predecessor organisations of the AMWU including for example the Amalgamated Engineering Union maintain their archives through the NBAC.

\textsuperscript{18} As an example: NBAC, NSWNA, Z142, Box 9, Minutes of NSWNA Annual Conference, 23 June 1960, pp. 23-24.
Manuscript Collections – National and State Libraries

For members of industrial tribunals who were involved in the cases and who had either retired from public life or who had died I sought access to personal papers that may have been lodged in manuscript collections in national and state libraries. These included Justice Barry Maddern, Justice Judith Cohen and Commissioner Len Bain who were members of the Full Bench of the Australian Conciliation and Arbitration Commission in the comparable worth proceedings, and Justice James Alley who along with Cohen and Bain were members of the Full Bench in the Anomalies and Inequities proceedings that followed the Full Bench proceedings. I searched catalogues of the manuscript collections of the State Library of Victoria, State Library of New South Wales and the National Library of Australia. The papers of Maddern and Cohen were available through the National Library of Australia. Staff at the National Library of Australia also assisted me with a search of catalogues and indexes of manuscript collection held throughout Australia to ensure that no other manuscript records were available.

The papers of Cohen required no additional access agreement. Maddern’s papers required that approval be given by his widow, whose address was supplied by staff of the National Library of Australia. Correspondence sent to that address requesting access to the files was not answered. Cohen’s papers were arranged chronologically. The only material that related directly to the comparable worth proceedings and anomalies and inequities proceedings included the decisions of those proceedings and incomplete sections of transcript from those proceedings. These documents I had already accessed through the files of the Australian Industrial Registry.

National Pay Equity Coalition

The National Pay Equity Coalition appeared in the HPM proceedings and the New South Wales Pay Equity Inquiry and equal remuneration principle proceedings. In these proceedings they
acted for the Women’s Electoral Lobby and the Australian Federation of Business and Professional Women. In originally contacting NPEC for the purpose of an interview I was also invited to access the files for the organisation which are not stored by any institutional archives but which are held by the convenor of NPEC, Meredith Burgmann. These files included the minutes of NPEC which are arranged chronologically, and a correspondence and document file, arranged chronologically by date of receipt, or by date sent. These files are referenced by an appropriate footnote reference. This reference includes a shorthand reference (NPECA) for National Pay Equity Archives.

5.5.2 JOURNALS OF INDUSTRIAL PARTIES

My knowledge of the approach of organisations that were a party to the case proceedings was also informed by the published records of those organisations. These included journals such as *The Lamp*, the journal of the NSWNA; the *Australian Nurses Journal*, the journal of the RANF; and *The Metal Worker*, the journal of the AMWU. The nursing journals were accessed through the library of the NSWNA, the journal of the AMWU through the library of that organisation. These organisations maintained collections of journals that were more complete than those available through the public domain. These journals provided an insight into how case strategy and proceedings were interpreted and reported to union members. These sources are identified by conventional reference but in footnote form.

The policy debate concerning gender pay equity in the periods preceding the 1993 federal equal remuneration amendments and the state jurisdiction initiated pay equity inquiries was also shaped by publications of industrial tribunals, government departments and statutory authorities. A number of these reports had been specifically commissioned by the parliament, industrial tribunals, the federal government or by federal statutory authorities, to assess the

19 For example, NPECA, Minutes of Meeting, 1 November 1995.
determinants of gender pay inequity, and the available industrial and policy mechanisms to address the earnings differential between men and women. These reports were available through the public domain. Press releases of the federal Department of Industrial Relations which announced the 1993 federal legislative amendments were accessed through the National Library of Australia. The record of applications lodged under particular sections of the prevailing industrial legislation is maintained by the annual reports of the A IRC and AIR. These were accessed through the library of the A IRC. These policy and reporting documents are not identified as primary data and are located in the bibliography for this thesis. My purpose in identifying them at this point in the chapter is to acknowledge their influence, together with the data retrieved from archival sources, in my preparation for the interviews undertaken for this thesis.

5.5.3 INTERVIEWS

A request for interview was sent to the principal advocate for each of the organisations that were a principal party to the proceedings. If a current address was not known, the request for interview was sent to the organisation with a covering and explanatory correspondence attached. Where organisations were represented by hired counsel, a request for interview was also sent to the organisation that they represented.

In the federal jurisdiction, it is customary in cases where the Commonwealth seeks to intervene that it is counsel or the advocate for the Minister for Industrial Relations\textsuperscript{21} who establishes the case for that intervention. In the HPM proceedings the Minister for Workplace Relations and Small Business sought to intervene and was granted intervener status. The Minister was not represented by counsel but by a senior officer of the Department for Workplace Relations and Small Business. A request for interview was sent to this officer, Edward Cole.

\textsuperscript{21} Or as the title may stand.
The documentary data concerning the HPM proceedings also revealed the construction of the 1993 equal remuneration legislative amendments as a key point of debate. The passage of the 1993 amendments had been preceded by an inquiry by the Sex Discrimination Commissioner, Human Rights and Equal Opportunities Commission (HREOC) investigating discriminatory overaward payments. Women’s earnings had also been the subject of a parliamentary inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. Key submissions were made by the newly emerging Equal Pay Unit of the federal Department of Industrial Relations. Requests for interview were sent to policy staff who acted as secretariat to the HREOC inquiry, Elizabeth Fletcher, Kathryn Freytag, Philippa Hall, and to the DIR submissions to the HREOC and Senate Inquiries, Kathy McDermott.

In the New South Wales Pay Equity Inquiry and equal remuneration principle proceedings the Crown briefed and hired Counsel. To understand the way in which the Crown position was formulated, requests for interview were sent to members of the Crown Working Party which briefed Counsel during proceedings. Requests for interviews were sent to those members of the Crown Working Party who were identified by way of their participation in proceedings, Richard Cox, Mary Grace, Elizabeth Fletcher, Kathryn Freytag, Philippa Hall. This process of identification was assisted by my involvement in these proceedings.

The documentary data also highlighted that the instigation of the New South Wales Pay Equity Inquiry was a contested matter, involving the Minister for Industrial Relations and the peak industrial organisations in New South Wales, the Labor Council of New South Wales and the Employers’ Federation of New South Wales. The Crown’s approach to gender pay equity was also uncertain in the early phases of the equal remuneration principle proceedings, with the industrial tribunal asking Counsel for the Crown to clarify the Crown’s position on a number of occasions. To explore these issues a request for interview was sent to the Attorney General and Minister for Industrial Relations at that time, the Hon. Jeff Shaw.
A request for interview was also sent to members of the Commission that presided over each of the proceedings that form the focus of the case studies. Where it was known that the member of the Commission was retired the request was sent to the Industrial Registrar asking that the correspondence be forwarded to the retired member of the Commission. Requests for interview were also sent to the members of the industrial tribunal that presided over the directions hearings that confirmed the interpretation of the equal remuneration proceedings established in the HPM proceedings, Vice President Ian Ross, Commissioner Dominica Whelan.

The capacity of interviews for individuals and representatives’ organisations from the comparable worth proceedings was limited due to the passage of time. Additionally a number of participants involved in those proceedings were deceased. There was a greater availability of potential respondents from the HPM and New South Wales Pay Equity Inquiry/equal remuneration principle proceedings.

A schedule of the requests for interview that were distributed is identified at Table A15.1 in Appendix Fifteen. Where requests for interviews did not receive a reply, a second request was sent. Given that a number of the respondents hold high profile positions in public life, the request for interview indicated that beyond the content of the thesis for examination, the names of participants would remain confidential.

5.6 CONCLUSION

This chapter has identified the research questions to be tested by this thesis. The investigation of these questions is shaped by the positions declared in this chapter concerning the genesis of things and the way in which claims to knowledge are produced. This framework is informed by both feminist standpoint epistemology and critical theory. Social
reality is constructed as is our knowledge of this reality; knowledge is socially situated, forever shaped by culture and context. This position declared that the use of critical theory as advanced by Habermas avoids a default to epistemological relativism. Particular knowledge claims can prevail over others on the basis of critical examination and a superior argument. This requirement for critical examination is advanced here by a case study approach employing the practices of dialogic social research. This approach within this thesis is centred on the critical and unique opportunities provided by particular and identified industrial proceedings to investigate three stages of gender pay equity reform in Australian labour law. This chapter has provided an outline of these proceedings and identified the specific means of examination; an analysis of the documents produced by each of the case proceedings, and interviews with practitioners involved in these proceedings. The research questions that were informed by the sociological review will shape and mediate the explanations and interpretations that are drawn from this data in an ongoing process of social inquiry as favoured by Hall (1999). This thesis turns now to the first stage in this inquiry, the 1986 comparable worth proceedings.
CHAPTER SIX: THE 1986 COMPARABLE WORTH CASE AND
ANOMALIES AND INEQUITIES PROCEEDINGS

6.1 INTRODUCTION

The previous chapter identified a case study approach as the means of advancing the research questions that frame this thesis. This approach is relied upon as particular industrial proceedings provide a unique and critical way of assessing gender pay equity reform. This chapter examines the 1986 comparable worth case, an important milestone in the application of the 1972 equal pay for work of equal value principle\(^1\). The 1972 principle followed the 1969 equal pay for equal work principle, the latter having broken through the institutionalised sexism that had marked early Australian wage fixation. The task of the 1972 principle was to remedy key deficiencies in its 1969 forerunner; the 1969 principle was confined to women and men engaged in similar work and did not extend to women engaged in predominantly feminised work. The widened scope of the 1972 principle held significant promise for Australian women. However, the approach of the industrial parties and the industrial tribunal to the determination of equal value was nebulous and incomplete, an institutional state of affairs that shaped the 1986 comparable worth proceedings.

The 1986 comparable worth case arose from an application for wage increases for nurses employed under the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972*\(^2\). The applicant unions, the Royal Australian Nursing Federation (RANF) and the Hospital Employees’ Federation of Australia (HEF), supported by the Australian Council of Trade Unions (ACTU), sought a series of rulings from the Australian Conciliation and Arbitration Commission (ACAC), including one that the Commission apply the 1972 principle via the concept of comparable worth which was then part of the equal pay debate in the United States. Following the rejection of their application in pursuit of comparable worth, the union pursued the case through the anomalies and inequities provisions of the prevailing wage fixing principles.

\(^1\) National Wage and Equal Pay Cases 1972 (1972) 147 CAR 172.
\(^2\) Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972 (1972) 145 CAR 700.
This chapter initially details the industrial conditions that preceded the comparable worth proceedings. The chapter is then organised as a chronology beginning with an account of the comparable worth case. This account includes an analysis of the concept of comparable worth advanced by the applicants and the reasoning relied upon by the ACAC in its rejection of comparable worth. This is followed by a review of the anomalies case taken by the applicants following the unsuccessful comparable worth application. The chapter concludes with an assessment of the implications of the case for the shape of future equal remuneration reform.

6.2 INDUSTRIAL CONDITIONS THAT PRECEDED THE CASE

The comparable worth case took place amid a series of industrial campaigns for increases in nursing wages. Nursing was and remains a highly gendered occupation. At the time of the comparable worth proceedings between 92 and 95 per cent of nursing work was undertaken by women (Brown and Jones, 2004: 5-6; Preston, 2005: 322) – the degree to which nursing was a feminised occupation underlined the significance of the comparable worth proceedings. There has been a long-standing perception that nursing work was poorly paid (Nowak and Preston, 2001: 241-242), a sentiment that was clearly apparent in 1986 when average weekly ordinary time earnings for registered nurses was slightly below that recorded for male average weekly ordinary time earnings for full-time non managerial employees and well below that recorded for computing professionals, school teachers and police offers (Preston, 2005: 329, 333). At this point award-based classification structures provided for limited career development, an issue that would be taken up in subsequent industrial proceedings where unions made application for a career structure that differentiated between clinical, education and administrative streams. Entry training for nurses at the time of the comparable proceedings was in a period of transition. Although the rate of transition varied across state jurisdictions nursing was moving to a degree-based occupation where training would be conducted through colleges and universities. Historically training had been situated in
hospital-based schools – the successful completion of training led to registration and access to the pivotal classification of Registered Nurse.

The industrial campaigns for increases in nursing wages were not tied, either directly or indirectly, to issues of equal pay or to the application of federal or state equal pay principles, but situated within a wider push for increases in nursing wages and conditions, including patient-staff ratios and access to training. Nursing shortages were tied to the paucity of nursing wages - in 1985, 56 per cent of registered nurses licensed to practice were not employed in nursing. The campaigns were most evident in the state jurisdictions, where the majority of nurses were employed, particularly New South Wales and Victoria. Industrial action in these states would ultimately result in a joint sitting by the state industrial authorities in those states to resolve wage claims.

Nurses had encountered considerable obstacles to the proper recognition of their work. Rates of pay and conditions of work were not regulated by an award until 1936 when the New South Wales Industrial Commission handed down an initial award, a development that would ultimately be followed in other jurisdictions, but not until the award had withstood appeals to a Full Bench with the appeal Bench observing that the ‘industry is one of a most unusual character, indeed one to which the word industry would not in ordinary parlance be applied at all’. This assessment of the nature of nursing led to normative appraisals of the work and of nurses’ right to industrial action. Within New South Wales, Justice Richards assessed in 1958 that nursing lacked comparison points with other areas of work, given that nursing was work that was primarily undertaken by women. Such assessments would be considered in

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7 Re Hospital Nurses, & c. (State) Conciliation Committee (1936) 35 AR 83.
8 Re Hospital Nurses (State) Award (1936) 35 AR 247 at 250.
9 In the context of setting rates of pay for male nurses. Re Hospital Nurses (State) Award (1953) 52 AR 243 at 248-250.
later arbitral and judicial reviews but not until the 1970s. Justice Sheldon referred specifically to the absence of proper assessment of these award provisions between 1950 and the late 1960s in hearings reviewing both on-call and qualification allowances paid to nurses\textsuperscript{10}. Nurses long felt excluded from the terms of the 1958 New South Wales equal pay legislative amendments because of the female dominated employment pattern in nursing\textsuperscript{11}.

Nurses’ right to campaign for wages was also the subject of conjecture. In 1966 the New South Wales Minister for Health observed that it caused him some surprise ‘when I found the nursing profession, so highly regarded by the public, suddenly organising mass demonstrations with all the familiar techniques of mass agitation. Further in some centres outside Sydney, your members appear to have aligned themselves with branches of the TLC’, a body whose officials can hardly be impartial in the party struggle which is part of politics\textsuperscript{12}.

Equal pay and the inadequacy of the measures open to the Association was a consistent agenda item in national conferences of the Association in the period prior to the introduction by the then Industrial Commission of New South Wales, of the equal pay for work of equal value principle in 1973\textsuperscript{13}. Prior to this time the NSWNA was confined by the narrow scope of the 1958 legislation which simply promoted the concept of equal pay for equal work\textsuperscript{14}. While the NSWNA supported the transition from the 1969 to 1972 federal equal pay principles it

\textsuperscript{10} Re Public Hospitals Nurses’ (State) Award (1971) 71 AR 572; Re Public Hospitals Nurses’ (State) Award (1973) 73 AR 62.
\textsuperscript{11} NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 23 June 1960, pp. 23-24; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 22 June 1961, pp. 28-29; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 21 June 1962, p. 19; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 20 June 1963, pp. 25-26; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 11 June 1964, pp. 31, 32-34; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 29 July 1965, p. 39.; NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 7 July 1966, pp. 422-44.
\textsuperscript{12} NBAC, NSWNA, Z142, Box 9, Minutes of New South Wales Nurses’ Association Annual Conference, 7 July 1966, p. 3.
\textsuperscript{13} NBAC, NSWNA, Z142, Box 10, Minutes of New South Wales Nurses’ Association Annual Conference, 22 June 1967, Report by General Secretary (L. Hart); NBAC, NSWNA, Z142, Box 10, Minutes of New South Wales Nurses’ Association Annual Conference, 20 June 1968, Report by General Secretary (L. Hart); NBAC, NSWNA, Z142, Box 10, Minutes of New South Wales Nurses’ Association Annual Conference, 19 June 1969, Report by General Secretary (H. Henlen); NBAC, NSWNA, Z142, Box 11, Minutes of New South Wales Nurses’ Association Annual Conference, 17-18 July 1973, Report by General Secretary (H. Henlen).
\textsuperscript{14} NBAC, NSWNA, Z142, Box 10, Minutes of New South Wales Nurses’ Association Annual Conference, 16 July 1970, Report by Industrial Officer (P. Lloyd-Lucas).
was unable, due to its predominantly state award coverage, to put forward a claim that the ACTU could utilise for the purpose of launching the 1972 principle\textsuperscript{15}.

The 1973 state equal pay principle was applied incrementally from 1973 onwards, but by consent and without any work value investigation\textsuperscript{16}. Something of the uneven approach to the appraisal of nursing work within industrial tribunals was highlighted by proceedings in 1974 before Justice Dey, where nurses sought work value increases in excess of those available though wage indexation. Dey effectively accepted the claim, arguing that although cost was a consideration, of equal merit was the public interest, an important component of which was the proper remuneration of the professional work of nurses\textsuperscript{17}. Dey's decision was ultimately overturned on appeal, primarily because of the threat it posed to wage indexation and the invitation it provided to other unions to seek wage increases outside of those available through wage indexation\textsuperscript{18}. The failure to reappraise the work value of nurses was the impetus for a series of rolling industrial stoppages in New South Wales\textsuperscript{19}.

In the period 1979-1982 there were also particular issues concerning the alignment of wages paid to Commonwealth nurses compared to those in state government employment, and anomalies between Commonwealth nurses in different states. The operation of the \textit{Salaries and Wages Pause Act 1982} (Cth) had inhibited the pursuit of further claims\textsuperscript{20}. However, on the election of a federal Labor government in March 1983, the RANF had successfully pressed the federal Minister for Employment and Industrial Relations, through the ACTU, for

\textsuperscript{15} NBAC, ACTU, N147/247, Correspondence from Federal Secretary, Australian Council of Trade Unions (H. Souter) to All Affiliates, 2 February 1972.

\textsuperscript{16} \textit{Public Hospitals Nurses’ (State) Award} (1974) 192 IG 1167; NBAC, NSWNA, Z142, Box 11, Minutes of New South Wales Nurses’ Association Annual Conference, 9-10 July 1974, Report by General Secretary (H. Henlen).

\textsuperscript{17} NBAC, NSWNA, Z142, Box 11, Minutes of New South Wales Nurses’ Association Annual Conference, 9-10 July 1974, Report by General Secretary (H. Henlen); NBAC, NSWNA, Z142, Box 12, Minutes of New South Wales Nurses’ Association Annual Conference, 6-7 July 1976, Report by General Secretary (H. Henlen); NBAC, NSWNA, Z142, Box 12, Minutes of New South Wales Nurses’ Association Annual Conference, 6-7 July 1976, Report by Industrial Officer (P. Lloyd-Lucas).

\textsuperscript{18} \textit{Re Public Hospitals Nurses’ (State) Award} (1976) 1976 AR 67. This decision is the final decision in a long running series of cases that contemplated Dey’s decision and predecessor cases. The decision details a recent award history of claim, appeal and counter appeal, see \textit{Re Public Hospitals Nurses’ (State) Award} (1976) 1976 AR 67 at 68-71.

\textsuperscript{19} NBAC, NSWNA, Z142, Box 27, Minutes of New South Wales Nurses’ Association General Council, 1 November 1982.

\textsuperscript{20} NBAC, RANF-ACT Branch, Z209, Box 33, Correspondence from Federal Secretary, Royal Australian Nursing Federation (J. Cooney) to Secretary, Public Service Board, 20 October 1982.
exemptions under section 10(3) of the Salaries and Wages Pause Act so that outstanding pay and allowance matters for Commonwealth employed nurses could be instigated in new proceedings before the Commission\textsuperscript{21}. The negotiations involving the ACTU also canvassed what the RANF identified as the pressing salaries issues facing nurses, while the matters identified for exemption included the award that would be chosen as the vehicle for the comparable worth claim\textsuperscript{22}. The election of the Labour government heralded the implementation of a Prices and Incomes Accord between the ACTU and the Australian Labor Party (ALP), an agreement which at that stage addressed the return of centralised wage fixing, the implementation of nominated features of the social wage, and a no extra claims commitment on the part of unions. The General Secretary of the New South Wales Nurses Association (NSWNA), Jenny Haines, was of the view that the terms of the Prices and Incomes Accord, particularly its no extra claims obligations and the non-immediate pursuit of catch-up claims, were insufficient to meet the wage shortfall faced by nurses. However her opposition to the Accord was not endorsed by the NSWNA\textsuperscript{23}.

6.2.1 DEVELOPING THE CONCEPT OF COMPARABLE WORTH

Strategies to implement equal pay were identified in key ACTU policy documents, including the Working Women’s Charter initially developed in 1977\textsuperscript{24} and the Action Plan for Women, the latter endorsed by the ACTU Executive in August 1984\textsuperscript{25}. The concept of comparable worth was raised initially at a March 1984 meeting of the ACTU Women’s Committee, where


\textsuperscript{22} NBAC, RANF-ACT Branch, Z209, Box 34, Correspondence from Industrial Officer, Royal Australian Nursing Federation (J. Teicher) to Secretary, Australian Council of Trade Unions (W. Kelty, attention I. Watson) 21 August 1984.

\textsuperscript{23} NBAC, NSWNA, Z142, Box 27, Minutes of New South Wales Nurses’ Association General Council, 28 February 1983, pp. 4-5; NBAC, NSWNA, Z142, Box 27, Minutes of New South Wales Nurses’ Association General Council, 19 September 1983, p. 19; NBAC, ACTU, N147/375-413, Minutes of Australian Council of Trade Unions Executive, 5-8 December 1983, p. 13.

\textsuperscript{24} Charter revised in 1985, NBAC, ACTU, N147/375-413, Minutes of Australian Council of Trade Unions Executive, 19-23 August 1985, p. 25.

\textsuperscript{25} NBAC, ACTU, N147/375-413, Minutes of Australian Council of Trade Unions Executive, 19-23 August 1984, p. 35.
the RANF’s Federal Secretary was the union’s representative. The concept of comparable worth was included in a Draft Equal Pay Manual prepared by the ACTU’s Working Women’s Centre; having considered this document, the Committee recommended that the ACTU Executive examine a range of strategies to achieve equal pay:

1. Inclusion of the concept of comparable worth (i.e. comparative work value), as outlined in the paper, in the ACTU submissions to the National Wage Case;
2. Support for unions seeking to take cases on an award by award or classification basis incorporating the concept of comparable worth (i.e. comparable work value) to arbitration;
3. Support for unions seeking to take cases through the Commonwealth or State anti-discrimination mechanisms to establish the concept of comparable worth (i.e. comparable work value);
4. The ACTU Working Women’s Centre to prepare a draft survey for affiliates to establish the incidence of wage differentials based on total earnings within their areas of coverage to be used as the basis for action by the ACTU or individual affiliates;
5. That the draft be finalised by the ACTU Working Women’s Centre and produced for distribution to all affiliates as soon as possible.

Prior to this time the only reference to comparable worth in ACTU policy concerning equal pay for work of equal value was a recognition, introduced in 1983, that the ‘value of jobs may have been set on the basis that they have been historically performed by women ...that comparable worth of jobs be established on a non-sexist basis’. Neither comparable worth nor equal pay featured in the Statement of Accord between the Australian Labor Party and the ACTU.

Following the development of recommendations by the ACTU Women’s Committee, the concept of comparable worth was further reconsidered at a meeting of Health Industry unions including both the RANF and the NSWNA and attended by the ACTU Secretary, Bill

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27 NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of the Australian Council of Trade Unions Women’s Committee, 14 March 1984, pp. 3-4.
28 NBAC, ACTU, S784, Box 4, Minutes of Australian Council of Trade Unions Congress 1981, 10-14 September 1981, p. 4; NBAC, ACTU, S784, Box 5, Minutes of Australian Council of Trade Unions Congress 1983, 12-16 September 1983, p. 188.
29 NBAC, ACTU, S784, Box 5, Minutes of Australian Council of Trade Unions Congress 1983, 12-16 September 1983, Background papers.
Kelty, in June 1984\textsuperscript{30}. This meeting heard a report on the available prospects for advancing nursing wages and resolved to establish a working party, chaired by the ACTU, to prepare a report examining the comparative worth of nurses for report by 1 February 1985\textsuperscript{31}. The meeting records the ACTU Secretary noting that with respect to the comparable worth of nurses' salaries, 'an argument could be advanced on a selective basis under the existing [wage fixing] guidelines but if that is not possible, then there should be an argument prepared by September 1985\textsuperscript{32}.

The final version of the Equal Pay Manual published in June 1985 put forward a program which proposed testing the consistency of comparable worth within the terms of the 1972 equal pay for work of equal value principle, prior to the planned review of wage fixing principles in September 1985. If the Commission were to find against this interpretation, changes to the principles could be developed prior to the comparable worth case proceeding.

The ACTU will also test the application of comparable worth on pay equity, initially using nurses. The ACTU believes that the 1972 equal pay decision embraces the concept of comparable worth or pay equity. The ACTU will seek to test this opinion, in principle, before the Australian Conciliation and Arbitration Commission prior to the planned review of the current wage fixing principles in September 1985. This timing will enable any necessary changes to be made to the wage fixing principles before proceeding with the nurses' test case\textsuperscript{33}.

The concept of comparable worth was also canvassed within the decision making bodies of the RANF. In September 1984 a meeting of RANF State Secretaries and Industrial Officers, the Industrial Advisory Committee, reported the resolution of the meeting of Health Industry unions and the establishment of the working party on which the RANF was represented. The RANF’s report of the meeting of Health Industry unions records the view of ACTU Secretary Bill Kelty that comparable worth would not be won in the first instance\textsuperscript{34}.

\textsuperscript{30} NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses' Association General Council, 3 December 1984, Report by General Secretary (J. Haines).

\textsuperscript{31} NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of Health Industry Unions Meeting, 12 June 1984, p. 4.

\textsuperscript{32} NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of Health Industry Unions Meeting, 12 June 1984, p. 4.

\textsuperscript{33} NBAC, ACTU, S784, Box 5, Australian Council of Trade Unions Working Women's Charter Implementation Manual on Equal Pay, June 1985, p. 31.

\textsuperscript{34} NBAC, RANF-ACT Branch, Z209, Box 32, Minutes of Royal Australian Nursing Federation Industrial Advisory Committee, 18-19 September 1984, pp. 2-3.
The working party met in November 1984. The ACTU Industrial Officer appointed to coordinate potential comparable worth applications reported that the ACTU Executive was committed to testing comparable worth 'on a pilot basis with a classification such as nurses'\(^{35}\) and, if necessary, to seek a change to the wage fixing principles. The ACTU's views as to the case strategy were at this stage loosely formed:

...the ACTU thinking was that there was a need to look at the wages history of nurses and analyse the knowledge, skills, responsibilities etc., involved in their jobs; compare that with other occupations in similar work environments (e.g., teachers), traditionally male occupations (e.g., transport workers); and with some of the occupations regarded as wage fixation standards (e.g., fitters); discuss the matter with the nurses’ employers and Federal and State Governments at some stage; perhaps have the Wage Fixation Principles altered at their next review in October 1985; and maybe run a test case on the matter\(^{36}\).

To compile the list of potential comparator occupations, the meeting called on the ACTU to consider occupations including engineers, firemen, ambulance drivers and police officers, and also established a work program for the preparation of the wage history of nurses and comparator groups\(^{37}\). In later presentations by the ACTU to RANF officers, the ACTU flagged that there would be wage increases as part of a process of integrating rates between employment in the state and federal jurisdictions, and then an additional five per cent wage increase that could be attributed to what the ACTU termed comparable worth wage increases. The quantum of the potential comparable worth increase identified by the ACTU was criticised by the ACT Branch of the RANF for being insufficient and prejudicial to any future comparable worth claims\(^{38}\).

While the RANF and the NSWNA\(^{39}\) were supportive of the case proceeding there was also evidence that the RANF wanted a greater influence over the carriage of the case. Concerned

\(^{35}\) NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of Union’s Meeting Regarding Nurses’ Wages, 16 November 1984, p. 1.

\(^{36}\) NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of Union’s Meeting Regarding Nurses’ Wages, 16 November 1984, p. 1.

\(^{37}\) NBAC, RANF-ACT Branch, Z209, Box 38, Minutes of Union’s Meeting Regarding Nurses’ Wages, 16 November 1984, pp. 1-2.

\(^{38}\) NBAC, RANF-ACT Branch, Z209, Box 164, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 19 September 1985, pp. 132-133.

\(^{39}\) NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses’ Association General Council, 2 September 1985, Report by General Secretary (J. Haines); NBAC, NSWNA, Z142, Box 32, Minutes of New South Wales Nurses’ Association General Council, 24 March 1986, Report by Assistant General Secretary (B. Ridgeway).
about the absence of evidence, the RANF initiated steps in April 1985 to collect comparable wages data for first year Police Officers, first year Fitters and first year Teachers\textsuperscript{40}, while a meeting of RANF Secretaries and Industrial Officers reported that they had unsuccessfully pressed the ACTU concerning the resources that the ACTU would be directing to the case\textsuperscript{41}. The Federal Council of the RANF in August 1985 accepted the recommendation of the Union’s federal Industrial Advisory Council that the case proceed in a particular manner, namely:

press the ACTU to continue to actively and speedily undertake the comparable worth case for nurses;

notify the ACTU that the RANF strongly prefers to approach the case in the following way:

- the ACTU seeks to have the principles of wage fixation varied in September 1985 to permit the comparable worth case to proceed within the principles;
- the ACTU seeks to run the comparable worth case commencing no later than the first quarter of 1986;
- the ACTU should not rely solely on the statistical information isolated by the ACTU, but should concentrate on actual existing rates in the classification/occupation being considered;
- in determining the occupation to be compared, some basic criteria be used including the need for three years tertiary education required for entry, state control of the occupation through registration boards, a high degree of responsibility for the work undertaken;
- in considering the salaries of nurse managers, the comparison should be with hospital, lay and medical administrators;
- press the ACTU to consult fully with the RANF and its branches in preparing its comparable worth case for nurses in recognition of the fact that the RANF is a repository of vital industrial and professional information relating to nursing\textsuperscript{42}.

Beyond the realm of the official record of the RANF’s Federal Council, relations between the RANF and the ACTU were arguably more terse with the Federal Secretary of the RANF, Judith Cooney, sending a telex message to the ACTU Secretary during the course of the Federal Council meeting demanding greater consultation by the ACTU. The telex, which carried the direct implication that the ACTU had promoted the concept of comparable worth to the RANF, conveyed the express demands of the RANF Federal Council:-

\textsuperscript{40} NBAC, RANF-ACT Branch, Z209, Box 70, Minutes of Royal Australian Nursing Federation Federal Council, 19 April 1985, p. 3.
\textsuperscript{41} NBAC, RANF-ACT Branch, Z209, Box 70, Minutes of Royal Australian Nursing Federation Secretaries and Industrial Officers, 19 April 1985, p. 2.
\textsuperscript{42} NBAC, RANF-ACT Branch, Z209, Box 71, Royal Australian Nursing Federation Special Federal Council Meeting, 1-3 August 1985, Report to ACT Branch Council.
That the RANF Council express outrage that the ACTU has failed to respond to repeated requests from RANF for written progress reports on comparable worth and integrated rates.

Both of these concepts were devised by the ACTU and sold to RANF as a panacea to the intolerable industrial problems confronting nurses nationally.

Further failure to respond will lead RANF Federal Council to seriously reconsider its affiliation to the ACTU43.

This discontent was reported and endorsed by the ACT Branch’s Industrial Action Group which also noted the lack of direction and support from the ACTU. The Industrial Action Group pressed the RANF’s Federal Council to continue to petition the ACTU as to the timing of the case and the evidence to be used in support of submissions44.

The first publicity about a comparable worth case and issues of equal pay directed to RANF members appeared in a report prepared by ACTU advocate Jenny Acton and distributed to nurses through their monthly journal, which was circulated to the RANF membership in April 1985. Within this report, comparable worth was defined both in terms of a doctrine, ‘earnings should be based on the knowledge, skill, effort, responsibility and so on his/her work requires relative to other work, regardless of whether the work is undertaken by a man or a woman’, and also of an unbiased technique45. The report referenced, as appropriate precedents, successful comparable worth cases within the United States jurisdiction, which had relied upon factor point job evaluation methods. The report noted that the ACTU would seek initially to test the view that the 1972 principle embraced the concept of comparable worth46. This tactical approach was explained on the basis that it would enable the ACTU to seek changes, if necessary, to the prevailing wage fixing principles47.

43 NBAC, RANF-ACT Branch, Z209, Box 71, Correspondence from Federal Secretary, Royal Australian Nursing Federation (J. Cooney) to Secretary, Australian Council of Trade Unions (W. Kelty), 1 August 1985.
44 NBAC, RANF-ACT Branch, Z209, Box 44, Minutes of Royal Australian Nursing Federation (ACT Branch) Industrial Action Group, 5 August 1985, p.49.
The RANF’s concerns were met partially following consultations with the ACTU, as it was the RANF who moved a statement on comparable worth at the September 1985 ACTU Congress and developed publicity material to be distributed to the membership in support of the campaign. The full terms of the September 1985 resolution which was endorsed by the ACTU Executive were as follows:

ACTU Congress endorses the program by which the ACTU is to develop equality of wages. This program involves:

First: Commitment to support of a Comparable Worth Case and urges all ACTU affiliates to show support for the case through the distribution of information to their members, the provision of any relevant material to the ACTU and by sending representatives to the hearings of the Comparable Worth Case.

Should the Conciliation and Arbitration Commission reject the contention that the 1972 equal pay decision embraces the concept of comparable worth, this Congress urges the ACTU to give a high priority to seeking changes through the 1985 review of the Wage Fixing Principles, to ensure that a Comparable Worth Case can be seen within the new Wage Fixing Principles.

Second: The concept of comparable worth be practically applied. That meetings of unions covering female dominated occupations, including nurses and keyboard classifications, should be held to further pursue the implementation of the principle.

The Working Women policy was amended following this resolution, with the newly amended policy providing the following course of action.

10. A Special Committee will be set up to determine

(i) The appropriate order in which those industries employing large numbers of women will be tested for comparable worth;
(ii) How comparable worth test cases for clerical, servicing, textiles, clothing and other female-dominated industries should best be pursued.

11. Further, that a political and public education campaign in support of comparable worth evaluations with Equal Pay as the target be developed, through

(i) the discussions leading to the review of the current Wage Fixing Principles in September 1985
(ii) promoting discussions on Equal Pay and comparable worth at union conferences and meetings of unionists at all levels
(iii) the provision of the resources of the ACTU to prepare discussion papers, media releases and information leaflets, etc., to ensure full community awareness of the issues relating to the implementation of Equal Pay.

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50 NBAC, ACTU, S784, Box 5, Minutes of the Australian Council of Trade Unions Congress 1985, 9-13 September 1985, p. 322.
The Action Plan for Women endorsed by the 1985 Congress reiterated the ACTU’s view that the 1972 equal pay decision embraced the concept of comparable worth. The Plan defined the principle of comparable worth but did not seek to distinguish the principle from that of work value, which was the principle traditionally relied on by Australian industrial tribunals to assess the value of work. Congress defined the principle of comparable worth as relating to ‘whether a worker’s pay is based on factors such as [the] knowledge, skill, effort and responsibility his/her work requires relative to other work, regardless of whether the work is undertaken by a man or a woman’.

In ensuing discussions involving the ACTU and the RANF in October 1985 the ACTU identified comparable worth as one element in a strategy to advance nursing wages and conditions and the RANF expressed its continued support for the comparable worth claim in December 1985. The advantage of comparable worth, from the perspective of the ACTU, was that it would remove any reluctance on the part of the Commission as to the type of work comparisons that it might make in applying the 1972 principle. From the RANF’s perspective they simply viewed comparable worth as work value ‘writ large’, although the South Australian Branch observed that to pursue a comparable worth campaign in South Australia would ‘require a massive change of traditional emphasis and attitude in the approach of the Industrial Commission which has always accepted like with like comparisons only on a fundamental base of Comparative Wage Justice’.

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52 NBAC, RANF-ACT Branch, Z209, Box 72, Minutes of Royal Australian Nursing Federation Federal Executive, 10-11 October 1985, p. 12.
53 NBAC, RANF-ACT Branch, Z209, Box 73, Minutes of Royal Australian Nursing Federation Industrial Advisory Committee, 2-3 December 1985, p. 1.
54 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
55 NBAC, RANF-ACT Branch, Z209, Box 70, Royal Australian Nursing Federation (SA Branch), Basic Concept of Comparable Worth and Proposal for Attaining it for Nurses, 12 April 1985.
The intended reliance by the ACTU on United States case law was seemingly well appreciated in government policy circles. The Director of the Women’s Bureau, a policy unit within the federal Department of Industrial Relations, Ursula Doyle noted in September 1985 that 'while the different wage fixing processes and legislation in the United States and Australia prevent direct translation of the United States experience, the ACTU consider the essential features of comparable worth are relevant to Australia and can be applied here' (Doyle, 1985: 6). Doyle noted that work value in Australia had been measured by 'many of the same elements as are included in overseas comparable worth cases’ (Doyle, 1985: 9-10). Yet in what was arguably a portent of what was to emerge, Doyle was equivocal about the degree of Commonwealth support that the ACTU could hope to receive, noting that ‘the role of government in any future comparable worth case is still unclear mainly because ACTU strategy has not yet emerged’ (Doyle, 1985: 9). Doyle’s observations were made at a conference organised by the Council on Action for Equal Pay (CAEP). The CAEP which had been originally formed in 1937 had been relaunched in August 1984 to draw attention to the frailties in current equal pay measures.

Alongside the nurses’ campaigns regarding wages and working conditions, a campaign for an award-based career structure that assessed gradations in work across three areas of nursing – clinical, administrative and education - was developed. This was influential to the ACTU’s decision to utilise a nursing award as the vehicle for the comparable worth proceedings. Although there was considerable antagonism between the RANF and the NSWNA concerning federal award coverage, as detailed in the following section of this chapter, the concept of a new classification structure had the support of the NSWNA56. A RANF Career Structure Committee, including representatives from all states and territories was established in 198257 and the RANF was one of the principal advocates for the transfer of nurse education from

56 NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses’ Association General Council, 4 January 1985, Report by General Secretary (J. Haines).
hospital-based schools to colleges\textsuperscript{58}. The institutional basis of nursing education would in turn become a key issue for the campaign by nurses for rates of pay commensurate with other degree-based occupations, and also the source of internal division within the NSWNA between the General Secretary, Jenny Haines, and a future General Secretary, Patricia Staunton. Haines continued to assert that the wages policy pursued by the federal government and adopted by the New South Wales state government was prejudicial to the nurses achieving the objective of parity with other health professionals, and that the recourse to a new classification structure would not remedy wage disparities\textsuperscript{59}. This internal debate extended to the two-tiered wage policy initially circulated by the ACTU in 1986\textsuperscript{60}.

While in broad terms the NSWNA endorsed changes to award-based career structures the support was conditional – the NSWNA not wishing to provide any support for attempts by the RANF to extend its federal award coverage.

....it was agreed that nursing unions nationwide should develop a consistent approach, the common objective is to establish a career structure based on people with the same knowledge, level of skill and responsibilities receiving the same rate of pay. In the meetings it has always been the objective of the independent state-based unions, including the NSWNA and the QNU, to pursue their own state-based claims and not lock into the RANF’s national objective, i.e., to establish a common rate of pay for nurses nationally, this common rate being established by whatever comes out of the negotiations and court proceedings on the Victorian [state tribunal] claim. The independent state-based unions cannot accept the outcome of the Victorian proceedings as the basis of a common national rate of pay, as to do so would compromise our current opposition to the federal log of claims pursued by the RANF and the HEF. Yet whatever is achieved out of the Victorian claim cannot be ignored by nurses in NSW, nor can we ignore the fact that the Victorian nurses by their recent campaign have set the precedent for the conduct of a wages campaign in each state\textsuperscript{61}.

### 6.2.2 FEDERAL AWARD COVERAGE FOR NURSES


\textsuperscript{59} NBAC, NSWNA, Z142, Box 32, Minutes of New South Wales Nurses’ Association General Council, 13 January 1986, Report to Council by General Secretary (J. Haines).

\textsuperscript{60} NBAC, NSWNA, Z142, Box 33, Minutes of New South Wales Nurses’ Association General Council, 3 November 1986, n.p.

\textsuperscript{61} NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses’ Association General Council, 4 November 1985, Report to Council by General Secretary (J. Haines).
The selection of the Private Hospitals’ and Doctors’ Nurses (ACT) Award as the reference point for the comparable worth claim was indirectly influenced by the RANF’s claim for a federal award and disputes among nursing unions as to coverage rights. The dispute over award coverage is of interest because it illustrates the intersection between gender and organisational politics – in this instance pay equity served as a tactical battlefield for rival organisational interests.

The claim by the RANF for a federal award was lodged in April 1982 when the RANF served logs of claims on all public and private hospitals throughout Australia. The prospect of a federal award with application throughout Australia was not new – evidence of previous attempts date back to the mid 1940s which were inextricably linked to attempts to establish one nursing union and to exploit the national nature of the profession. A concerted effort for a single nursing union and a single federal award was reignited within the RANF in 1977. Until that time the General Secretary of the NSWNA also held a position as an Industrial Officer of the RANF. Although harmonisation between the federal and state unions remained a possibility, it was a distant objective with the General Secretary opining that the resistance of the RANF ‘had thrown down the gauntlet’ to the Association. Harmonisation talks briefly resurfaced in 1982, although by 1983 a call for the Federal Council of the RANF to initiate a joint working party with the NSWNA received insufficient support from either organisation, notwithstanding persistent calls for unification from the Queensland branch of the RANF.

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63 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
64 NBAC, RANF-ACT Branch, Z209, Box 34, Report on harmonisation of interests of the Royal Australian Nursing Federation and the New South Wales Nurses’ Association, August 1977; NBAC, Z142, NSWNA, Box 27, Minutes of New South Wales Nurses’ Association Council, 25 September 1982, Report to Council by General Secretary (J. Haines).
65 NBAC, NSWNA, Z142, Box 12, Minutes of New South Wales Nurses’ Association Annual Conference, 14-15 July 1977, Report by General Secretary (H. Henlen).
68 NBAC, RANF-ACT Branch, Z209, Box 32, Correspondence from Branch Secretary, Royal Australian Nursing Federation-Queensland (M. Gagen) to Federal Secretary, Royal Australian Nursing Federation (J. Cooney), 22 July 1983.
Amid a complex history, the key protagonists were the RANF, a federally registered union with branches in each state and territory, but with limited coverage of nurses in New South Wales and Queensland, and the NSWNA, a state registered organisation with rights to cover nurses within New South Wales. At the time of the comparable worth proceedings, 45 per cent of the RANF’s membership was located in Victoria, with only 9 per cent located in New South Wales and Queensland, a membership balance which necessitated the Queensland branch operating by way of a grant from the RANF’s Federal Council.

Although the dispute between the two nursing unions was long standing, the antipathy between these two organisations at the time of both the single federal award application and the comparable worth application remained significant. The dispute over the representation of nurses was something of a lightning rod in elections for the Federal Secretary of the RANF in 1985 and successive elections for the State Secretary of the NSWNA in 1982 and 1987. Both organisations challenged the ability of the other to represent the interests of nurses – the NSWNA viewed the RANF as being equipped to address the professional needs of nurses, but disputed the capacity of the RANF to represent nurses in connection with an industrial dispute; the RANF viewed the NSWNA as being unnecessarily militant.

Within the RANF, the claim for a federal award was viewed as the vehicle for strengthening the RANF’s industrial position and maintaining ‘RANF leadership in the nursing industry....and prevent[ing] other unions [from] establishing federal award regulation in the industry’. The disparity in rates between different state and federal awards served as the prompt for state governments to oppose the federal award. The substance of the submissions from state governments concerned the industrial disruption that would potentially arise from the transfer

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69 NBAC, RANF-ACT Branch, Z209, Box 72, Royal Australian Nursing Federation Declaration of Membership, 31 December 1985; see also NBAC, RANF-ACT Branch, Z209, Box 32, Royal Australian Nursing Federation Declaration of Membership, 31 December 1982.

70 NBAC, RANF-ACT Branch, Z209, Box 32, Correspondence from Federal Secretary, Royal Australian Nursing Federation (J. Cooney) to All Branch Secretaries, Federal Councillors, 6 April 1983.

of industrial regulation of nursing wages and conditions from the state to the federal jurisdiction. This opposition focused on the higher rates of pay available to nurses employed under some state awards, particularly those in New South Wales and Victoria, compared to those employed under federal awards and determinations. Rates in Tasmanian state awards were, however, lower than those available federally. Opposition within organised labour came not only from the NSWNA, but also from the Hospital and Research Employees’ Association and the NSWNA-aligned Queensland Nurses’ Union, who in different ways viewed the RANF claim as a challenge to their membership. The HEF had also served the appropriate documentation for a federal award covering nursing staff in 1984, a claim viewed as a challenge by the RANF to the scope and incidence of any federal award that may be made.

In material circulated to branches in February 1983, the RANF identified the federal award as being a pivotal strategy in the drive towards industry unionism and lessening its vulnerability to rival membership claims from other unions.

The legal technicalities of award-making in the federal industrial jurisdiction require that unions serve a log of claims on employers across state boundaries. When employers refuse to meet the terms of the claims, unions file claim for the ACAC to find a dispute between the union and all employers who have been served with, but not met the claims of the union. A dispute finding has been the mechanism required by legislation for the making of an award; the latter sets out the terms and conditions that are in part settlement of that dispute. A finding of a dispute can be open to challenge, usually on the basis that adequate industrial

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73 NBAC, NSWNA, Z142, Box 30, Minutes of New South Wales Nurses’ Association General Council, 30 July 1984, Report by General Secretary (J. Haines); NBAC, NSWNA, Z142, Box 30, Minutes of New South Wales Nurses’ Association General Council, 3 September 1984, Report by General Secretary (J. Haines); NBAC, NSWNA, Z142, Box 30, Minutes of New South Wales Nurses’ Association General Council, 2 October 1984, Report by General Secretary (J. Haines); NBAC, NSWNA, Z142, Box 30, Minutes of New South Wales Nurses’ Association General Council, 3 December 1984, Report by General Secretary (J. Haines); NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses’ Association General Council, 1 July 1985, p. 3.
74 NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses’ Association General Council, 3 December 1984, Report by General Secretary (J. Haines).
77 NBAC, RANF-ACT Branch, ZZ09, Box 7, Correspondence from Federal Secretary, Royal Australian Nursing Federation (J. Cooney) to Royal Australian Nursing Federation Branch Secretaries, 7 February 1983.
arrangements are already in place, by way of instruments of federal or state industrial authorities. In this instance the RANF was successful, by way of a July 1984 decision of Justice Cohen, in the finding of a dispute. However Justice Cohen's decision\textsuperscript{78} did not lead to hearings around the determination of a federal award as the dispute finding was the subject of what would ultimately be unsuccessful appeals to the Full Bench in May 1985\textsuperscript{79} and High Court in September 1986\textsuperscript{80}. The NSWNA also sought to establish the groundwork for its own case for federal registration through an amalgamation with a division of the Public Service Association of South Australia. With an organisational base in South Australia, the NSWNA would then be equipped to apply for federal registration as they represented the interests of nurses across more than one state\textsuperscript{81}.

In the face of what the RANF Federal Executive believed would be a prolonged campaign of opposition, the RANF sought to broach a negotiated settlement with the NSWNA and the Queensland Nurses' Union. These discussions, which preceded the commencement of the comparable worth proceedings and scheduled negotiations concerning the application for a federal award, also canvassed the merits of the comparable worth claim, including the proposed ambit and quantum of the wage increases that would be sought\textsuperscript{82}. While the matter of the federal award remained unresolved at the time of the comparable worth and following anomalies and inequities proceedings, conciliation and harmonisation negotiations continued\textsuperscript{83}. Conciliation included ACTU intervention at a number of junctures\textsuperscript{84} and

\textsuperscript{78} Royal Australian Nursing Federation and Private Hospitals and Nursing Homes Association of Australia & Ors (1984) 11 IR 220.

\textsuperscript{79} Royal Australian Nursing Federation and Private Hospitals and Nursing Homes Association of Australia & Ors (1984) 11 IR 241.

\textsuperscript{80} Re Royal Australian Nursing Federation; ex parte NSW Nurses' Association & Ors (1985) 16 IR 185.

\textsuperscript{81} NBAC, NSWNA, Z142, Box 13, Minutes of New South Wales Nurses' Association Annual Conference, 18-20 July 1979, pp. 4-5.

\textsuperscript{82} NBAC, RANF-ACT Branch, Z209, Box 164, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 23 October 1985, pp. 140-141; NBAC, NSWNA, Z142, Box 31, Minutes of New South Wales Nurses' Association General Council, 2 December 1985, Report by General Secretary (J. Haines).

\textsuperscript{83} NBAC, RANF-ACT Branch, Z209, Box 73, Minutes of Royal Australian Nursing Federation Federal Council, 7-11 April 1986, pp. 10-11; NBAC, NSWNA, Z142, Box 32, Minutes of New South Wales Nurses' Association General Council 13 Jan 1986, Report by General Secretary (J. Haines).

\textsuperscript{84} NBAC, RANF-ACT Branch, Z209, Box 72, Correspondence from Federal Secretary, Royal Australian Nursing Federation (J. Cooney) to Federal Councillors, Branch Secretaries, 25 March 1986; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Special Branch Council, 3 March 1988, pp. 1-3.
representation by the NSWNA at the 1987 RANF’s Annual Federal Council meeting. This settlement led to the RANF amending their application so that it would not immediately apply to New South Wales without the agreement of the NSWNA. The benefit for the RANF was that the NSWNA agreed to integrate its membership with the RANF’s New South Wales branch – likewise the Queensland Nursing Union and the RANF’s Queensland branch. These steps coincided with the RANF changing its name to the Australian Nursing Federation (ANF) in 1988. This move led to further disunity within the RANF, with the Victorian Branch determining in March 1988 that it opposed the federal award if it did not extend to New South Wales and Queensland. As part of their opposition the Victorian branch of the RANF withheld monies from the federal executive, a dispute that was not resolved until September 1988 when a general meeting of the RANF’s Victorian branch decided to pursue a federal award in Victoria. Ultimately the application for a single federal award was amended so that separate federal awards were pursued on a state by state basis. The first award was a federal award for Tasmanian public sector nurses determined in October 1988 followed by an award for South Australian public sector nurses in March 1989.

In utilising an RANF award as the basis of the comparable worth claim, the ACTU sought to highlight the undervaluation of nursing work, but also to utilise what the ACTU viewed as strong community support for the work of nurses. In the midst of the wider dispute among nursing unions over industrial coverage, the use of a RANF award as the vehicle for the application was viewed by the RANF as ACTU support for the RANF’s desire to gain greater recognition in the federal jurisdiction and to demonstrate their capacity to pursue the industrial interests of the nurses. The RANF had sought to increase its involvement within the ACTU and consistent with this increased involvement the RANF Federal Council, in a self-

90 No author. (1989) ANF’s federal award at a glance, *Australian Nurses Journal*, vol. 18, no. 9, p. 32.
91 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
acknowledged change in philosophy, gave explicit support to the then Federal Secretary’s nomination for a vacant position on the ACTU Executive. The increased involvement of women in decision making roles within the ACTU was also a ACTU objective, given that in 1979 all positions on the ACTU Executive were occupied by men. Lodging the claim in the ACAC was the required course of action given the origin of the 1972 principle, although the RANF had a limited membership in the federal jurisdiction. The pattern of award coverage at the time of the application was that the majority of nurses were covered by state awards; federal award coverage was primarily confined to awards covering nurses in the Australian Capital Territory (ACT) and the Northern Territory and nurses employed by the Commonwealth government through the Department of Veterans’ Affairs.

6.3 THE COMPARABLE WORTH CASE

In procedural terms the comparable worth case commenced with the RANF and HEF filing separate applications in 1985 to vary a common rule award, the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972*. A common rule award is an industry award which has application to all workplaces within its scope and application; in the federal jurisdiction it allows industrial awards to be made in the ACT and the Northern Territory. Within these territories, the normal mandatory requirement for an interstate industrial dispute as the threshold criteria for the making of a federal award is waived. The Commission joined the RANF and HEF applications, which were listed initially before Deputy President Keogh for a directions hearing.

94 AIR, C No. 2219 of 1985, Application by the Royal Australian Nursing Federation to vary the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972* re rates of pay for nurses.
95 AIR, C No. 2271 of 1985, Application by the Hospital Employees’ Federation to vary the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972* re rates of pay for nurses.
96 *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972* (1972) 145 CAR 700.
The ACTU representing the RANF and HEF submitted that the matter be referred to a Full Bench of the ACAC pursuant to s.34 of the _Conciliation and Arbitration Act 1904_ (Cth). The ACTU identified multiple grounds for this referral: the test case nature of the applications sought by the RANF and the HEF; the relevance of the case to other groups; public interest grounds; and, as a means to prevent appeals that may arise from the decision of a single member of the Commission. The proposed reference was supported by the Confederation of Australian Industry (CAI) and the Confederation of ACT Industry, although these parties argued that case be referred to the National Wage Case Full Bench. Advocacy for the ACTU was undertaken by its Senior Industrial Officer, Jenny Acton, while Colin Polites, a partner with Freehill, Hollingdale and Page, undertook advocacy for the CAI. Both Acton and Polites would eventually be appointed Deputy Presidents of the Commission, Acton in 1992, Polites in 1989. Equal pay rallies involving both members of the RANF and NSWNA were organised in both Melbourne and Sydney to coincide with the proceedings. There was wide community anticipation about the proceedings, one expression of which was a request from the Women’s Film Unit, Film Australia to the ACAC to film the proceedings.

The application for a s.34 referral was agreed to by the President (1 November 1985), although the President did not accede to the CAI application that the National Wage Case Full Bench be reconvened. As a result a bench was convened comprising Justices Maddern and Cohen and Commissioner Bain, with proceedings commencing before the Full Bench on 26 November 1985. Maddern and Cohen well both well versed in the Commission’s approach to wage fixation - Barry Maddern was admitted to the Victorian Bar in 1967 and appointed as a

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97 AIR, C Nos. 2219 and 2271 of 1985, Correspondence from Deputy President (M B Keogh) to President (Moore J), Australian Conciliation and Arbitration Commission (ACAC), 28 October 1985.
98 Elevated to Senior Deputy President in 1999.
99 Elevated to Senior Deputy President in 1994. Colin Polites is distinguishable from George Polites who was Director-General of the CAI 1978-1983.
100 NBAC, NSWNA, Z142, Box 32, Minutes of New South Wales Nurses’ Association General Council, 24 March 1986, Report by Assistant General Secretary (B. Ridgeway).
101 Correspondence from Executive Producer, Women’s Film Unit, Film Australia (D. Torsch) to Deputy Industrial Registrar, Australian Conciliation and Arbitration Commission, 25 October 1986.
102 AIR, C Nos 2219 and 2271 of 1985, Unreported decision by the President under s.34 C Nos. 2219 and 2271 of 1985, 1 November 1985.
103 At the time of the decision arising from the comparable worth case Justice Maddern had been appointed President of the Commission following the retirement of Sir John Moore in December 1985.
Deputy President of the Commission in 1980, while Judith Cohen had worked as a solicitor from 1953, been appointed as a Commissioner in 1975 and elevated to the position of Deputy President in 1980.

Parties to the case included the RANF, the HEF and the Confederation of ACT Industry. Parties that successfully sought to intervene included the ACTU, the State Public Services Federation (SPSF), the CAI, the ACT Health Authority, the Public Service Board (PSB), the Minister of State Employment and Industrial Relations, referred to in future as the Commonwealth, the state governments of Tasmania and Victoria, the Council of Action for Equal Pay (CAEP) and the National Council of Women. Proceedings commenced in December 1985 but were adjourned on the application of the Commonwealth due to unrelated industrial action by nurses, concerning levels of staffing, in the ACT. Industrial action ceased within a few days when the federal Minister for Health agreed to an independent inquiry into the level of nursing staff resources required by the Australian Capital Authority Health Authority to provide adequate health care services.

The application lodged by the RANF and the HEF provided the following rationale for the application:

1. The increase in rates of pay sought would be consistent with the principles contained in the decision of the Commission in the 1972 Equal Pay Test Case.

2. Nursing is an occupation which has been undervalued because it is traditionally and predominantly female. Nurses require comparable worth pay increases to rectify this undervaluation.

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104 The Council for Action on Equal Pay (CAEP) was supported by the following organisations: National Council of Women; Union of Australian Women; Women’s Electoral Lobby Australia; Women in Trade Unions Network, Queensland; Women’s Legal Resources Group, Victoria; Women’s Education and Employment in Victoria; Women’s Liberation Switchboard, Victoria; Women’s Social and Political Coalition, Victoria. Although the CAEP was supported by the National Council of Women, the National Council of Women made separate submissions which were in support of those made by the CAEP, see AIR, C Nos. 2219 and 2271 of 1985, Transcript, C Nos. 2219 and 2271 of 1985, pp. 142-148).

105 AIR, C Nos. 2219 and 2271 of 1985, Exhibits Commonwealth1, Commonwealth2; AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 43, 45-46.


107 AIR, C Nos. 2219 and 2271 of 1985, Correspondence from Deputy President (M B Keogh) to President (Moore J), Australian Conciliation and Arbitration Commission (ACAC), 28 October 1985.
The ACTU did not initially seek to argue the merits of the case but sought a ruling on two threshold matters; firstly a reaffirmation that the 1972 equal pay decision was still available to the parties and secondly a ruling that the applications were not affected by the wage fixing principles that had been determined through the 1983 National Wage Case. These issues, together with the concept of comparable worth, became focal points in the proceedings. Each of these will now be considered.

6.3.1 THE CONTINUED APPLICATION OF THE 1972 PRINCIPLE

The ACTU's decision to seek a reaffirmation of the 1972 principle, prior to a substantive hearing of the comparable worth claim, was based on their interpretation of the terms of the 1972 principle. The Commission in handing down the 1972 principle provided some expectation that increases arising from the application of the principle would be awarded by 30 June 1975.

...Under normal circumstances, implementation should take place by three equal instalments so that one-third of any increase is payable no later than 31 December 1973, half of the remainder by 30 September 1974 and the balance by 30 June 1975.

The ACTU, whose submissions were supported by the State Public Services Federation, initially took the Full Bench to a number of decisions which demonstrated that the ACAC had determined a number of equal pay matters following 1975. The ACTU further contended that both single members of the Commission and Full Benches of the Commission had not been constrained in their determinations by the 1975-1981 Wage Fixing principles.

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112 AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 21-30.
113 There was not a singular set of wage fixing principles between 1975 and 1981. Wage fixing principles were determined by the National Wage Case April 1975 (1975) 167 CAR 18 and were amended by a series of National Wage Cases between 1975 to 1981 [see for example, National Wage Case September 1975 (1975) 171 CAR 79, National Wage Case May 1976 (1976) 177 CAR 335, Wage Fixing Principles Case September 1978 (1978) 211 CAR 268, National Wage Case June and September 1980 Quarters (1981) 250 CAR 79, Inquiry into Wage Fixing Principles
which were extant at the time of the decisions. The ACTU then contended that, as the 1983 wage fixing principles\textsuperscript{114} were similar to the wage fixing principles in 1975-1981, the present applications before the Commission should be unaffected by those principles.

In our submission, the arbitral dicta clearly shows that in the past the Commission has not felt unable to embrace the 1972 equal pay decision and its equal pay for work of equal value principles because of the passage of time since the decision on principles was handed down because of the existence of the Wage Fixing Principles. The only matters, in our submission, which are different between the period of the decisions I have referred to and the current period are firstly the effluxion of time, and secondly the fact that we have another set of Wage Fixing Principles now applying\textsuperscript{115}.

During the ACTU's submission the Full Bench directly countered the ACTU's submission that there was an equivalent application between the 1975-1981 wage fixing principles and the 1983 wage fixing principles. The Full Bench in particular observed key differences in two principles, work value and inequities\textsuperscript{116}. The Full Bench sought further clarification as to whether the ACTU's submission could be aligned to the submissions of the Women's Electoral Lobby (WEL), the Union of Australian Women (UAW) and the National Council of Women (NCW) in the 1983 National Wage Case\textsuperscript{117}. In their submissions to the 1983 National Wage Case, the three women's organisations had argued for a re-evaluation of women's wages in occupations traditionally undertaken by women. The basis of the submissions by WEL, UAW and the NCW was that the implementation of the 1972 equal pay principle had not been supported by appropriate work value assessments. Their submission was that as individual awards came up for variation for National Wage Case increases, the Commission should be provided with an opportunity to introduce comprehensive work value exercises. The Full Bench in the 1983 National Wage Case specifically rejected such an approach, noting that it 'would provide the opportunity for the development of additional tiers of wage increases, which would be inconsistent with the centralised system which we propose\textsuperscript{118}.

\textsuperscript{114}(1981) 254 CAR 341].These principles accompanied a period of indexation, a phase of wage fixing that was abandoned by the Commission in December 1981 \textit{National Wage Case July 1981} (1981) 260 CAR 4.

\textsuperscript{115}\textit{National Wage Case October 1983} (1983) 4 IR 429.

\textsuperscript{116}AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 23-30.

\textsuperscript{117}AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 31.

\textsuperscript{118}AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 36.

The ACTU reaffirmed that its threshold application was confined to a reaffirmation of the 1972 equal pay for work of equal value principle\(^{119}\), a position which was also supported by the Victorian government\(^{120}\). In further submissions the ACTU distinguished its current application from the submissions of the women's organisations in the 1983 National Wage Case and as if to enforce this distinction, endorsed the Commission's rejection of the submissions of the women's organisations in 1983\(^{121}\).

Illustrating its concern over the ramifications of the ACTU application, Justice Maddern asked the ACTU to clarify the likelihood of the present application being replicated in other industries:

> How wide do you suspect this application to extend? You have referred us to the nursing industry, that is what this case is about. What about outside the nursing industry; are we looking at something that is going to have enormous ramifications? Are we looking at something that is going to apply to one or two cases? Do you have any idea of what other case it will apply to\(^{122}\)?

At a further point in the proceedings the ACTU confirmed its position that each case would be run on its merits by tabling, as evidence, a decision of the ACTU Executive (25-28 November 1985). This decision effectively endorsed the claim of the ACTU in the proceedings but noted that:

> ...the ACTU believes that every case must be established on its merits and that the ACTU will not support any flow-on of any increases to other sections of the workforce. Any cases based on comparable worth will need to be established on merit\(^{123}\).

In responding to the threshold matters raised by the ACTU, the submission of the Commonwealth illustrated its view of the relationship between equal pay applications and the wage fixing principles. The Commonwealth initially affirmed its commitment both to the 1972 principle\(^{124}\), the centralised system of wage determination and the Prices and Incomes

\(^{119}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 36.
\(^{120}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 90.
\(^{121}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 36-37, 208.
\(^{122}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 37.
\(^{123}\) AIR, C Nos. 2219 and 2271 of 1985, Exhibit ACTU1; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 61
\(^{124}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 62-63.
Accord\(^\text{125}\). The Commonwealth noted that there was no conflict between these objectives provided that any wage claims were dealt with under the terms of the current wage fixing principles. The Commonwealth advanced a position that most of the workforce had `already received equal pay for work of equal value as defined by that decision……[a]wards that have not been varied by 1985 to reflect the 1972 principle are arguably in an anomalous position\(^\text{126}\). The Commonwealth supported the continued application of the 1972 principle\(^\text{127}\) and placed on record cases in both the federal and state jurisdictions where federal and state equal pay principles continued to be applied\(^\text{128}\). The Commonwealth’s support was conditional, with the Commonwealth noting that ‘[w]hatever the practice between 1975 and 1981, the Commonwealth would submit that it would be entirely inappropriate to deal with equal pay claims, as in some sense outside current wage fixing principles\(^\text{129}\). The Commonwealth, whose position was supported by the Public Services Board\(^\text{130}\), argued that scope existed for the parties to take matters for determination under the 1972 principle through the anomalies provisions within the anomalies and inequities principle (principle 6) of the 1983 wage fixing principles\(^\text{131}\). This approach was one described by the ACTU as too restrictive and inconsistent with the Commission’s traditional approach to the use of anomalies provisions\(^\text{132}\).

Historically the anomalies and inequities principle had been relied on by the Commission as a means of wage restraint during periods of wage indexation. The terms of the current principle at the time of the comparable worth claim identified the criteria for increases in wages and conditions outside of those awarded through National Wage Cases\(^\text{133}\). An anomalies principle was first introduced in 1975; its development followed conferences of the principal parties.

\(^{125}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 64.
\(^{126}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 81.
\(^{127}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 64.
\(^{128}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 79-80.
\(^{129}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 81.
\(^{130}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 81.
\(^{131}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 90.
\(^{132}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 81.
\(^{133}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 200-201.
\(^{134}\) Replicated in full at Appendix Three.
before the President of the Commission following the introduction of wage indexation in the 
National Wage Case of September 1975134. The principle was formally introduced into the 
wage indexation principles in the May 1976 National Wage Case135 and remained in place 
until July 1981 when the Commission abandoned wage indexation136. The terms of the 
principle next came under consideration at the October 1983 National Wage Case which 
indicated that its task was to decide whether there should be a return to a centralised wage 
fixing system, and the principles on which such a system should operate137. By way of that 
process the anomalies principle was amended in 1981, so that an anomaly could not be 
identified through reliance on the doctrines of comparative wage justice and the maintenance 
of relativities138.

Within the comparable worth proceedings the Commonwealth identified the benefits of a 
recourse to the anomalies provisions, within the current wage fixing principles, as precluding 
the possibility of 'claims for equal pay adjustments to awards which have not received the 
benefit of the 1972 decision becoming vehicles for general pay increases'139. The 
Commonwealth asserted that the centralised wage system formed a key element of the 
government’s economic strategy and had been instrumental to Australia’s economic recovery 
from a period of recession. Given this contest the Commonwealth submitted that it would be 
‘quite inappropriate to do anything that could prejudice the centralised system’140. With this 
submission made, the Commonwealth was still keen to demonstrate its credentials in the area 
of equality of opportunity by reference to the Commonwealth’s ratification of the 
International Labour Organisation’s equal remuneration convention141, the passage of sex

month wage pause – National Wage Case December 1982 (1982) 287 CAR 82 - a hiatus extended by the National 
Wage Case of June 1983 which determined that the pause would remain in place until rescinded by a Full Bench of 
the ACAC.
139 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 79-80.
140 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 81.
141 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 64.
discrimination\textsuperscript{142}, public sector reform\textsuperscript{143} and affirmative action legislation\textsuperscript{144} and budgetary allocations to women's programmes within the Department of Employment and Industrial Relations\textsuperscript{145}.

The CAEP rejected the proposition that equal pay applications should only be heard through anomalies proceedings, asserting that such an approach would effectively preclude the reassessment of rates of pay in feminised occupations\textsuperscript{146}. The CAEP acknowledged that through the 1983 National Wage Case the Full Bench of the Commission had rejected the submissions for a reevaluation of women's wages in occupations traditionally undertaken by women\textsuperscript{147}. In reply the CAEP argued that gender pay inequity was still evident, particularly in feminised areas of work\textsuperscript{148} and that further action was required by the Commission to address that part of gender pay inequity that could be addressed through the variation of award provisions. The CAEP submission reflected a feminist analysis of the labour market, suggesting that to subordinate women's claims for equitable remuneration to other economic considerations was to require women to continually underwrite the economy at the expense of their own living standards and that of their children\textsuperscript{149}.

The CAI accepted the ACTU's submission that the 1972 principle still applied\textsuperscript{150}, but argued that the ACTU was seeking a revision of the 1972 principle under the cover of the current application. In the CAI's submission the ACTU were attempting to redefine the 1972 principle by substituting the concept of comparable worth for the concept of equal pay for work of

\textsuperscript{142} AIR, C Nos. 2219 and 2271 of 1985, Exhibit Commonwealth4; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 82.
\textsuperscript{143} AIR, C Nos. 2219 and 2271 of 1985, Exhibit Commonwealth5; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 84.
\textsuperscript{144} AIR, C Nos. 2219 and 2271 of 1985, Exhibit Commonwealth6; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 84.
\textsuperscript{145} AIR, C Nos. 2219 and 2271 of 1985, Exhibit Commonwealth7; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 87.
\textsuperscript{146} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 127.
\textsuperscript{147} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 92.
\textsuperscript{148} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 93.
\textsuperscript{149} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 92.
\textsuperscript{150} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 164.
equal value. The CAI refuted the ACTU’s interpretation of the application of the 1983 wage fixing principles, contending that the silence of the 1975-1981 principles on the application of the 1972 equal pay principle could not be held to be equivalent to the relationship between the 1972 principle and the 1983 wage fixing principles. The CAI further argued that the continued application of the 1972 principle was correctly accommodated by the inequities provisions within the anomalies and inequities principle of the 1983 wage fixing principles.

The CAI’s direction to the inequities provisions which was supported by the Tasmanian Government stipulated that the scope of the comparisons would only involve similar work, a limitation that was expressed prominently within the inequities provisions of the anomalies and inequities principle.

The inequities principle was first introduced by the Commission in the September 1978 assessment of the wage fixing principles, and remained unamended until the abandonment of wage indexation in July 1981. The provisions provided a means whereby the Commission could hear applications for wage increases arising from disparities in pay where employees were performing similar work. In defining similar work the provisions reflected the influence of the Commission’s understanding of work value. Work is considered similar to another class of work or classes of work by reference to ‘the nature of the work, the level of skill and responsibility stipulated that the conditions under which the work is performed’. The provisions further noted that the classes of work forming the comparison submitted to the Commission must be ‘truly like with like’ and that in addition to the similarity of the work there must be another ‘significant factor which makes the situation inequitable’. The provisions noted that a historical and geographical nexus may not of itself be considered such a factor. Through the October 1983 National Wage Case the Commission took the opportunity

152 AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 164-165.
153 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 150.
154 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 165.
to further tighten the inequities provisions so that comparisons could only be made for employees in the same occupation or profession\textsuperscript{157}.

The CAI’s reference to the inequities provisions distinguished the CAI submission from that of the Commonwealth which had asserted that claims could be submitted appropriately under anomalies provisions. The CAI defended this distinction on the basis that the anomalies provisions of the 1983 wage fixing principles could not be relied upon, given that the cases would breach one of the traditional tests of anomaly; namely that it would involve the use of comparative wage justice in the establishment of an anomaly\textsuperscript{158}. The submissions by the CAI on the inequities provisions were rejected by the ACTU on the basis that it negated the intent of the 1972 principle, that being to widen the scope of equal pay applications beyond that of the 1969 equal pay for equal work principle\textsuperscript{159}.

In arguing that the ACTU was seeking to redefine the 1972 principle, the CAI aligned the submissions of the ACTU with the unsuccessful submissions of the women’s organisations in the 1983 National Wage Case\textsuperscript{160}. The CAI thus asserted that the breadth of the application being made by the ACTU had previously been rejected by the Commission. The CAI’s submission also addressed the history of the \textit{Private Hospitals’ and Doctors’ Nurses (ACT) Award} and argued that differential rates of pay for male and female nurses had not ever been a feature of the award. The award had been determined in 1972 with the rates of pay, both at the time of its determination and in the period following 1972, reflecting those applying to nurses employed under ACT public sector awards and determinations. On the CAI’s submission the current rate in the public sector award reflected the outcome of an extensive work value inquiry and that subsequently a rate of pay had been determined for the job irrespective of the sex of the worker. Thus the CAI argued that given the absence of differential rates of pay in the award, it could not be argued that the 1972 principle had not

\textsuperscript{157} National Wage Case October 1983 (1983) 4 IR 429 at 459.
\textsuperscript{158} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 191.
\textsuperscript{159} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 202-203.
\textsuperscript{160} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 175.
been applied to the award, even though the award had been determined in advance of the 1972 equal pay principle\textsuperscript{161}.

Some support for this history of wage setting within the award was provided by the ACT Health Authority and the PSB, which noted that historically rates of pay for nurses employed in the public sector in the ACT were influenced by the rates of pay awarded by state industrial tribunals in New South Wales and Victoria\textsuperscript{162}. There had also been a number of work value cases held before members of the Commission and Public Service Arbitrators\textsuperscript{163} in the period 1976-1981 which involved an amalgam of both work value increases and the community wage increases, the latter following the wage increases that had been awarded under the federal \textit{Metal Industry Award 1971}\textsuperscript{164}. In these submissions there was no evidence as to whether there had been an explicit consideration of the 1972 principle in cases in the federal jurisdiction, or alternatively the consideration of applicable equal pay principles in cases in state jurisdictions.

This aspect of the current application, on the submissions of the CAI, brought into sharp focus a decisive issue concerning the interpretation of the 1972 principle. The CAI argued that the 1972 principle was directed to the elimination of differential rates for men and women undertaking the same work, whereas the submissions of the applicant parties were arguing that the 1972 principle be interpreted by the Commission to remedy a perceived undervaluation of work primarily undertaken by women\textsuperscript{165}. In questioning the CAI over this aspect of their submission, the Commission demonstrated some sympathy for the proposition that the 1972 principle did have application to those cases involving areas of feminised work, where the key points of comparison did not involve differential rates of pay received by male

\begin{footnotesize}
\begin{enumerate}
\item AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 180-181.
\item AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 193.
\item Prior to 1984/1985 the determination of industrial awards and the hearing of industrial disputes involving Commonwealth employment was not heard in the Australian Conciliation and Arbitration Commission but by Commonwealth Public Service Arbitrators.
\item Re \textit{Metal Industry Award 1971} (Australian Conciliation and Arbitration Commission, Moore J, Williams J, Brown C, 18 December 1981, Print E8389); AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 194.
\item AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 182-184.
\end{enumerate}
\end{footnotesize}
workers under the same award. Justice Cohen in responding to the CAI submission noted that ‘there may be something to the argument that there was never an implementation of the bringing of a whole sector up to a male sector, in light of the history that had gone before about the male bread-winners wage and what went before the 1972 equal pay case166.

It was the Commission, rather than the applicant parties or supporting interveners, that raised broader concerns about the valuation of nursing work that had been highlighted by cases in other jurisdictions. Justice Maddern took the CAI to the comments about rates of pay in nursing that had taken place in the 1983 National Wage Case, as well as the contemporary inquiry by the Victorian state government concerning nursing in Victoria167. The CAI in reply argued that the Bench’s first point of consideration should be the wage fixing principles as determined by the 1983 National Wage Case. From this foundation the CAI submitted that the current principles provided opportunities for applicant parties to pursue cases involving changes in the work and responsibility of nurses168. The CAI submitted that the current application was clearly distinguishable from this suggested course in that the applicant parties were seeking the evaluation of the rates of pay of nurses with other disparate areas of work, on the basis that nursing as a feminised area had traditionally been undervalued169. The CAI argued that the application was therefore outside the scope of the current principles and given the potential of the application to flow to other areas of feminised work, as submitted by the CAEP, ‘that ought to be enough to finish the case off now’170.

The foregoing material illustrates that the comparable worth claim was contested on a number of preliminary grounds including its alignment with current tribunal prescriptions on wage fixation. This aspect of the proceedings then introduced further debate as to whether a claim that sought to address an anomaly or inequity in wage fixation, in this case for nurses, could properly involve investigations of work value across occupations.

166 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 181.
167 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 183.
170 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 185.
6.3.2 DEFINING COMPARABLE WORTH

A curious feature of the case was the ordering of the submissions. While it may have been expected that the submissions of the parties concerning comparable worth would follow those concerning the two threshold issues raised by the ACTU, this did not occur. Such was the spectre of comparable worth that the CAEP, Commonwealth and CAI all led submissions regarding comparable worth concurrent with those concerning the threshold matters. In the case of the Commonwealth and the employer organisations this tactic reflected their opposition to the potential for comparable worth to alter existing wage relativities\(^\text{171}\).

Notwithstanding these procedural questions it soon became apparent in the submissions of the parties and in the ACAC’s questioning of advocates that there were two substantive issues. The first concerned the scope of the application of the 1972 principle and the second concerned the degree and frequency to which the applicants and the ACAC could utilise across award comparisons to support applications. This issue arose from the terms of paragraph 5(b) of the 1972 principle which states:

> Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary\(^\text{172}\).

The site of contest in the interpretation of this aspect of the principle was the frequency with which the Commission would be required to rely on comparisons of female classifications within one award and male rates of pay in a different award. A directly related issue involved those instances where such comparisons took place, and whether there was any requirement for the classifications to be similar in nature.

\(^{171}\) Interview, Philip Gardner, Industrial Officer, Royal Australian Nursing Federation, 18 May 2005.

\(^{172}\) National Wage and Equal Pay Cases 1972 (1972) 147 CAR 172 at 180.
The second substantive issue raised through the submissions was the suitability of the work value criteria as the means available to the parties and the ACAC for assessing the value of work. The 1972 principle was clear in its support for the continued reliance by the Commission on work value as the means of undertaking the comparisons envisaged by the principle (paragraphs 2, 4):

2. Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned.....

4. Implementation of the new principle by arbitration will call for the exercise of broad judgement which has characterised work value inquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues

The ACTU's submissions regarding comparable worth were very limited and reflected its view that the Commission would deal with the two threshold issues separately from any detailed consideration of comparable worth. The evidentiary work that would be required to support comparable worth work value comparisons involving nursing had not been undertaken by the RANF as they were awaiting a determination from the Commission on the threshold matters. In its opening submissions the ACTU simply asserted that comparable worth and the 1972 principle were one and the same - 'we also submit that the notion of comparable worth, which was being bandied around in the general community, is merely [the] 1972 equal pay decision'. It was unclear from this line of argument as to whether the ACTU was proposing that comparable worth was a concept which would assist ACAC in its application of the 1972 principle, or alternatively that comparable worth was a methodology through which the 1972 principle could be applied.

This absence of clarity was the basis of acute questioning from the Bench which went specifically to the ACTU's interpretation of comparable worth. This questioning saw the ACTU reaffirm its position, on a number of occasions, that comparable worth means equal pay for

174 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
175 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 30.
work of equal value\textsuperscript{176}, but also observe that the Bench consider the 'concept of comparable worth in the context of the Australian industrial environment'\textsuperscript{177}. The questioning from the Bench sought clarification from the ACTU as to whether comparable worth implied a much wider set of comparisons than those envisaged by the 1972 principle. The Bench's questioning assumed that comparable worth in its application could include comparisons of different rates of pay received by male workers, whereas the 1972 principle concerned the revision of female rates of pay. Illustrating their concern over the scope of comparisons that might potentially be possible under a doctrine of comparable worth, the Bench questioned the ACTU as to whether their application would permit the comparisons of the rates of pay received by male ballet dancers and builders labourers\textsuperscript{178} and as a secondary example, a driver and a builders labourer\textsuperscript{179}.

The Bench also asked the ACTU to clarify the scope of the comparisons available to the parties and the ACAC under the terms of the 1972 principle. One member of the Bench, Justice Cohen, advanced the following interpretation of the paragraph 5(b) of the 1972 principle, an interpretation that provided a limited outlook for highly feminised segments of the labour market:

\begin{quote}
Is that not talking about a comparison within an award; within a specific award, where there are inequalities – there is a distinction between male and female rates? What the Commission was saying there was we must have some basis for trying to have a single set of rates in that award and we look, first of all, to comparisons within the award, if there are male rates; if there are not, then you have to look to similar rates in other awards by comparison for that particular set of occupations in this award we are talking about.

You may even have to look at some male rates in another award, but surely it is not talking about the situation where you have a totally female work force and there is no comparison\textsuperscript{180}?
\end{quote}

When Justice Cohen in a continuation of this exchange asserted that the comparisons envisaged by the 1972 principle would involve similar or identical comparisons\textsuperscript{181}, the ACTU

\textsuperscript{176} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 34-38.
\textsuperscript{177} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 33.
\textsuperscript{178} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 34-35.
\textsuperscript{179} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 37.
\textsuperscript{180} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 35.
advocate drew Justice Cohen's attention to the lack of any such limiting words in the
construction of paragraph 5(b) of the 1972 principle. The ACTU's submissions did not
advance the type of comparisons that it would be relying on in order to achieve an increase in
wage rates in the relevant award. Nor did its submissions confirm that an inter-award
comparison was required due to the lack of appropriate comparators within the award.
However, both in its s.34 application before Deputy President Keogh and in its submissions
before the Full Bench, the ACTU advanced the claim that nursing work in the award was
undervalued because it was a feminised area of work.

The Commonwealth's submissions were somewhat equivocal in their support for the concept
of comparable worth. The Commonwealth submitted that the concept of comparable worth
was 'reflected in the 1972 decision and its procedures for implementation'. The
Commonwealth defined the alignment of comparable worth as arising because of the scope
of comparisons provided by paragraph of 5(b) of the 1972 principle, specifically the capacity
of the Commission to undertake comparisons with male classifications in other awards. Yet,
consistent with its observations about the primacy of the wage fixing principles, the
Commonwealth stipulated that it would not support any new procedures or concepts in
relation to the implementation of equal pay for work of equal value which would have the
effect of going beyond the scope of the 1972 decision.

Although the Commonwealth placed no reliance on the material, it nonetheless took the
Commission to the application of comparable worth in international jurisdictions, namely
Canada, the United States and the United Kingdom. In its summary of the application

181 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 35.
182 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 35.
185 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 71.
186 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 71.
187 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 64.
188 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 64.
of comparable worth in the United States the Commonwealth took the Commission to the use of job evaluation systems and a decision of the United States Court of Appeal where comparable worth was defined in the following terms.

The comparable worth theory, as developed in the case before us, postulates that sex-based discrimination exists if employees in job classifications occupied by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar\textsuperscript{192}.

Despite the Commonwealth indicating that it placed no reliance on the material that it put forward regarding comparable worth, the Commission indicated a significant degree of interest in the material. In response to the Commonwealth's submission, the Full Bench sought further details of the application of comparable worth in the three international jurisdictions canvassed by the Commonwealth. The Bench sought details of whether the application of comparable worth was limited to that of a single employer, the treatment of market rates, and whether comparable worth involved the comparison of male rates of pay in relation to other male rates with a view to the adjustment of male rates of pay\textsuperscript{193}. Justice Cohen asked the Commonwealth whether it was submitting that the 1972 principle could be relied upon to support the positive adjustment of male rates of pay. In reply the Commonwealth advised that the terms of the 1972 principle were paramount and in their submission the principle did not extend to the comparison of male rates of pay against other male rates of pay\textsuperscript{194}.

Through further questions, members of the Bench articulated their own interpretation of the principle. Justice Cohen provided an indication of her own unwillingness to utilise comparisons external to the award, at the centre of a particular application to remedy inequity within that award.

That decision addresses itself to any qualities between male and female rates within individual awards. It does not seem to address itself to a case such as the present

\textsuperscript{191} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 67.
\textsuperscript{192} American Federation of State, County and Municipal Employees v. The State of Washington 1985. 770.F. 2d. 1401. 9th Circuit, p. 5.
\textsuperscript{193} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 67-69.
\textsuperscript{194} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 70.
where a whole section of the workforce is female, and that award would not have been before it, or would not probably have been contemplated by that Bench. There is no indication in the principle that it contemplated a situation like this, is there? That particularly seems to be the case in 5(b)\(^{195}\).

But my reading of that principle – on my reading of that principle the Bench [in the 1972 equal pay for work of equal value decision] was concerned always with the minimisation of discrimination in individual awards\(^{196}\).

Justice Maddern asked the Commonwealth to respond to the proposition that the precise intent of the Bench in the 1972 equal pay for work of equal value case would be borne out in the application of the principle in the cases following the determination of the 1972 principle.

...but I wonder whether there is any guide to what those principles were supposed to mean in the context of the question just asked: from the practice of the Commission in the various case that came on after 1972, because if we found that the practice of the Commission was a wide practice which encompassed this sort of application, you would come to one conclusion, if you found that the practice of the Commission was different to that it would be at least arguable that this is what the principle was meant to mean\(^{197}\).

In reply, the Commonwealth argued that the 1972 principle could clearly be distinguished from the 1969 principle\(^{198}\) with one of the key points of distinction being that the 1972 principle clearly contemplated situations where the work was essentially or usually performed by women\(^{199}\). The Commonwealth submitted that the 1972 Full Bench contemplated that this distinction would instigate unfamiliar issues (paragraph 4 of the principle), but also cautioned against any automatic application of a formula which would circumvent a consideration of the value of the work performed (paragraph 6 of the principle)\(^{200}\). The Commonwealth reaffirmed its position that the 1972 principle directly provided for comparisons across different awards and as such involved ‘addressing inequities that may have existed, not only within awards but between awards, also where appropriate\(^{201}\).

\(^{195}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 87-88.

\(^{196}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 89.

\(^{197}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 89.


\(^{199}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 129.

\(^{200}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 128.

\(^{201}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 129.
In assessing whether the intent of the 1972 Bench could be derived from the cases that followed the determination of the 1972 principle, the Commonwealth raised the issue of consent agreements. While it submitted that it had not conducted a full analysis of the reasoning relied upon by the Commission in hearing applications that relied upon the 1972 principle, it did note that the 1972 principle had primarily been applied through consent agreements of the industrial parties. Given that the applications before it were mainly consent arrangements, the Commonwealth submitted that there was little by way of the public record to assess the precise nature of the work value assessments undertaken in the application of the 1972 principle. The Commonwealth, however, submitted that even if a wider and more comprehensive analysis of arbitrated matters were to reveal that the Commission had mainly relied on intra-award comparisons in its application of the 1972 principle, then this should not preclude the Commission from relying on comparisons that extended beyond a single award. In support of this submission the Commonwealth again drew the Bench’s attention to the terms of paragraph 5(b) of the 1972 principle.

Somewhat ironically the submissions of the CAEP and the CAI were the most direct as to the utility of comparable worth, although the submissions presented diametrically opposed positions as to whether that utility was advantageous. The CAEP’s submission addressed what it asserted was the major limitation of the 1972 principle, namely the lack of any appropriate specification as to the means of revaluing the rates of pay in feminised areas of work. In doing so the CAEP contended that comparable worth methodology was a means of implementing the 1972 principle, superior to the work value criteria traditionally relied upon by the Commission. Comparable worth was defined by the CAEP as ‘an objective non-sexist comparison between predominantly female occupations[s] and selected predominantly male occupation[s]’ using ‘an agreed set of objective non-sexist value criteria.’ The CAEP

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202 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 129.
203 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 129.
204 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 130.
206 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 91.
207 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 91.
asserted that an approach grounded in comparable worth was consistent with Australia’s obligations under the ILO Convention 100\textsuperscript{208}.

In arguing that the 1972 principle lacked the means of redressing what it termed the discriminatory evaluation of skill, the CAEP argued that the work value criteria traditionally relied on by the Commission were gendered. The CAEP took the Commission to the work value criteria stipulated by Senior Commissioner Taylor in a decision in 1968 relevant to work value in the vehicle industry\textsuperscript{209}, and observed that such criteria reflected a masculinised working environment\textsuperscript{210}. In particular the CAEP noted that the criteria placed a high importance on aspects of work associated with masculinised work and skills measured by way of apprenticeships or formal training. The CAEP noted that this did not contemplate work undertaken by women which required training that was not recognised by way of formal credentials. The work cited by the CAEP included child care workers, community services workers and sales assistants\textsuperscript{211}. The CAEP asserted an inherent gender bias in the work value criteria but did not take the Commission to any specific cases where the Commission had applied the criteria in a manner which undervalued feminised areas of work. Its evidence in support of this submission was confined to research undertaken by Clare Burton towards completion of a masters thesis. The Commission’s discomfort with such an approach was evident in Justice Maddern’s observation that ‘I would need more convincing of that particular point than just extracts from an unpublished masters thesis’\textsuperscript{212}.

The CAEP’s submissions took the Bench to the job evaluation methodology utilised in comparable worth cases in the United States, in particular the points factor job evaluation scheme developed by Hay Associates\textsuperscript{213}, and presented exhibits to explain the job evaluation

\textsuperscript{208} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 122-123.
\textsuperscript{209} Re Vehicle Industry Award (1968) 124 CAR 293 at 308.
\textsuperscript{210} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 107-108.
\textsuperscript{211} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 108-109.
\textsuperscript{212} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 110.
\textsuperscript{213} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 113.
methodology\(^{214}\). The CAEP submission referred to the United States Court of Appeal case introduced by the Commonwealth\(^{215}\) and asserted that while the case had been appealed successfully by the State of Washington, the basis of the appeal was incapacity to pay rather than legitimacy of the comparable worth claim and methodology\(^{216}\). The CAEP submission did not take the Commission to the contested basis of comparable worth in the United States and its assertion as to the basis of the United States Court of Appeal’s decision is open to dispute, given that the United States Court of Appeal was also at pains to indicate that it was not endorsing the principle of comparable worth\(^{217}\).

In taking the Bench to the cases in international jurisdictions, the CAEP’s intention was to demonstrate the propensity of tribunals and courts in those jurisdictions to compare different areas of work; painters and secretaries\(^{218}\), clerical workers and truck drivers\(^{219}\), canteen workers and ship joiners, ship painters and thermal insulation engineers\(^{220}\), women making breast prostheses and male moulders\(^{221}\). Justice Cohen questioned the CAEP as to whether comparable worth should be available in Australia for parties seeking the adjustment of male rates of pay\(^{222}\). Upon being advised that this was not the CAEP’s submission, Justice Cohen asked the CAEP to indicate why they were introducing the concept of comparable worth\(^{223}\). At this point the CAEP reaffirmed the need to examine the method by which work value assessments were conducted and the importance of comparisons of disparate masculinised and feminised work to the goal of pay equity\(^{224}\).

\(^{214}\) AIR, C Nos. 2219 and 2271 of 1985, Exhibits CA2 and CA3; AIR, C Nos. 2219 and 2271 of 1985 Transcript, p. 113, pp. 118-119.  
\(^{215}\) American Federation of State, County and Municipal Employees v. The State of Washington 1985, 9th Cir, 770 F. 2d. 1401.  
\(^{216}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 114.  
\(^{217}\) American Federation of State, County and Municipal Employees v. The State of Washington 1985, 9th Cir, 770 F. 2d. 1401, p. 9.  
\(^{218}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 113.  
\(^{219}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 114.  
\(^{220}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 120.  
\(^{221}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 120.  
\(^{222}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 114.  
\(^{223}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 115-116.  
\(^{224}\) AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 117.
Throughout its submission, the CAEP struggled in the eyes of the Commission to address the prevailing industrial principles and the requirements of the federal jurisdiction in Australia. The CAEP submission asserted that inequities in women’s earnings could be sourced to a number of determinants. These included the low rates of pay in female dominated occupations compared to those in male dominated occupations, pay differences which were amplified in their effect by the degree of occupational segregation in the Australian labour market. The CAEP used both Organisation for Economic Cooperation and Development (OECD) and Australian Bureau of Statistics (ABS) data on average weekly earnings to support their submissions. The CAEP argued that the earnings disparity reflected the lack of application of the 1972 principle to female dominated areas of work and that such inequities were contrary to ‘accepted contemporary attitudes of women both in Australia and overseas’. Their use of data on average weekly earnings differences between particular occupations, selected on the basis of the density of male or female employment, posed some difficulties for the Commission. Although the data indicated a consistent level of earnings disparity it was not sufficiently clear to the Commission whether the disparities arose from differences in award rates or market rates of pay. The Commission’s interpretation of the relevance of such data reflected a position that the tribunal’s major area of responsibility lay in the determination of award rates of pay rather than differences in average weekly earnings which reflected the existence of overaward payments. Justice Maddern summarised this approach in a question put to the CAEP.

Ms Jackson, have you made any comparison at all of the wage rates levels in awards of the tribunals, as compared to in these categories [ABS occupational categories] that you are talking about. All of the figures that you have put forward to us are average weekly earnings which are only very – well they are significantly influenced by award rates, but they certainly do not indicate what the position is in awards of the tribunals. Indeed, something is – some of the comparisons that you have just made, some of the things that you have said are considered to be important may be important to people in the overaward area, but I think they have a limited relevance and limited importance in awards of the Commission and the wage rates are fixed in this Commission.

225 AIR, C Nos. 2219 and 2271 of 1985, Exhibit CA1; AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 95, pp. 101-104.
226 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 91.
227 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 104.
The CAI’s submissions on comparable worth commenced with a critique of the lack of clarity in the ACTU’s submissions as to the meaning of comparable worth, suggesting that the concept that had been placed before the Commission by the ACTU was ‘ill-defined and amorphous’. The CAI had previously put on record its opposition to the concept of comparable worth. On being notified that the ACTU intended to put comparable worth proceedings before the ACAC, the CAI observed in its 1984-85 Annual Report that the concept had the ‘potential to completely undermine’ the restrictions placed on ‘industrial claims by [the] wage fixing principles’. In the current proceedings the CAI initially argued the 1972 principle could clearly be distinguished from the concept of comparable worth, notwithstanding the ambiguity in the submissions concerning comparable worth, and that the 1972 Full Bench had not even contemplated the prospect of dissimilar work being compared. The CAI noted that job evaluation had been rejected by the 1983 National Wage Case Full Bench and that through this rejection the Commission had affirmed its reliance on work value as the means of conducting comparisons of work.

Throughout their submission the CAI contended that the 1972 principle had established a template for the Commission’s approach to the requirement for the comparison of work. Relying on the wording of paragraph 5(b) of the 1972 principle the CAI asserted that standard procedure and the type of investigation intended by the Full Bench involved the comparison of rates of pay of male and female employees within a single award. To this end the submissions of the CAI were assisted by the lack of claims by organised labour that sought the application of the principle on the basis of inter-award comparisons. The CAI submitted that the ACTU was using the concept of comparable worth to expand what the 1972 principle had confined to the category of exceptional cases. Further, the CAI argued that the principle had expressly limited the comparison of female and male rates of pay across awards through that part of the 1972 principle that directed the parties to comparable

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229 NBAC, CAI, Z196, Box 73, Annual Report Confederation of Australian Industry 1984-85, p. 11.
230 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 158.
231 AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 160.
areas of feminised work prior to a comparison with male rates of pay\textsuperscript{233}. The CAI argued that there was no part of the 1972 principle that suggested that these comparisons would involve dissimilar work. In supporting this position, the CAI took the Full Bench to a number of decisions that the Commission had made in applying the 1972 principle; in the pursuit of comparative wage justice, they had relied on 'like with like' comparisons\textsuperscript{234}.

### 6.3.3 REJECTING COMPARABLE WORTH

In its decision the ACAC rejected the use of comparable worth as a means of applying the 1972 equal pay for work of equal value principle. This decision illustrated that fourteen years after the determination of the 1972 principle there were limited opportunities through which this principle could be applied. The limitation was particularly acute in areas involving significant numbers of women workers, given the ACAC's concern over the extent of wage increases that would take place outside of the price and productivity increases determined through National Wage Cases. In affirming the continued availability of the 1972 principle, the Commission rejected the ACTU’s submissions as to the method of processing the claims. In this regard the ACAC’s regard for the current wage fixing principles was paramount. The ACAC drew attention to that part of the 1983 principles which noted that all increases in wages, other than those for prices and productivity movements, should be in accordance with those principles.

The ACAC determined that the current application could be distinguished from those equal pay claims determined by the ACAC during the 1975-1981 wage fixing principles. The basis of this distinction, on the reasoning of the ACAC, was that the cases taken in the 1975-1981 period predominantly involved an examination of work performed within single awards. This application of the principle therefore did not undermine the basic concepts of the prevailing centralised wage fixing system because there were limited opportunities for any awarded

\textsuperscript{233} AIR, C Nos. 2219 and 2271 of 1985, Transcript, p. 158.
\textsuperscript{234} AIR, C Nos. 2219 and 2271 of 1985, Transcript, pp. 161-162.
wage increases to flow on\textsuperscript{235}. This judgement, on the part of the ACAC, underlined the consequences of the limited nature of the applications taken by applicant unions in the period following the determination of the 1972 principle, particularly the absence of applications that would require the ACAC to undertake comparisons beyond a single award. Clearly the Full Bench was of a view that such applications would carry a greater potential for wage flow-ons, although it did not provide any reasoning as to why this outcome would necessarily occur.

The ACAC did, however, reason that the current case was different from those taken in the period 1975-1981. The basis of this judgement was that if wage increases were to be awarded to nurses under the \textit{Private Hospitals’ and Doctors’ Nurses (ACT) Award} there was the potential for flow on to a much wider group of nurses employed under the state awards\textsuperscript{236}.

The ACAC did not dispute that there may be relevant issues concerning the valuation of nursing work and acknowledged that there were a number of special factors relevant to a review of nurses’ salaries\textsuperscript{237}. It was unable to determine these matters in relation to the \textit{Private Hospitals’ and Doctors’ Nurses (ACT) Award} on the material placed before it, an unsurprising conclusion given the nature of the unions’ application. It directed the applicants to file applications in accordance with the procedures laid down under the anomalies principle, but made no distinction as to whether claims should be treated as an anomaly or an inequity.

In summary, we say that the 1972 equal pay principle is available to be implemented in awards in which it has not been implemented and that all such applications should be processed through the Anomalies Conference. From the material that was put to us it appears that all parties acknowledge that a number of special factors may be relevant to a review of nurses’ salaries. It is our view that the pursuit of this claim through the Anomalies Conference should involve the raising of all those issues, including those referred to in the ACTU Executive decisions of November 1985\textsuperscript{238}.

\textsuperscript{235} Re Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972 (1986) 13 IR 108 at 114 (the Comparable Worth Case).
\textsuperscript{236} Comparable Worth Case (1986) 13 IR 108 at 114.
\textsuperscript{237} Comparable Worth Case (1986) 13 IR 108 at 114.
\textsuperscript{238} Comparable Worth Case (1986) 13 IR 108 at 114.
Although the ACTU’s application has not sought a specific ruling on comparable worth, the ACAC responded directly to the submissions placed before it. The ACAC’s determination in this area underscored the weakness of the arguments of the applicants. The reliance by the ACTU on comparable worth obscured the opportunity for the ACAC to indicate clearly that the 1972 principle provided the opportunity to utilise the work value principle and compare disparate areas of work. This omission failed to rectify a key ambiguity in Australia’s pay equity jurisprudence, a point pursued in further detail later in this chapter. The Full Bench made no specific ruling in this regard. The ACAC indicated the influence of the material on comparable worth submitted by the Commonwealth. The ACAC referred to those extracts from the United States Court of Appeal case which in the view of the ACAC indicated that the doctrine of comparable worth ‘refers to the value of the work in terms of its worth to the employer’. The ACAC determined this approach was anachronistic to the intent of the ACAC in the 1972 principle and the direction in that principle to the use of work value inquiries as the ACAC’s preferred method of comparison. The CAI, in particular, welcomed the ACAC’s rejection of comparable worth and observed that the Bench ‘substantially adopted the CAI’s submissions’.

The decision also illustrated that the ACAC assessed that it had a limited jurisdiction when assessing differences in earnings between men and women. The ACAC’s approach demonstrated its reluctance to address pay disparities that extended beyond inequity in base award rates of pay. The ACAC initially noted that much of the evidence led concerning the gender-based inequities was not amenable to ‘award wage prescription’ or the issues raised in the proceedings. In this regard the ACAC was particularly critical of the submissions of the CAEP which it noted went beyond the applications before the Commission and lacked any

'reference to award rates which might well indicate a different position from that which is shown by figures relating to actual rates of pay'.

6.4 REBADGING THE COMPARABLE WORTH CLAIM

Shortly after the Commission’s rejection of the comparable worth application the RANF determined that it would submit a new claim relying on three current wage fixing principles: work value change (principle 4); anomalies and inequities (principle 6); and allowances (principle 9). This decision was the source of disagreement among nursing unions. At a meeting of nursing unions in February 1986 the NWSNA and the Queensland Nurses’ Union had rejected recourse to the anomalies principle because it lacked the mechanism to generate wage increases for their members. Ultimately it was the view of the ACTU, joined by the RANF, the HEF and FMWU, which supported an application under the anomalies and inequities principle which prevailed.

The ACTU brought a claim before an Anomalies Conference on behalf of its affiliate, the Royal Australian Nursing Federation, on 19 March 1986. The Anomalies Conference was chaired by the newly appointed President of the Commission, Justice Maddern, who was familiar with the claim given his position on the Full Bench in the comparable worth proceedings. The anomalies and inequities principle provides guidance on the procedure the Commission must follow in hearing claims based on an anomaly or an inequity and the criteria that claims for an anomaly or inequity must satisfy. If there is an absence of agreement by the parties, as there was in the current proceedings, the President can either hold that there is no anomaly or inequity or determine that there is an arguable case which should proceed to a Full Bench of the Commission for consideration.

244 Comparable Worth Case (1986) 13 IR 108 at 113.
245 NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 26 February 1986, p. 6.
246 As determined by the National Wage Case June 1986 (1986) 14 IR 187. The relevant principles (work value change, anomalies and inequities, allowances determined by the June 1986 National wage Case departed only in a minor way from those that were operative at the time of the original comparable worth claim, as determined by the 1983 National Wage Case, National Wage Case October 1983 (1983) 4 IR 429.
247 NBAC, NSWNA, Z142, Box 32, Minutes of New South Wales Nurses’ Association General Council, 24 March 1986, pp. 2-3.
On 2 April 1986 the President determined that there was an arguable case that should proceed to a Full Bench of the Commission. The President also referred the claims based on changes in the nature of the work to the same Full Bench because, in the view of the President, the issues were clearly inter-related. Pursuant to s.34 of the *Conciliation and Arbitration Act* the President convened a Full Bench, comprising Justice Alley, Justice Cohen and Commissioner Bain. Justice Cohen and Commissioner Bain were members of the Bench that had heard the original comparable worth claim. Justice Alley, who headed the Bench, had been appointed Deputy President of the Commission in 1977, after twenty five years as a partner of the law firm, Moule, Hamilton and Derham.

The final claim submitted to the Commission by the RANF was in respect of nurses covered by a number of public service determinations and awards of the Commission. The parties to the proceedings estimated that in total the claim covered 6 000 nurses, with the majority of those employed in the ACT (2 467) and Northern Territory (1 264). The claim included nurses employed under the *Private Hospitals’ Doctors’ Nurses (ACT) Award*, in addition to nurses employed in the Northern Territory, those employed by the Australian Telecommunications Commission (Telecom) and the remainder employed by the Commonwealth government. In the ACT and Northern Territory, the claim covered nurses in both the public and private sectors and a full range of workplaces where nurses perform their duties: hospitals, nursing homes, doctors’ surgeries, blood banks and as community health nurses and rural nurses in aboriginal communities. The claim with respect to nurses employed by the Commonwealth government primarily comprised nurses employed in repatriation hospitals operated by the Department of Veterans Affairs, occupational health nurses employed in the Department of Defence and in various other Commonwealth departments,

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including 100 nurses employed by the Department of Community Services. The claim spanned three categories of nursing work: Registered Nurses, Enrolled Nurses and those undertaking training, variously described as enrolled nurses in training and student nurses training to be registered nurses.

Registered Nurses are registered through nurse registration boards, primarily state and territory-based, and collectively perform the whole range of nursing functions. This broad classification comprises nurses working in hospitals extending from the newly employed graduate through a range of positions in clinical, administrative and educational units through to the Director of Nursing. The classification of Registered Nurse also comprises occupational health and community nurses in surgeries and clinics external to the hospital environment. An Enrolled Nurse includes nurses who have enrolled as such with a state or territory registration board under the supervision of a registered nurse.

The original claim included registered nurses employed by the Commonwealth government in Victoria. The majority of these nurses were however ultimately excluded from the final claim put before the Commission. This exclusion was a result of an agreement reached between the parties to a separate Anomalies Conference\(^\text{250}\) where the claim to be addressed by the Conference concerned aligning the rates of pay and award structure of registered nurses employed in Victoria by the Commonwealth government, with those covered by the common rule award for registered nurses in Victoria, an award of the Industrial Relations Commission of Victoria. This particular settlement was one part of a long running claim by Victorian nurses and the Victorian branch of the RANF\(^\text{251}\), although there remained dissatisfaction among the membership at the settlement’s claim as it related only to first year nurses and student nurses.


nurses\textsuperscript{252}. The campaign in Victoria was an extended one, involving national industrial action, and included the demand for professional rates and opposition to the decision of the Victorian government to assume the rights and powers of the Victorian Nursing Council, and in doing so enable enrolled nurses to undertake the work previously undertaken by registered nurses\textsuperscript{253}.

Through an Anomalies Conference, the President of the Commission granted a claim for resolution of inequities pursuant to the relevant provisions of the wage fixing principles\textsuperscript{254}. The agreement involved the RANF excising from the anomalies and inequities claim before Alley J, Cohen J and Bain C, all nurses employed by the Commonwealth government in Victoria. The withdrawal was without prejudice to argument that might have been led in the current or future proceedings concerning a national rate of pay for registered nurses\textsuperscript{255}.

Carriage of the claim was jointly carried by the ACTU and the RANF. Given the significance of the membership of the ACT Branch to the case, the ACT Branch Secretary, Prue Power, was delegated authority for coordination of the case\textsuperscript{256} and responsibility for particular submissions was allocated to the ACT Branch Industrial Officer, Philip Gardner\textsuperscript{257}. The employer case with respect to nurses employed by the Commonwealth was presented by the PSB, supported by the Minister for Veterans’ Affairs and the ACT Health Authority. Telecom presented separate submissions. The employer case with respect of public sector nurses employed in the Northern Territory was presented by the Public Service Commissioner of the

\textsuperscript{253} NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch, Hospital Employees’ Federation-ACT Branch (Joint Meeting), 15 December 1986, pp. 1-4.
\textsuperscript{255} NBAC, RANF-ACT Branch, Z209, Box 73, Minutes of the Royal Australian Nursing Federation Industrial Advisory Committee, 10 July 1986, pp. 1-2.
\textsuperscript{256} NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of the Royal Australian Nursing Federation-ACT Branch Council, 24 September 1986, p. 4; NBAC, RANF-ACT Branch, Z209, Box 75, Minutes of the Royal Australian Nursing Federation Federal Executive Committee, 6-7 October 1986, p. 24.
\textsuperscript{257} NBAC, RANF-ACT Branch, Z209, Box 75, Correspondence from Federal Industrial Officer, Royal Australian Nursing Federation (K. Howard) to E. Jenkins, J. Gibbs, pp. 1-2.
Northern Territory (PSCNT). Private sector employers in the ACT were represented by the Confederation of ACT Industry and in the Northern Territory by the Northern Territory Confederation of Industry and Commerce. The CAI was granted intervention status and presented submissions.

The case was different in a number of respects from the comparable worth proceedings; particular features of this differentiation are discussed in the following sections of this chapter. Having won their application for the President to convene a Full Bench on the basis that an arguable case existed, the ACTU/RANF ran a substantive case rather than one that sought rulings on threshold matters. A considerable proportion of the proceedings, which spanned 29 September 1986 to 4 March 1987, was therefore directed to the hearing and gathering of evidence. Inspections were held in Canberra, Darwin, Sydney, Melbourne and Adelaide. Formal evidence was given by 41 witnesses and a total of 126 exhibits were tendered.

Prior to detailing aspects of the application some clarification of the applicable wage fixing principles is required. The anomalies case was determined under the June 1986 wage fixing principles despite significant changes to the principles announced in the March 1987 National Wage Case. The 1986 wage fixing principles remained the applicable framework as the proceedings relevant to the relaunched RANF claim had concluded prior to the change in the principles, although a decision had not been determined. The 1986 National Wage Case had effected a minor change to the anomalies and inequities principle determined by the 1983 National Wage Case, although this change only affected those claims that sought a catch-up to the metal industry standard. This issue of timing was significant, as the March 1987 National Wage Case had brought a considerable tightening of the anomalies and inequities principle, such that all claims before the Anomalies Conference and Full Benches

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258 National Wage Case March 1987 (1987) 17 IR 65. The March 1987 principles were announced 10 March 1987 which was prior to the decision in the current case – 7 May 1987.
should be subject to a ceiling of four per cent, except where the Anomalies Conference or Full Bench determined such applications should be considered under pre-existing principles\textsuperscript{261}.

The new principles had been the subject of some concern to the RANF who successfully put a motion to the April 1987 Special Unions Conference, which called on outstanding nursing career claims to be regarded as special and extraordinary, to be heard under the pre-existing principles and exempt from the four per cent second-tier ceiling\textsuperscript{262}.

\textbf{6.4.1 DEFINING THE ACTU/RANF CLAIM}

The ACTU/RANF sought a single salaries and career structure to apply to all nurses covered by federal awards and determinations. The ACTU/RANF had two objectives: to increase the rates of pay for nursing awards established by these industrial arrangements; and to provide a more appropriate career structure than the existing one. A national career structure for nursing had been ratified formally by the Federal Council of the RANF in September 1986 and distributed to RANF members, noting that a national structure would provide a 'professional framework that offers society a mechanism by which the nursing profession assures the competence of its members'\textsuperscript{263}. The structure was canvassed at branch council meetings of the RANF\textsuperscript{264}. These were followed by general meetings where the structure was adopted as the basis for the conduct of the claim before the Commission\textsuperscript{265}. The progress of the case was discussed at general meetings of the ACT Branch throughout the proceedings\textsuperscript{266}.

\begin{thebibliography}{99}
\footnotesize
\item[261] National Wage Case March 1987\textsuperscript{(1987)} 17 IR 65 at 91.
\item[264] NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 22 July 1986, p. 6.
\item[265] NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch General Meeting, 12 August 1986, pp. 1-3.
\item[266] NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch General Meeting, 11 March 1987.
\end{thebibliography}
The new structure, set out in Table 6.1, provided for five levels of progression from Registered Nurse through to Director of Nursing. There were three streams, clinical, administration, education. Three traditional roles – Deputy Director of Nursing, Supervisor and Charge Nurse – were excluded from the RANF model, although some of the previous functions were incorporated into new roles, such as Assistant Director of Nursing. Three new classifications were introduced – Nurse Manager, Clinical Nurse Consultant and Clinical Nurse\textsuperscript{267}.

Table 6.1: Career Structure Proposed by ACTU/RANF

<table>
<thead>
<tr>
<th>Level</th>
<th>Enrolled Nurse</th>
<th>Student Nurse</th>
<th>Student Enrolled Nurse</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level I</td>
<td>Registered Nurse</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Level II</td>
<td>Clinical Nurse</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Level III</td>
<td>Nurse Manager</td>
<td>Clinical Nurse Consultant</td>
<td>Nurse Educator</td>
</tr>
<tr>
<td>Level IV</td>
<td>Assistant Director Nursing (Management)</td>
<td>Assistant Director Nursing (Clinical)</td>
<td>Assistant Director Nursing (Staff Development/Education)</td>
</tr>
<tr>
<td>Level V</td>
<td>Director (Nursing)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


The claim of the RANF was different from that put to the Full Bench in the comparable worth proceedings. The key distinguishing characteristic was the lower reliance by the applicants on comparisons with comparable areas of work. Key parts of the application sought to align the rates of pay for nurses covered by the claim, with the rates of pay received by nurses employed under a suite of awards determined by state industrial tribunals. This strategy was influenced by the terms of the inequities principle which is predicated on the basis of the work in question being of a similar nature. However, the claim in this respect, did not rely on a comparable worth style comparison. The claim included comparisons with other areas of work. This was evident in two areas: the evidence led to support the RANF claim that there was an anomaly between nursing salaries and other ward-based areas of work; and, the claim by the RANF that the Commission determine rates of pay commensurate with rates paid to other professional occupations within the health care industry. The same evidence that might have been led in the comparable worth proceedings would be put - just ‘dressed up in different clothing’ that would be less confronting for the Commission.\(^268\)

This change in the substantive focus of the application was also reflected in the way the RANF reported the case to its membership, the case being reported as an application to

\(^{268}\) Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
review the salaries of nurses employed under Commonwealth awards and determinations, including an assessment of work value changes in the industry. Similarly, the RANF reported that the current proceedings formed part of the 'pursuit of the ACTU Nursing Industry strategy' which included the 'testing of the applicability of the 1972 Equal Pay Principle' and the claim for a review of salaries through the Anomalies and Inequities Principle. The ACTU Executive reaffirmed its support for nurses seeking improvements in their wages and career structure, but mindful of Commission’s concern about the potential for flow-ons, the ACTU Executive indicated that it would not support the automatic flow-on of any increases to other sections of the workforce.

The wage rates sought by the RANF, set out in Table 6.2 provided for a two-step implementation process. The first step provided for newly aligned wage rates that would apply from the operative date determined by the Commission (Column A, Table 6.2). The RANF sought a date of effect of 19 March 1986, the date when the President of the Commission determined that an arguable case existed under the terms of the wage fixing principles. The second step concerned the awarding of professional rates. The RANF submitted that their monetary claim in respect of the awarding of full professional rates for nurses should be granted by 21 January 1989, with phasing in from the date of the effect of the Commission’s decision (Column B, Table 6.2).

The salaries contained in ACTU/RANF claim relied on the Commission finding that there were grounds for determining that both anomalies and inequities existed with respect to current nursing salaries and that the salaries did not reflect changes in work value. The ACTU/RANF argued that the issue of whether nursing salaries should be aligned with professional rates of

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pay impacted all of these components of the claim and was also the subject of separate submissions. Each of the components of the ACTU/RANF claim will now be considered in turn.

**Table 6.2: Classification Structure Proposed by the ACTU/RANF**

<table>
<thead>
<tr>
<th>Classification</th>
<th>Column A Annual rate as of date and effect</th>
<th>Column B Annual rate as of January 1989</th>
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<td>Pupil Nurse</td>
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<tr>
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<td>18500</td>
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<td>Level I</td>
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<td>Category 4</td>
<td>54500</td>
<td>66500</td>
</tr>
</tbody>
</table>

\(^{272}\) Categories by hospital or agency size/complexity for all Directors of Nursing/Nurse Executives.

\(^{273}\) Increment reserved for possible senior appointment at Level IV.
Anomalies in Nurses’ Wage Rates

The ACTU/RANF relied on six circumstances that they claimed collectively and in some cases singularly, constituted grounds for the Commission holding that an anomaly existed with respect to the wage rates of nurses within the scope of the awards and determinations that were the subject of the application.

2. Unusual features relating to the shortage of nurses.
3. Allegations that nurses’ rates have been “community determined”.
4. Changes in the nature of the work.
5. Recent decisions in relations to the training of nurses.
6. The claims that there was a need to provide a proper career structure for nurses.

The submissions of the parties on each of these circumstances is reviewed below, as is the response of the Full Bench. The one exception is changes in work value where the Full Bench determined that it did not consider that the evidence concerning work value-based wage increases should be considered under the terms of the anomalies and inequities principle, but under the work value principle. The Full Bench’s reasoning on this issue and the other grounds out forward by the ACTU/RANF provides some insights as to what the Commission determined to be an appropriate intersection between the requirements of the 1972 principle and the anomalies and inequities principle.

Non Application of 1972 Equal Pay Principle

The RANF submitted that the rates of pay of registered nurses had been fixed in regard to the female-dominated nature of the workforce and that this employment profile had served to depress the level of wages, a pattern of wage setting that had never been rectified. The submissions encompassed award histories for those awards and determinations presently before the Commission and an identification of the basis of the wage and salary increases

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AIR, A No. 257 of 1986, Exhibit RANF1.
awarded to nurses since the inception of the relevant award or determination\(^275\). The RANF acknowledged and the Commission concurred that on a number of occasions it was not possible to identify the basis of past wage increases. This absence of detail was particularly apparent in orders from the Commission that reflected consent arrangements between the parties\(^276\). The ACTU/RANF argued that the sex bias within wage rates for nurses in ACT hospitals was evident in the reasoning of the Commission in a Full Bench decision in May 1970 which had followed a work value inquiry.

As this is predominantly female occupation, we have been more greatly influenced by the rates payable to other classifications of females than those payable to males. The fact that all parties sought the same rates for males and females had the effect of bringing into the comparisons we have made the rates paid to certain females who benefited by the *Equal Pay* decision [the 1969 decision]. The result of this had tended to cause us to award somewhat higher rates for females than we would have prescribed otherwise\(^277\).

The submission of the ACTU/RANF was that there was no evidence that the 1972 equal pay for work of equal value principle had been applied distinctly. Their submissions compared the percentage increase of the wage of the ACT nurse since the 1972 decision with that of the ACT fitter during the same time period\(^278\), to illustrate the contention that there had been no elevation of the nurses’ rate to eliminate the differentiation resulting from its fixation as a rate for a predominantly female classification.

The PSB argued that it could not be conclusively demonstrated, either way, whether the 1972 decision was reflected in nursing salaries. The PSB’s contentions were that the consent orders that had varied salaries in the early 1970s reflected consideration of the rates of pay under state awards, particularly those in New South Wales, which the PSB argued bore evidence of the application of the principle of equal pay for work of equal value determined by the Industrial Commission of New South Wales. The PSCNT supported the PSB’s submissions, but with reference to the Northern Territory argued that the key award in the Northern Territory

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\(^{275}\) AIR, A No. 257 of 1986, Exhibits RANF2, RANF4; AIR, A No. 257 of 1986, Transcript, pp. 70, 82.


\(^{277}\) *Re The Hospital Employees Etc (Nursing Staff ACT) Award 1966* (1970) 132 CAR 459 at 468.

\(^{278}\) AIR, A No. 257 of 1986, Exhibits RANF4, RANF7; AIR, A No. 257 of 1986, Transcript, pp. 82, 177.
was a genuine award which took into account all relevant factors including equal pay, a factor which, they asserted, was explicit at the time during negotiations between the parties.\textsuperscript{279}

The Full Bench determined that there was some evidence that increases in New South Wales nursing rates had influenced wage settlements for Commonwealth nurses in the early 1970s, and that the decisions of the New South Wales Industrial Commission indicated that equal pay was fully implemented in that jurisdiction. On balance, however, the Full Bench determined that it was satisfied that the rates of pay in Commonwealth nursing awards still reflected the sex composition of the nursing workforce. Movements in rates since 1969 had served to remove the differences between male and female rates within nursing awards but the original sex bias had remained.\textsuperscript{280} The Full Bench determined that the lack of application of the 1972 principle was a special and isolated circumstance that contributed to an anomaly, although it did not ascribe any weighting to this aspect of the ACTU/RANF claim.

\textit{Shortage of Nurses}

THE ACTU/RANF led evidence of the shortage of nurses across a series of labour markets relevant to the awards and determinations before the Commission with the exception of those relating to the Northern Territory and Telecom.\textsuperscript{281} Their submissions extended to the high percentage of nurses who were working outside the health care industry and the high labour turnover evident in the Northern Territory. Each of these factors, in the submission of the ACTU/RANF, was due to the absence of the career opportunities in the clinical stream of nursing work. These arguments were rejected by the PSB, with the support of the PSCNT. While not disputing the ACTU/RANF’s profile of the labour market,\textsuperscript{282} they argued that such a shortage did not constitute an anomaly under the terms of the current principle. Somewhat incongruously, and despite evidence of the Commission accepting labour shortages as the basis of higher market rates in masculinised industries and occupations, the Full Bench

\textsuperscript{279} AIR, A No. 257 of 1986, Exhibit NT1; AIR, A No. 257 of 1986, Transcript, p. 845.
\textsuperscript{280} Re Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 432.
\textsuperscript{281} AIR, A No. 257 of 1986, Exhibit RANF5, pp. 17-19, 26, 34, 57-62; AIR, A No. 257 of 1986, Transcript, pp. 128-130.
\textsuperscript{282} AIR, A No. 257 of 1986, Exhibit NT6; AIR, A No. 257 of 1986, Transcript, p. 1689.
determined that they did not accept the ACTU/RANF arguments that the labour shortage was a result of the absence of wage rates that would initially attract and then retain nursing staff. However, the Full Bench identified the severe shortage of nurses together with the evidence of the large number of qualified nurses who have left the industry as a special circumstance that had contributed to the existence of an anomaly in terms of the present claim.  

Community Determined Rates

The ACTU/RANF argued that the wage fixing history for nurses indicated that nursing salaries were shaped primarily by the rates of pay established by industrial tribunals. While a number of the awards were nominally minimum rates awards they operated as paid rates awards as there was little evidence of overaward payments. The ACTU/RANF submitted that the nursing industry was an industry where the concept of a market rate, as traditionally understood, did not apply, within either the public or private sector. Accordingly there was little market influence on award rates of pay fixed by industrial tribunals. This situation was contrasted by the ACTU/RANF with the pattern of wage fixing in the professional, clerical, administration, technical, trades and blue collar areas of the Australian Public Service, the ACT Health Authority and the Northern Territory Public Service, which, the ACTU/RANF argued, was influenced by market rates surveys. These submissions were opposed by the employer organisations, with the PSCNT providing data to the Commission on its request, about the pattern of wage increases for Registered Medical Officers, Occupational Therapists and Registrars, although these occupations received significantly higher rates of pay than nurses. This data proved to be persuasive to the Full Bench, who decided that there was no evidence that the method of wage fixation for nurses was of a special or isolated nature.

Training


A considerable body of evidence was led by the ACTU/RANF concerning the altered training arrangements for nurses. The proceedings occurred at a time when the transition from hospital-based to tertiary institution education for nurses was in its early stages. On 24 August 1984 the Commonwealth Government had declared its in-principle support for the full transfer of nurse education to Colleges of Advanced Education (CAEs)\(^\text{287}\). The intention of the Commonwealth government was that the last intake of hospital-based courses would occur in 1990 with the full transfer completed by 1993. At the time of the claim, intakes for hospital training had ceased in New South Wales, the ACT and the Northern Territory. The transfer to college education had commenced in Victoria, South Australia, Western Australia and Tasmania, but there had been no transfer arrangements instituted in Queensland. This change was reflected through the recognition of tertiary credentials in the Award, by way of qualification allowances for nurses who had gained additional credentials.

This overview of transfer arrangements was largely agreed; what was contested was whether this change in training provisions was the basis of the awarding of professional rates. Employer submissions in this regard focused on the differences in the qualifying awards that were presently being awarded by educational institutions in different states. A number of CAEs were offering three year diploma courses which entitled those awarded with a diploma to registration with the requisite authority. This qualification was distinguished from three or four year bachelor degree courses which not only qualified degree holders for registration, but provided nurses with the necessary prerequisite for enrolling in postgraduate courses\(^\text{288}\). The Commission held that the degree courses were markedly different from the diploma courses\(^\text{289}\), a distinction that would ultimately prove prejudicial to the ACTU/RANF’s claim for a professional rates structure, but were sufficient in terms of a finding of an anomaly. The

\(^{287}\) AIR, A No. 257 of 1986, Exhibit RANF49; AIR, A No. 257 of 1986, Transcript, p. 888.

\(^{288}\) AIR, A No. 257 of 1986, Guidelines for the National Registration of Awards in Advanced Education as reproduced in RANF49 (pp. 2-5); AIR, A No. 257 of 1986, Transcript, p. 888.

Commission found the change in education provisions constituted a special element within the existing situation of the pay and career structure of nurses\textsuperscript{290}.

\textit{Career Structure}

The absence of a career structure, particularly in the clinical areas of nursing, was generally agreed among the parties\textsuperscript{291}. The precise terms of a classification structure to remedy this deficiency was not agreed. The key difference between the parties was whether the Commission should adopt the uniform classification structure proposed by the RANF across all the awards and determinations before it – the position of the ACTU/RANF – or reflect in a new classification structure one or more aspects of the classification structures in place across state nursing awards – the position of the employer organisations. The RANF in their submissions drew attention to the way in which their preferred structure had been influenced by decisions by state industrial tribunals and took the Commission to the structures operative in state nursing awards\textsuperscript{292}. The Commission placed some weight on the rates and structures in state awards as the vast majority of nurses were subject to the terms of award made by state industrial authorities. This dominance of state award coverage was particularly evident in the public sector, where ninety per cent of nurses were covered by state awards\textsuperscript{293}.

Employer submissions challenged the RANF’s contention that the form and content of a career structure should be considered by the Commission as an anomaly. From the perspective of the employer organisations, issues concerning the career structure should be considered rightfully under the terms of the work value principle. The Commission did afford some regard to the employer submissions and agreed that the deficiencies in the existing nursing career structure did not of themselves constitute an anomaly. Nevertheless the

\textsuperscript{290} \textit{Re Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972 & Other Awards} (1987) 20 IR 420 at 435.
\textsuperscript{291} See for example, AIR, A No. 257 of 1986, Exhibit RANF78; AIR, A No. 257 of 1986, Transcript, p. 1317.
\textsuperscript{292} AIR, A No. 257 of 1986, Exhibit RANF75; AIR, A No. 257 of 1986, Transcript, p. 1254.
\textsuperscript{293} \textit{Re Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972 & Other Awards} (1987) 20 IR 420 at 422.
Commission considered that the limitations in the career structure was a circumstance that had relevance to the existence of an anomaly.294

Commission’s Determination Regarding the Finding of an Anomaly

The Commission was satisfied that there was a problem of a special and isolated nature which constituted an anomaly within the meaning of the anomalies and inequities principle. The grounds relied on by the ACTU/RANF that were persuasive to the Full Bench were the non-application of the 1972 principle of equal pay for work of equal value to nurses covered by federal awards and determinations, the shortage of nurses within the labour market, the changes in education provision that were occurring in the nursing industry and the deficiencies in existing career structures. The importance of the Commission’s finding was that it provided the basis for the Full Bench to grant orders for wage increases outside those granted through National Wage Case increases, although it provided limited direction on the continued utility of the 1972 principle. The amount and form of the wage increases granted by the Full Bench will be discussed towards the conclusion of this chapter.

Inequities in Nurses’ Wage Rates

The ACTU/RANF’s claim for inequity rested on two grounds: differential rates for similar work for nurses covered by the awards and determinations before the Commission; and differential rates between federal awards and determinations relevant to nursing and state awards.

Evidence submitted by the ACTU/RANF indicated that the annual differential for registered nurses (first year) employed in New South Wales and the ACT amounted to $2,500 in favour of nurses employed in New South Wales.295 The differences between the nursing rates in the ACT and the Northern Territory and that of the other states were evident in both the public

and private sectors. The RANF evidence took the Commission to recent decisions by state industrial tribunals concerning nursing rates of pay in state industrial awards, evidence that would also be relied on in the ACTU/RANF submissions on work value. Although the RANF sought reference to the differential and higher rates of pay available to nurses employed under state awards, the orders that it sought from the Commission provided for higher rates of pay than those available under state awards. This differentiation arose from that part of the ACTU/RANF claim that addressed professional rates.

The ACTU/RANF’s reliance on the inequities principle while seeking higher rates of pay than those available under state awards was a significant feature within the PSB’s submissions. The PSB argued that if the Commission were to rely on the inequities principle it could only award rates directly aligned with those available under state awards. The PSB submitted that as state awards in Queensland were presently under review, no determination should be made concerning Commonwealth nurses employed in Queensland. Thus the PSB’s submission was that the classification structures for Commonwealth awards should be differentiated by state to facilitate this alignment. On this reasoning, rates of pay for nurses covered by federal awards and determinations and employed in the ACT should be aligned to those available under New South Wales state awards.

The PSB made separate submissions with respect to nurses employed by the Department of Veterans’ Affairs, arguing that there was an increasingly close relationship between Department of Veterans’ Affairs hospitals and state government operated public hospitals. This factor, together with evidence of the similarity of the work between nurses employed

299 AIR, A No. 257 of 1986, Exhibit PSB11; AIR, A No. 257 of 1986, Transcript, p. 1524
300 AIR, A No. 257 of 1986, Exhibits PSB1, PSB9; AIR, A No. 257 of 1986, Transcript, p. 38, 1520.
under public hospital awards of state industrial authorities and nurses employed by the Department of Veterans’ Affairs, should be cause for the Full Bench, on the submission of the PSB, to rely on the inequities principle to align the rates for these two groups of workers on a state by state basis. To this end the PSB tabled a review of repatriation hospitals commissioned by the Minister for Veterans’ Affairs and correspondence from the Prime Minister to the Premier of New South Wales, which indicated Commonwealth support for the rationalisation of the repatriation and state hospital systems. The PSB actively campaigned on the issue of ‘matched state rates’, distributing wages information to nurses employed under Commonwealth awards and determinations, urging nurses to cease their current campaigning and accept an outcome based on parity with their state counterparts. This campaign was viewed dimly by the RANF who identified it as an active attempt by the PSB and the Department of Veterans’ Affairs to interfere in the internal processes of the RANF.

The PSCNT submitted a career structure which differed from the uniform structure and rates advocated by the ACTU/RANF and, by reference to the inequities principle, argued that the rates should not exceed those available under state awards.

The Full Bench, in responding to the submissions concerning inequities drew attention to the narrow scope of the inequities provisions of the anomalies and inequities principle. It noted that the principle’s threshold criteria included that the work be of a similar nature and that two overriding considerations in the principle were that there must be no likelihood of flow on and that the increase must be an once-only matter. The Full Bench found that the ACTU/RANF could not simultaneously rely on the inequities principle to note the similarity of work performed by nurses employed under state awards, while at the same time submitting rates that would ultimately be different from those under state awards. Similarly, the Full

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Bench rejected the PSCNT’s submission arguing that as the rates of pay submitted by the PSCNT were not in complete alignment with those prevailing under state awards, the claim could not be justified under the inequities principle. The Full Bench made no finding as to whether it considered the work of nurses employed under state awards to be of a similar nature to that of nurses employed under federal awards and determinations.

The Full Bench supported, in part, the PSB’s proposed use of the inequities principle for Department of Veterans’ Affairs nurses. It indicated that it would be prepared to award state-based award rates for nurses employed by the Department of Veterans’ Affairs on the basis that the evidence indicated some differentiation between the work of nurses in the various state-based Department of Veterans’ Affairs hospitals. The Full Bench determined that the requirement imposed by that part of the inequities principle which specified that there must be some significant other factor was met by the Full Bench’s earlier finding of an anomaly. The Full Bench, however, excluded the Department of Veterans’ Affairs hospital in Queensland as no particular evidence had been led regarding the work of nurses employed at this facility. The Full Bench rejected the submission of the PSB that the inequities principle be relied on to align the rates of pay for nurses employed under Commonwealth awards and determinations in the ACT with those available under state awards in New South Wales applying to the south eastern region of that state. The basis of the Full Bench’s rejection was that there were differences in hospital administration and nurses training between New South Wales and the ACT which meant that the requirement within the inequities principle that the work be of a similar nature could not be met.

The Commission’s deliberations indicated that the narrow scope of the inequities principle created difficulties for parties seeking a finding that work was of a similar nature. This difficulty was evident in the Commission refusing a claim of similar work for nurses employed across different sites of nursing employment. While making no direct finding as to whether

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the work of nurses employed under state awards was of a similar nature to that of nurses employed under federal awards and determinations, the Commission nevertheless rejected the alignment of classification structures and rates of pay between one region within New South Wales and the ACT. At the same time it aligned the rates of pay of Department of Veterans’ Affairs nurses with that of their state public hospital nurses.

**Work Value of Nursing Work**

In the Commission’s view the major focus of the evidence was not that tendered in support of the claims that either an anomaly, or inequity existed, but alternatively in support of the proposition that that changes in work value were not reflected in the rates of pay. This was reflected in the evidence of the ACTU/RANF – 51 of the 104 exhibits tendered by the ACTU/RANF were witness statements from nurses in support of the applicant’s submissions concerning changes in work value. These witness statements and the ACTU/RANF’s submissions built substantially around the responses to a work value survey distributed by RANF-ACT Branch to its members, which assessed changes in work value since November 1991. The ACTU/RANF submitted that the Full Bench in addressing the question of work value should not only have recourse to work value principle (principle 4) but also the anomalies and inequities principle (principle 6). This course of action was open to the Full Bench, in the submission of the ACTU/RANF, because the work value principle would only allow for an evaluation of work value changes from existing rates.

The ACTU/RANF argued that the existing rates were not properly fixed because the 1972 principle had not been properly applied. The ACTU/RANF’s submissions identified eight categories of changes in work value, which were also consistent with the changes identified by the NSWNA in proceedings in the Industrial Commission of New South Wales:

1. Increased patient dependency.

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310 NBAC, RANF-ACT Branch, Z209 Box 79, Royal Australian Nursing Federation-ACT Branch Work Value Survey-Completed Returns; NBAC, Royal Australian Nursing Federation-ACT Branch, Z209, Box 80, Royal Australian Nursing Federation-ACT Branch Work Value Survey-Completed Returns; NBAC, Royal Australian Nursing Federation-ACT Branch, Z209, Box 81, Royal Australian Nursing Federation-ACT Branch Work Value Survey-Completed Returns.

2. New drugs, new techniques of drug administration and intravenous therapy.
3. Changes in work orientation and the devolution of responsibility from medical officers.
4. Technological changes and new procedures which have affected nurses’ work.
5. Staff shortages as they relate to nurses’ work.
6. Differences and changes in nursing techniques and functions.
7. Changes in isolation and infection control which have come about through the advent of multi-resistance bacteria and new diseases.
8. Changes in education necessitated by the other work value changes\(^{312}\).

The parties agreed about changes in work value since 1981. In 1981 there had been a series of work value cases that affected the awards and determinations that fell within the scope of the application. This agreement was reflected in a series of agreed facts documents that addressed work value changes in the ACT\(^{313}\), the Northern Territory\(^{314}\) and nominated repatriation hospitals operated by the Department of Veterans’ Affairs\(^{315}\). There was no agreement between the parties concerning changes in the value of work performed by nurses employed by Telecom.

The Full Bench indicated that a number of changes agreed by the parties had also been addressed in the series of work value cases undertaken in 1981, but determined that the changes stipulated were ongoing in nature. The Full Bench had indicated difficulties in aligning the nursing work encompassed by the awards and determinations before it, with the criteria of similar work stipulated by the inequities principle. Yet with respect to work value, the Full Bench’s decision reflected a capacity to appraise the work in more collective terms. The Bench indicated that it was satisfied that all of the classifications under review had contributed to the expansion in nursing functions. Equally the Full Bench assessed that the changes in nursing procedures in hospitals were also evident in other areas of the profession\(^ {316}\).

\(^{312}\) AIR, A No. 257 of 1986, Exhibit RANF1.
\(^{314}\) AIR, A No. 257 of 1986, Exhibit RANF89; AIR, A No. 257 of 1986, Transcript, p. 1677.
\(^{316}\) Re Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 443.
Allowances

The ACTU/RANF’s claim regarding allowances was consistent with its proposal for a national wage and career structure and pressed for a uniform prescription of three existing allowances, qualification allowance, functional allowance, responsibility allowance, across all the awards and determinations before the Commission, using as a guide the framework and rate of allowances available to public sector nurses in New South Wales. The ACTU/RANF presented evidence\(^{317}\) with which the Full Bench concurred as to the considerable diversity in the amount and method of payment in the existing allowances across the awards\(^{318}\). Yet the Full Bench rejected the claim of the ACTU/RANF, indicating that the applicant had not argued a case consistent with the terms of the allowances principle (principle 10), nor demonstrated that the increase was justified on work value grounds\(^{319}\).

Professional Rates

The ACTU/RANF’s proposal for a classification structure and rates of pay reflected what they anticipated would be the awarding of professional rates in state tribunals following the upgrading of nursing education. The ACTU/RANF’s claim for professional rates rested on the resolution of the ACTU/RANF’s claim of an anomaly, in particular the non-application of the 1972 principle and the change to full-time CAE training for nurses.

The submissions of the ACTU/RANF were not extensive concerning this aspect of their claim. In contrast to the weight of evidence tendered in support of the work value claims only three exhibits were submitted relevant to this aspect of the claim\(^{320}\). Similarly, the RANF in reporting this aspect of the claim to the membership simply noted, ’[the] RANF believes nurses’ work has been significantly undervalued, that nursing has not been afforded recognition as a professional activity and that nurses have historically been subjected to

\(^{317}\) AIR, A No. 257 of 1986, Exhibit RANF83; AIR, A No. 257 of 1986, Transcript, p. 1342.

\(^{318}\) Re Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 444.


\(^{320}\) AIR, A No. 257 of 1986, Exhibits RANF7, RANF85, RANF86; AIR, A No. 257 of 1986, Transcript, pp.177, 1359-1360.
super-exploitation because of the fact that nursing is predominantly a female industry\textsuperscript{321}. The Full Bench sought greater clarification as to what was meant by the concept of professional rates. This request disclosed a distinction in the position of the ACTU and the RANF. The ACTU submitted that professional rates were ‘salaries commensurate with those paid to other professionals in the health industry’\textsuperscript{322}. The RANF defined professional rates as ‘rates which ....resolve all the anomaly issues now before the Bench’ and indicated that ‘no special or different comparative work value exercise is, in our submission, necessary’\textsuperscript{323}. The ACTU/RANF submitted evidence of comparative rates of pay in Science and Technical Grades in the Australian Public Service\textsuperscript{324}, and state public hospitals\textsuperscript{325} in addition to other areas of the health sector. This comprised the areas of physiotherapy and medical technology.

The paucity of evidence was deliberate on the part of the ACTU/RANF. They wanted to reserve the evidence that would be required to support a substantial professional rates claim for a separate and additional application as they assessed that they may extract additional wage increases. Incorporating professional rates as part of the current application was likely to discount the wage outcomes that could be realised\textsuperscript{326}. To an extent the continued inclusion of professional rates in the claim was a partial concession to the original comparable worth claim. However, from the outset it was the intention of the RANF that professional rates would be pursued in a separate application under the work value principle, following similar applications in state industrial tribunals, particularly in New South Wales and Victoria\textsuperscript{327}.

Mindful that the wage fixing principles would increasingly restrict the amount of the wage increase that would be possible through any single application, the RANF determined that advances in nursing wages would be pursued through multiple rounds. These rounds of

\begin{footnotes}
\begin{itemize}
\item[324] AIR, A No. 257 of 1986, Exhibit RANF85; AIR, A No. 257 of 1986, Transcript, p. 1359.
\item[325] AIR, A No. 257 of 1986, Exhibit RANF86; AIR, A No. 257 of 1986, Transcript, p. 1360.
\item[326] Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
\item[327] See for example, Re Registered Nurses Award (Victorian Industrial Relations Commission, Marshall P, Eggington C, Williams C, 16 August 1988, Decision D88/0228).
\end{itemize}
\end{footnotes}
single applications would stress particular features of changes to the work value of nurses, such as the progressive transfer to college-based education and the requirement for classifications that recognised clinical promotion. All of these claims to increased work value bore a shadow of comparable worth but framed in very different terms.\(^{328}\)

In considering these submissions the Full Bench drew reference to the terms of the 1972 principle: firstly, the requirement that the awarding of equal pay be based on work value comparisons, and secondly, the type of work value comparisons envisaged by the principle. The decision records that the comparative wage rate material presented by the ACTU/RANF was viewed by the Commission 'to be of no assistance in respect of work value comparison and we are unable to make any analysis of the type contemplated by the 1972 Equal Pay decision.'\(^{329}\) The ACTU/RANF did not submit evidence of job descriptions to accompany their comparative assessment of rates of pay. The Full Bench also determined that the transition in nursing education was still in a preliminary phase, and thus could not be competently contrasted with occupations where there was a well established system of degree-based credentials.\(^{330}\)

The ACTU/RANF's claim for professional rates was stymied by the paucity of their evidence. While this was a conscious strategy on the part of the ACTU/RANF, equally problematic were the narrow terms in which the Full Bench viewed the 1972 principle. The Full Bench considered that doubt existed about whether the non-application of the 1972 principle was available to the parties, and to the Commission, to justify the lifting of rates to a professional level. The Full Bench assessed that the ACTU/RANF's claim to an anomaly rested on the persistence of a sex-bias in nursing wage rates which had not been corrected. Addressing this sex-bias, in the view of the Commission, was a different objective from increasing the rates of pay of all nurses to a level consistent with professional status.\(^{331}\) Through this reasoning the

\(^{328}\) Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
\(^{329}\) Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 446.
\(^{330}\) Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 446.
\(^{331}\) Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972 & Other Awards (1987) 20 IR 420 at 446.
Full Bench confirmed the limited opportunities for applicants to pursue equal pay claims. The comparable worth and the anomalies and inequities proceedings determined that access to the 1972 principle was mediated by the wage-fixing principles. Beyond this obstacle applicants were required to meet the terms of an increasingly narrowly cast anomalies and inequities principle. Through this framework the Commission refused the possibility of any prospective application of the principle to ensure that rates remained free of sex-bias. The Commission believed that it had the responsibility to address a claim for the non-application of the 1972 principle but not new emerging sex-biases in the rates of pay, arguably evident in the case of nurses as their degree-based credentials were not realising professional rates of pay.

6.4.2 A NATIONAL CAREER STRUCTURE FOR NURSES

The Full Bench expressed sympathy for the ACTU/RANF objective for a national career structure and wage rates for nurses, but determined that it was unable to fulfil this objective as the nurses covered by the awards and determinations represented a small minority of nurses throughout Australia. The Full Bench reasoned that no party was in a position to provide it with guarantees that an identical structure would be pursued in proceedings before state industrial tribunals. The Bench commended the future operation of a ‘truly national award covering a large section of nurses’ and in doing so provided what the RANF viewed as direct support for the concurrent applications to establish greater federal award coverage and a ‘national structure of regulation’. In awarding wage increases, the Bench endorsed the proposition that the 1972 principle had not been applied to the awards in question, although it was unclear from the decision as to what component of the final wage increase could be traced to this, or indeed other aspects of the ACTU/RANF claim. The Full Bench gave broad support to the classification structure submitted by the ACTU/RANF as it had been trialled with some success prior to its implementation in the relevant state public sector.

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334 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.
awards in South Australia. However, the Full Bench was conscious that the structure differed from that evident for public sector nurses employed under state awards in New South Wales, Victoria, Western Australia and Tasmania.

In issuing orders that provided for a new classification structure the Full Bench resisted the challenge of the PSB to the Commission's jurisdiction in this area. The PSB submitted that it was not the role of the Commission to adjudicate between proponents of different classification structures or itself to determine a model structure. The PSB argued that the Commission could not align itself with the role played by state industrial tribunals as those tribunals had essentially ratified agreements between the parties. This submission was rejected comprehensively by the Full Bench which noted that classification structures were an integral element of nursing salaries, which itself was a matter that pertained to the relations between employers and employees. Thus the jurisdiction of the Commission to prescribe a classification structure was without question. After clarifying its jurisdictional capacity the Full Bench determined that different orders, prescribing different classification structures, would apply to awards and determinations in the Northern Territory, the ACT. There would also be separate orders, differentiated by state, for nurses employed by the Department of Veterans’ Affairs, the Department of Community Services and Telecom. In anticipation of the exclusion of the Department of Veterans Affairs nurses from the primary orders, Department of Veterans’ Affairs nurses employed in New South Wales had instituted bans on elective admissions and on recording patient statistics.

The classification structure prescribed in the different orders issued by the Commission bore a strong similarity to that proposed by the ACTU/RANF. The major area of departure, in the classification structure issued for the Northern Territory, was that the highest band of classifications in the ACTU/RANF proposal (Level V), which contained four classifications

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ranging from $44 500 to $54 500, was reduced to a single classification, applicable only to Directors of Nursing to be paid at $44 500. This change was also reflected in the classification structure specified by orders for awards applicable to the ACT, with additional changes to the progression arrangements for Registered Nurses from Level III onwards.

The salaries specified by the Commission departed from those in the ACTU/RANF claim in two respects. As the Commission had rejected the submissions concerning professional rates, it did not award the salaries consistent with the ACTU/RANF’s claim in this area (column B, Table 6.2). The difference in salary for the base classification of registered nurse, with three years experience, was $3,400 or 16.6 per cent. Additionally the Commission rejected the ACTU/RANF claim for the new rates to apply, in instalments, from 19 March 1986 and made the dates operative from the date of the decision (7 May 1987). Thus the Commission rejected the ACTU/RANF submissions that the order rectifying the anomaly should have a retrospective operation. The implementation of the Commission’s orders emanating from the proceedings was not without dispute. Stop work meetings and industrial action occurred in the ACT and ACT members were levied to fund a campaign of rolling action over the failure, in the view of the RANF-ACT Branch, of the ACT Health Authority to implement the orders.

Sympathy aside, and despite the lack of detailed submissions on professional rates, the RANF publicly was unimpressed with the Full Bench’s decision identifying it as an ‘abrogation of its

338 NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Special Branch Council, 11 May 1987, p. 2; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation General Stop Work Meeting, 13 May 1987, pp. 1-4; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation General Stop Work Meeting, 2 June 1987, pp. 1-4; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Joint Royal Australian Nursing Federation/Hospital Employees’ Federation Special Stop Work Meeting 18 August 1987; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Joint Royal Australian Nursing Federation/Hospital Employees’ Federation Special Stop Work Meeting 26 August 1987; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Special General Meeting, 16 September 1987, pp. 1-2; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Stop Work Meeting, 21 September 1987, pp. 1-3; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Stop Work Meeting, 30 September 1987, p. 2; NBAC, RANF-ACT Branch, Z209, Box 170, Minutes of Royal Australian Nursing Federation-ACT Branch Special Branch Council, 3 November 1987, pp. 1-2; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council 27 April 1988, p. 6.
responsibilities’ and ‘avoiding the buck’. The RANF needed to maintain momentum for subsequent claims for professional rates. Thus the key issue of disappointment advanced by the RANF was the failure of the Commission to award professional rates, an issue that would not be contemplated in federal proceedings until 1989, and, despite the objections of the then ANF, within the parameters of the structural efficiency principle. The case brought in 1989 focused on the merits of an integrated career structure and sought recourse to the special case provisions of the wage fixing principles rather than any explicit reliance on the 1972 equal pay principle. This approach was deliberately taken by the RANF.

There would in future applications be limited reference to any claim to equal pay or the feminised nature of the work. Based on the reasoning that there was no existing ‘mechanism for the value of touch’, subsequent work value applications would focus on the highly technical aspects of the profession, including the knowledge of medications and procedures and the operation of highly specialised equipment in units such as emergency and intensive care.

Professional rates were achieved in New South Wales and Victorian state awards in 1989, followed by decisions in the AIRC in 1989 and 1990 covering federal nursing awards which now operated in all states and territories with the exception of New South Wales, Queensland and Victoria. By 1991 Queensland nurses would also be covered by a federal award as would those in Victoria, the latter after a period of considerable challenge including an appeal by the Victorian government to the High Court. The decision in New South Wales to award

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340 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.

341 As noted earlier in the chapter the RANF changed their name to the Australian Nursing Federation (ANF) in 1988.


343 NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Special Branch Council, 9 August 1989, pp. 1-3.

344 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005.

professional rates came eighteen months after the New South Wales Nurses’ Association first advised the relevant employer in New South Wales, the New South Wales Department of Health, of its intention to seek professional rates for all registered nurses, irrespective of whether nurses had undertaken their training through the public hospitals or at a tertiary institution.

The Association decided to pursue the claim as an anomaly within the state’s wage fixing principles rather than an explicit reliance on the 1973 state equal pay principle. The New South Wales Industrial Commission initially rejected the Association’s claim that an arguable claim for an anomaly existed. The Commission’s basis of rejection was that the NSWNA had sought new classifications and qualification allowances as a result of the transfer of nursing education to the college-based system. The Commission’s reasoning was that the Association in effect was double dipping. Following a period of industrial action agreement was reached with the Department of Health that an arguable claim for an anomaly existed, an agreement which within the context of the wage fixing principles meant that the case could proceed to hearing.

During this period the New South Wales Industrial Commission and the Victorian Industrial Relations Commission agreed to a joint compulsory conference to resolve the claims that were before both Commissions and to prevent the leapfrogging that had characterised historically the progression of rates in New South Wales and Victoria.

Agreement was reached finally between the Association and the New South Wales Department of Health. It was put to the New South Wales Commission as a consent matter, following similar agreement and ratification by the Victorian Industrial Relations Commission.

Within the federal jurisdiction the ANF sought to apply the wage increases awarded in state jurisdictions to all applicable federal awards. As noted earlier in this chapter the applications were routed through the special case provisions of the August 1988 and August 1989 wage fixing principles. They were also joined with applications made by unions for wage increases consistent with the structural efficiency principle in the August 1989 wage fixing principles. In these proceedings the decisions of state industrial authorities in New South Wales and Victoria, bore some influence, although the AIRC quibbled with the ANF’s use of the term ‘professional rates’ and referred to the Full Bench’s unease with the term in the anomalies proceedings that followed the comparable worth case. Of direct concern to the Commission was the ANF’s claim for a new salary structure for all nurses, irrespective of whether they were hospital or college trained, given that ‘professional rates for nurses cannot be related to the possession of a degree or its equivalent’. The Full Bench remained unconvinced that nurses should be part of an integrated structure for professional rates of pay. The Commission interpreted the ANF submissions as requiring a consistent approach to the fixation of nurses’ salaries throughout Australia, and ‘recognition of a community of interest within nursing rather than maintaining a nexus with any other group’. The Full Bench indicated that they were more persuaded by the arguments concerning a consistency of approach in the fixation of nurses’ salaries and saw any potential decision as more properly directed to addressing the ‘mish mash’ of rates across nursing awards.

While the decision of the Full Bench in the ‘professional rates’ case provided some uniformity in award structures, some aspects of the decision rankled with particular branches and the membership. As with the decisions in New South Wales and Victoria, the increase in salaries came at the expense of qualification allowances so that those nurses who were already in receipt of maximum qualification allowances received negligible increases. Salaries in the

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351 Re Australian Nursing Federation (1989) 32 IR 170 at 172.
352 Re Australian Nursing Federation (1989) 32 IR 170 at 171.
353 Re Australian Nursing Federation (1989) 32 IR 170 at 171.
354 Re Australian Nursing Federation (1989) 32 IR 170 at 171.
federal awards remained below those available in New South Wales and although there were increases in the base rate, there were also offsets due to the loss of penalty rates, with there being a greater proportionate drop in penalty rates in the ACT, Tasmania and the Northern Territory. The loss of salary-related conditions in the ACT was also the source of some enmity between the ACT Branch and the federal executive, with the branch determining, prior to and following the final professional rates decision, that the erosion of salary related allowance in the ACT, Tasmania and Northern Territory was an unnecessary consequence of the professional rates case. The final salary structure, although it acknowledged the degree-based credential for nurse registration, was not commensurate with other health professionals, including physiotherapists, occupational therapists and medical technologists.

6.5 CONCLUSION – IMPLICATIONS FOR REFORM

The comparable worth proceedings concerned not only the application to Australian labour law of the concept of comparable worth, but also the continued availability of the 1972 principle in the wake of changes to wage policy. Given Australia’s system of industrial awards, the choice of comparable worth as a strategy to pursue pay equity posed a significant challenge to the ACAC. Primarily this challenge arose because the jurisdiction with which comparable worth was most clearly associated, the federal jurisdiction in the United States, utilised workplace-based job evaluation as the methodology through which comparable worth could be proven. The tribunal’s unease with the concept was given further impetus by the failure of the applicant unions to clarify whether they were promoting comparable worth as a concept or a methodology, a deficiency taken up by both the Commonwealth and employer parties with a view to emphasising the distinctiveness of the approach being taken by the ACTU relative to the approach to work valuation and wage fixing relied on by the Commission.

355 NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council Meeting, 26 April 1989, p. 3; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council Meeting, 28 March 1990, pp. 3-4; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Stop Work Meeting, 3 April 1990; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch General Meeting, 7 May 1990; NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 23 August 1990, p. 6.

The strategy relied upon by the ACTU and the applicant unions carried a key procedural weakness. In procedural terms the ACTU claim did not explicitly seek the ACAC’s endorsement of comparable worth, although the case ultimately went to such an issue. The ACTU initially sought a threshold ruling that the 1972 principle was still available to applicant parties and that the application of the principle was not thwarted by the operation of the current wage fixing principles. The ACTU did not lead any material on comparable worth other than to submit that the concept was compatible with the terms of the 1972 principle.

The reference to comparable worth in the ACTU application was sufficient, however, for other parties including the Commonwealth, the CAI and the CAEP to prepare submissions on comparable worth. The substance of the submissions by the Commonwealth and the CAI effectively took the ACAC to the operation of comparable worth in international jurisdictions. Although the Commonwealth and the CAI adopted different interpretations of the material, the reference points provided by the CAI and Commonwealth led the ACAC to declare the concept incompatible with the ACAC’s traditional reliance on work value as a method of establishing the value of work.

The case also revealed the disjuncture between organised labour and the CAEP as to how the ACAC should assess whether the 1972 principle had been properly applied. The CAEP, in supporting the ACTU claim, was the only party to the proceedings to argue that the ACAC needed an approach that would rectify the low pay received by women in occupations that were heavily sex-segregated. The weakness of the submissions of the CAEP was that they aligned the remedy for low pay in highly segregated areas of feminised work to the concept of comparable worth and not to work value. The submissions by the CAEP extended significantly beyond that of the ACTU in that they argued for a review of each award, as it came before the Commission for the purposes of National Wage Case increases, to assess whether the 1972 principle had been properly applied. The ACTU failed to support the
contentions of the CAEP that the ACAC review each award to assess the application of the 1972 principle. The approach of the CAEP reflected an uneven approach to the task of pay equity reform. Their submissions relied on an award-based approach to remedying what they viewed as the inadequate application of the 1972 principle. To this extent they relied on the traditional instruments of the Commission. Yet the submissions of the CAEP eschewed the Commission’s approach to work value and proposed an alternative, comparable worth, that on the evidence presented to the Commission shifted the emphasis to narrowly focused assessments, seemingly at odds with award remedies.

Given that comparable worth was pivotal to the ACTU’s application, the absence of support by the ACTU for the CAEP submissions for a review of awards could not be traced to the reliance by the CAEP on comparable worth as a methodology that would remedy any deficiencies revealed by the review of awards. The failure of the ACTU to endorse the review sought by the CAEP could be traced to the challenge it posed to the ACTU’s commitment to the Prices and Incomes Accord and the wage fixing principles. Although the principles were an instrument of the Commission, the 1983 principles owed much of their lineage to the Accord, given the mutually supportive nature of the submissions made by the ACTU and the Commonwealth as to the form of the wage fixing principles that should be determined by the 1983 National Wage Case.

The ACAC’s decision illustrated the primacy of the wage fixing principles, relative to the entitlement to equal pay for work of equal value. The ACTU argued that it was open to the ACAC to apply the 1972 principle independently of the wage fixing principles, a position that was opposed by both the Commonwealth and the CAI. The Commonwealth, which took the view that its equity obligations had been met by way of its legislative programs in affirmative action and sex discrimination, argued that applicant parties should process claims that relied on the 1972 principle through the anomalies provisions of the anomalies and inequities principle of the 1983 wage fixing principles. The CAI argued a similar path, but through the inequities provisions. This reasoning was ultimately accepted by the ACAC, an interpretation
that elevated the principles and their objectives above that of the 1972 principle. Applicants
seeking access to the 1972 principle had the task of proving evidence of an anomaly and
inequity consistent with the terms of an increasingly narrowly cast anomalies principle.

The outcome highlighted the consequences of the lack of applications seeking revaluation of
feminised work on the basis of inter-award, as opposed to intra-award, comparisons in the
period immediately following the 1972 principle. Fourteen years after the determination of
the 1972 principle its relative ascendancy had been swept way by the primacy of the wage
fixing principles, the construction of which had been and would continue to be significantly
influenced by Accord negotiations between the ACTU and the federal Labor government. The
ACAC did not reject the veracity of evidence led by the CAEP about the levels of low pay that
characterised feminised work but argued a diminished responsibility as the wage disparities
cited by the CAEP on the Commission’s reasoning arose from a number of factors external to
award prescription. This finding of the Commission also indicated the narrow terms on which
it was prepared to contest the resolution of gender pay equity.

The Commission’s assessment, more pronounced in the anomalies proceedings, of the type of
comparisons that were available to applicants under the terms of the 1972 principle, had
limited case law to draw upon. The 1972 principle had primarily been applied by way of
consent arrangements and the Commission was unable to reference the utilisation of the
principle for the inter-award comparisons that were required to counter the impact of
occupational segregation on pay inequity. That part of the principle that provided for equal
pay for equal value on the basis of inter-award comparisons had not been widely tested. The
lack of suitable reference points demonstrated not only failings in the terms and
interpretation of the 1972 equal pay for work of equal value principle, but also the failure of
organised labour to exploit the opportunities provided by the principle for working women, a
measure of the weakening of the political mobilisation that gave rise to the 1969 and 1972
reforms. The failure of the parties to utilise the principle was then exposed by the short-lived
nature of pay equity reform and the subjugation of the 1972 principle to the demands of
wages policy. The diminished importance of the 1972 principle, relative to the wage fixing principles, was more apparent in the period shaped by the Accord negotiations between the federal Labor government and the ACTU, than the phase of wage indexation in the period 1975-1981.

As to a way forward for pay equity claims the ACAC made no specific ruling on the substantive issue that arose within the proceedings; that being the ability of applicant parties to utilise the 1972 principle to pursue equal pay for work of equal value on the basis of comparisons with masculinised areas of work external to the award(s) at the core of any application. The comparable worth proceedings revealed one of the weaknesses of the 1972 principle: inter-award comparisons were only to be utilised by the Commission after the potential for intra-award comparisons and comparisons with other feminised areas of work had been exhausted. The absence of a specific ruling was in spite of the ACAC’s acknowledgement that there may be relevant issues concerning the valuation of nursing work. It simply directed the parties to the anomalies principle within the current wage fixing principle, but made no determination as to whether the claim should be treated as an anomaly or an inequity.

The ACAC ruled that the 1972 principle was still extant but narrowed the opportunities through which it might be utilised. Beyond the constraint of applicants having to proceed through the anomalies and inequities provisions, the ruling did not provide an accessible schema that would provide for the continued application of the 1972 principle and facilitate applicant parties relying on inter-award comparisons as a means of claiming recourse to the remedies available under the 1972 principle. The anomalies proceedings that followed the comparable worth case defined the limited grounds on which pay equity claims could be pursued. The primary aspects of this claim rested not on discrepancies in pay between nurses and masculinised areas of work, but on the differences in rates of pay between nurses in the federal jurisdiction compared to nurses employed under awards determined by state jurisdictions. The narrow ambit of the ACTU/RANF claim was cast deliberately also. While the
claim reflected what the RANF thought would be possible from the ACAC given its decision in the comparable worth proceedings, the RANF thought that professional rates claims would have a higher chance of success and also achieve higher rates of pay in state industrial tribunals, through the Victorian branch of the RANF in Victoria and the NSWNDA in New South Wales.

Beyond the deficiencies in the ACTU/RANF evidence, the Commission in the anomalies proceedings indicated its lack of surety as to whether a claim for professional rates, a claim whereby the rates of nurses would be aligned with other degree-based occupations, was consistent with the terms of the 1972 principle. The Commission therefore ruled against the prospective application of the 1972 principle to ensure that rates of pay remained free of sex-bias. Rafferty’s (1990, 1991, 1994) assessment of separate proceedings involving public sector social workers, dental therapists and family court counsellors, endorsed the capacity of anomalies and inequities provisions to address the valuation of feminised work, but also illustrated the extent to which unions minimised their reliance on the 1972 principle and the degree to which the eventual outcomes were mediated by the processes of negotiation and compromise.

### 6.5.1 A WAY FORWARD

The ambiguities posed by the comparable worth case and the absence of a specific reaffirmation by the ACAC that the parties could seek an application of the 1972 principle based on inter-award comparisons identified a clear program for pay equity reform. The reasoning by the Commission in the comparable worth case revealed its reticence to engage in inter-award comparisons of work. While the 1972 principle provided the opportunity to utilise such comparisons it contained something of a safety valve for the Commission in that the principle elevated within award comparisons as the primary methodology. The

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357 Interview Philip Gardner, Industrial Officer, Royal Australian Nursing Federation (ACT Branch), 18 May 2005; See also NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council, 30 March 1989, p. 5.
comparable worth proceedings indicated that the available institutional arrangements required greater clarity so that applicants would not be restricted in the type of comparisons they could rely on in support of applications under the equal pay for work of equal pay principle. There was significant precedent for the Commission engaging in comparisons of dissimilar work across rather than within industry awards. For a considerable period, Australian wage fixing had centred on the benchmark rate of the metal trades fitter. The trade credentials of the fitter had proved the means of establishing rates of pay for trade qualified workers in awards applicable to engineering, building, plumbing, and electrical areas of work. Rates of pay for post-trade qualified workers or non-trade workers have been set historically by tribunals relative to the trade rate of pay. Yet comparative work value assessments embracing feminised areas of work clearly posed a challenge for the Commission. Rates of pay in feminised areas of work were depressed by the female characterisation of the work and the relative late entry of the work to industrial forms of organisation, subject to formalised terms and conditions of employment. Thus reassessing the value of work in feminised areas of employment, through comparisons with masculinised areas of employment, had the capacity to disturb existing wage relativities, a challenge that the Commission was reticent to meet.

The comparable worth proceedings also indicated a requirement for the commitment to equal pay to be independent of any restrictions on wage increases that were potentially authorised by the prevalent wage fixing principles. Although the Full Bench in the comparable worth proceedings was partially sympathetic to the wages claims of nurses it was not prepared to accommodate the claim outside of the wage fixing principles. Nor was the Commission prepared to apply the 1972 principle in a prospective manner so that rates of pay remained free of sex bias.

A pressing issue that arises from the comparable worth proceedings is whether the weaknesses in jurisprudence revealed by the proceedings were addressed in subsequent pay equity reform. If these issues were taken up by institutional actors what was the result? In
particular, what measures were considered to address the Commission and organised labour’s reluctance to use the 1972 principle in a way that was more advantageous for women? These questions are addressed in the following chapter which assesses the impact of a legislative commitment to equal remuneration, introduced to the Australian federal jurisdiction in 1993.

7.1 INTRODUCTION

The previous chapter examined the utility of the jurisprudence that emerged from the 1972 equal pay for work of equal value principle and identified key weaknesses. These concerned the assessment of equivalence in work value and a diminished status for women’s right to claim equal pay relative to the priorities forged by the Australian Conciliation and Arbitration Commission’s wage fixing principles. The extent to which these weaknesses were addressed in subsequent phases of gender pay equity reform is a theme taken up by this chapter which examines the next landmark in Australian pay equity reform; the 1993 equal remuneration amendments to federal industrial relations legislation.

Under legislative amendments, the Commission has not been compelled to issue equal remuneration orders. Hence the focus is an analysis of the only arbitrated proceedings concerning an application for such orders\(^1\). These proceedings featured an application made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU)\(^2\) on behalf of process workers and packers employed at HPM Industries, a Sydney-based electrical component manufacturer. The application was refused and a subsequent application settled without recourse to final arbitration. However, the Commission’s strategy in interpreting the current equal remuneration provisions in the HPM proceedings was subsequently confirmed in parts by proceedings concerning equal remuneration orders for clerical workers employed at David Syme & Co Ltd, proprietors of *The Age* newspaper in Melbourne\(^3\).

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\(^1\) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries (1998) 94 IR 129 at 158 (the *HPM Case*).

\(^2\) Otherwise known as the Australian Manufacturing Workers’ Union.

\(^3\) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd (1999) 97 IR 374 at 375 (the *Age Case*).
The chapter begins with an analysis of the circumstances that preceded the introduction of the equal remuneration amendments in 1993, particularly those factors that prompted their reliance on discrimination. The chapter is then organised as a chronology commencing with an account of the application for equal remuneration orders at HPM Industries that proceeded to arbitration before Commissioner Simmonds. Upon the initial application being refused the applicant union lodged a new application that was the subject of further Commission proceedings prior to being settled by a new enterprise agreement. These subsequent proceedings are important because they might indicate a different interpretation of the equal remuneration provisions by the Commission or different strategies on the part of the applicant union or respondents. Similar issues were at stake in the applications lodged by the AMWU, which concerned clerical workers employed at David Syme & Co Ltd. The chapter concludes with an analysis of the implications of the cases for the effectiveness of pay equity reform.

7.2 EQUAL REMUNERATION AMENDMENTS TO THE *INDUSTRIAL RELATIONS ACT 1988* (CTH)

The equal remuneration provisions were introduced formally by the *Industrial Relations (Reform) Act 1993* (Cth), the product of a circuitous constitutional and legislative path. Equal remuneration provisions had not been enshrined previously in federal legislation as the Constitution effectively excluded the federal Parliament from fixing conditions of employment. Hence these amendments provided the first statutory commitment to equal remuneration within the federal jurisdiction, an inclusion made possible by the federal government’s reliance on its external affairs powers and its status as signatory to a suite of international anti-discrimination conventions, including the International Labour Office’s (ILO) Convention 100 *Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*. The amendments did not preclude broad inter-award comparisons of work, nor did they provide specific legislative provisions for such a comparison.
7.2.1 POLICY BASED RESEARCH AND INQUIRY

The development of an appropriate legislative means to further advance pay equity followed a number of policy reports on women’s wages, all of which pointed to the continued disparity between women’s and men’s wages. In 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs initiated an inquiry lasting almost three years into equal opportunity and equal status for women in Australia (Parliament of the Commonwealth of Australia - House of Representatives Standing Committee on Legal and Constitutional Affairs, 1992). The length of the inquiry owed something to the parliamentary cycle. The inquiry was referred to the Committee in May 1989 by the then Attorney-General, Lionel Bowen, but ceased in February 1990 following the dissolution of the Parliament. The Committee was re-established by the new parliament in May 1990 and the Inquiry was referred again to the Committee by the newly appointed Attorney-General, Michael Duffy.

Within the period of the parliamentary inquiry the National Women’s Consultative Council (NWCC) released a report into gender pay equity. The origins of the report reflected feminist criticism about the lack of federal cases specifically based on the application of the 1972 principle (Bennett, 1988; Short, 1986). The NWCC report found that women’s comparatively low receipt of overaward payments had been a key factor in women’s lower earnings, and labelled the disparity in overaward payments between men and women as discriminatory (NWCC, 1990: 36-37). This finding was the basis of a recommendation that proposed that the use of the discrimination provisions within the *Sex Discrimination Act 1984* (Cth) be used to address this disparity, although the report also recommended that the 1972 principle and the anomalies and inequities provisions within the wage fixing principles remained the most effective means to address pay equity in the industrial jurisdiction (National Women’s Consultative Council, 1990: 55).

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5 The National Women’s Consultative Council report notes that at 1990 there had only been fifty three applications recorded in federal proceedings. This count would however exclude consent arrangements where wage increases relevant to equal pay were a component of larger wage increases brought to the commission as consent arrangements.
Returning to the parliamentary inquiry it recommended amendments to the relevant sex
discrimination and affirmative action legislation. The Inquiry did not recommend any
legislative amendments to the industrial relations legislation in the area of equal pay, nor did
it make recommendations that affected the use of the 1972 equal pay for work of equal value
principle. This latter omission amounted to a rejection of the submissions of women’s
organisations. Guided by the experience of the comparable worth proceedings, these groups
submitted that there should be no impediments to applicants taking claims to the Australian
Industrial Relations Commission (AIRC) on the basis that the 1972 principle had not been
applied or had been poorly applied\(^6\). The submissions of the women’s organisations
represented a shift in approach from the comparable worth proceedings, a shift that was
evident also in the submissions of the National Pay Equity Coalition (NPEC) at the August
1988 National Wage Case. At these proceedings NPEC argued that, given the Commission’s
rejection of comparable worth, it would pursue access to the 1972 principle but seek to
remove what the Coalition held to be the Commission’s gender bias in interpreting the
principle (Burton, 1990).

Rather than take up NPEC’s approach, the parliamentary inquiry’s only substantive
recommendations about wage fixing concerned the potential impact of award restructuring
and enterprise bargaining on wage differentials. Given that the Government promoted the
introduction of enterprise bargaining, this was uncomfortable for the Parliamentary
Committee, a discomfort reflected in its recommendation:

> The Committee recommends that all parties to award restructuring and enterprise
> bargaining agreements be cognisant of the differential between male and female
> earnings, and ensure, at the very least, that attempts be made to close the gap
> (Parliament of the Commonwealth of Australia - House of Representatives Standing
> Committee on Legal and Constitutional Affairs, 1992: 86-87).

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\(^6\) NPECA, Submission by the National Pay Equity Coalition to the House of Representatives Standing Committee on
Legal and Constitutional Affairs Inquiry into Equal Opportunity and Equal Status for Australian Women, 1989, p. 44.
In 1991, in response to the recommendation of the NWCC report, the Human Rights and Equal Opportunities Commission (HREOC) through the then Sex Discrimination Commissioner, Quentin Bryce, commenced an Inquiry into Sex Discrimination in Overaward Payments. The inquiry’s origins technically resided in the authority provided to HREOC under the terms of the Sex Discrimination Act\textsuperscript{7}. The terms of reference directed the Inquiry to an examination of the extent of the disparity in overaward payments between men and women, and the role of sex discrimination in contributing to that disparity. The Sex Discrimination Commissioner was assisted by an Advisory Committee which included the Australian Council of Trade Unions (ACTU) and the Confederation of Australian Industry (CAI). The federal Department of Industrial Relations made extensive submissions (Department of Industrial Relations, 1992) and maintained close consultation with the secretariat established for the inquiry\textsuperscript{8}. Key policy advice was provided by a newly established unit in the department, the Equal Pay Unit. Through its submissions, the Department indicated that it saw a role for anti-discrimination legislative provisions as a means to address disparities in overaward payments. The Department did not recommend that such provisions be included in industrial relations legislation but drew attention to Australia’s obligations under international conventions and the approaches to indirect discrimination adopted in ‘Canada, the United States, the United Kingdom and European countries’ (Department of Industrial Relations, 1992: 18).

In its report the inquiry struggled to establish whether the distribution of overaward payments was discriminatory. Its key finding was equivocal:

A number of factors influence overaward payments. These factors include market forces, the concentration of women in more lowly graded positions and in part-time and casual work, and occupational and industrial segregations. Limitations on the data available on overaward payments pose difficulties in determining precisely the incidence and level of discrimination in overaward payments, however it is likely that broadly based overaward differentials reflect practices which constitute direct and indirect discrimination on the basis of sex (Human Rights and Equal Opportunities Commission, 1992: 6).

\textsuperscript{7} Under ss.48(1)(d) to (h).
\textsuperscript{8} Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
This finding was accompanied by a broad-based recommendation for greater linkages between anti-discrimination law and industrial relations law (Human Rights and Equal Opportunities Commission, 1992: 7). This theme was taken up by amendments to the *Sex Discrimination Act* which removed the previous exemption applicable to awards and orders of an industrial tribunal from the *Sex Discrimination Act*. The introduction of federal sex discrimination law by the newly elected federal Labor government in 1983 had been controversial, in part because the legislation in its original form incorporated affirmative action provisions that would ultimately be the basis of separate and weaker legislation in 1986 (Wallace, 1985: 16, 21; Bacchi, 1996: 81). Beyond this controversy, the original sex discrimination legislation was actually quite conservative in nature (Thornton, 1991: 60-61); the proposed amendments recommended by the Senate Inquiry addressed areas considered too expansive for the original legislation.

The report of the HREOC inquiry into overaward payments attracted limited discussion – in part, the lack of exposure afforded to the report reflected the cool response of the ACTU to its release. In meetings with the Sex Discrimination Commissioner, Quentin Bryce and the Secretary to the Inquiry, the ACTU President, Jenny George, declared the report a direct criticism of the ACTU’s support for enterprise bargaining, an understandable sensitivity given that the report provided extensive evidence of the gender differences in overaward payments and the substantially different involvement of men and women in overaward bargaining.

### 7.2.2 DRAFTING OF EQUAL REMUNERATION AMENDMENTS

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9 This occurred in two stages. The *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) provided that the Sex Discrimination Commissioner could refer, to the Australian Industrial Relations Commission, awards or agreements *made* after January 13 1993 or those awards *varied* after January 13 1993, that the Sex Discrimination Commissioner deems appear to be discriminatory.

10 Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005; Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.

11 Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
Despite the political tension that had accompanied the HREOC report, the unit within the federal bureaucracy that had contributed to the drafting of the equal remuneration legislative amendments, the Equal Pay Unit of the federal Department of Industrial Relations, continued close consultation with the Sex Discrimination Unit. Much of this consultation concerned the references to the international conventions which were a required feature of the proposed legislation, given its constitutional reliance on the external affairs power. The problems posed by the 1986 comparable worth case were also an issue taken up at the drafting stage. What these policy makers sought was, for the first time, a legislative entitlement to equal pay. Such an entitlement took equal pay out of the intricate deliberations of industrial tribunals and gave it statutory force. In making this transition from tribunals to statute, the federal bureaucracy also aimed to broaden the concept of equal pay to equal remuneration.

The legislation proposed a discrimination test as the legal device to evaluate equal pay applications. The use of this test owed something to a belief that a more complete understanding of discrimination would assist a claim for equal remuneration brought before an industrial tribunal. Those involved in drafting the legislation would later admit this belief to be misplaced, since at the very least the amendments needed to reflect the wider understanding of discrimination as it was applied in the international conventions. It was also counter-intuitive, given that the most recent inquiry into the substantial differences in overaward payments between men and women had not been able to identify definitively such payments as discriminatory. Conscious of the sensitivities in using the international conventions to underpin the legislation, the amendments deliberately avoided any guidance to the AIRC as to how discrimination might present itself.

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12 Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
13 Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
14 Interview Philippa Hall, Senior Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 11 February 2005.
15 Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
The references to discrimination in the industrial relations law also coincided with a period of reform of federal discrimination law, amendments that were given impetus both by the appointment of Sue Walpole as Sex Discrimination Commissioner in 1993\textsuperscript{16} and the implementation of a series of amendments in 1992 and 1994 to the \textit{Sex Discrimination Act}. These were consistent with the recommendations of the Inquiry into Equal Opportunity and Equal Status for Women in Australia (Parliament of the Commonwealth of Australia - House of Representatives Standing Committee on Legal and Constitutional Affairs, 1992). In short there was popular support in policy circles for the use of anti-discrimination law as a statutory means to advance women's equality.

At one level the equal remuneration amendments represented something of a rejection of the utility of existing mechanisms, namely the 1972 equal pay for work of equal value principle. The critical attitude among policy makers towards the 1972 principle arose from their disquiet at what they perceived to be the Commission’s timidity in using it when strong evidence of gender pay inequities existed. Neither the Equal Pay Unit nor the Sex Discrimination Unit gave active consideration to federal government support for a new equal remuneration principle as an alternative to the legislative amendments\textsuperscript{17}. The confidence of the Sex Discrimination Unit in the power of the provisions based on their discrimination remained intact until 1998. The Equal Pay Handbook published by the unit at that time continued to invoke what the unit described as highly supportive case law from Europe, Canada, the United Kingdom and the United States (Human Rights and Equal Opportunities Commission, 1998).

\textsuperscript{16} Interview Kathryn Freytag, Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 10 February 2005; Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.

\textsuperscript{17} Interview Kathy McDermott, Director, Equal Pay Unit, federal Department of Industrial Relations, 7 December 2005; Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.
7.2.3 MINIMUM ENTITLEMENTS FRAMEWORK

The introduction of the equal remuneration amendments based on international conventions was only one of a number of ways these conventions were used to establish a minimum rights framework dealing with minimum wages, parental leave and unfair dismissals. The commitment to establishing a minimum rights framework reflected the federal government’s nervousness over the equity effects of enterprise bargaining, and formed one part of the government’s response to the parliamentary Inquiry into Equal Opportunity and Equal Status for Women. The government’s response at that time contained an interesting emphasis on what it viewed as the objective of the amendments, namely that the amendments were designed to ‘protect employees who are not within the protection of federal and state awards’ (Keating and Fatin, 1992: 40). In other words, enterprise bargaining was understood to have the potential to further disadvantage workers in vulnerable circumstances; stronger legislative protections were required to meet that vulnerability.

With these in place the policy shift to enterprise bargaining proceeded and included the introduction of non-union enterprise bargaining agreements. This was the first time Australia’s conciliation and arbitration system provided for employee representation other than through registered organisations, primarily trade unions. The promotional efforts that accompanied the legislation simultaneously promoted what the Department of Industrial Relations titled the ‘initiatives aimed at improving social justice within the Australian industrial relations system’ (Department of Industrial Relations, 1994: 89) with ‘more effective arrangements for direct bargaining, including the establishment of a new stream of enterprise flexibility agreements’ (Department of Industrial Relations, 1994: 169). Balancing these provisions was the allure of the minimum rights framework and legislative amendments that directed the AIRC to ensure, prior to certifying an enterprise agreement, that appropriate consultation had occurred. Specific consultation arrangements were outlined for workplaces that had a significant proportion of women workers, part-time workers, young workers and workers from a non-English speaking background. The legislative measures introduced at this
time included provisions for the AIRC to review awards every three years and among a number of objectives, take action to remedy any discriminatory provisions.

The federal government’s interest in a minimum rights framework embedded in federal industrial relations legislation was motivated in part by industrial relations changes enacted by the newly elected Kennett government in Victoria in 1992. By way of the *Employee Relations Act 1992* (Vic) the Kennett government abolished compulsory arbitration and state awards. Under pressure from the ACTU (Reade, 1995) the federal government sought to facilitate the transfer of state award coverage to the federal system. This involved a number of legislative steps. Amendments passed in 1992 allowed the AIRC fewer grounds in which it could refuse to hear a matter simply because the matter was traditionally subject to state award coverage\(^{18}\). The next step was the creation of a minimum rights framework within federal legislation based on international conventions. This allowed Victoria to argue on behalf of Victorian workers, previously subject to Victorian state award coverage, that the applicable Victorian legislation did not fulfil the minimum requirements established by ILO Conventions. This assisted Victorian workers to migrate to the federal system because it obviated the argument that an adequate alternative remedy to a federal award existed under state laws. This was a traditional objection by employers to the creation of a federal award for state award employees\(^{19}\).

### 7.2.4 DEFINITIONS OF DISCRIMINATION AND STATEMENTS OF PRINCIPLE

The amendments therefore bore the imprint of feminists within and outside the federal bureaucracy; they also constituted something of a political concession to the opposition of feminists to the introduction of enterprise bargaining. The amendment’s reliance on the

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\(^{18}\) *Industrial Relations Amendment Act (No. 2) 1988* (Cth).

\(^{19}\) These 1992 and 1993 federal legislative amendments would in turn be negated by the transfer, by the Kennett government, of the complete Victorian industrial relations system to the federal jurisdiction in December 1996. This step coincided with the drafting of new federal legislation by the newly elected Coalition government.
external affairs provisions also gave the federal government a tactical lever in its battle against the industrial relations introduced by the Kennett government in the state of Victoria.

Subsequent events were to demonstrate that the sophisticated understanding of indirect discrimination by feminists working in the Sex Discrimination Unit and the Equal Pay Unit was not matched elsewhere. In 1994 and 1995 within the National Wage Case, hearings were convened to determine how the parties and the Commission might conduct award review pursuant to s.150A of the *Industrial Relations Act 1988* (Cth). The provisions in s.150A required that the AIRC review each of its awards to consider if they were deficient in any prescribed respect and to take action to remedy any such deficiencies. The deficiencies identified by the legislation [s.150A(2)] included provisions which might discriminate against an employee. The legislation identified a number of grounds of discrimination, including sex. During the course of these proceedings HREOC participated in a series of working parties established by the Commission and prepared a number of papers on discrimination. While the paper on direct discrimination was largely accepted by the parties, the paper on indirect discrimination was not similarly endorsed. It was not acknowledged in the final decision of the Commission or the subsequent guidebook on award reviews published by the Commission.  

The definitions of discrimination that were adopted by the Commission during these proceedings would ultimately become pivotal during the HPM proceedings. The definitions were submitted by HREOC, but were not the definitions of discrimination extant at that time in the *Sex Discrimination Act*. The policy staff in the Sex Discrimination Unit of HREOC who put forward the definitions wished to avoid the proportionality tests in the *Sex Discrimination Act*. At that time the staff did not have available to them the new and more accessible

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definitions of discrimination that would ultimately be incorporated in the *Sex Discrimination Act* in December 1995\(^\text{21}\).

The equal remuneration legislative provisions were not accompanied by any statement of principle by the Commission as to their interpretation. Subsequent proceedings concerning the application for equal remuneration orders at HPM Industries would highlight the jurisdictional issues that would confront the intervention of a Full Bench in equal remuneration proceedings. However, the Full Bench had been pressed for clarification on pay equity issues. This pressure for clarification and intervention by the Commission did not come from organised labour, but from feminists outside the labour movement. In the Review of Wage Fixing Principles in August 1994, the first National Wage Case since the implementation of the equal remuneration provisions, HREOC, supported by NPEC, petitioned the AIRC unsuccessfully to establish a new pay equity principle\(^\text{22}\). These submissions were replicated in National Wage Case proceedings in October 1995, with a further submission by both HREOC and NPEC that the AIRC investigate the reasons for the lack of improvement in the gender pay equity ratio. The Commission rejected these applications on the basis that the Commission could not be considered a general regulatory body with powers of investigation but that it would continue to hear matters on application\(^\text{23}\).

In April 1997 the Commission was again pressed in National Wage Case proceedings by HREOC, who submitted that the AIRC determine principles to assist the parties in the understanding and utilisation of the principles. Once again the Full Bench refused the application with the Full Bench noting that this ‘was a matter to be resolved in the context of applications’\(^\text{24}\). In these proceedings the ACTU did not explicitly support HREOC’s submissions but it did link its living wage claim to the objective of equal remuneration for work of equal

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\(^{21}\) Interview Philippa Hall, Senior Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 11 February 2005


\(^{24}\) *Safety Net Review April 1997* (1997) 71 IR 1 at 45.
The ACTU argued that granting the increase it sought to minimum award rate and
safety net adjustments would operate to reduce sex-based earnings differentials, given
women’s lower access to overaward payments and enterprise bargaining. The ACTU also
sought a Statement of Principle from the Commission to the effect that part-time workers not
be discriminated against.25

7.2.5 UTILISATION OF EQUAL REMUNERATION PROVISIONS

The arbitrated proceedings arising from the equal remuneration provisions would prove to be
exceptions to the rule, because there have been so few applications in this area. Since their
proclamation in March 1994 there have been only eighteen applications lodged up until June
2007.26 Four of the eighteen applications arose from the claims for equal remuneration at
HPM Industries and David Syme & Co, and only one application, the first application
concerning HPM Industries, has proceeded to arbitration.27

7.3 AN APPLICATION FOR EQUAL REMUNERATION ORDERS AT HPM
INDUSTRIES

An application under s.170BD of the Industrial Relations Act 1988 concerning a claim for
equal remuneration at HPM Industries28 was one of three equal remuneration applications
made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
(AMWU) in December 1985. The claim on HPM Industries demanded that process workers
and packers at HPM’s Darlinghurst site receive the same rate of pay as employees classified
as storemen or general hands.

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26 Based on an analysis of applications for equal remuneration orders (s.170BD) as reported in the Annual Reports of
the President of the Australian Industrial Relations Commission, 1993-1994 through to 2006-07.
27 These applications were respectively: C No. 23933 of 1995, Automotive, Food, Metals Engineering, Printing and
Kindred Industries Union and HPM Industries, Application for an Order Requiring Equal Remuneration for Work of
Equal Value, 6 December 1995; C No. 21025 of 1998, Automotive, Food, Metals Engineering, Printing and Kindred
Industries Union and HPM Industries, Application for Orders Requiring Equal Remuneration for Work of Equal Value,
10 March 1998; C No. 30630 of 1999, Automotive, Food, Metals Engineering, Printing and Kindred Industries Union
and David Syme & Co Ltd; C No. 32261 of 1999, Automotive, Food, Metals Engineering, Printing and Kindred
Industries Union and David Syme & Co Ltd.
28 AIR, C No. 23933 of 1995, Automotive, Food, Metals Engineering, Printing and Kindred Industries Union and HPM
The other two applications concerned Utilux Pty Ltd, New South Wales29 and John Sands (Australia) Ltd, Victoria30. HPM Industries and Utilux were bound by the *Metal Industry Award 1984 – Part I*31 while John Sands was bound by the *Graphic Arts – General – Interim Award 1995*. All three applications were lodged by the AMWU. The applications were made in response to a call by the ACTU, for affiliates to forward to the peak body workplaces that might form the basis of cases before the Commission to test the utility of the equal remuneration provisions. In this call the ACTU indicated its clear commitment to test the provisions and noted that the equal remuneration provisions provided the Commission with the power to make determinations concerning disparities in overaward pay33. The ACTU was anxious that the provisions be utilised, but encountered some inertia on the part of affiliates who were unsure as to what would constitute an appropriate application. This inertia reflected in part the lack of recent experience in Prosecuting equal pay matters, and with this in mind the ACTU assigned its senior industrial advocate, Jennifer Doran, to undertake a series of workplace inspections in manufacturing to identify potential applications34. Although the call had been a general one, the ACTU clearly had a preference for cases that involved a large union and one that would proceed to arbitration35. Although all three applications were announced with fanfare at a press conference jointly convened by the ACTU and the AMWU36, the AMWU reasoned that the application concerning HPM Industries was the strongest of the three applications, a strength that neatly dovetailed with a new organising initiative of the union directed to production workers in the manufacturing workforce. Historically workers at

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33 NBAC, AMWU, Z628, Box 12, Minutes of Australian Council of Trade Unions Executive, 19-23 August 1985.
34 Internal Memorandum from Assistant Secretary, Technical and Supervisory Division (M. Adlam) to National Office, Australian Manufacturing Workers’ Union, 20 February 1995. This memorandum was appended by Meeting Notes of Australian Council of Trade Union’s Women’s Committee, 14 February 1995.
34 Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
HPM had not been highly unionised, a situation that progressively changed from 1992 onwards\textsuperscript{37}.

The focus on potential applications within manufacturing was deliberate on the part of the ACTU, based on a calculation that this sector would provide the ‘within establishment’ comparisons that would assist the Commission to determine that the objective of equal remuneration had not been met. The ACTU had determined further that a single site workplace would be the most effective initial point at which to test the provisions; success in that site would be a necessary precursor to any subsequent award-based applications\textsuperscript{38}.

The three applications were listed before the President of the Australian Industrial Relations Commission (AIRC), Justice Deidre O’Connor, in October 1995\textsuperscript{39}. O’Connor, a judge of the Federal Court and former head of the Administrative Appeals Tribunal was a recent appointment to the Commission, being appointed to the Presidency in 1994 following the death of Justice Maddern. When the s.170BD applications came before her, the President gave a clear indication that she thought the matter would proceed to a Full Bench of the Commission and would constitute a test case:

I have listed it [the applications] for mention and should the matter proceed to a hearing which may involve arbitration on the issue, I propose to constitute a Bench because I have taken the view under section 108, considering it under section 108, that it would amount to a test case on this principle\textsuperscript{40}.

The President ruled that prior to the hearing of submissions or evidence, the matters should proceed to conciliation. The Metal Trades Industries Association (MTIA) argued that this was appropriate given that there were processes in the award, primarily the competency

\textsuperscript{37} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005.
\textsuperscript{38} Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
\textsuperscript{39} The file note at the Australian Industrial Registry records that the applications concerning HPM and Utilux were initially referred by the Registry to Senior Deputy President March SDP who was at that time head of the metal industry panel. Marsh SDP referred the matters to the President for allocation. The file note at the Australian Industrial Registry records that the application concerning John Sands was initially referred by the Registry to Justice Munro who was at that time assisting Vice President McIntyre with the printing panel. Munro J referred the matters to the President for allocation.
\textsuperscript{40} AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, p. 3.
standards process, that had not been followed\textsuperscript{41}. Although the ACTU contended that these arguments were purely relied upon to delay the claim, the applications concerning HPM and Utilux were assigned by the President to Commissioner Oldmeadow and that concerning John Sands was assigned to Commissioner Smith\textsuperscript{42}.

The MTIA’s involvement in the proceedings had been the cause for some concern within its ranks. Some senior officers within the MTIA argued that the body should not be involved in the proceedings as the MTIA would be seen to be opposed to equal remuneration. Such opposition was, however, balanced by the MTIA’s contractual obligations to assist its member, HPM Industries\textsuperscript{43}. Yet the reticence within the MTIA did shape the style of the MTIA’s participation, since it advised HPM to engage counsel for the proceedings. The company had little experience of industrial advocacy nor the resources to support the type of submissions that would be required. Such an arrangement allowed the MTIA to appear separately to HPM thereby avoiding any entanglement with the merits of the case\textsuperscript{44}.

Each matter proceeded to a number of conciliation conferences before the assigned member of the Commission, with progress reports provided to the President\textsuperscript{45}. During the conciliation proceedings the MTIA sought support from the Commission for a three month moratorium on the equal remuneration claim. The ACTU intervened in support of the AMWU, indicating that it would seek to have the Full Bench reconvened pursuant to s.108 for further directions and

\textsuperscript{43} Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
\textsuperscript{44} Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
documenting what it termed a lack of cooperation from HPM. In reply the MTIA indicated that it would argue that the Full Bench had no jurisdiction in respect of a claim under s.170BD. In short the MTIA would argue that that the Full Bench’s powers were only invoked by matters involving an industrial dispute. In contrast the application concerning HPM did not arise from an industrial dispute, but from that section of the legislation that drew its legitimacy from the Parliament’s powers to make laws with respect to external affairs.

Shortly thereafter the MTIA also advised AIRC President that the MTIA would argue that the Commission did not have the power, under s.170BI of the Act, to deal with the application in the manner sought.

## 7.3.1 FULL BENCH PROCEEDINGS

The applications concerning Utilux and John Sands were referred by Commissioner Oldmeadow back to the President who directed these matters to a Full Bench hearing under s.108 of the *Industrial Relations Act*. The Full Bench comprised the President, Vice-President McIntyre, Senior Deputy President March, and Commissioners Smith and Oldmeadow.

During these proceedings the ACTU asked the Full Bench to exercise its powers in each of the following areas:

- issue a statement of principles regarding the conduct of applications in general under the equal remuneration provisions of the Act;
- issue a summons to HPM for the production of documents relation to wage rates and job descriptions;
- make a direction that HPM provide its assessment of the application of the competency units to representative groups of employees by 24 May 1996, and call a conciliation.

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48 This section of the legislation concerns the additional effect of this division of the legislation.
49 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Correspondence from Metal Trades Industries Association (R. Boland) to President (O’Connor J), Australian Industrial Relations Commission, 16 May 1996.
51 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Memorandum by the President (O’Connor J), Australian Industrial Relations Commission, to Deputy Industrial Registrar, 30 April 1996.
conference as soon as practicable after the provisions of the above information to deal with outstanding matters and to consider whether or not conciliation is exhausted.

The Statement of Principles sought by the ACTU included a provision that competency standards were an appropriate means to assess the skills of the workers involved in applications before the Commission. It was clear, therefore, that the ACTU was asking the Commission to modify its method of evaluating work value even though the Commission had made clear its approach to work value, in the context of equal pay applications, in the 1986 comparable worth proceedings. The ACTU’s submissions in this regard relied on the delays that it and the applicant union, the AMWU, had encountered with the competency standards implementation process at HPM. Competency standards are recognised in the *Metal Industry Award* as a mechanism for the classification of employees under the award. The guide produced by the MTIA, the Metal Trades Federation of Unions (MTFU), and the Australian Chamber of Manufactures (ACM) for the implementation of the competency standards in the metal and engineering industry describe the standards as ‘a set of descriptors of the level and skill and the depth of knowledge employees require to work competently at various skill levels in an industry’ (Metal Trades Industries Association, Metal Trades Federation of Unions, Australian Chamber of Manufactures, 1997: 2). The ACTU went on to contrast what they viewed as HPM’s obstruction of due process, arguing that the use of competency standards had been endorsed by the MTIA in the initial proceedings before the President in December 1996.

A statement of principle regarding the conduct of applications under the equal remuneration provisions set out in Division 2 of Part VIA of the Act for the assistance of the parties to the applications before the Commission:

(i) In addressing applications under these provisions an objective assessment of the skills of the workers involved, should be undertaken.

(ii) Once undertaken such an assessment will form the basis of fulfilling the criteria of “work of equal value”.

(iii) In respect to the two companies subject to the Metal Industry Award, assessment of skills in accordance with the Competency Standards as

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52 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Australian Council of Trades Union submission in s.108 proceedings (p.2). This submission was attached to Correspondence from the Australian Council of Trade Unions (J. Doran) to President (O’Connor J), Australian Industrial Relations Commission, 21 May 1996.

53 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Australian Council of Trades Union submission in s.108 proceedings (p. 2). This submission was attached to Correspondence from the Australian Council of Trade Unions (J. Doran) to President (O’Connor J), Australian Industrial Relations Commission, 21 May 1996.
provided in Clause 6E of the Award, is an appropriate objective test in this regard.

(iv) Any concerns or disputes regarding whether the Competency Standards properly identify women’s skills etc. can be resolved in accordance with the procedure set out in the Competency Standards.

(v) An objective test, including the Competency Standards, if properly implemented and acted upon in respect of overaward payments, has the capacity to resolve claims for equal remuneration for work of equal value.

(vi) The procedure for the implementation of Competency Standards under the Metal Industry Award requires equal pay where reclassification occurs. There is no such requirement where employees remain at their current classification. However, the procedure encourages parties to resolve overaward anomalies in such cases.

(vii) If, following negotiations for the implementation of such objective tests, disparities in rates remain which are based on gender, arbitration before the Australian Industrial Relations Commission can be sought.

The ACTU at this point made no direct submissions as to the scope of the legislative provisions. However both prior to, and following the proceedings, the ACTU through policy pronouncements and decisions of the ACTU Executive, emphasised the use of the equal remuneration provisions for addressing gender differences in overaward payments.

The equal value provisions of the Industrial Relations Act should be fully utilised and extended as far as possible in terms of both differential overaward payments and other employment benefits in the proper valuing of traditional women’s work (Australian Council of Trade Unions, 1995).

That the ACTU congratulates those women’s groups and community organisations which campaigned effectively, along with unions, for the retention of the equal remuneration provisions in the Workplace Relations Bill, and calls on all unions to utilise these provisions to address existing widespread discrimination against women workers in overaward payments. To further this objective the Executive also calls on unions to include equal remuneration clauses in their general log of claims (Australian Council of Trade Unions, 1996: 8).

The MTIA in the s.108 proceedings appeared for HPM, John Sands and Utilux. The MTIA submitted that a Full Bench could not be constituted under s.108 with respect to applications of this nature and was therefore unable to make any directions in the manner sought by the ACTU. The MTIA argued that the equal remuneration provisions of the legislation resided in Division 2 of Part VIA of the Industrial Relations Act. This section of the legislation relied

54 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Draft Statement of Principles submitted by Australian Council of Trade Unions and Australian Manufacturing Workers’ Union. This draft was attached to Correspondence from the ACTU (J. Doran) to the President (O’Connor J), Australian Industrial Relations Commission, 20 May 1996.

55 Paragraph 4 of the Working Women’s Policy.
primarily on the Parliament’s powers to make laws with respect to external affairs\(^{56}\). The MTIA submitted that the power under s.108 to refer matters to a Full Bench was confined by the legislation to matters involving an industrial dispute and did not include matters where the Commission was not dealing with an industrial dispute but was alternatively exercising its powers derived from the Parliament’s power to make laws with respect to external affairs\(^{57}\). This tactic of the MTIA had originally been devised as a stalling strategy, one that would take advantage of the untested nature of the provisions and hopefully ensure that the Full Bench did not arrive at a Statement of Principles. This strategy of thwarting the Full Bench’s involvement was devised within the MTIA and had not previously been discussed in proceedings or in open discussions concerning the provisions\(^{58}\). The President’s comments at the time of the December 1995 proceedings indicated that in her view, if the matters were not settled by conciliation, the matters would proceed to a Full Bench for arbitration.

The MTIA extended their submission to argue that the additional effect of Division 2 given by s.170BI relies on the Parliament’s powers to make laws with respect to the prevention of industrial disputes extending beyond the limits of any one state\(^{59}\). On this point the MTIA argued that an application for an order under Division 2 of Part VIA of the *Industrial Relations Act* could not rely on the additional effect of that Division created by s.170BI while, at the same time, relying on the provisions in those divisions which were based on the external affairs powers\(^{60}\). The MTIA’s submission countered the union claim that the application fell within the ambit of previous dispute findings within the metal industry or unresolved logs of claims served by the applicant union in the metal industry\(^{61}\). The MTIA contended that if the Bench were to find that there was an unresolved claim concerning equal remuneration, then

\(^{56}\) Consistent with s.51(xxiv) of the *Commonwealth of Australia Constitution Act* 1901 (UK).
\(^{57}\) AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, MTIA’s submission in s.108 proceedings. This submission was attached to correspondence from MTIA (R. Boland) to President (O’Connor J) Australian Industrial Relations Commission, 20 May 1996.
\(^{58}\) Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
\(^{59}\) Consistent with s.51(xxxv) of the *Commonwealth of Australia Constitution Act* 1901 (UK).
\(^{60}\) AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Metal Trades Industries Association submission in s.108 proceedings (pp. 2-4). This submission was attached to Correspondence from Metal Trades Industries Association (R. Boland) to President (O’Connor J), Australian Industrial Relations Commission, 20 May 1996; AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, p. 47-54.
this was a claim that the MTIA agreed to - hence there was not a proper interstate industrial dispute as required by the legislation\textsuperscript{62}. To this end the MTIA drew on arguments that sought to distinguish the Commission's powers when preventing as opposed to settling a dispute. The MTIA also countered any potential submissions by the union that an interstate dispute could be found concerning HPM, John Sands and Utilux. In advance the MTIA argued that there was insufficient connection between the organizations for a proper interstate industrial dispute to be found, and hence again the Commission had no power to adjudicate\textsuperscript{63}.

Although the MTIA had flagged its intention to oppose the Full Bench's involvement in the applications, the Full Bench did not immediately proceed to jurisdictional arguments but asked the ACTU to expand on the statement of principles that it sought. The Full Bench immediately engaged in a discussion of competency standards, discussions that would ultimately have ramifications for subsequent arbitral proceedings. Roger Boland, appearing for the MTIA indicated that he wished to proceed to the jurisdictional issues at the outset. Boland caught the Commission off-guard with this approach, something revealed by the President's initial response to him to the effect that she 'did not see the jurisdictional issues as relevant while we are dealing with the conciliation process'\textsuperscript{64}. Only when Boland indicated that his submission included the Bench's jurisdictional capacity to issue summons and make directions as part of the conciliation process did the President agree to hear the MTIA submission, given that if the MTIA submissions prevailed the Commission would have no power to make directions or compel witnesses\textsuperscript{65}. Having heard Boland on jurisdiction, the power of his arguments was confirmed by the President's blunt observation to the ACTU

\textsuperscript{62} AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Metal Trades Industries Association submission in s.108 proceedings (pp. 5-9). This submission was attached to Correspondence from Metal Trades Industries Association (R. Boland) to President (O'Connor J), Australian Industrial Relations Commission, 20 May 1996; AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, p. 51.

\textsuperscript{63} AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Metal Trades Industries Association submission in s.108 proceedings (pp. 10-11). This submission was attached to Correspondence from Metal Trades Industries Association (R. Boland) to President (O'Connor J), Australian Industrial Relations Commission, 20 May 1996; AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, pp. 47-54.

\textsuperscript{64} AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, p. 47.

\textsuperscript{65} AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Transcript, p. 47.
advocate: ‘I do not think we actually can ignore that Ms Doran….and proceed to the hearing of the application’.

The Full Bench asked the MTIA to put its arguments in written submissions and also gave the ACTU a chance through written submissions to respond to these jurisdictional arguments. The MTIA’s submissions came as something of a surprise to the ACTU and the AMWU. They had considered that the MTIA and HPM may attempt to delay the proceedings until new industrial legislation foreshadowed by the newly elected conservative government was proclaimed. At that time it was anticipated that the new legislation would not include equal remuneration provisions. With this prospect in the offing the ACTU and AMWU had not anticipated the very direct challenge from the MTIA to the utility of the equal remuneration provisions and the capacity of the Full Bench to establish a framework for equal remuneration provisions.

In reply, the ACTU did not address the MTIA’s arguments concerning the proper convening of a Full Bench pursuant to s.108. Its submissions instead went primarily to the MTIA’s arguments concerning the interpretation of s.170B1, contending that the MTIA relied on an excessively narrow interpretation of the Commission’s power and drew a highly artificial distinction between the Commission’s powers to prevent and to settle disputes. In following arguments the ACTU also submitted that the MTIA’s arguments in respect to logs of claims were at odds with the Commission’s expansionary approach to the interpretation of such logs.

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68 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Australian Council of Trades Union submission in s.108 proceedings (p. 2). This submission was attached to Correspondence from the Australian Council of Trade Unions (J. Doran) to President (O’Connor J), Australian Industrial Relations Commission, 21 May 1996.
69 AIR, C No 23931 of 1995, C No 23932 of 1995, C No 23933 of 1995, Australian Council of Trades Union submission in s.108 proceedings (pp. 2-3). This submission was attached to correspondence from the Australian Council of Trade Unions (J. Doran) to President (O’Connor J), Australian Industrial Relations Commission, 21 May 1996.
The Full Bench saw merit in the first part of the MTIA’s submissions, observing that given that the Full Bench was constituted under s.108 to deal with applications which relied primarily on those parts of Division 2 (of Part VIA) that are based on the application of external affairs powers, a Full Bench could not be constituted under s.108. Having determined in favour of the MTIA on this point of law, the Full Bench saw no need to determine the applicability of s.170BI to the application relating to HPM. The Full Bench also noted that it remained open for the President to consider an application that, on the grounds of public interest, should be referred to the Full Bench under an appropriate power. With this observation noted it was, however, clear that the view of the MTIA had prevailed on the matter of jurisdiction and the Full Bench determined that it was unable to consider the statement of principles sought by the ACTU.

The matters concerning HPM and Utilux were then assigned by the President to Commissioner Oldmeadow. Given the nature of the Full Bench’s decision and the subsequent reallocation of matters, Oldmeadow issued a statement relisting the case for 21 June 1996. She also indicated that parties should put submissions relevant to the future
conduct of the applications\textsuperscript{75}. Following re-listing, Oldmeadow issued a further statement for progressing the equal remuneration claim concerning HPM\textsuperscript{76}. The statement included an undertaking from the AMWU to suspend industrial action in the period 25 June 1996 to 17 July 1996, as well as a commitment from HPM that it would commence enterprise bargaining negotiations in mid August 1996. Subsequently the AMWU advised the Commission that a meeting of AMWU members at the various sites of HPM Industries in Sydney (excluding Bruce Street) had rejected that part of the statement indicating that enterprise bargaining negotiations would not begin until August 1996. The union declared it would therefore reinstate its campaign of industrial action\textsuperscript{77}. In conciliation hearings before Commissioner Olmeadow the ACTU/AMWU pressed the Commissioner to adopt a statement of principles concerning the conduct of the application\textsuperscript{78}. Oldmeadow determined that it was premature to agree to the ACTU/AMWU statement of principles given that conciliation had not been exhausted\textsuperscript{79}. Further, the Commission would wish to draw upon the experience of other parties involved in the conciliation of equal remuneration claims. This would be necessary to determine firstly whether there should be a statement of principles and secondly, what its content should be\textsuperscript{80}. In pressing Oldmeadow for a statement of principles the ACTU was taking the Commission to an approach that had arguably been rejected by the Commission in the s.108 proceedings.

Throughout this conciliation period the implementation of competency testing commenced at HPM and included further disputes between the parties. These required the direct


\textsuperscript{77} AIR, C No 23933 of 1995, Resolution of Australian Manufacturing Workers’ Union members at HPM Industries. This was appended to Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 25 June 1996.

\textsuperscript{78} AIR, C No 23933 of 1995, Outlined in Correspondence from Australian Council of Trade Unions (J. Doran) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 19 June 1996.


intervention of Commissioner Olmeadow, in relation to the interpretation of the data and
skills boundaries, and the validation processes that were employed$^81$.

### 7.3.2 ARBITRATION PROCEEDINGS BEFORE COMMISSIONER SIMMONDS

Commissioner Oldmeadow issued a decision and statement on 16 June 1997 indicating that in
her view conciliation had been exhausted and that the matter should proceed to arbitration.
The President then assigned the manner to Commissioner Simmonds on 20 June 1997,
eighteen months after the matter was first listed. The allocation of an application, to a non-
Presidential member of the Commission, that relied on provisions that had not previously
been utilised in arbitrated provisions was not necessarily unusual$^82$, although perhaps
somewhat surprising. The allocation to Simmonds owed something to the Commission’s
expectation that the ACTU/AMWU would rely on competency standards, and to Simmonds’
previous experience in assisting the parties in the implementation of the metal industry
competency standards. Simmonds had been appointed to the Commission in December
1989, following an extended career as an official with the Hospital Employees Federation.

Through a statement and direction from Commissioner Simmonds a number of hearing dates
were set aside for parties to raise jurisdictional issues$^83$. However no party sought to raise
such issues, so arbitral proceedings before Simmonds commenced on the 22 September
1997. In addition to the applicant and the respondent seven interveners were represented:
The Minister for Workplace Relations and Small Business on behalf of the Commonwealth;
the Australian Chamber of Commerce and Industry (ACCI), the ACTU$^84$, the MTIA, the
National Pay Equity Coalition (NPEC), the Women’s Electoral Lobby (WEL), and the Australian
Federation of Business and Professional Women (AFBPW). The NPEC, WEL and the AFBPW

$^81$ This disputation was outlined in witness statements of Casey van Berkel (Exhibit D3, paragraphs 10-18) and
Richard Jenkins (Exhibit K3, p. 6) in following arbitral proceedings before Commission Simmonds, C No. 23933 of
1995.

$^82$ Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005; Interview

$^83$ Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries, (Australian
Industrial Relations Commission, Simmonds C, 18 July 1997, Print P3278).

$^84$ The ACTU and AMWU then shared carriage of the application.
were represented jointly in the matter and throughout the proceedings were referred to as
the Women’s Organisations. The HREOC through the Sex Discrimination Commissioner, Sue
Walpole, was also granted leave to intervene. Subsequent to intervention being granted,
HREOC subsequently advised that it would not appear throughout the course of the
proceedings, but did submit material for consideration in the proceedings. The Sex
Discrimination Commissioner would also give evidence in the proceedings. The New South
Wales Government which had intervened in conciliation proceedings before Commissioner
Oldmeadow\textsuperscript{85} did not press forward with that intervention in the proceedings before
Commissioner Simmonds.

Paid rates at HPM came from a mixture of three different industrial instruments; the award
rate of pay, the enterprise agreement and overaward payments\textsuperscript{86}. The claim of the
ACTU/AMWU was as follows:

1. That the female process workers and female packers at HPM’s Darlinghurst
premises should receive equal remuneration for work of equal value.

2. That all current female process workers classified at the C13 level shall receive at
least the same rate of pay as the highest paid male general hand classified at
either C14 or C13.

3. That all current female process workers and female packers classified at C12 shall
receive at least the same rate of pay as the highest paid male general hand and/or
storeperson classified at C12.

4. That all future female process workers and female packers have access to the same
three level increment salary structure that applies to male general hands and
storepersons.

Further, we have sought a recommendation that all female process workers
classified at C13 receive an amount equal to the differential between the C14 and
C13 award minimum rates more than the highest paid male general hand classified
at C14\textsuperscript{87}.

\textsuperscript{85} AIR, C No 23933 of 1995, Correspondence from Director General, New South Wales Department of Industrial
Relations (K. Boland on behalf of H. Bauer) to Commissioner Oldmeadow, Australian Industrial Relations Commission,
21 June 1996.

\textsuperscript{86} \textit{Metal Industry Award 1984 – Part 1} (Australian Conciliation and Arbitration Commission, Williams J, 27 April 1984,
Print No. Print F4869). At the time the applicable agreement was the \textit{HPM Industries Pty Ltd, Darlinghurst Site
Agreement 1996} (Australian Industrial Relations Commission, H0524-1996) which had been preceded by the \textit{HPM

\textsuperscript{87} The final orders sought by the ACTU/AMWU were altered through the course of the proceedings, see AIR, C No
23933 of 1995, Transcript, p. 703.
The rates of pay at HPM at the time of the arbitrated proceedings before Commissioner Simmonds are set in Table 7.1. The full extent of the earnings disparities between the classifications of Storeperson, General Hand, Process Worker and Packer were not apparent at the time of original application and were the subject of submissions by the ACTU concerning the issue of summons at the Full Bench proceedings\(^8\).

Table 7.1: Wages Rates, by Classification, Sex, HPM Industries, 1997

<table>
<thead>
<tr>
<th>HPM Classification</th>
<th>Award Rate</th>
<th>Enterprise Agreement Rate</th>
<th>Wage Rate Process Workers</th>
<th>General Hand</th>
<th>Packer</th>
<th>Storeperson</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Female Male</td>
<td>Female Male</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C14 – Level 1</td>
<td>$359.40</td>
<td>$367.70</td>
<td>$426.20</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>C14 – Level 2</td>
<td>$359.40</td>
<td>$367.70</td>
<td>$438.70</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>C14 – Level 3</td>
<td>$359.40</td>
<td>$367.70</td>
<td>$443.71</td>
<td>1</td>
<td>1</td>
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<td>1</td>
</tr>
<tr>
<td>C13</td>
<td>$376.10</td>
<td>$386.57</td>
<td>$413.90</td>
<td>293</td>
<td>4</td>
<td></td>
<td>297</td>
</tr>
<tr>
<td>C13</td>
<td>$376.10</td>
<td>$386.57</td>
<td>$415.76</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>C13</td>
<td>$376.10</td>
<td>$386.57</td>
<td>$426.20</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>C13</td>
<td>$376.10</td>
<td>$386.57</td>
<td>$434.25</td>
<td>1</td>
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<td>C13</td>
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<td>$386.57</td>
<td>$436.92</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>C12 – Level 1</td>
<td>$398.60</td>
<td>$412.00</td>
<td>$440.50</td>
<td>3</td>
<td>24</td>
<td>1</td>
<td>28</td>
</tr>
<tr>
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<td>$398.60</td>
<td>$412.00</td>
<td>$453.43</td>
<td>4</td>
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<td>4</td>
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<tr>
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<td>$398.60</td>
<td>$412.00</td>
<td>$466.75</td>
<td>4</td>
<td>8</td>
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<td>12</td>
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<td>C12</td>
<td>$398.60</td>
<td>$412.00</td>
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<td>$398.60</td>
<td>$412.00</td>
<td>$477.15</td>
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<td>2</td>
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<td>$412.00</td>
<td>$490.36</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>C12</td>
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<td>$412.00</td>
<td>$517.36</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td>299</td>
<td>4</td>
<td>12</td>
<td>24</td>
</tr>
</tbody>
</table>

The wage rates structure at HPM Industries was a complex matter. The first dimension came from the classification of any given job as defined by the *Metal Industry Award* which had a fourteen level classification structure, C1 being the most highly paid classification. Process Workers, the overwhelming majority of whom were women, were classified primarily at C13 under the award, with four classified at C12. Packers, all of whom were women, were classified at C12. Seven of the twelve General Hands were classified at C14, one at C13 and the remaining four at C12. All of the eighteen male Storepersons were classified at C12.

The certified agreement in place at HPM Industries then carried forward this classification but with higher wage rates. To further complicate matters a series of overaward payments then overlaid the award and agreement rates. At the level of C14 and C12 there was a three level structure of overaward payments. At C14 only the General Hands were in receipt of the top two tiers of the available overawards. At C12 only the male Storepersons and the General Hands received the top two tiers of the overaward payments. This was not the extent of overaward payments evident at HPM. Overaward payments were evident throughout C13 and also in addition to the three level scale at C12. Throughout these proceedings these latter overaward payments were described by HPM as anomalies.

At the outset of proceedings Commissioner Simmonds did not establish a framework that would shape the hearing of the application. This was a deliberate approach on the part of Simmonds as he had no predetermined view concerning the provisions but was prepared to be taken to argument by the parties. In contrast to the submissions of the MTIA, HPM, ACCI and the Commonwealth, the submissions of the ACTU/AMWU were dominated by their view of the substantive merit of the application. This aspect of the union case far outweighed that devoted to the Commission’s interpretation of the provisions. It was not until the submissions by the MTIA, HPM, ACCI and the Commonwealth that the Commission was taken

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89 Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005.
to sustained argument on issues of interpretation. The employers and the government took a
two part approach to the interpretation: the work in question had to be of equal value, and
the earnings differences had to have a discriminatory cause. From Maiden's perspective the
exclusion of detailed arguments within the ACTU/AMWU submissions as to an expansionary
interpretation of the provisions was a key weakness - the ACTU/AMWU submissions
'constantly had trouble connecting the facts with the provisions'. The absence of clarity in
the ACTU/AMWU's approach was evident in their final submissions concerning the provisions
where they submitted:

...in order to decide whether the rates of remuneration are established on the basis of
sex discrimination, as the union and ACTU contend, the Commission needs to consider
argument regarding the value of the work.

In relation to this case we submit that the union and the ACTU have clearly established
that the discrimination has occurred in the setting of the rates of these workers. In
doing so, we have also shown that the work is of equal value.

**Work of Equal Value**

In his final decision Commissioner Simmonds determined that a critical and threshold issue in
the determination of a s.170BD application was the assessment of whether the work was of
equal value. The way the industrial parties and interveners approached this issue generated
considerable disputation within the proceedings. Three issues were in dispute. The first
cconcerned the direction provided by the Act on how equal value could be established. The
second concerned the reliance of the ACTU/AMWU relying on competency standards for this
purpose. The third went to the capacity of competency standards to determine work value.
The Commission’s response to these matters is the only definitive indication of the AIRC’s
approach to the assessment and determination of equal pay under s.170BD.

**Defining Equal Value**

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The ACTU/AMWU argued that the term ‘equal remuneration for work of equal value’ was determined by reference to the suite of the Anti-Discrimination Conventions as cited in the Act. In putting forward this argument part of the ACTU/AMWU application addressed the issue of which legislation should prevail for the purpose of hearing and determining the application. The application had been lodged while the Industrial Relations Act was still in force. During the course of the original conciliation proceedings the Workplace Relations Act 1996 (Cth) was promulgated. Commissioner Simmonds referred to the Acts Interpretation Act 1901 (Cth) and two Full Bench decisions of the AIRC that dealt with the issue of transitional proceedings. Simmonds determined that the only substantial change to the equal remuneration provisions brought about by the enactment of the Workplace Relations Act was the advent of s.170BHA, a section that did not impact upon the application in the current proceedings. Given these circumstances it was necessary to deal with the application under the terms of the Workplace Relations Act.

The ACTU/AMWU in highlighting the status of international conventions in Australia, drew particularly on the General Survey of the Reports on the Equal Remuneration Convention and Equal Remuneration Recommendation delivered to the 72nd Session of the ILO in 1986. The union argued that this material demonstrated that the concept of work of equal value was broader than the notion of same or similar work, and that this broader concept permitted the measurement of jobs with varying content. This was a key consideration as the jobs in contest at HPM were different. Neither the Convention nor the ILO advocated a definitive method for assessing whether work was of equal value, other than the chosen technique should be objective and exclude any consideration of the worker’s sex. Different member countries adopted different approaches, including comparable work, cost of production and

94 This section of the legislation provides guidance as to the relationship of this division of the legislation with other divisions of the legislation.
95 HPM Case (1998) 94 IR 129 at 158.
96 AIR, C No. 23933 of 1995, Exhibit D19.
97 AIR, C No. 23933 of 1995, Exhibit D1, Attachment I; AIR, C No. 23933 of 1995, Transcript, p. 3.
value to the employer, and job content. The ACTU/AMWU argued that the Conventions required the Commission to advance a broad approach to the determination of the test of equal remuneration for work of equal value.

HPM argued that neither the Workplace Relations Act nor the Equal Remuneration Convention provided any prescription as to how the Commission might satisfy itself as to whether work was of equal value. On the reasoning of HPM, the only substantive direction provided to the Commission arose from the terms of the Equal Remuneration Convention, the terms of which indicated that the method of establishing equal value be consistent with "the methods in operation for determining rates of remuneration." HPM thus asserted that the Commission should therefore rely on the methods used in the 1969 equal pay and 1972 equal pay of work of equal value decisions. At the same time HPM identified an additional ground for the Commission to refuse the application, one which would in turn form the basis of yet further legal argument. In drawing the Commission’s attention to its reference to work value in the 1972 principle, HPM reminded the Commission that its decisions in 1969 and 1972 applied to minimum rather than market rates of pay. The ACCI utilised a similar argument, suggesting that the Commission should adopt a cautionary approach in dealing with overaward payments in the context of applications under the equal remuneration provisions of the legislation. The ferocity of the employer submission to the potential intervention of the Commission in the area of overaward payments is evident in ACCI’s submission:

The prospect of frequent Commission interventions in overaward payments should be a daunting one for all parties, as well as the Commission. These payments are an important source of flexibility in the industrial relations system, and any attempt at systematic or widespread regulation of them would be highly undesirable. A practice of attempted regulation based on concerns such as average overawards at a plant or business and transparency would simply lead to a proliferation of litigation.

The position of the Commonwealth in the proceedings was thus far undisclosed. Preparation of the submissions for the Commonwealth fell to the Policy and Small Business Division within the Department of Workplace Relations and Small Business. The bureaucrats responsible for

99 AIR, C No. 23933 of 1995, Exhibit K12, p. 4.
100 AIR, C No. 23933 of 1995, Exhibit N1, p. 5; AIR, C No. 23933 of 1995, Transcript, pp. 599-604.
the submissions sought to focus their work on the technical construction of provisions, rather than providing support or otherwise to the application. The task of preparing submissions, throughout the entire proceedings, was accompanied by a significant level of scrutiny prior to their approval, including by the Minister’s office and departmental legal advisors\(^{101}\). The Commonwealth in its submission noted, by reference to the comments made in the second reading speech in the Senate during debate on the legislation, that the reference to equal remuneration in the legislation rather than to equal pay implied ‘a broader examination of equal remuneration issues in the past’\(^{102}\). Although noting the expansionary nature of the 1993 equal remuneration amendments with its explicit reference to remuneration, the Commonwealth argued that the Commission should nevertheless minimise its role in this area, suggesting that the AIRC should not interfere with workplace flexibility and managerial prerogative.

It is important that local workplaces maintain the flexibility and managerial prerogative to utilise overaward payments in response to local conditions in order to ensure the continued viability and competitiveness of their business. The Commonwealth maintains that it is necessary to protect the integrity of local practice and solutions as long as they are non-discriminatory\(^{103}\).

The ACTU/AMWU sought to demonstrate the value of the work of Process Workers, Packers, General Hands and Storeperson classifications by reference to metal industry competency standards. Competency standards are explicitly recognised in clause 6E of the *Metal Industry Award* and provide a mechanism for the classification of employees under the award\(^{104}\). The implementation guide to the competency standards produced by the industrial parties (Metal Trades Industries Association, Metal Trades Federation of Unions, Australian Chamber of Manufactures, 1997) forms an appendix to the award and incorporates decisions and orders

\(^{101}\) Interview Kathy McDermott, Assistant Secretary, Policy and Small Business Division, Department of Workplace Relations and Small Business, 7 December 2005.

\(^{102}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 4; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{103}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 7; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{104}\) The applicable award at the time of the application (ODN C No 02568 of 1984, Print F8925). In July 1998, following the application of the award simplification provisions of the *Workplace Relations Act*, a new award was handed down - *Metal, Engineering and Associated Industries Award 1998* (Australian Industrial Relations Commission, Marsh SDP, 1 July 1998, Print Q0444).
of the Commission. The competency standards within the metal industry consist of over three hundred separate competency units, each of which identifies skill requirements and performance criteria (Metal Trades Industries Association, Metal Trades Federation of Unions, Australian Chamber of Manufactures, 1997: 3). A worker’s suitability for classification under the grading system of the Metal Industry Award is by means of an assessment of his or her competencies. One of the mechanisms used for this assessment is a cumulative point scoring system which is then aligned with the competency guidelines for each level of the Metal Industry Award. The ACTU/AMWU used the application of competency assessments at HPM to argue that there was no relationship between the skill levels of HPM employees and the wage rates paid by HPM.

At the time of the application, the system of competency assessment was not consistently applied throughout all levels of the award. The equal remuneration application at HPM concerned employees nominally employed across classifications C12, C13 and C14 of the Metal Industry Award. At the time of the application, the classification levels C12 and C11 had defined points boundaries, 64 at the C12 level and 32 at the C12 level. Yet at C14 and C13 there were no assigned points boundaries (Metal Trades Industries Association, Metal Trades Federation of Unions, Australian Chamber of Manufactures, 1997: 100).

Imprimatur to Utilise Competency Standards

The ACTU/AMWU’s submission before Commissioner Simmonds based their reliance for the use of competency standards on observations made by members of the Full Bench in the s.108 Full Bench proceedings (17 May 1996) and apparent undertakings given by the MTIA.

105 Metal Industry Award 1984 – Part I (Australian Industrial Relations Commission, Marsh SDP, Polites SDP, Oldmeadow C, 3 July 1995, Print M2963). This decision led to an order varying the award, see consent variation to the Metal Industry Award 1984 – Part I. Re Metal Industry Award 1984 – Part I (Australian Industrial Relations Commission, Marsh SDP, Polites SDP, Oldmeadow C, 29 July 1995, Print M3565). Competency standards were also the subject of a further decision by Commissioner Oldmeadow and a resultant consent variation to the award. Re Metal Industry Award 1984 – Part I (Australian Industrial Relations Commission, Oldmeadow C, 15 May 1996, Print N1676); Metal Industry Award 1984 – Part I (Australian Industrial Relations Commission, Oldmeadow C, 15 May 1996, Print N1674).

106 AIR, C No. 23933 of 1995, Exhibit D1, Attachment K, pp. 17-20.
and HPM during those and subsequent proceedings. Given this reliance some analysis of the s.108 proceedings adjoins the account of the submissions made before Commissioner Simmonds.

The union submissions before Commissioner Simmonds\textsuperscript{107} focused on the direction provided by Senior Deputy President Marsh in the earlier Full Bench proceedings. Marsh had made the following observation amid an exchange with the ACTU advocate, Jenny Doran, concerning the relationship of competency standards to the equal remuneration application at HPM.

Marsh was a senior member of the AIRC having been appointed to the AIRC’s predecessor, the Australian Conciliation and Arbitration Commission in 1988, an appointment that followed an eighteen year career as industrial advocate for the ACTU.

The way I am viewing it is in the metal industry, there are competency standards, one of the objectives of which is to provide objective, precise and clear analysis of skill and work value. It is the old terminology. In my view, that in itself, implementing that process should eliminate discrimination on the basis of different work values, so you have got like with like and skill is recognised. That is what competency is about. There is a process in the award to achieve that

It seems to be in the answer you gave Commissioner and her Honour, that you are using competencies as one step in an equal pay application, whereas I am viewing it as this should be a competency case up front, in which case the proper application of that award provision should eliminate any gender bias that exists because we are looking at a really objective skill assessment and evaluation and implementation\textsuperscript{108}.

These comments were observations made from the Bench and not confirmed in any subsequent decision. Yet the ACTU/AMWU interpreted the comments in the s.108 proceedings as an endorsement by the AIRC of the use of competency standards to demonstrate the equivalence or otherwise of work. This interpretation of the comments of Senior Deputy President Marsh by the ACTU/AMWU was a view privately shared by Commissioner Simmonds, who believed that members of the Full Bench agreed that competency standards were an appropriate systematic method to assess equivalence of work.

\begin{flushright}
\textsuperscript{107} AIR, C No. 23933 of 1995, Exhibit D16, pp. 28-29; AIR, C No. 23933 of 1995, Transcript, pp. 359-366.
\end{flushright}
value\textsuperscript{109}. As observed earlier in this Chapter the ACTU/AMWU’s application to the s.108 Full Bench proceedings had submitted that the Full Bench issue a statement of principles concerning the conduct of equal remuneration applications, an application that was rejected indirectly by the Full Bench.

Viewed in their entirety the Full Bench proceedings had revealed a range of positions by its members concerning competency standards. The Full Bench had expressed concern that the ACTU sought a statement of principle to legitimise the application of competency standards in gender bias issues because such issues ‘may not have been picked up in the development of the competency standards\textsuperscript{110}. The Full Bench was equivocal at best about this rationale given that the competency standards process should have been gender neutral at the outset\textsuperscript{111}. Yet the agreed nature of the competency standards within the metal industry held some weight with the Commission. When advised by the ACTU that they wanted to ensure that the \textit{Equal Remuneration Convention} was accommodated by the use of competency standards, Senior Deputy President Marsh indicated that she thought that she ‘would not be particularly assisted by what some international body has said should form a job evaluation system, in the light of the fact that [the] metal industry has got its own, tailored to its industry, by agreement, developed over many years\textsuperscript{112}.

In hindsight the ACTU and AMWU advocates viewed their s.108 submissions seeking Full Bench assurances about the gender neutrality of the competency standards as an error of judgement\textsuperscript{113}. It undermined competency standards at a very early stage in the proceedings – this seeming lack of confidence in competency standards by the applicant parties would in turn be utilised by the employer parties. This concern about the capacity of competency standards to assess the feminised areas of process work and packing reflected the views of those women within the National Research Centre of the AMWU who were responsible for

\textsuperscript{109} Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005.
\textsuperscript{113} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005.
preparing the advocacy material. Throughout the case these concerns would stand in significant contrast to the confidence of the predominantly male AMWU leadership and that of the ACTU officers in the capacity of the competency standards to assess work value\textsuperscript{114}.

Returning to the Full Bench’s observations concerning the utility of competency standards, the President indicated that she did not view competency standards ‘as a tool’ but rather as process provided by an award clause, one that helps to ‘objectively assess the factual situation at this company or these companies’\textsuperscript{115}. The ACTU pressed the Full Bench to forge an ‘interrelationship between the competency standards process and an application under the equal remuneration provisions’\textsuperscript{116}, a position that the Full Bench was reluctant to provide because the competency standards process had not been completed at HPM. Although the ACTU argued that this was because of the obfuscation of the employer\textsuperscript{117} the Full Bench noted that there were appropriate processes in the award. In any event the application did not proceed any further because of the MTIA’s successful arguments concerning the Full Bench’s jurisdiction.

In addition to their reliance on the observations of the Full Bench, the ACTU/AMWU also asserted that both the HPM and the MTIA consented to the use of competency standards. However, the purpose of the use of competency standards was disputed by the parties. The MTIA argued that HPM did not consent explicitly to the use of competency standards for the purpose of the application, a point which was noted also by Commissioner Simmonds\textsuperscript{118}. The MTIA submitted that it had advised HPM to use competency standards simply to assess the HPM in-house classification of employees against the award classifications – competency

\begin{flushleft}
\textsuperscript{114} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005; Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
\textsuperscript{117} AIR, C No 23931 of 1995, C No. 23932 of 1995, C No. 23933 of 1995, Transcript, pp. 29-44.
\textsuperscript{118} HPM Case (1998) 94 IR 129 at 161.
\end{flushleft}
standards had not ever been viewed by the MTIA as determinative of work value, a position they also advised to HPM\(^{119}\).

HPM and the MTIA further contended that the comments by the Full Bench in the May 1996 s.108 proceedings and their own undertakings in the subsequent conciliation proceedings before Commissioner Oldmeadow did not provide an endorsement of the use of competency standards as an appropriate tool for demonstrating equivalence of the work for the purposes of the s.170BD application. In proceedings before Commissioner Simmonds both HPM and the MTIA indicated that their support for the use of competency standards at HPM did not constitute agreement for their use to determine an agreement under s.170BD. The ACTU/AMWU argued that this was a new distinction, given the employer’s position at conciliation proceedings before Commissioner Oldmeadow in December 1995. During those proceedings the MTIA put a written position to the Commission on behalf of HPM which indicated that that HPM was prepared to implement competency standards. Commissioner Olmeadow noted in her report to the President concerning the progress of the equal remuneration application, dated 22 December 1995, the commitment of HPM to implementing the competency standards process:

> HPM Industries (HPM) is representing itself in these proceedings. HPM has committed itself to implementing the competency standards. It does not propose a deadline for completion of the exercise. General discussion between HPM and AMWU and the Australian Council of Trade Unions (ACTU) at the conference suggested that the exercise at HPM might be shortened by undertaking a pilot study of groups of the various positions in contention. The extent to which this is possible is not known at this stage\(^{120}\).

The Full Bench’s decision in the s.108 proceedings records that the MTIA submitted that the implementation of competency standards ‘would correct pay differentials based in criteria

\(^{119}\) Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.

other than skill at Utilux and HPM\textsuperscript{121}. Through the conciliation proceedings before

Commissioner Oldmeadow there were a number of meetings between the parties concerning

the application of competency standards process. These generated correspondence between

the parties which included the draft list of competency standards for process workers, general

hands and storepersons/packers\textsuperscript{122}. In a letter to Commissioner Oldmeadow dated 15 March

1996, the AMWU reported the following agreement between the AMWU and HPM concerning

the nature of the competency standards process, reached at a meeting 15 February 1996.

1. AMWU delegates will not be prevented from participation in meetings regarding this case.

2. The competency standards implementation process at HPM’s Hill Street will be

conducted by experienced training advisers from MTIA and the MTFU [Metal Trades

Federation of Unions] in conjunction with the Consultative Committee, HPM

management and the employees. The process will be in accordance with the terms

of the Metal Industry Award.

3. The expedited competency standards will begin as soon as the MTIA and MTFU

representatives are available. Hopefully in the week beginning 19/2/96.

4. The MTIA and the MTFU representatives will come up with a proposal for what

sample group of employees should be examined. This proposal will then be subject

to negotiation between the AMWU and HPM.

5. Once the expedited competency standard process is complete, the AMWU and HPM

will be given the opportunity to suggest any changes and will attempt to reach a

consensus view\textsuperscript{123}.

Through submissions before Commissioner Simmonds, HPM contended that it had

consistently maintained a position that the competency standards process ‘was never going to

be sufficient of itself to determine the legitimacy of the [equal remuneration] claim’\textsuperscript{124}. The

MTIA acknowledged that it had advised that competency standards be applied, as a first step,
to determine whether the employees at the subject of the claim were appropriately


\textsuperscript{122} AIR, C No. 23933 of 1995, Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to HPM Industries (J. Horan, E. Arena, D. Wang), Metal Trades Industries Association (J. Smith), Metal Trades Federation of Unions (J. Brunskill), Australian Manufacturing Workers’ Union (R. Fortescue), Australian Council of Trade Unions (J. Doran), 23 February 1996.

\textsuperscript{123} AIR, C No. 23933 of 1995, Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 15 March 1996, including as attachment report titled, Progress of Equal Pay Claim at HPM since conference before Commissioner Oldmeadow on 20 December 1995, pp. 1-2 of attachment.

\textsuperscript{124} AIR, C No. 23933 of 1995, Exhibit K12, p. 32.
The MTIA argued that such advice was appropriate if it would have provided HPM with a ground on which to argue that insofar as the award was concerned, the higher rate paid to general hands was justified. What was evident even at this point in proceedings was the subtlety of the employer position in relation to the precision in their argument concerning the requirements of the equal remuneration provisions. Effectively the MTIA was saying that the competency standards could be used for the purpose of classification, but that an equivalent classification did not necessarily impute equivalent work value, reflected in the differential overaward payments and hence different rates of pay by the company.

The MTIA submitted that the implementation of the competency standards process revealed that the job profiles for some female process workers and production packers were realising higher point scores than those for individual storepersons and general hands. On the MTIA's submission this result led to HPM proposing the negotiation of a new classification structure, a proposal that did not eventuate because HPM did not accept the conditions stipulated by the AMWU. During this period, the MTIA maintained for the company that any pay differentials at HPM were not gender-based, and denied that competency standards were the sole criterion for the purpose of the s.170BD application. Amid this imbroglio, the competency implementation process was never finalised.

In the proceedings before Commissioner Simmonds the MTIA sought to diminish the effectiveness of competency standards for the purpose of determining the application. As part of this strategy the MTIA drew on the ACTU's submissions to the s.108 proceedings and argued that it was the ACTU/AMWU which had been opposed to the use of competency standards. At that time the ACTU's argument was that the equal remuneration claims lodged

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by the AMWU in the metal industry should not have to await the outcome of the competency standards process.

Certainly, we accept that having an assessment of the skills of the worker as a subject of this claim is probably a necessary part of any ultimate arbitration of these matters, but we do not see it as then directly linked to the competency assessment process under the Metal Industry Award, it is a matter that can go hand in hand whilst the competency assessment is taking place and some of the considerations are the same, but this application is about gender bias in the valuing of women performing work today it is not about what might happen in the future under a restructured award or the award arrangements at a particular place subsequent to the application made of the new competency assessment the same is in the Metal Industry Award128.

Although these submissions were made by the ACTU in the context of the claim not being delayed by the outcome of the competency standards process, the MTIA used the submissions to indicate an inconsistency in the position of the ACTU concerning the utility of competency standards for the purpose of the application129. At the time of the Full Bench proceedings the ACTU’s assessment of the relationship between competency standards and equal remuneration was most accurately summarised by the statement on the use of the competency standards that was put by the ACTU to the Full Bench. This statement acknowledged the capacity for a range of factors to contribute to overaward payments. The union argued that competency standards were an appropriate means of setting equitable overaward payments.

3. Competency Standards do not in any mandatory way proscribe differential overaward payments to employees at the same classification level.

4. Nor do the Competency Standards prevent employers, employees and unions agreeing on factors other than skills and competencies in the setting of overawards.

5. Therefore, by itself, the implementation of Competency Standards does not give any guarantee against discriminatory overawards.

6. There are a range of historical issues which have given rise to discriminatory overawards pre-dating the new Metal Industry Award classification structure, in particular issues of gender segmentation of jobs and gender bias in the valuing of particular aspects of work.

8. Differential overawards continue to be paid for a variety of reasons including differences in skills and competencies, years of service, the nature of the work and performance. Often these differentials have not been based on objective criteria and in many instances overawards are selectively granted. The union’s approach is to support overawards being based on agreed criteria capable of objective assessment and general application. Therefore, the union supports the use of Competency Standards as a basis for setting equitable overawards.

10. This is on the basis that it is recognised that the Competency Standards are the result of a negotiation process and as a result contain various compromise positions. It must also be recognised that in many instances as a result of past practices, workplace cultures and workplace job design, men have greater opportunities for acquiring skills and competencies.

11. In utilising Competency Standards in the setting of overawards the principle of proportionality must apply. This means the relative value of the assessed competencies must relate to the actual rate of pay. There should be proportionality between the assessed competency and the overaward payment (See Paragraph 3.6 of the Implementation Manual)\(^{130}\).

Following the Full Bench proceedings the ACTU/AMWU’s resolve about the use of competency standards strengthened, assisted in part by what the union viewed as the direction of the Full Bench and the strong support from the AMWU leadership for the competency standards to be used for the purpose\(^{131}\). In written and oral submissions in the proceedings before Commissioner Simmonds, the ACTU/AMWU rejected in a forthright manner the submissions by HPM that it had consistently held a contrary view regarding the use of competency standards.

At no stage during the proceedings of the application did the MTIA or HPM argue against the appropriateness of the competency standards being applied and utilised, and at no time did they put on the table for consideration any other factor\(^{132}\).

Behind the scenes the challenge by the MTIA and HPM to the use of competency standards for the purpose of the application unnerved the union advocates, but did not deter them from relying on them. Some thought was given to changing course, but an alternative course was

\(^{130}\) AIR, C No 23931 of 1995, C No. 23932 of 1995, C No. 23933 of 1995, Exhibit ACTU2, pp. 1-3; AIR, C No 23931 of 1995, C No. 23932 of 1995, C No. 23933 of 1995, Transcript, p. 27. Those parts of this statement that are omitted here refer to the submission of particular documents.

\(^{131}\) Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005.

not seriously considered as too much had been invested in the implementation of competency standards at HPM\textsuperscript{133}.

Before turning to the disputation over the capacity of competency standards to be determinative of work value, some record of the implementation of competency standards should be made. Despite the imbroglio that attended it, competency standards work had been undertaken at HPM, although the process was incomplete. The application of the competency standards at HPM was broadly consistent with the five step process outlined in the \textit{Metal Industry Award}, although in advance of the timetable provided by that award. Each party nominated their own expert to conduct the application of the competency standards, what was known in the proceedings as a validation process. Disputes between the parties as to the applicable competency units delayed the testing process, as did the parties’ interpretation of the application of the competency standards\textsuperscript{134}. Although the purpose of the competency standards remained contested, the result of the assessments were evaluated by Simmonds, who concluded that ‘the majority of Process Worker jobs had a higher skill score than a majority of General Hands and the majority of Packer jobs had a higher skill score than a majority of Storeperson jobs’\textsuperscript{135}.

\textit{Competency Standards as Work Value}

The parties disputed the capacity of competency standards to determine accurately the value of the work. According to the submission of the ACTU/AMWU competency standards were ‘the most valid method of assessing whether the work performed by these groups of workers is of equal value’\textsuperscript{136}. This claim introduced a related issue, namely whether competency standards captured all aspects of remuneration, most particularly overaward payments. Whether competency standards could be inclusive of actual rates of pay had already been the

\textsuperscript{133} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005; Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
\textsuperscript{134} AIR, C No. 23933 of 1995, Exhibit D1 (Attachment J), p. 8.
\textsuperscript{135} \textit{HPM Case} (1998) 94 IR 129 at 138.
\textsuperscript{136} AIR, C No. 23933 of 1995, Exhibit D16, p. 28; AIR, C No. 23933 of 1995, Transcript, pp. 359-366.
point of some confusion in the s.108 Full Bench proceedings, but had not proceeded beyond
an exchange between Senior Deputy President Marsh and the ACTU’s advocate Jenny
Doran. The ACTU outlined the development of competency standards and asserted that
given that competency standards were recognised in the award as the appropriate
classification of employees in a skill-based award structure, they were an appropriate means
to assess work value.

The ACTU/AMWU utilised the evidence of Casey van Berkel and Richard Jenkins to attest
to the capacity of competency standards to assess adequately and objectively the value of
the work for the purpose of the application. Both had experience with the metal industry
competency standards. Van Berkel had been the former Victorian Coordinator of the National
Metal Industry Training Advisory Body and later the AMWU coordinator for the
implementation of competency standards. Jenkins was a former National Coordinator of the
National Metal and Engineering Training and Career Development Project, the project that
drove the development of the competency standards. Jenkins was now employed by the
MTIA with specific responsibility for education and training.

Much of the case turned on the relationship between competency standards and the paid rate
at HPM and more precisely, the capacity of competency standards to measure the value of
work attached to the paid rate. As noted earlier the paid rates at HPM were a complex
amalgam of the award rate of pay, the enterprise agreement, and overaward payments. The
evidence of van Berkel and Jenkins differed on the application of competency standards to
paid rates. Van Berkel conceded that competency standards were not designed to provide a
’ready mechanism for the establishment of actual rates of pay’, testimony that HPM used to

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138 For van Berkel see AIR, C No. 23933 of 1995, Exhibit D3; AIR, C No. 23933 of 1995, Transcript, pp. 32-39; for
support their position\textsuperscript{139}. He proposed that the application of the standards to overaward payments 'was the most appropriate tool of objective assessment'\textsuperscript{140}. Jenkins, however, declared that the standards could only be applied to actual rates by agreement between the parties and that employers rarely set actual rates of pay on the basis of a single set of criteria\textsuperscript{141}.

The ACTU/AMWU used the evidence of van Berkel to argue that the competency standards included all the aspects of work value as understood by the Commission. To illustrate this point, the ACTU advocate asked van Berkel to illustrate how the criteria specified in Senior Commissioner Taylor’s oft-cited 1968 definition of work value were encompassed by competency standards. Van Berkel’s testimony was the only explicit evidence relied on by the union to link competency standards to the concepts of work value traditionally used by the Commission. The ACTU/AMWU’s reticence to afford greater respect to the Commission’s traditional regard for work value was not only influenced by the AMWU’s commitment to competency standards, but also by a lack of confidence that the work value criteria would actually support the application. The ACTU/AMWU reasoned that there was no singular set of work value criteria and that the available criteria would not capture the differences in work between the classifications\textsuperscript{142}. More specifically the ACTU/AMWU considered that the work value criteria were flawed both in their terms and in the history of their application\textsuperscript{143}.

In sharp contrast to union equivocation about work value, HPM and the MTIA contested the capacity of the competency standards to address all aspects of work value\textsuperscript{144}. They argued that the application could not be determined without a full work value examination. HPM identified a series of factors, set out in Table 7.2, that it asserted were not captured by the

\textsuperscript{139} For van Berkel see AIR, C No. 23933 of 1995, Transcript, p. 47; for HPM response see AIR, C No. 23933 of 1995 Exhibit K12, p. 27; AIR, C No. 23933 of 1995, Transcript, pp. 24, 42, 53-61.

\textsuperscript{140} AIR, C No. 23933 of 1995, Exhibit D3, paragraph 9; AIR, C No. 23933 of 1995, Transcript, pp. 32-39, 81.


\textsuperscript{142} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005.

\textsuperscript{143} Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.

\textsuperscript{144} AIR, C No. 23933 of 1995, Exhibits K5, K6 (HPM), B1 (Metal Trades Industries Association).
current competency standards, including work intensity and accountability for product and service quality. These factors were rejected by the ACTU/AMWU as being discriminatory and having been merely concocted for the purpose of avoiding the application of the competency standards\textsuperscript{145}. HPM’s defence of the existing wage rates was that they reflected an analysis of the work value of each section of the workforce, including the nature of the work performed and the nature of the supervision received. These arguments involved a number of assertions about differences in work value including the assessment that the work of Storepersons, Packers and General Hands was more physically demanding than that of Process Workers.

\textsuperscript{145} AIR, C No. 23933 of 1995, Exhibit D16, p. 31; Transcript, pp. 359-366.
Table 7.2: HPM’s Assessment of the Work Value of General Hands, Packers, Process Workers and Storepersons

<table>
<thead>
<tr>
<th>Factors Influential in HPM’s Assessment of Work Value</th>
<th>HPM’s Assessment of the Work of General Hands, Packers, Process Workers and Storepersons</th>
</tr>
</thead>
</table>
| - The amount of training and induction required 
- Product knowledge needed 
- Responsibility (for decision making, continuity of production etc.) 
- Accountability for quality 
- Range and complexity of functions performed 
- Skills used 
- Flexibility and adaptability 
- Intensity (to meet deadlines in a ‘just in time’ process, 24 hour or less delivery schedules) 
- The incidence of heavy lifting, heavy carrying, climbing, walking, standing or sitting 
- Dexterity 
- Physical/Mental demands generally 
- Concentration/Accuracy | General Hands Compared to Process Workers 
The work of General Hands: 
- is more physically demanding, involving lifting, standing, walking, carrying and loading involving weight yields which are variable but commonly weights equalling or exceeding 20 kilograms; 
- requires significantly greater product knowledge and knowledge and components; 
- in contrast to the work of Process Workers the work of General Hands is performed at rates set by others, the rate of production determined by orders; 
- is critical to the continuity of the production process itself which is to day that these workers are key personnel. If these workers do not turn up to work then the delegation of their function must be ‘upwards’ to Supervisors or Storepersons. It is not possible, as a matter of fact, to delegate their function ‘downwards’, to packers and process workers; 
- involves a greater range of functions amongst other things, they can and do from time to time perform process work functions but the reverse is not the case. |
| Packers (Production Packers) compared to Process Workers 
The work of Packers: 
- must have a greater product knowledge than process workers; 
- must be able to read and understand orders; 
- the packing table must work at rates of intensity which are often high to meet demand. That is the rates set by others; 
- at the packing table work is more physically demanding as some are required to stand all day. | |
| Storepersons compared to Process Workers 
The work of Storepersons: 
- involves a greater range of functions; 
- is much more physically and intellectually demanding; 
- requires a greater product knowledge; 
- involves a need to accurately read and understand orders | |

Source: Adapted from AIR, C No. 23933 of 1995, Attachments to Exhibit K5; AIR, C No. 23933 of 1995, Exhibit K6, pp. 6-7; AIR, C No. 23933 of 1995, Transcript, pp. 310-314.

With this material, HPM refuted the use of competency standards for the purpose of testing gender pay equity. HPM also noted that the Metal Industry Award did not compel the use of the standards at levels C13 and C14. HPM contended also that competency standards were only intended to define award classification, work reorganisation, and to identify training needs. HPM contended that the standards were not designed to assess the factors that underpinned overaward payments. Working from this premise HPM argued that the difference in competency standard scores across the classifications directly contradicted the proposition.

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that the scores could be used comparatively to demonstrate equivalence in work value. The lack of clarity about the purpose to which competency standards could be put which was evident in the submissions of the ACTU, also emerged in the HPM submissions. The company argued that competency standards did have a function in determining award classification, but then attempted to draw a distinction between this function and the minimum rates in the *Metal Industry Award*. The HPM distinction held that there was no relationship either direct or indirect, between the rates of pay in the *Metal Industry Award* and the competency standards because the rates of pay had been set prior to the formulation of the standards.

The MTIA reiterated the arguments put forward by HPM and made further submissions concerning the inappropriateness of award classification as a device to establish equivalence in work value. The basis of the MTIA's assertion was that in all cases it was not open to the Commission to assume that the award classification rate was the appropriate starting point for determining whether there was equal remuneration for work of equal value. The MTIA drew attention to the history of the C14 classification in the *Metal Industry Award* noting that one of its antecedent classifications (classification 308 – Employee Not Elsewhere Classified), prior to the restructure of the award in 1989/1990, was used to capture the work value of any employee regardless of their work value who was not classified under any of the award’s other 349 classifications. The ACTU/AMWU refuted this proposition by arguing that existing award relativities had been of historical relevance to industrial tribunals in valuing the work of the occupation in question.

Returning to the ACTU's use of competency standards, the MTIA argued that reliance on competency standards by the AIRC would mean that the Commission would appear to be abandoning other tests that were previously considered important in wage fixation. For the MTIA this issue was one of the more critical aspects of the whole proceedings.

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147 AIR, C No. 23933 of 1995, Transcript, pp. 579-582.
First, it would appear to signal that in fixing actual rates of pay on the basis of work value the AIRC was abandoning other tests such as the nature of the work, responsibility and conditions under which the work is performed. Secondly, it would be saying to employers that the range of criteria they use in valuing work, eg., experience, seniority, individual merit, shortages of labour are no longer relevant\textsuperscript{149}.

The MTIA’s submission implied that they were prepared to accept a relationship between the competency standards and minimum award rates of pay, but argued that if the Commission were to adopt competency standards as the means of assessing equivalent work value, this would result in the MTIA reconsidering ‘its position on the connection between minimum rates of pay and competency standards’\textsuperscript{150}.

The ACTU/AMWU refuted this aspect of the MTIA’s submission, arguing that it implied a narrow approach to work value issues when even the 1969 and 1972 equal pay decisions had been applied without the need for comprehensive work value inquiries\textsuperscript{151}. The union held that the explicit requirement for work value in the 1972 principle was adequately accommodated by their reliance on competency standards. This defence had two lines of argument: first, the lack of a singular method of work value inquiry in the Australian industrial relations system, and second, the work value element in the wage fixing principles applicable in 1996 was based on measuring changes in work value, rather than some absolute and fixed definition of work value\textsuperscript{152}.

The ACTU/AMWU argued that the competency standards approach overcame the problems identified by the Commission in the 1986 comparable worth case. To this end the ACTU/AMWU distanced themselves from comparable worth, arguing that the Full Bench had rejected the concept of comparable worth as advanced by parties other than the ACTU\textsuperscript{153}.

The ACTU/AMWU argued that the 1986 comparable worth decision could not be used to claim

\textsuperscript{149} AIR, C No. 23933 of 1995, Exhibit B1, p. 21; AIR, C No. 23933 of 1995, Transcript, pp. 576-597.
\textsuperscript{150} AIR, C No. 23933 of 1995, Exhibit B1, p.21; AIR, C No. 23933 of 1995, Transcript, pp. 576-597.
\textsuperscript{151} AIR, C No. 23933 of 1995, Transcript, p. 627, 640.
\textsuperscript{152} AIR, C No. 23933 of 1995, Transcript, p. 621; Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
\textsuperscript{153} AIR, C No. 23933 of 1995, Transcript, p. 659.
that work value comparisons were confined only to work of a similar nature. Set against the
dissimilar work performed by women and men at HPM the ACTU argued that work value
comparisons needed to address Australia’s entrenched occupational segregation and the
ACTU/AMWU reasoned that competency standards, as an ‘objective system of assessment’\(^\text{154}\),
provided an appropriate machinery to undertake this task\(^\text{155}\). Through a seemingly
incongruous metaphor the ACTU argued that competency standards addressed the problem
of comparable worth:

> The competency standards seek to compare apples with apples.…We would submit that
this is in fact more consistent with our system of industrial relations than the notion of comparable worth which was rejected in the nurses’ case which rejected an apples versus orange[s] approach\(^\text{156}\).

**Work of Equal Value – Commissioner Simmonds’ Decision**

In his decision Commissioner Simmonds found that the *Equal Remuneration Convention*
required that the methods relied upon by individual signatories to the Conventions be
appropriate to local, national methods applicable for determining rates of remuneration\(^\text{157}\).
Given this direction Simmonds determined that the appropriate authority remained the 1972
case providing for equal pay for work of equal value. This principle explicitly required the
Commission to use work value inquiries to determine application that sought equal pay
orders. Simmonds defined work value in terms of the wage fixing principles in place at the
time of the case, namely ‘the nature of the work, skill and responsibility required or the
conditions under which the work is performed’\(^\text{158}\). Simmonds determined that as a single
member of the Commission it was inappropriate for him to apply a new method of job
appraisal for the purpose of the applications for equal remuneration orders. Simmonds also
effectively agreed with the submissions of employers that the determination of overaward

\(^{154}\) Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
\(^{155}\) AIR, C No. 23933 of 1995, Transcript, p. 666.
\(^{156}\) AIR, C No. 23933 of 1995, Transcript, p. 666.
\(^{158}\) *Safety Net Review April 1997* (1997) 71 IR 1 at 73.
payments at HPM went beyond considerations of work value, although such considerations should not be discriminatory\textsuperscript{159}.

In dealing with the overaward payment question, Commissioner Simmonds believed that any agreement between the parties as to an appropriate method of job appraisal would be highly persuasive and that "ultimately this issue should be determined in an appropriate proceeding\textsuperscript{160}. Simmonds was not persuaded that such an agreement was actually in place, thereby rejecting the ACTU/AMWU's argument that there was an agreement in place to use competency standards for the purpose of establishing equal value. He rejected the proposition that the comments of Senior Deputy President March, when viewed in the context of the entire case, could be taken as a direction to the parties to embark upon the application of the competency standards for the purpose of the application or to determine equal value issues. Commissioner Simmonds was also persuaded by the absence of an explicit agreement by the MTIA in those proceedings to use competency standards in the manner claimed by the union.

Commissioner Simmonds also noted that the absence of a complete agreement concerning the uses to which the competency standards process might be put was evident in the failure of Commissioner Oldmeadow to agree to the Statement of Principles sought by the ACTU in conciliation proceedings. The terms submitted by the ACTU in conciliation before Oldmeadow provided for the application of the competency standards as an 'objective test' for the purpose of the application. Simmonds' conclusion was that it was a reasonable proposition that if the ACTU/AMWU were of the view that an agreement between the parties to use competency standards was really in place, then they would not have sought a Statement of Principles of this kind\textsuperscript{161}. Simmonds acknowledged some of the ambiguities of the evidence

\textsuperscript{159} \textit{HPM Case} (1998) 94 IR 129 at 161.
\textsuperscript{160} \textit{HPM Case} (1998) 94 IR 129 at 161.
\textsuperscript{161} \textit{HPM Case} (1998) 94 IR 129 at 162.
before him on this issue, finding that even if a commitment was given in conciliation proceedings then it was not binding in any arbitration proceedings that followed\textsuperscript{162}.

In any event Commissioner Simmonds went further, and rejected competency standards as an appropriate method of determining work value. He found that while the standards were an objective and gender neutral mechanism for measuring particular competencies they did not measure attributes outside skill and responsibility. In retrospect, both Simmonds and the MTIA advocates viewed as counter-intuitive the decision by the ACTU/AMWU to place such a reliance on competency standards, notwithstanding the perceived direction from the Full Bench. On this independent but coincidental reasoning competency standards were more attuned to the needs of the trades and post-trade classifications, areas of masculine employment, whereas the focus of the application was a valuation to be made of highly feminised non-trade areas of manufacturing employment\textsuperscript{163}. This contradiction identified by Simmonds could be traced to the significant investment that the AMWU had made in competency standards\textsuperscript{164}. The MTIA’s assessment was particularly blunt about the AMWU’s national (and male) leadership – ‘Cameron and Roe wanted a result out of competency standards’\textsuperscript{165}. With this wider imperative to give competency standards added regulatory force, there was little prospect that in a high profile case the AMWU would modify their unyielding commitment to the standards as the sole determinant of the matter.

Beyond the question of competency standards, Commissioner Simmonds’ decision also gave some indication of the evidentiary standard that applicants would need to meet in future applications. In ruling on the measure of work value provided by the classification structure, Simmonds determined that the award classification process itself was not a definitive

\textsuperscript{162} \textit{HPM Case} (1998) 94 IR 129 at 161.
\textsuperscript{163} Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005; Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
\textsuperscript{164} Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005.
\textsuperscript{165} Doug Cameron was the National Secretary of the Australian Manufacturing Workers’ Union, Julius Rose was the Assistant National Secretary of the Technical and Supervisory Division. Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
determination of equal value. Bypassing the work value variables considered during rounds of award restructuring, Simmonds found that the last extensive inquiry into work value in the award (being in a predecessor award, the Metal Trades Award\textsuperscript{166} was over thirty years old\textsuperscript{167}; it was too much for Simmonds to presume that the relativities established by that case could still be justified on work value grounds\textsuperscript{168}.

\begin{center}
\textbf{A Discriminatory Cause for Earning Differences}
\end{center}

The second substantive issue addressed in the case material was whether the earnings differences at HPM were discriminatory. Despite the flaws in union legal strategy concerning the test for establishing equivalent work value, the case ultimately demonstrated the difficulty in satisfying a discrimination case in matters where dissimilar but gendered work was involved.

In claiming that the earnings structures at HPM were discriminatory the substance of the ACTU/AMWU argument was as follows:-

\begin{enumerate}
\item[(i)] That in relation to HPM’s Darlinghurst premises, the work performed by Process Workers and Packers is of equal value to work performed by General Hands and Storepersons.
\item[(ii)] That the current wage rates paid to Process Workers and Packers are generally lower than the rates paid to General Hands Storepersons.
\item[(iii)] That the current wage rates paid to Process Workers and Packers have been established in whole or in part on the basis of the sex of these employees, in particular on the basis that the Process Workers are overwhelmingly women and all the Packers are women.
\item[(iv)] Therefore, the wage rates of the female workers in these jobs at HPM have been established in whole or in part on the basis of discrimination based on sex\textsuperscript{169}.
\end{enumerate}

Commissioner Simmonds decided that the test he would apply was whether the rates of pay for the designated classifications had been established without discrimination based on sex (‘a sex discrimination test’). Simmonds established that s.170BB(2) gives the term ‘equal

\footnotesize
\textsuperscript{166} Metal Trades Award 1952 as reprinted 15 August 1963, 103 CAR 463.
\textsuperscript{167} \textit{Re Metal Trades Award 1952} 121 CAR 587.
\textsuperscript{168} HPM Case (1998) 94 IR 129 at 162.
\textsuperscript{169} AIR, C No. 23933 of 1995, Exhibit D16, p. 1; AIR, C No. 23933 of 1995, Transcript, pp. 359-366.
remuneration for work of equal value’ the same meaning as in the *Equal Remuneration Convention* [1(b)]. Simmonds identified that the Convention in its sub-article indicates that this particular term refers to remuneration established without discrimination based on sex and these precise terms form a note to s.170BB of the legislation\(^1\). Thus Simmonds concluded that a threshold issue before an order could be made pursuant to s.170BC\(^2\) was that the Commission had to be satisfied that rates of remuneration had *not* been established without discrimination based on sex\(^3\). Simmonds’ interpretation effectively meant that the applicant needed to demonstrate that HPM had established rates of remuneration based on sex in their remuneration of Process Workers and Packers. The case did not feature written or oral submissions from the union, which disputed Commissioner Simmonds’ interpretation of the provisions in this way\(^4\). Thus a different conceptual interpretation of the provisions was not advanced by the union at the outset of the proceedings and the union submissions were directed towards demonstrating that the existing rates of pay reflected sex discrimination.

Commissioner Simmonds’ interpretation indicates that he understood the reference to discrimination within the notation to the legislation determined the operation of the federal legislative provisions. Simmonds was cognisant of the onerous requirements of the discrimination standard – the standard provided for a considerable level of complexity given the nature of the applications that would come before the Commission. As most of the more blatant examples of discrimination had been remedied, those remaining instances would, in all likelihood, be more difficult to unpack\(^5\). Yet Simmonds considered that the Commission, as constituted, required a particular level of rigour. In an industrial climate where the emphasis for the Commission was on setting minimum rates, these provisions provided the opportunity for the Commission to issue orders that effectively went to paid rates. This induced a level of reticence in the Commission to utilise these provisions – thus, there needed

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\(^1\) *HPM Case* (1998) 94 IR 129 at 158.

\(^2\) This section of the legislation details the equal remuneration orders that can be made under the legislation.

\(^3\) *HPM Case* (1998) 94 IR 129 at 159.

\(^4\) Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005.

\(^5\) Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2000.
to ‘be surety as to the cause of any difference in rates’\(^\text{175}\). According to Simmonds this disjuncture in terms of the Commission’s role made the ‘provisions almost unworkable’\(^\text{176}\).

**Defining Discrimination**

Given that parties to the proceedings worked from the proposition that discrimination in the existing rates of pay had to be proved, the definition of discrimination to be relied upon and the onus of proof in claims regarding indirect discrimination were key issues in the case.

Discrimination is not explicitly defined by the *Workplace Relations Act* nor in the *Equal Remuneration Convention*. The ACTU/AMWU, using the witness evidence of the former Sex Discrimination Commissioner, Sue Walpole, argued that the Commission should adopt the meaning then afforded to discrimination in the federal *Sex Discrimination Act*\(^\text{177}\).

5 Sex Discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:
(a) the sex of the aggrieved person;
(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;
the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

\(\text{178}\)

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

\(^{175}\) Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2000.

\(^{176}\) Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2000.

\(^{177}\) AIR, C No. 23933 of 1995, Exhibit D6; AIR, C No. 23933 of 1995, Transcript, pp. 151-160.

\(^{178}\) Excluded from this extract is section 5(1A) (Breastfeeding) which was not in force at the time of these HPM proceedings. This provision took effect from 12 November 2003 following passage of the *Sex Discrimination Amendment (Pregnancy and Work) Act 2003* (Cth).
Other sections in the *Sex Discrimination Act* make it clear that s.5(1) refers to direct discrimination while s.5(2) refers to indirect discrimination.

The ACTU/AMWU’s reliance on the definitions that applied in the *Sex Discrimination Act* at the time of the arbitral proceedings was contested by HPM, the employer organisations and the Commonwealth. The difference between the parties on this issue arose because the operative definitions relied on by the ACTU/AMWU differed from those considered by the AIRC in 1995, when a Full Bench of the AIRC established procedures for the Commission dealing with s.150A proceedings. Section 150A was a federal industrial provision which enabled the Commission to conduct reviews of all federal awards to remove provisions that were discriminatory (*Australian Industrial Relations Commission, 1995b*). The definitions of direct and indirect discrimination adopted by the AIRC for the purpose of s.150A award review proceedings were based on, but did not entirely replicate, provisions that were operative in the *Sex Discrimination Act* and ILO Convention 111 at that time.

**Direct Discrimination** occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion, particular opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.

**Indirect discrimination** occurs when a person is required to comply with a requirement or condition which is not reasonable under the circumstances and can be complied with by a substantially higher proportion of people of a different race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin, or by those who are not pregnant, do not have a physical or mental disability, or with different family responsibilities. The definition of indirect discrimination is cumulative - that is, all of the elements must be present
* there must be requirement or condition;
* it must be one the complainant cannot meet;
* it must be able to be met by a significantly greater proportion of one group than another; and
* it must be unreasonable in the circumstances of each case.

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Within the s.150A proceedings the AIRC had defined discrimination to include direct and indirect discrimination. These issues of definition had not been subsequently considered by the AIRC prior to the HPM proceedings and following the introduction of the *Workplace Relations Act*, the s.150A provisions were repealed\(^\text{181}\). However, in the period between the Commission's consideration of the definitions of discrimination in the s.150A proceedings (October 1995) and the HPM proceedings the definitions of discrimination in the *Sex Discrimination Act* had changed by virtue of amendments to the *Sex Discrimination Act* (December 1995)\(^\text{182}\).

The ACTU/AMWU relied on the definitions of discrimination in the *Sex Discrimination Act* because they were more straightforward and did not contain the proportionality tests that were present in the definition of indirect discrimination adopted by the AIRC for s.150A proceedings. Importantly the December 1995 amendments to the *Sex Discrimination Act* also provided that the burden of proof shifts to the respondent (s.7C) when the respondent utilises a defence of reasonableness (s.7B) to explain sex related remuneration differences arising from indirect discrimination. The union reliance on these definitions shaped their submissions concerning the evidence of discrimination and the requirement for HPM to demonstrate that their system of remuneration was reasonable. The Commonwealth's submissions specifically addressed the meaning that the Commission should afford to the term discrimination and rejected the arguments put forward by the ACTU/AMWU. The Commonwealth argued that the AIRC should not adopt the definitions that were extant in the *Sex Discrimination Act*, but should adopt the meaning given to discrimination by a Full Bench of the AIRC in 1995\(^\text{183}\).

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\(^\text{181}\) The s.150A provision in the *Industrial Relations Act* which addressed the review of awards, were subsequently repealed by the *Workplace Relations Act*; ILO Convention 111, *Convention Concerning Discrimination in Respect of Employment and Occupation*: definition of discrimination to include direct and indirect discrimination see *Third Safety Net Adjustment and Section 150A Review* (1995) 61 IR 236 at 247-248.

\(^\text{182}\) Amendments to the *Sex Discrimination Act* which altered the definition of indirect discrimination and made changes to the provisions concerning reasonableness and burden of proof were effective from 16 December 1995 following passage of the *Sex Discrimination Amendment Act 1995* (Cth).

\(^\text{183}\) AIR, C No. 23933 of 1995, Exhibit C1, pp. 4-5; AIR, C No. 23933 of 1995, Transcript, pp. 601-604.
Establishing Evidence of Discrimination

Working from the definition of direct discrimination in the *Sex Discrimination Act*, the ACTU/AMWU presented evidence concerning the employment and remuneration of men and women at HPM to satisfy that test. The argument relied on by the ACTU/AMWU also drew legitimacy from the work of the Sex Discrimination Unit within HREOC outlining the way in which direct and indirect discrimination manifested itself in the labour market\(^{184}\). This material and the testimony of Sue Walpole reflected an optimistic approach to the interpretation of discrimination that had continued to influence the work of Sex Discrimination Unit under Walpole’s leadership\(^{185}\).

The ACTU/AMWU argued that HPM directly discriminated against the female process workers and packers in their rate of pay on the grounds that they were paid less than men employed in the same or lower award classifications, denied an incremental structure and treated differently in rewards for service [s.5(1)]. On the ACTU/AMWU’s reasoning this less favourable treatment was based on the ‘characteristic that appertains generally to persons of the sex’ of the worker [s.5(1)(b)] or a ‘characteristic generally imputed to persons of the sex’ of the workers [s.5(1)(c)]. The ACTU/AMWU asserted that the characteristics, real or imputed by HPM, were that women were not able to lift heavy weights or were not interested in tasks performed by men at the company\(^{186}\). According to the union, the effect of HPM imputing these characteristics to the women workers at HPM was that they were ‘streamed’ into women’s jobs, namely Process Workers and Packers\(^{187}\). The ACTU/AMWU argued that results of the application of the competency standards process at HPM provided sufficient evidence that the circumstances of men and women at HPM were not materially different, and that there were no differences in the physical conditions under which the work was performed\(^{188}\). In anticipation of HPM arguments that there was no intent to discriminate against women

\(^{184}\) AIR, C No. 23933 of 1995, Exhibit HREOC2; AIR, C No. 23933 of 1995, Transcript, p. 42.

\(^{185}\) Interview Elizabeth Fletcher, Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission, 20 February 2005.

\(^{186}\) AIR, C No. 23933 of 1995, Exhibit D18, paragraphs 3-5.


\(^{188}\) AIR, C No. 23933 of 1995, Exhibit D18, paragraphs 10-13; AIR, C No. 23933 of 1995, Transcript, pp. 368-369
workers at HPM, the ACTU/AMWU argued on the authority of a High Court judgement that there was no requirement for the ACTU/AMWU to establish or demonstrate that HPM had the motive or intention to discriminate\textsuperscript{189}. Despite the solid basis of the union argument on intention to discriminate, it was a complex issue because the union had previously argued that there were material differences between the jobs, namely the physical lifting requirement.

The supplementary submission of the union addressed the provisions within the \textit{Sex Discrimination Act} concerning indirect discrimination, which only applied if the Commission accepted that there was a material difference in the circumstances of the two groups of workers. This applied if HPM had imposed `a condition, requirement or practice' [s.5(2)] on women in that they only offered women the Process Workers or Packer jobs. This practice disadvantaged women in three areas; they received lower rates of pay as men on the same or lower classification, were denied access to increments and received lesser rewards for service\textsuperscript{190}. The ACTU/AMWU further argued that there was no relationship between the information on market rates presented by HPM and the incremental wage scale in place for General Hands and Storepersons, a scale not available to Process Workers and Packers. The unions argued that the information concerning market rates was dated and lacked substance and verification. In short it provided no justification for the use of overaward payments at HPM.

The Women's Organisations supported the ACTU/AMWU submissions concerning the application of the then operative definitions of discrimination within the \textit{Sex Discrimination Act}. Their submissions linked the evidence concerning alleged discrimination to the absence of transparent pay practices. They argued that the evidence of discrimination arose from the evidence that all women were paid less than the highest paid men in the groups under

\textsuperscript{189} \textit{Australian Iron & Steel Pty Ltd v Banovic} (1989) 168 CLR 165; Transcript C No. 23933 of 1995, p. 685

\textsuperscript{190} AIR, C No. 23933 of 1995, Exhibit D18, paragraphs 12-20; AIR, C No. 23933 of 1995. Transcript, pp. 368-373.
consideration, despite competency assessments showing that the highest skill points were found in women’s employment positions. The Women’s Organisations further submitted that the HPM was unable to demonstrate any objective basis for the difference in pay and that there was no consistent transparent pay system in operation.

The Women’s Organisations focused on the evidence provided by HPM concerning the relationship between the length of service and pay. They noted that the Process Workers employed at $413.90 had service ranging from a few months to thirty five years, but all received the same rate of pay. Conversely General Hands had service with HPM ranging from a few months to seventeen years but had more diverse remuneration, receiving between $426 to $466. The highest paid employee in a General Hand classification had just one year of service. What was absent from the Women’s Organisations’ submissions was the relevance of this material to a traditional work value argument. Given that competency standards specifically excluded experience as a job factor, the material concerning the experience was contemplated more ably within a work value framework of the type historically recognised by Australian industrial tribunals. The Women’s Organisations also addressed HPM’s reliance on physical work and manual handing in particular as rationales for the difference in pay between the two sets of classifications. Their submission emphasised the absence of a clear relationship between manual handling and rates of pay, and argued that HPM’s emphasis on manual handling constituted both direct and indirect discrimination. Direct discrimination arose where factors were considered for some jobs and not for others, or were assessed, or valued differently where the circumstances were not materially different. Indirect discrimination arose where factors found in mainly male jobs attracted extra pay while factors present in feminised work did not attract extra pay.\(^{191}\)

In reply to the ACTU/AMWU’s assertions about discrimination, HPM argued that the unions could not rely on a presumption of gender bias in the pay differentials. From the perspective

of HPM, even the claimed shortcomings of the system of overaward payments at HPM did not on face value, suggest discrimination in the wage rates. Explicitly HPM noted that:

There is not presumption of gender bias in wage differentials and no principle that suggests that if not, or no satisfactory, explanation for such differentials is forthcoming then the conclusion is that they are based on gender bias and that equal remuneration is the correct solution\textsuperscript{192}.

The MTIA supported this aspect of HPM’s submission, noting that the evidence before the Commission simply demonstrated that the employer valued the work of the male comparators more highly than the female employees. This did not mean that there was evidence that the company had discriminated either directly or indirectly against the female employees\textsuperscript{193}. This argument exploited the narrowness of the discrimination test\textsuperscript{194}. Similarly the ACCI argued that the existence of different earnings was insufficient to establish discrimination and that the ACTU/AMWU were required to demonstrate that the differences were not due to different work value, different jobs being performed at different skill levels and involving differences in job duties\textsuperscript{195}.

HPM argued that the principle of equal remuneration for work of equal value was only one principle or benchmark that applied to the setting of actual rates of pay. This supported the company’s larger case that there were aspects of pay, including payments for reliability, productivity, and experience that were effectively outside of the operation of the principle. HPM could not precisely account for the history of the overaward payments paid to the General Hands and Storepersons, other than a reference to a telephone survey of five companies in 1986 which was used to illustrate the contribution of market factors to the higher rates of General Hands and Storepersons\textsuperscript{196}. The data from the survey was incomplete and this imprecision also characterised HPM’s rationale for the three tiered system of overaward payments, as well as the discretionary overaward payments in evidence at

\textsuperscript{192} AIR, C No. 23933 of 1995, Exhibit K12, p. 55.
\textsuperscript{193} AIR, C No. 23933 of 1995, Exhibit B1, pp. 7-8, p. 27; AIR, C No. 23933 of 1995, Transcript, pp. 576-597.
\textsuperscript{194} Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005.
\textsuperscript{195} AIR, C No. 23933 of 1995, Exhibit N1, p. 5; AIR, C No. 23933 of 1995, Transcript, pp. 599-604.
\textsuperscript{196} AIR, C No. 23933 of 1995, Transcript, pp. 225-226.
HPM. Rather than this imprecision being a liability for HPM, counsel for the company sought to use it to HPM’s advantage. Through a series of questions put by the company’s counsel, HPM Human Resource Manager, Edward Arena, agreed that not all aspects of the overaward payments paid to the General Hands and Storepersons could be explained\(^{197}\). This was not necessarily atypical in the metal industry, and in the view of the Commission, the MTIA and the ACTU the lack of rationale for the overaward payments ultimately assisted HPM’s case\(^{198}\).

In addressing the scope of the equal remuneration provisions and the interpretation of discrimination the Commonwealth argued that there was a requirement in the *Workplace Relations Act* that equality underpin the overaward system. Specifically the Commonwealth argued that ‘the overaward system should be based on specifiable criteria, although this will not negate a proper role for management judgement’ and that the ‘same criteria and assessment arrangements be applicable to all relevant employees’\(^{199}\). Although this nominally held some application to HPM, given its lack of any documented system of overaward payments, the Commonwealth’s submission was multi-faceted. It acknowledged that overaward payments fell within the scope of equal remuneration provisions and that the equal remuneration provisions allowed for a broader examination of the equal pay/remuneration than had been the case in the past\(^{200}\). Yet the Commonwealth urged caution on the Commission, claiming it was ‘incumbent upon the Commission to [intervene] with regard to its previous rationale for minimising its arbitral role in this area’\(^{201}\) – to do so otherwise would blur the distinction between ‘the award safety net and workplace agreements and create an unnecessary and substantial rigidity in the labour market’\(^{202}\). This position provided the opportunity for the Commonwealth, within the proceedings, to argue a

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\(^{197}\) AIR, C No. 23933 of 1995, Transcript, p. 352.

\(^{198}\) Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005; Interview Roger Boland, Director Industrial Relations, Metal Trades Industries Association, 15 February 2005; Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.

\(^{199}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 16; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{200}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 16; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{201}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 4; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{202}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 12; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.
role for enterprise bargaining to be an appropriate vehicle for the negotiation of equal remuneration.

While the Commonwealth acknowledged that there was precedent for the Commission to address overawards, its submission carefully, if not tortuously, argued that the Commission had maintained historically a distinction between national and local wage-setting matters. The Commonwealth also sought a distinction between the award rate of pay for the work which the Commonwealth argued reflected the intrinsic value of the work and overaward payments which represented a complex amalgam of factors. The Commonwealth contended that overaward payments should be based on specifiable and equally applied criteria, but consistent with its position of not addressing the specific facts of the HPM case, the Commonwealth was not called upon, nor did it submit, any direct comment on whether it thought overaward payments at HPM met the standard it set for overaward payments.

Reasonableness and Burden (Onus) of Proof

The ACTU/AMWU argued that the Sex Discrimination Act contained specific requirements concerning the defence of reasonableness and the burden of proof. In short a respondent to a claim of indirect discrimination may rely on a defence of reasonableness, and argue that the alleged disadvantage is reasonable in the circumstances. Tribunals can consider the nature and extent of the disadvantage, the feasibility of overcoming the disadvantage and whether the disadvantage is proportionate to the result or overall objective of the respondent. The Sex Discrimination Act requires, however, that if a respondent is relying on a defence of reasonableness, then the onus of proof of demonstrating that the conditions, requirements or practices nominated in the application do not constitute indirect discrimination, falls to the respondent. The ACTU/AMWU argued that given these provisions HPM was required to

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203 Exhibit C1, C No. 23933 of 1995, p. 12; Transcript C No. 23933 of 1995, pp. 605-617; Interview Kathy McDermott, Director, Equal Pay Unit, federal Department of Industrial Relations, 7 December 2005.

204 Exhibit C1, C No. 23933 of 1995, p. 16; Transcript C No. 23933 of 1995, pp. 605-617.
demonstrate that the lower rates of Process Workers and Packers did not constitute discrimination.

7B Indirect discrimination: reasonableness test

(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.

(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
(b) the feasibility of overcoming or mitigating the disadvantage; and
(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

7C Burden of proof

In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

The Women's Organisations supported the ACTU/AMWU submissions and further submitted that the HPM were unable to demonstrate any objective basis for the difference in pay and that there was no consistently applied transparent pay system in operation. Working from the Sex Discrimination Act's provisions concerning reasonableness and the burden of proof, the Women's Organisations drew on decisions from the European Court of Justice (ECJ). Reference was made to two judgements where the ECJ had determined that the burden of proof in proving that an act does not constitute discrimination rested with the employer. The first case concerned a non-transparent pay system while the second involved evidence demonstrating an appreciable difference in the rates of pay for two jobs of equal value where one job was carried out by women and the other by men. These submissions were the subject of detailed attention by the Commonwealth who argued that while international jurisprudence had some relevance, it was the Workplace Relations Act that provided the

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205 AIR, C No. 23933 of 1995, Exhibit R1, pp.30-32.
208 Enderby and Frenchay Health Authority v. Secretary of State for Health (1993) 22 IRLR 59.
terms on which the Commission should perform its functions. On this logic, and given the relationship between the equal remuneration provisions and the international conventions, the Commission could have regard to the terms of the *Equal Remuneration Convention*, the deliberations of the International Labour Conference and deliberations of any supervisory machinery established by the ILO. Yet the Commonwealth clearly preferred the provisions of the *Workplace Relations Act* over any consideration of decisions by other tribunals giving effect to the Convention.

The issue of whether the applicant or respondent bore the onus of proof drew significant submissions from HPM and the Commonwealth. This issue, together with the potential for the Commission to intervene in the regulation of overaward payments, were the topics which attracted the most evident anxiety from HPM and the Commonwealth. HPM challenged the ACTU/AMWU’s position that the evidentiary onus was shifted to the respondent, drawing attention to the absence of any such provisions in either the *Industrial Relations Act*, following the inclusion of the equal remuneration provisions in 1993, or the *Workplace Relations Act*. HPM also noted that despite the changes to the *Sex Discrimination Act* in 1995 which reversed the onus of proof in discrimination matters, the federal Parliament did not see fit to make changes to the equal remuneration provisions in the *Industrial Relations Act*. The HPM submission was supported by the ACCI who argued that the legislation contained no basis for reversing the onus of proof. The ACCI submitted that the power open to the Commission under s.170BD was one to be exercised on application, not through the Commission’s own motion. As with other applications made before the AIRC, it was the task of the applicant to substantiate the application to the satisfaction of the Commission.

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209 AIR, C No. 23933 of 1995, Exhibit C1, p. 10; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.
210 AIR, C No. 23933 of 1995, Exhibit C1, p. 10; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.
212 AIR, C No. 23933 of 1995, Exhibit N1, pp. 2-3.
The Commonwealth opposed any reversal of the evidentiary burden where a prima facie case of discrimination was disclosed and submitted four contentions in support of its position:

- the existence of unequal pay does not, in itself, continue a prima facie case of discrimination;
- a reversal of the onus of proof as submitted by the ACTU can not properly be pressed upon the Commission as a process/means of satisfying itself as it derives from statutory provisions (the Sex Discrimination Act) which are intrinsically distinct from the legislation which the Commission is required to apply (the Workplace Relations Act);
- the relevant provisions on which the Commission should rely in regard the evidentiary and other burdens on the parties to the equal remuneration applications in s.110 of the Act;
- case law from other domestic or international jurisdictions has little or no probative value and therefore the Commission should exercise caution in regard to it\(^{213}\).

**Commissioner Simmonds’ Findings – Definition and Findings of Discrimination**

In assessing the submissions on the definition of discrimination to be followed, Commissioner Simmonds determined that he would follow the definition adopted by the AIRC through the s.150A proceedings. Although Simmonds acknowledged the subsequent repeal of the s.150A legislative provisions by way of the passage of the *Workplace Relations Act* and the potential direction provided by s.106 of the *Workplace Relations Act\(^ {214}\)*, he determined that it was unnecessary to rule on these points. On his reasoning the primary concern was the inherent problems that would arise for the Commission in following two definitions of discrimination, one in respect of award and agreement making, by way of the implications of the s.150A proceedings, and another in respect of applications under the equal remuneration provisions of the legislation. Simmonds noted that any argument in favour of the amended *Sex Discrimination Act* provisions (as submitted by the ACTU/AMWU) would need to be advanced and determined in a forum, specifically Full Bench proceedings, before it would be applied generally by the Commission\(^ {215}\). This had not occurred. The inconsistency in the operative definitions of discrimination, between those adopted in proceedings under the *Workplace Relations Act* and those under the *Sex Discrimination Act*, continues to this day (February

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\(^{213}\) AIR, C No. 23933 of 1995, Exhibit C1, p. 7; AIR, C No. 23933 of 1995, Transcript, pp. 605-617.

\(^{214}\) Concerning allowable award matters to be dealt with by a Full Bench.

\(^{215}\) *HPM Case* (1998) 94 IR 129 at 159.
2008), even though the *Workplace Relations Act* provides that the AIRC addresses the principles of the *Sex Discrimination Act*, and its objects include the prevention and elimination of discrimination (s.3).

Commissioner Simmonds’ interpretation of the requirements of direct discrimination was that they were only invoked if the circumstances applying to Process Workers, Packers, Storepersons and General Hands were sufficiently similar. Simmonds drew on his findings regarding the equivalence of work value, where he had determined that the competency standards were not an appropriate tool to demonstrate the equivalence of the work. Simmonds identified the work value criteria as the appropriate criteria but no evidence was led concerning the equivalence of the work using that criteria. Simmonds therefore concluded that he could not be satisfied ‘on what is before me that the different remuneration paid to Process Workers and Packers by comparison to that paid to General Hands and Storepersons arises in circumstances that are sufficiently similar to amount to discrimination based on sex’. Simmonds directly commented on the scope of the case strategy relied on by the applicant in this respect, noting that ‘it must be emphasised that this decision does not come to a conclusion about whether HPM directly discriminates in remunerating Process Workers and Packers. The conclusion on that matter is limited to the specific case put by the claimant’.

Commissioner Simmonds found that there was different remuneration of the male and female comparators but the circumstances were not sufficiently similar for that to amount to direct discrimination. Simmonds did not consider that s.93 of the *Workplace Relations Act* imported the reversal of the onus of proof as provided in the *Sex Discrimination Act*, but nonetheless saw good reason for the person or institution imposing indirectly discriminatory requirements to establish their reasonableness. He found that no requirement or condition had been

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established by the applicant so it was not necessary to consider ‘reasonableness’ of the requirement or condition. He noted that gender segmentation of workforce did not amount to a requirement or condition.

The applicant’s case was flawed in two key respects. First, the ACTU/AMWU relied on competency standards rather than work value as a means of establishing equal value. The alternative strategy was for the unions to argue that previous applications of the work value criteria were gendered rather than rejecting the criteria out of hand. Second, the unions did not advance an alternative interpretation of the provisions which would not require the applicant to demonstrate that the differences in earnings had a discriminatory clause. Even with these shortcomings noted, Commissioner Simmonds’ reasoning underlined the flaws in the 1993 legislative amendments. Rather than an expansionary interpretation of discrimination as arguably practised in selected international jurisdictions, a narrow comparator-based interpretation was relied upon by Simmonds. The discrimination test, interpreted in this way, acted to heighten the evidentiary burden on applicants. This was not the intended outcome of the amendments but also provided a reminder as to how the impediments to pay equity are ‘revealed to us a little bit at a time’.

Both the ACTU and the AMWU were angry at what they saw as the Commission’s reluctance to make a decision on the facts of the case. They viewed Simmonds’ decision as highly technical and one that used the complexity of the equal remuneration provisions as a means of abrogating the AIRC responsibility in regard to the practices in place at HPM. This view carried over to the publicity generated to members; in the AMWU’s journal Simmonds’ judgement was labelled a ‘decision not to make a decision’. That Simmonds’ decision would be technical was not surprising given that the HPM proceedings represented a precedent

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case. The disappointment of the advocates aside, Simmonds’ decision also needs to be set against the limited range of arguments that was put to him. The disappointment of the advocates was shared by the women at HPM, although they remained intensely supportive of Maiden and the AMWU organiser Adam Kerslake who had been largely responsible, together with some very resilient delegates, for recruiting members at HPM. For Maiden this loyalty was somewhat poignant, as the union as a whole ‘was not grieving over the decision’ although the decision did have an impact on broader policy decisions within the union. The fate of the original equal remuneration application, in addition to those which followed it, would ultimately deter state branches of the AMWU from supporting an organising strategy aimed at mobilising production workers in support of equal remuneration claims.

7.3.3 RELAUNCHING THE HPM CLAIM

Rather than appeal the decision of Commissioner Simmonds, the AMWU re-lodged an equal remuneration application on 10 March 1998 seeking equal remuneration orders pursuant to s.170BC. Some consideration was given to an appeal but the AMWU decided to pursue a new application for two reasons: a new application stood a better chance of success; and higher costs would be incurred by an appeal given that counsel would have been engaged.

The ACTU/AMWU submitted that the orders sought came into the operation from 6 December 1995, the date where the original s.170BD application had been lodged with the AIRC. The retrospective nature of the orders and the applicant’s submissions seeking directions for programming and determination of the matter became the substance of proceedings before Justice Munro. The matter was referred by Australian Industrial Registry

227 As with the original proceedings the ACTU intervened in the case and shared carriage of the application with the AMWU.
staff to Munro, who at time was head of the metal industry panel following Senior Deputy President Marsh's appointment to the award simplification panel in February 1998. Munro was a long standing member of the Commission having been appointed as a Senior Deputy President in 1986. Through the course of these proceedings the AMWU revised their order, in anticipation that the employees at Hill Street would be transferred to another HPM site in Waterloo. The specific terms of the order sought were as follows:

That the female Process Workers classified at C13 or C12 employed at Hill Street, Darlinghurst on 6 April 1998 in the job profiles known as Ground Floor Assembly 1, Ground Floor Assembly 2, Hot Stamp, DLD, Excel, Second Floor Assembly, Second Floor Modular, Third Floor Assembly 1, Third Floor Assembly 2, Neon and Dimmer shall receive the same rate of pay as the highest paid male General Hand employed at Hill Street, Darlinghurst on 6 April 1998 (currently $466.75 per week).

That the female Packers employed at Hill Street, Darlinghurst on 6 April 1998, in the job profiles known as Packing Table, DLD, Excel and Chicken Yard shall receive the same rate of pay as the highest paid male Storeperson employed at Hill Street, Darlinghurst on 6 April 1998 (currently $517.83 per week).

That the rates of pay pursuant to 1 and 2 above apply to these female Process Workers and Packers irrespective of whether they are employed at HPM Industries’ Hill Street or Bruce Street work sites, at the date this order is issued.

In his decision and issue of directions, Justice Munro made a number of observations concerning the equal remuneration provisions, noting the absence of any orders from the Commission exercising its power under s.170BC and assessing that ‘considerable uncertainty exists about the elements necessary to make a proper case for exercise of the power in section 170BC, and, to a lesser extent, about the form and content of an order should one be made.’ Munro indicated that there were two conditions precedent to the making of an order specified by s.170BC. The first, specified in paragraph 170BC(3)(a), required that employees were not presently in receipt of equal remuneration for work of equal value. The second, provided by paragraph 170BC(3)(b), indicated that the order can be ‘reasonably

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regarded as appropriate and adapted to giving effect to the Conventions and
Recommendations specified in the objects of Part VIA.\(^{230}\)

Justice Munro doubted that the Commission had the power to grant a s.170BC order with
retrospective operation as requested by the unions\(^{231}\). Yet Munro issued directions requiring
HPM to provide the union with access to documents concerning job descriptions and job
vacancy data for all the job descriptions outlined in the original application heard by
Commissioner Simmonds\(^{232}\). Munro made the following observations concerning the
disclosure of records:-

> Where the reason for a level of remuneration, or for an enterprise level classification
practice becomes relevant, it should be remembered that generally such evidence and
information about such matters tends to be peculiarly within the knowledge and control
of the respondent employer. It follows that evidence about those matters will often be
weighed in a manner that takes account of that relative capacity to produce relevant
evidence on the point. That principle gives additional weight to the desirability of the
respondent employer being required to make adequate disclosure of records pertaining
to the history, duties and remuneration practices relating to the work in issue.\(^{233}\)

In the proceedings before Justice Munro particular questions arose as to the measures the
Commission would rely on when assessing equal value. The ACTU/AMWU indicated that
inspections of the workplace should precede any statement of findings that the Commission
may make about the work value factors to be relied upon. This reflected some reluctance
and uncertainty in the minds of the union advocates on how they should engage work value
for the purpose of the application. In reply Munro noted that the parties did not agree about
the considerations that would be the basis of any work value assessment of the work. Given
these circumstances Munro indicated that the applicant was at liberty to rely on the method
of its own choosing. It was also open to the Commission to adopt any method of evaluation
that he or she `may hold to be adequate and effective in persuading the member to be

\(^{230}\) *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, (Australian
Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), paragraph 12.

\(^{231}\) *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, (Australian
Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), paragraphs 11, 14.

\(^{232}\) *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, (Australian
Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), Direction 2(a).

\(^{233}\) *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries*, (Australian
Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), paragraph 19.
satisfied that the relevant work is of equivalent value. Munro affirmed Commissioner Simmonds’ decision that the work value criteria were the primary source of guidance in such evaluations, but also noted that an assessment of work value cases revealed that work value equivalence was a relative measure that included the exercise of judgement by the Commission. Munro also observed that a number of evaluation techniques had been applied for various purposes and with various outcomes.

The new application was then referred to Commissioner Simmonds who was shortly thereafter requested by HPM to make an interim decision on the issue of retrospectivity. This request arose, in part, because the company had made redundant the position of General Hand, absorbing it into the Storeperson classification and in the process making redundant the employment of all General Hands. In addition to the abolition of the General Hands position, HPM had also made redundant four of the Storeperson positions and six of the Packers positions, twenty positions in total. HPM advised the Commission that they had advised the redundant workers that they would be able to apply for twenty new positions that were being created by the company. The positions that were made redundant did not involve positions that had been earmarked for reclassification as part of the relocation of much of the Darlinghust site, to the company’s Bruce Street, Waterloo site. Following the redundancy notices, the thrust of the HPM’s submission was that the ACTU/AMWU’s case could now no longer succeed because the comparison to male positions was no longer available to it. HPM’s action was not foreseen by the ACTU/AMWU. Nor had it been advised by the Australian Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries, (Australian Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), paragraph 18. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries, (Australian Industrial Relations Commission, Munro J, 19 May 1998, Print Q1002), paragraph 18. At that time only ten general hands remained in employment. General Hands made redundant 10 July 1998. Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005; Doran, J. (1998) Equal Remuneration – The Reality, Address to the Annual Convention of the Industrial Relations Society of Queensland, 26 September 1998, p. 4. This documentation supplied by Jenny Doran in interview. Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 February 2005.
Industry Group (AIG)\textsuperscript{239}. HPM’s submission was that in these circumstances the case should now no longer proceed.

The HPM submission was rejected by the ACTU/AMWU, a position that surprisingly gained some support from the Commonwealth. In short the Commonwealth argued that Commission could have regard to past circumstances and the Commission was not limited in any comparisons it may make to women and men employed in the same workplace\textsuperscript{240}.

Commissioner Simmonds determined that it was undesirable that the proceedings should be divided in the manner sought by HPM and that the timetable for the case should be adhered to\textsuperscript{241}. As a result of the company abolishing the position of General Hand, the ACTU/AMWU revised the orders that they were seeking, to further specify the comparison that they were relying on. The applicants sought primary and secondary orders from the Commission, a distinction that addressed the varying disparity in rates between the nominated classifications of workers. The relevant components of the orders sought by the applicants were as follows:-

\textit{Primary Order}  
That the female Process Workers and Packers who were employed at Hill Street Darlington on 6 April 1998 shall receive equal remuneration to male General Hands or Storepersons who performed work of equal value at the time the generally higher rates of remuneration were paid to the make workers.

\textit{Secondary Order}  
That the female Process Workers and Packers who were employed at Hill Street Darlington on 6 April 1998 shall receive equal remuneration to male Storepersons who perform work of equal value\textsuperscript{242}.

This applicants’ uncertainty as to how they should demonstrate equivalence in work value persisted in hearings before Commissioner Simmonds, an ambiguity that was somewhat

\textsuperscript{239} Following an amalgamation between the Metal Trades Industries Association (MTIA) and the Australian Chamber of Manufactures (ACM) the amalgamated organisation became known as the Australian Industry Group. HPM’s membership of the MTIA was transferred to the AIG. Interview Roger Boland, Director Industrial Relations, Australian Industry Group, 15 February 2005.
\textsuperscript{240} \textit{AIR}, C No. 21025 of 1998, Exhibit Commonwealth\textsuperscript{2}, pp. 1-2.
\textsuperscript{241} \textit{Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries}, (Australian Industrial Relations Commission, Simmonds C, 21 August 1998, Print Q5139).
surprising to Simmonds and the MTIA\textsuperscript{243} who privately believed that a reliance on work value would substantially strengthen the union’s application. In submissions the ACTU/AMWU argued that it accepted Simmonds’ decision that the appropriate method of evaluating equal value was to apply the criteria of work value and accordingly submitted considerable documentation to the proceedings concerning the Commission’s past approach to valuing work\textsuperscript{244}. The ACTU/AMWU argued that it viewed the competency standards evidence as consistent with this approach and argued that the Commission should take account of the evidence concerning competency standards as well as other work value factors\textsuperscript{245}. The ACTU/AMWU submitted that case law before the Commission suggested that the predominant factor to be taken into account in relation to work value factors was that of skill and that the skill involved in the performance of work at HPM was most comprehensively assessed in the competency standards assessment process undertaken in 1996/97 and 1998\textsuperscript{246}. The ACTU/AMWU added to these submissions an analysis that aligned the competency standards data with the work value criteria embedded in the current wage fixing principles, in addition to the criteria developed by Senior Commissioner Taylor\textsuperscript{247}. The AMWU’s commitment to competency standards remained resolute. At its July 1998 National Conference as well as noting its ‘major commitment to the legal and industrial struggle for equal pay at HPM\textsuperscript{248}, the AMWU also assessed that:-

Real implementation of equal pay continues to be important issue for many workers. While the Howard government has tried to dilute the ability of women members not currently receiving equal pay to seek redress, the AMWU will continue its efforts to pursue equal pay. This will be done through accessing legislation, where available, as well as accessing jobs through competency standards\textsuperscript{249}.

\textsuperscript{243} Interview Commissioner Jim Simmonds, Australian Industrial Relations Commission, 9 February 2005; Interview Roger Boland, Director Industrial Relations, Australian Industry Group, 15 February 2005.
\textsuperscript{244} AIR, C No. 21025 of 1998, Exhibit ACTU8, p. 3.
\textsuperscript{245} AIR, C No. 21025 of 1998, Exhibit ACTU8, p. 3; AIR, C No. 21025 of 1998, Exhibit ACTU1, Tab E, Tab F.
\textsuperscript{246} AIR, C No. 21025 of 1998, Exhibit ACTU12, p. 4.
\textsuperscript{247} AIR, C No. 21025 of 1998, Exhibit ACTU9; AIR, C No. 21025 of 1998, Transcript, p. 12.
\textsuperscript{248} NBAC, AMWU, Z628, Box 42, Minutes of the 14th Biennial National Conference of the Australian Manufacturing Workers’ Union, 26-30 July 1998, p. 16.
In the revised primary and secondary orders sought by the ACTU/AMWU, the applicants’ claim was for the Commission to find that ‘for the purpose of determining which groups of workers are performing work of equal value, work is of equal value if it falls within ten (10) competency points’. The ACTU argued that it would rely on the evidence of Casey van Berkel, as it had done in the original proceedings. In addition to van Berkel’s evidence the ACTU/AMWU advised the Commission that it would utilise the evidence of Julius Roe, Assistant National Secretary of the Technical and Supervisory Division of the AMWU and a ACTU Director on the National Training Board (NTB), and Susan Lacey, a private sector industrial consultant with expertise in job evaluation and competency standards. The AIG opposed this component of the ACTU/AMWU’s application, arguing that the new witness evidence filed by the ACTU/AMWU was insufficient to substantiate their claim. According to the AMWU advocate, Roe’s appearance reflected the underlying insistence by the AMWU that competency standards were an appropriate mechanism to determine work equivalence. Roe has been influential in the original decision to utilise competency standards.

The ACTU/AMWU did not challenge the definitions of discrimination adopted by Commissioner Simmonds in the original proceedings or his interpretation of the defining requirement set in the legislation ‘that there are rates of remuneration established by discrimination based on sex’. This was not a strategy pursued by the Women’s Organisations. In their submissions they took the Commission to the construction of the legislative provisions. Their interpretation was that the Workplace Relations Act defines equal remuneration for men and women workers for work of equal value in terms of rates of remuneration established without discrimination based on sex. Their key proposition was that this definition provided for alternative and not cumulative formulations. Thus, on this argument, the legal test could be met by establishing that men and women did not receive equal remuneration for work of

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251 Witness Statements of Casey Van Berkel, Julius Roe and Susan Lacey were contained among a series of witness statements, see AIR, C No. 21025 of 1998, Exhibit ACTU6.
equal value; or that the rates of remuneration of the women workers covered by the application were affected by sex discrimination; or that both propositions were true.\textsuperscript{255}

This position reflected a change in strategy by the Women’s Organisations. Following Commissioner Simmonds’ original decision, NPEC acknowledged that the submissions of the Women’s Organisations and the ACTU in the original proceedings were deeply flawed in their reliance on discrimination because they did not advance a more workable interpretation of the provisions. Accordingly it was decided that submissions in any subsequent proceedings should approach this issue very differently.\textsuperscript{256}

The new concept of undervaluation which was at that time being developed in the course of the New South Wales Pay Equity Inquiry was not reflected in the ACTU/AMWU’s contentions, in part because the ACTU/AMWU believed that Commissioner Simmonds would be too cautious to adopt a situation where ‘he started with a blank sheet of paper’ and apply a untested interpretation of discrimination from another jurisdiction.\textsuperscript{257}

The Commonwealth’s submissions in the second HPM application once again counselled caution on the Commission with regard to its assessment of overaward rates and pressed the Commission to only grant equal remuneration orders if it was satisfied that the rates of remuneration were not free of sex discrimination.\textsuperscript{258} A series of inspections took place at the HPM’s Bruce Street premises and the parties filed submissions. The ability of the Commission to assess overaward payments was again the subject of extensive submissions by HPM, the MTIA and the ACCI, the latter having successfully intervened in the proceedings. The collective approach of the employer submission was that a number of factors contributed to

\textsuperscript{255} AIR, C No. 21025 of 1998, Exhibit J1, p. 4.
\textsuperscript{256} NPECA, Minutes of Meeting, 10 March 1998; NPECA, Minutes of Meeting, 20 August 1998.
\textsuperscript{257} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 February 2005.
\textsuperscript{258} AIR, C No. 21025 of 1998, Exhibit Commonwealth1, p. 5; AIR, C No. 21025 of 1998, Transcript, p. 443.
overaward payments and that employers alone were in the 'only position to effectively assess [such] factors'.

**A Negotiated Settlement**

The case was settled in early 1999 by a new enterprise agreement after more than three years before the AIRC. Upon the new agreement being certified, the AMWU agreed to withdraw and discontinue the equal remuneration application. The AMWU also agreed not to pursue a new equal remuneration application during the life of the agreement. The decision by the AMWU to settle the agreement was prompted by two factors. First, there was an expectation among AMWU members that a new enterprise agreement, including pay increases, would be negotiated prior to the annual cessation of manufacturing operations over the 1998/1999 New Year period. HPM effectively stalled negotiations on the enterprise agreement using the equal remuneration proceedings as the rationale for the delay. Second, there was pessimism within the AMWU leadership as to the chances of the equal remuneration application succeeding.

The settlement remedied some issues but many of the inequities remained undisturbed by the new classification structure, which would apply not only at the Darlinghurst and Waterloo sites of HPM but also at HPM’s other Sydney-based sites at Botany and Alexandria. The AMWU described the outcome as a victory in an ‘epic wage battle’. The underlying press release issued by the AMWU was described by Maiden as ‘all spin’, as in reality ‘we had lost’. The members remained supportive but the terms of the enterprise agreement were a

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259 AIR, C No. 21025 of 1998, Exhibit ACCI1, p. 4.
261 Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries and anor, (Australian Industrial Relations Commission, Munro J, 3 February 1999, Print R1338), paragraph 4; see also Correspondence from Australian Manufacturing Workers’ Union (D. Oliver) to Commissioner Simmonds, Australian Industrial Relations Commission, 2 February 1999.
poor substitute for the orders originally sort by the AMWU. The AMWU recommended to its members that they accept the agreement but Maiden wished privately they had rejected it\textsuperscript{265}. The enterprise agreement provided for three wage increases over a two year period, the timing and precise nature of which are set out in Table 7.3. The new classification structure in the agreement effectively removed the top two tiers of the three level of rates that had applied to General Hands and Storepersons at C12 and the entire three tiered structured that had previously applied to General Hands at C14. In addition the discretionary overaward payments that had previously been paid throughout the classifications from C12 to C14 were abolished. The agreement therefore removed the higher overaward payments that had previously been paid on a disproportionate basis to General Hands and Storepersons, while not increasing the rates payable to Process Workers commensurate with the higher rates previously received by the General Hands and Storepersons. The one concession for the Process Workers was that they received a slightly higher first wage installment ($20) relative to other classifications ($18). Bearing in mind that the position of General Hand had been largely abolished midway through 1998, the agreement included a reclassification process for those employees for whom the abolition of the previous system of overaward was disadvantageous. This process provided for a framework through which the three C13 process workers receiving discretionary overawards could move to C12, and the reclassification of the seventeen C12 Storepersons receiving either a Level 2 or Level 3 overaward payment or discretionary payment to C11\textsuperscript{266}.

The new classification structure provided the same rate of pay for Process Workers and Packers as the restructured classification in the stores area. The agreement also effectively abolished the previous performance payment system which had only applied to ‘masculine’ work, which operated over and above the system of discretionary overaward payments. While the agreement reflected the AMWU’s pessimism about its equal remuneration application, the

\textsuperscript{265} Interview Emma Maiden, Advocate, Australian Manufacturing Workers’ Union, 21 March 2005.

\textsuperscript{266} It is not apparent from the available evidence whether all employees previously in employment at HPM’s Hill Street site and in receipt of overaward payments discontinued by the new enterprise agreement were still in employment at the time of the new agreement. Similarly it is not clear whether all employees proceeded to reclassification or alternatively had their rate ‘red circled’ (maintained) for the period of their employment.
various changes to the classification structure also suggested an element of fatigue on the part of HPM, which had held a very traditional and conservative approach to industrial relations before its involvement in the case. The company had not previously played a key or prominent role in metal industry employer campaigns being content to accept the advice and representation of the MTIA. It was not used to a role in the industrial relations spotlight.

Table 7.3: Agreed Classification Structure, HPM Industries, January 1999

<table>
<thead>
<tr>
<th>HPM Classification</th>
<th>Current Rate</th>
<th>First Increase (21/1/1999)</th>
<th>Rate after First Increase</th>
<th>Rate after Second Increase (3%)</th>
<th>Rate after Second Increase (3.5%)</th>
<th>Total Increase</th>
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</thead>
<tbody>
<tr>
<td>C14 (three months only)</td>
<td>$400</td>
<td>--</td>
<td>--</td>
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<td>--</td>
<td>--</td>
</tr>
<tr>
<td>C14 Level 1</td>
<td>$426.20</td>
<td>Rate Abolished</td>
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<tr>
<td>C14 Level 2</td>
<td>$438.70</td>
<td>Rate Abolished</td>
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</tr>
<tr>
<td>C14 Level 3</td>
<td>$443.71</td>
<td>Rate Abolished</td>
<td></td>
<td></td>
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<tr>
<td>C13</td>
<td>$414</td>
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<td>$434</td>
<td>$447</td>
<td>$463</td>
<td>$49 (11.8%)</td>
</tr>
<tr>
<td>C13 Discretionary Overaward</td>
<td>$415.76</td>
<td>Rate Abolished</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>C13 Discretionary Overaward</td>
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<td>Rate Abolished</td>
<td></td>
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<tr>
<td>C13 Discretionary Overaward</td>
<td>$434.25</td>
<td>Rate Abolished</td>
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<td></td>
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<tr>
<td>C13 Discretionary Overaward</td>
<td>$436.92</td>
<td>Rate Abolished</td>
<td></td>
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<tr>
<td>C12 Level 1</td>
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<td>$18 (4.1%)</td>
<td>$458</td>
<td>$472</td>
<td>$488</td>
<td>$48 (10.9%)</td>
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<tr>
<td>C12 Level 2</td>
<td>$453.43</td>
<td>Rate Abolished</td>
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<td></td>
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</tr>
<tr>
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</tr>
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<td>C12 Discretionary Overaward</td>
<td>$471.10</td>
<td>Rate Abolished</td>
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</tr>
<tr>
<td>C12 Discretionary Overaward</td>
<td>$477.15</td>
<td>Rate Abolished</td>
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</tr>
<tr>
<td>C12 Discretionary Overaward</td>
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<td>Rate Abolished</td>
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<td>C12 Discretionary Overaward</td>
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<tr>
<td>C11</td>
<td>$506</td>
<td>$18 (3.6%)</td>
<td>$524</td>
<td>$540</td>
<td>$559</td>
<td>$53 (10.5%)</td>
</tr>
</tbody>
</table>


267 Interview Roger Boland, Director Industrial Relations, Australian Industry Group, 15 February 2005.
7.4 A CLAIM FOR EQUAL REMUNERATION ORDERS AT DAVID SYME & CO

7.4.1 PROCEEDINGS BEFORE VICE PRESIDENT ROSS

A subsequent set of proceedings where the AIRC was required to consider the terms of the equal remuneration provisions arose in February 1999. The proceedings concerned an application filed by the AMWU concerning rates of pay received by female clerical employees and male production employees employed by David Syme & Co Ltd, proprietors of The Age newspaper. Pay was set at the company by an enterprise agreement and overaward payments and it was some surprise to the union that David Syme did not settle the claim prior to the matter going to jurisdictional debate at the Commission. The application posed particular questions for the Commission and the parties to the proceedings, primarily whether the interpretation of the equal remuneration provisions made by Commissioner Simmonds would prevail.

The claim of the AMWU sought the following orders pursuant to s.170BC:-

1. That the female clerical employees employed at the company shall receive equal remuneration for work of equal value.

2. That all female clerical employees employed in the advertising department in jobs currently given the job titles of 'Tele Sales Advisers' and 'Copy Control Clerks', and any other jobs which have an equal skill component and which are of equal value, who are paid at Level 1 of the current clerical quota based wage structure shall receive at least the same rate of pay as the remuneration set by the company for male employees in production jobs classified at Level 4 of the classification structure applicable in the Publishing Department and the rate which is set for the Level 3 Machine Operator in the Machine Department.

3. That all female employees employed at the company shall have access to a skill-based classification structure established for male production employees.

4. That no employee’s remuneration be reduced as a result of this order.

David Syme advanced four jurisdictional objections to the application:

An application for an order under Division 2 of Part VIA of the Act cannot rely on the additional operation of the Division created by s.170BI while simultaneously relying on the primary operation of the Division (the ‘alternative remedy point’).

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269 NPECA, Minutes of Meeting, 9 February 1999.
270 Age Case (1999) 97 IR 374 at 375.
If the application were granted it would create an inequity between male and female clerical employees (the 'inequity' point).

By virtue of s.170N of the Act the Commission is precluded from exercising its arbitral powers under Part VI of the Act in relation to the matters at issue between the AMWU and the Company (the 's.170N Point').

The application is uncertain and ambiguous (the 'ambiguity' point).\(^{271}\)

**Availability of Alternative Remedies**

As head of the printing industry panel within the AIRC Vice President Ross allocated the matter to himself. Ross had been appointed Vice-President of the Commission in 1994, following ten years in various positions with the ACTU. On the issue of alternative remedy Vice President Ross referred to the Full Bench's reasoning in the s.108 proceedings arising from the original HPM application\(^ {272}\). In these proceedings the Full Bench found some merit in the MTIA's submission that the application for an order under Division 2 (of Part VIA) could not simultaneously rely on the provisions in the Division that were based on the external affairs powers, for example s.170BC, which concerns the making of equal remuneration orders, and the additional effect to the Division provided by s.170BI concerning the prevention of industrial disputes about equal remuneration. Vice President Ross also observed that since the Full Bench's decision federal legislation had been amended to insert s.170BHA, which provided in more definitive terms that an application could not be lodged under Division 2 for an order securing equal remuneration for work of equal value if proceedings for an alternative remedy to secure equal remuneration had begun under another provision of the Act\(^ {273}\). Ross subsequently ruled that the respondent was correct in contending that the

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\(^{273}\) Age Case (1999) 97 IR 374 at 378.
Commission could not determine applications simultaneously under the primary and secondary operation of the *Workplace Relations Act*274.

**Inequity between Male and Female Clerical Employees**

David Syme submitted that the orders sought by the AMWU, if granted in the terms sought, would result in an inequity between male and female clerical employees. In reply, Vice President Ross reasoned that the Commission needed to be satisfied that there was not, at present, equal remuneration for work of equal value. Such a requirement brought with it the definition of the expression ‘equal remuneration for work of equal value’ in Article 1 of the *Equal Remuneration Convention*275. Ross then supported the approach taken by Commissioner Simmonds in the original HPM application in asserting that the first step in the determination of a s.170BD application was an assessment of whether the rates of remuneration in question had been established without discrimination based on sex. Consistent with this reasoning, Ross determined that the ‘the AMWU would need to show that the rates of pay for the relative clerical employees were established having regard to the gender of the employees concerned or at least a large proportion of them’276. Ross found that there was no impediment to the application referring to all clerical issues. The primary issue was not the gender of the employees but whether their remuneration has been established without discrimination based on sex277.

**Commission’s Recourse to Arbitral Powers**

Vice President Ross’ substantive reasoning on the impact of s.170N278 was that restrictions on the Commission’s right to exercise its arbitral powers primarily concerned matters under Part VI (Dispute Prevention and Settlement) of the *Workplace Relations Act*, not Part VIA275.

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274 *Age Case* (1999) 97 IR 374 at 379.
275 *Age Case* (1999) 97 IR 374 at 380.
277 *Age Case* (1999) 97 IR 374 at 380-381.
278 This section of the legislation provides that the commission can not arbitrate during a bargaining period for an enterprise agreement.
(Minimum Entitlements of Employees). The company had raised the relevance of s.170N to the proceedings because there was a bargaining period existing between the parties. Section 170N effectively holds that during a bargaining period, the Commission must not exercise its arbitration powers under Part VI in relation to a matter that is at issue between the negotiating parties. The Company argued that none of the powers normally available to the Commission under s.111(1) were available to the Commission in the hearing of the current application. Vice President Ross held that if the interpretation submitted by the Company were to be adopted it would have absurd consequences, such that the Commission could issue orders under s.170BC during a bargaining period, but not exercise any of its powers which accompany the normal hearing and determination of a matter\textsuperscript{279}.

Vice President Ross did not rule any further on this particular matter of ambiguity given the conclusions that he had made in relation to other jurisdictional matters. Ross struck out the AMWU application, concluding that the application was poorly drafted and contained a number of ambiguities. Ross’ decision provided a direct comment on the continued absence of technical competence and acuity displayed by the applicant organisations, given that both organisations had been involved in the HPM proceedings. Ross ruled that any fresh application would need to have regard to his observations concerning the inequity submissions of David Syme\textsuperscript{280}. The ACTU appearing for the AMWU, thought Ross’ decision indicated a reluctance to address the substantive issue at hand – the disparity in pay. Although the proceedings raised further questions about the feasibility of the provisions, the ACTU held the view that it was the Commission’s interpretation of the provisions rather than the substantive terms of the provisions that was the key impediment to equal remuneration being progressed through these means\textsuperscript{281}. This interpretation of the provisions by the Commission, rather than the construction of the application or the failings in union strategy, formed the focal point of the ACTU’s summation of the proceedings.

\textsuperscript{279} Age Case (1999) 97 IR 374 at 381-383.
\textsuperscript{280} Age Case (1999) 97 IR 374 at 384.
\textsuperscript{281} Interview Jennifer Doran, Senior Industrial Advocate, Australian Council of Trade Unions, 18 May 2005.
Prior to resuming this account of the application for equal remuneration orders at David Syme & Co I will briefly review additional proceedings where the question of alternative remedy has been raised.

The question of alternative remedy arose in proceedings before the Commission, concerning an application by the AMWU for equal remuneration orders at Gunn and Taylor (Aust) Pty Ltd. In proceedings before Commissioner Whelan, Gunn and Taylor had submitted that the application should be dismissed because an adequate alternative remedy existed under Commonwealth and State law within the meaning of s.170BE\(^{282}\) of the equal remuneration provisions\(^{283}\). The employer's submissions drew specific attention to the prominence in the union submissions of the rate of pay received by a female trade worker and her rate of pay compared to her male counterparts; hence in the employer's mind the proposed order was directed to the resolution of an individual grievance against her employer. Whelan rejected this contention and the matter was taken to appeal before a Full Bench, both on this matter and on the terms of the order sought by the AMWU. The Full Bench in rejecting the appeal noted that the proceedings before Commissioner Whelan were still in their infancy and thus it would be premature to conclude that in truth the application was directed to the benefit of one employee only. The appeal was rejected on this ground and on the terms of the order sought by the AMWU\(^{284}\).

There was a related debate within proceedings arising from an amended application by the Australian Services Union (ASU) for s.170BC orders to apply to the *Victorian Local Authorities Award*\(^ {285}\). The application was before a Full Bench of the Commission, a consequence of a

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\(^{282}\) This section of the legislation indicates that no equal remuneration orders can be granted if an adequate alternative remedy exists.


\(^{285}\) AIR, C No. 2002/2620, *Victorian Local Authorities Award 2001*. Application under s.113 of the Act by the Australian Municipal, Administrative, Clerical and Services Union to vary clauses 21.2.1, 23.1.1(b), 23.1.1(c), and 23.1.1(d) of the award.
successful petition by the ASU in June 2002 pursuant to s.107 of the Workplace Relations Act. At that time the ASU did not seek s.170BC orders; the original May 2002 application sought a variation of the award (under s.113) for wage increases so that the wages more properly reflected the work value of child care workers. Twelve months after the original application was filed it was amended to incorporate an application for s.170BC orders; the original components of the application were left unchanged. Following this amendment employer organisations raised a key jurisdictional issue, namely whether the Commission could determine a matter under both the equal remuneration (Part VIA) and award variation (s.113, Part VIA, Division 3) provisions of the legislation. The Commission reserved its decision on this matter and was not required ultimately to issue a decision on these jurisdictional matters. As a result of an agreement with the employer organisations over wage increases the ASU withdrew its application for equal remuneration orders.

7.4.2 PROCEEDINGS BEFORE COMMISSIONER WHELAN

The AMWU lodged a new application in May 1999 and sought a different order pursuant to S.170BC and made no reference to s.170BI in their application. The terms of the orders were as follows:-

1. That all clerical employees shall receive equal remuneration for work of equal value.

2. That equal remuneration for clerical employees shall be fixed by:
   (a) setting the rate of remuneration paid to employees employed as “Tele Sales Advisers” in the Telephone Sales Centre, who are currently paid at clerical grade 1, at the same rate of pay as the remuneration set by the company for employees employed as publishing grade 4 and press grade 3 (the base trades rate);
   (b) setting the base trades rate as the rate for Grade 3 of the attached skill based classification structure;
   (c) grading all clerical employees employed by the company in accordance with the attached classification structure and relativities.

3. No employee’s remuneration shall be reduced as a result of this order.

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286 AIR, C No. 2002/2620, Transcript, PN1-PN50; AIR, C No. 2002/2620, Decision under s.108 of the Industrial Relations Act 1988 (Cth) by the President (Giudice J), Australian Industrial Relations Commission, issued by way of memorandum, 3 July 2002.


The newly submitted application was allocated to Commissioner Whelan, a former Industrial Officer with the ACTU (1985-1994), who had been appointed to the Commission in 1995. While the union had drafted a more precisely worded application, Commissioner Whelan was faced by what she viewed as the absence of guiding principles as to the interpretation of the provisions. Whelan did not think that the existing interpretation of the provisions by the Commission was particularly helpful – even allowing for the uneven quality of the submissions and cases that had shaped previous proceedings. Whelan drew these conclusions with the concession that the federal Commission has not had the benefit of the evidence and consideration of the issues that had informed the New South Wales and Queensland Pay Equity Inquiries. Yet Whelan believed that the lack of ground rules rendered the interpretation of the provisions vulnerable to whichever member of the Commission received the application. Notwithstanding Whelan’s concession, there was an onus also on applicants to mount cases that were presented fully and properly. If the quality of the applicant case had been stronger, poor interpretation by Commissioner Simmonds or Vice President Ross or Whelan could have been taken up in appeal proceedings and a definitive interpretation from a Full Bench could have been obtained by this route. The unions could not seriously contemplate an appeal against Simmonds’ or Ross’ decisions because the cases were flawed in their construction.

This lack of clarity in the provisions was exploited in further jurisdictional argument raised by the respondent. David Syme sought to have a number of jurisdictional matters dealt with as threshold issues:

(i) Whether the application for equal remuneration orders filed with the Commission on 31 March 1999 invokes the Commission’s jurisdiction under Division 2 of Part VIA of the Act.
(ii) If so, does the Commission have jurisdiction to issue a summons for production of documents.

290 Interview Commissioner Dominica Whelan, Australian Industrial Relations Commission, 9 February 2005.
(iii) If the Commission does have jurisdiction, discretionary considerations concerning the form of the summons\textsuperscript{291}.

The Company's submissions with respect to the Commission's jurisdiction contended that it was not invoked because the orders did not disclose how the AMWU sought to establish the facts, as required by s.170BC. In responding to these submissions Commission Whelan also considered the forms of assessment that were required by the equal remuneration provisions. Whelan drew attention to the decisions of Commissioner Simmonds and Justice Munro noting the relevance of the Commission practice with respect to work value comparison\textsuperscript{292}. Whelan then reasoned that the 'words of the Convention do not suggest that the only comparisons acceptable are those which compare the work being performed by males with those being performed by females. Indeed it is clear that the issue is not who performs the work but the basis on which the rates have been established\textsuperscript{293}.

This recourse to the \textit{Equal Remuneration Convention} was shaped by Whelan's belief that too little emphasis had been placed on the operation of the \textit{Equal Remuneration Convention}. Applicants had approached the equal remuneration provisions with a very particular interpretation of discrimination in mind and one which owed much to the interpretations of discrimination in domestic rather than international equal opportunity jurisdictions. The only submission that argued for a prospective test of discrimination was that put forward by NPEC\textsuperscript{294}. A prospective test holds that the legal requirements of the provisions could be met by establishing that men and women did not receive equal remuneration for work of equal value. In these proceedings, Whelan was surprised that the ACTU/AMWU did not take the opportunity to advance the reasoning that the Company's \textit{failure} to value the work properly

\textsuperscript{294} NPECA, Minutes of Meeting, 30 September 1999; NPECA, Minutes of Meeting, 10 May 2000.
meant that the requirements of the provisions could be invoked. Whelan believed that any reference to international interpretations was accompanied by a fear that such interpretations would import the reversal of the onus of proof obligations that characterised some judgements of the European Court of Justice (ECJ). As indicated earlier such reversal of the onus of proof obligations had only recently been imported to Australian discrimination law and then only in the federal *Sex Discrimination Act*. In short, the failure to determine objectively why there was a difference in rates of pay might have forced the Commission to a new legal test, the reversal of the onus of proof, with which it had no experience.

Commissioner Whelan also had regard to the decisions by Commissioner Simmonds and Justice Munro and determined that it would be wrong to pre-empt the parameters of paragraphs s.170BC(a) and s.170BC(b) due to the absence of advice on the evidence that the applicant sought to present. Whelan consequently rejected the submission that the application was without foundation.

On the power to issue a summons Commissioner Whelan observed that in her view the arguments had not advanced beyond those considered by Vice President Ross concerning the effect of s.170N on the Commission’s powers in hearing the application. Nor did Whelan believe that the request for documents as contained in a summons issued by the Commission was oppressive. On this point Whelan had regard to Justice Munro’s observations in the second HPM application that particular evidence germane to the application was likely to be held by the company.

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David Syme appealed against the decision of Commissioner Whelan seeking a stay under s.45(4) of the *Workplace Relations Act*299. Justice Munro who heard the stay application expressed no definitive view about the viability of the jurisdictional arguments raised by the company300, but reasoned that that the issue of whether or not there was power to issue a summons at an interlocutory stage of proceedings under s.170BD did not give rise to considerations that warranted a stay of proceedings301. Proceedings resumed before Commissioner Whelan who issued further directions in June 1999 and August 1999302. The matter was ultimately settled, a settlement that was of some relief to the parties who had demonstrated diminished enthusiasm to address the substantive issues303. Substantive submissions regarding work value were therefore not advanced, but the union demonstrated a lack of confidence in the utility of work value as an assessment method as it had in the original HPM proceedings. In contrast, Whelan thought these concerns with work value showed something of ‘a failure of imagination’ as work value had always been an elastic concept. It remained an eminently more suitable concept than competency standards which still remained oriented to ‘masculine’ areas of work304.

For Commissioner Whelan, the eagerness of the parties to settle the matter together with the uncertain framework in which the application operated reflected two related issues concerning the provisions. In an era where the Commission’s arbitral rights were primarily confined to minimum rates of pay rather than actual rates of pay there was a particular ‘nervousness’ among the Commission and among the industrial parties about the power

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299 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd,* (Australian Industrial Relations Commission, Munro J, 10 June 1999, Print RS856).
300 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd,* (Australian Industrial Relations Commission, Munro J, 10 June 1999, Print RS856), paragraph 5. Decision was issued ex tempore in Transcript, on 19 April 1999 prior to its publication in a revised and ordered form.
301 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd,* (Australian Industrial Relations Commission, Munro J, 10 June 1999, Print RS856), paragraph 7.
303 Interview Commissioner Dominica Whelan, Australian Industrial Relations Commission, 9 February 2005.
provided by these provisions for the Commission to provide orders for actual rates of pay. Such orders had the potential to unpack the structure of relativities in minimum award rates. These had been embedded historically in the award system and modernised through the implementation of the structural efficiency principle and minimum rates adjustment processes that had flowed from National Wage Case Proceedings in August 1988 and August 1989. While some areas of low paid work had benefited from the increase in rates provided by that structure the principal reference points provided by those structures were the classification and rates structure in the metal industry.

7.5 CONCLUSION

The federal equal remuneration provisions provide a nominal legislative right to equal remuneration for work of equal value. The provisions have been tested rarely and have been applied substantially only in the claim for equal remuneration involving the Sydney-based electrical component manufacturer, HPM Industries. The Commission’s approach in hearing this particular claim has been confirmed in later proceedings involving David Syme. The available case history indicates that the provisions are beset by a number of limitations that have been compounded by their conservative interpretation by the Commission. This conservatism has been allowed to prevail partly because of the poorly conceived and fundamentally flawed legal arguments made by unions seeking remedy under the equal pay provisions.

The legislative limitations span a number of areas. The provisions’ legitimacy relies on the Commonwealth’s external affairs powers, but this head of authority compromises the relationship between the equal remuneration provisions and other key sections of the Workplace Relations Act. This includes the capacity of the Full Bench to hear applications

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305 Interview Commissioner Dominica Whelan, Australian Industrial Relations Commission, 9 February 2005.
under the equal remuneration provisions and constraints on applicants to use the equal remuneration provisions as the basis of a variation to a multi-employer award.

The limitations present a difficult threshold for applicants. Reflecting international conventions, the provisions refer to the *Equal Remuneration Convention* which requires that rates of remuneration be established without discrimination based on sex. The reliance on overt discrimination as an issue in equal remuneration rested on a misplaced faith in the capacity of this concept to have real purchase in Australian wage fixing. 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, has tightened the grounds on which equal remuneration claims can be heard.

In the HPM proceedings these problems impeded an investigation of the differences in the work and wage structures of female and male workers: women employed as process workers and packers and engaged in repetitive, dexterous work and in the main lacking access to overaward payments; men employed in heavier general hands and stores work but enjoying access to overaward payments. The design of the legislation was exploited by an employer who actively resisted the Commission and the union’s investigation of its system of work reclassification and overaward payments. The frailties of the legislation also suited the Commonwealth for whom the equal remuneration provisions provided an unwanted opportunity for the Commission to exercise arbitral powers and exercise an influence over actual as opposed to minimum rates of pay.

The limitations in the equal remuneration provisions can be pursued in more detail in four principal areas:

§ the relationship of the provisions to other sections of the *Workplace Relations Act*;
§ the capacity of the provisions to address disparities in overaward payments;

§ the requirement to demonstrate equivalence of work value; and,

§ the requirement to demonstrate a sex-based discriminatory cause for earnings disparities.

Each of these will now be considered in turn.

7.5.1 RELATIONSHIP OF THE EQUAL REMUNERATION PROVISIONS WITH OTHER SECTIONS OF THE WORKPLACE RELATIONS ACT 1996 (CTH)

The analysis of the equal remuneration provisions in this Chapter has acknowledged their underutilisation. There are a number of questions concerning the provisions that have not been explored, whether by way of direct application or other consideration by the Commission. The Commission itself has noted the considerable uncertainty about the elements necessary to make a proper case for exercise of the equal remuneration powers. This view is further supported by the absence of any equal remuneration orders by the Commission under s.170BC.

The available case history has indicated that there are narrow opportunities through which the Commission may hear equal remuneration applications. The proceedings before the Full Bench in the initial HPM application revealed that the traditional avenue through which the President of the Commission may allocate a matter of a test case nature to a Full Bench is no longer available to the President. This is because the allocation of matters to a Full Bench rests on a presumption of an industrial dispute, as defined in the legislation. However, applications made under the equal remuneration provisions are not founded on such grounds because the head of power derives from Parliament’s external affairs powers. The present interpretation of the provisions by the Commission is that it cannot simultaneously rely on the provisions in the Division 2, Part VIA that are based on the external affairs powers, for example s.170BC, which concerns the making of equal remuneration orders, and the
additional effect to the Division provided by s.170BI, concerning the prevention of industrial disputes about equal remuneration. Effectively this interpretation means that the Commission cannot determine applications simultaneously under the primary and secondary operation of provisions under the *Workplace Relations Act*.

Further it is unclear from the available case evidence, whether the Commission could determine a matter under both the equal remuneration (Part VIA) and award variation (s.113, Division 3, Part VI) provisions of the legislation. The 1972 equal pay principle remained available to industrial parties and thus the potential existed for applicants to seek an award variation through recourse to that principle. This possibility needs to be read against three considerations:

§ the limited capacity for the Commission under the 1972 principle to take into account overaward payments, a limitation that is underlined by the current legislative settings concerning the Commission’s powers with respect to award making and minimum rates awards;

§ each application needed to establish that the value of the work had been incorrectly set and that the 1972 principle had not been properly applied, nor have any subsequent applications of the work value principle addressed the perceived disparity in rates;

§ the precise relationship between the current wage-fixing principles and the 1972 principle is unclear. The 1972 principle does not acknowledge that historic work value assessments or the application of previous wage principles may have been based on assumptions that were gendered.

### 7.5.2 CAPACITY OF THE EQUAL REMUNERATION PROVISIONS TO REMEDY DISPARITIES IN OVERAWARD PAYMENTS
The case law has revealed three threshold matters in the hearing of an equal remuneration application. The first concerned the scope of the term equal remuneration, the second the means through which applicants establish whether the work in question was of equal value, and the third, the test that the Commission would apply to assess whether the objective of equal remuneration for work of equal value was being met.

The HPM and David Syme cases indicate that the federal provisions have application to a broad definition of remuneration extending beyond minimum rates and incorporating overaward payments. This reflects the definition of remuneration in the *Equal Remuneration Convention* referred to by the legislation. This is useful for pay equity purposes, as women have traditionally received lower overaward payments. However, this proved a nominal advance, because in the HPM proceedings the Commission was reticent to extend its role as a minimum rate setting tribunal into the realm of determining paid rates, because of the arguments presented by the employer organisations and the Commonwealth. Exploiting the policy shift to enterprise bargaining and the Commission’s reduced arbitral powers, both the Commonwealth and the MTIA argued that the Commission should refrain from using the power potentially provided to it by the equal remuneration provisions to intrude into the determination of paid rates. Thus, the proceedings did not provide any clarity as to whether the Commission can, on the basis of gender differences in overaward pay, adjust minimum federal award rates of pay by way of equal remuneration orders. This issue was clouded by uncertainty about whether the Commission had the power to utilise the equal remuneration provisions to vary, by way of s.113 orders, a multi-employer industry award.

**7.5.3 REQUIREMENT TO DEMONSTRATE EQUAL VALUE**

The second threshold requirement disclosed by the HPM and David Syme cases is the requirement that applicants demonstrate that equal value characterises the work. The question that follows is the means by which the equivalence might be assessed. Through the
proceedings reviewed here there was consistent reference to work value criteria and
Commissioner Simmonds determined that the ACTU and AMWU erred in not using work value
to demonstrate equivalence between the work of Process Workers, Packers, General Hands and
Storepersons. Commissioner Simmonds’ reliance on work value criteria arose from the
terms of the 1972 equal pay for work of equal value principle, which the Commission used to
guide it in the application of Division 2, Part VIA. However, Justice Munro in the second HPM
application indicated that a number of evaluation techniques had been applied for various
purposes in the past, with varied outcomes, and indicated that it was also open to the
Commission to adopt any method of evaluation. In the case involving the second HPM
application and that involving the second application for equal remuneration orders at David
Syme, the Commission reaffirmed that the choice of the method of demonstrating that the
work was of equal value falls to the applicant.

The lack of clarity among members of the Commission over how they would measure work
was not assisted by the reluctance of the Full Bench to develop a statement of principles to
guide equal remuneration applications. The approach of the ACTU/AMWU in the initial HPM
proceedings was that the work value criteria were insufficient for the purpose, lacking on
their reasoning an appropriate systematic focus. The ACTU/AMWU based their reasoning on
the lack of a singular set of work value criteria and a belief that competency standards would
provide a more objective and systematic approach to the assessment of the work.

The absence of definitive work value criteria was not in dispute throughout the proceedings.
Although the work value criteria nominated by Senior Commissioner Taylor in 1968 is often
used in discussions of work value, these were not definitive. The ACTU/AMWU’s approach
was that an emphasis on the work value criteria would be prejudicial to their application. Yet
this criticism of the work value criteria was misdirected, especially given the potential learning
from the comparable worth proceedings in reviewed in Chapter Five. Within tribunals work
value has been a malleable concept, moulded by applicants and respondents alike to suit the
purpose of the proceedings.
Even allowing for the uncertainty as to how equal remuneration applications should be prosecuted, the decision by the ACTU and AMWU to utilise competency standards as a means of assessing work value was strongly conditioned by the commitment of the (mostly male) AMWU leadership to competency standards. This commitment was shaped not by issues of gender pay equity but by the AMWU’s desire to legitimise competency standards and the approach to industrial organisation that they represented. Throughout the proceedings the dispute between the parties as to whether there was an agreement to use competency standards mediated against a clearer assessment of whether competency standards were an appropriate choice for the purpose of the application. However, competency standards were poorly suited to the task, given that their principal focal point was the trade and post-trade area of the engineering trades. At the time of the application the point scoring system of the competency standards did not extend to the classification covering metal industry process workers.

7.5.4 REQUIREMENT TO DEMONSTRATE A SEX-BASED DISCRIMINATORY CAUSE FOR EARNING DISPARITIES

A further requirement disclosed by the proceedings concerns the test applicants are required to meet to demonstrate that the test of equal remuneration has not been met. The equal remuneration provisions, introduced in 1993, state that equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex. The Commission through both the HPM and the David Syme proceedings interpreted this provision to establish a threshold requirement, such that

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307 In June 1998 women comprised 9.6 per cent of the AMWU’s membership. Representation on Executive bodies was as follows: National Executive (0 per cent), National Council (3.6 per cent) and National Conference (8.3 per cent) – NBAC, AMWU, Z628, Box 20, Return of Australian Manufacturing Workers’ Union (J. Roe) to a Survey of Women in Unions jointly conducted by the Australian Council of Trade Unions and Centre for Labour Studies, University of Adelaide, August 1998. The AMWU had initiated measures to increase the number of women in decision making bodies of the union including the appointment of a National Women’s Coordinator and National and State Women’s Committees – NBAC, AMWU, Z628, Box 42, Minutes of the 13th Biennial National Conference of the Australian Manufacturing Workers’ Union, 24-28 July 1996, p. 15; NBAC, AMWU, Z628, Box 42, Minutes of the 14th Biennial National Conference of the Australian Manufacturing Workers’ Union, 26-30 July 1998, p. 16; NBAC, AMWU, Z628, Box 46, Internal Memorandum from National Secretary (D. Cameron) to J. Roe, Australian Manufacturing workers Union, 20 July 1999. Attached to this correspondence was the Charter for the National Women’s Committee.
applicants are required to establish a discriminatory cause for any male/female earnings disparity that is the subject of the application.

The Commission’s reasoning in this area is based on the *Equal Remuneration Convention*. Indeed the legislative provisions owe their legitimacy to Australia’s status as a signatory to the Convention. This was the means that policy makers at the time determined was the most effective vehicle to enshrining a legislative entitlement to equal remuneration. Yet the reference to the Convention extended beyond the technical apparatus it provided to insert the right into federal industrial relations legislation. There was faith, within key policy units of the federal government, in arbitral or judicial tests of discrimination as a means of redressing both pay and employment inequity. This direction was influenced by European applications and understandings of the test of discrimination, most notably by the European Court of Justice, which had proved successful in addressing systemic forms of discrimination. This influence was evident not only in the equal remuneration amendments in the industrial relations legislation but also in amendments to sex discrimination legislation.

The application of discrimination evident in the available case law has not matched European applications of discrimination. At the outset, the parameters of the test to be applied were rendered unclear by a lack of clarity as to the meaning to be afforded to the term discrimination. The HPM case demonstrated that the definitions of direct and indirect discrimination relied on by the Commission were not compatible with those that reside in the *Sex Discrimination Act*. Beyond the issue of definition the difficulty of applying a test of discrimination to collective industrial arrangements was demonstrated in the HPM case. Commissioner Simmonds determined that applications would be required to demonstrate that the differences in earnings between Process Workers, Packers, General Hands and Storepersons had a discriminatory cause. In the Age case, Vice President Ross determined that, in the absence of any argument to the contrary, he would follow the same approach. The discrimination test, that the Commission has determined underpins the equal
remuneration provisions, has tightened the grounds on which an equal remuneration claim might be made. It is a test that is narrower than that required by the 1972 equal pay principle.

In the HPM case, direct discrimination was not found because the work was sufficiently dissimilar, such that the remuneration differences between men and women could not be found to exist in the same circumstances, itself a function of the sex-based division of labour. Indirect discrimination was not found because no requirement or condition was found to account for the remuneration disparities between men and women workers. In the Age case the Commission indicated that the key requirement was the influence of discrimination on the setting of rates of pay, rather than comparisons of work being performed by men with that being performed by women. Yet reliance of the provisions on discrimination, and the interpretation of discrimination, provides a strong direction for applicants to rely on comparators. The enforced use of comparators is problematic particularly in terms of applications that concern feminised areas of work, when set against the degree of occupational segregation that characterises the labour market.

The reliance on a discrimination test within the equal remuneration provisions limits the capacity for an application seeking orders for a variation to a multi-employer award, even allowing for the uncertainty that attends the use of the provisions in conjunction with the Commission’s award variation powers. The current interpretation of discrimination supports a narrow form of job comparison. This form of comparison is ill-suited to forms of evidence that have historically been relied upon to support work value-based claims that have application to an industry award. Given the reliance of women on award regulation, the capacity of the provisions to address gender pay equity is reduced if award-based remedies fall outside the operation of the provisions. The absence of work value reviews in awards is important. The Commission indicated that the length of time since the last significant work value examination
(thirty years) meant that it was unlikely that the award relativities established at that time still held.

The limitations provided by the discrimination test severely curtailed the capacity of the Commission to investigate work value across the scope of a multi-employer industry award. Of some influence is the context into which the equal remuneration provisions have been introduced. The direction of industrial relations reform has reduced the scope for award-based remedies to labour market inequality. The across-the-board solutions provided through the 1969 and 1972 equal pay principles are no longer available. When the 1969 and 1972 cases were run, there was a comparative wage justice framework, with complex although inequitable relativities across occupations and awards and a history of work value cases setting benchmarks for work value and rates assessments. The scope for arbitration by the AIRC has been significantly reduced over the last decade. The provisions of enterprise agreements that could be arbitrated and the range of matters on which the Commission could arbitrate was significantly reduced. While there was a regular process for setting wage-fixing principles under which minimum rates and minimum conditions could be set, there was significantly less opportunity for an examination of work value within an award.

The proceedings reviewed in this chapter have revealed weaknesses in the jurisprudence that emerged from the 1993 equal remuneration amendments. These weaknesses which arise from the construction of the provisions and their interpretation provide insight to the design of institutional pay equity reform. Notably the reference to discrimination has hindered rather than enhanced the utility of equal remuneration provisions in Australian labour law. The capacity of the provisions to promote gender pay equity was also hindered by the intrusions of neoliberal policy change on Australian labour law more generally. This has narrowed the opportunity for new advances in gender pay equity reform in the federal jurisdiction. In this vacuum state industrial jurisdictions have examined their capacity to narrow the gender pay gap. It is these measures that are addressed in the next chapter.
CHAPTER EIGHT: THE NEW SOUTH WALES PAY EQUITY INQUIRY AND EQUAL REMUNERATION PRINCIPLE PROCEEDINGS

8.1 INTRODUCTION

This chapter examines the outcomes from two of the more recent institutional developments in pay equity, the New South Wales Pay Equity Inquiry and the determination of a new equal remuneration principle. Both of these cases were conducted in the Industrial Relations Commission of New South Wales, and therefore covered workers covered by state awards. As we saw earlier, state industrial relations commissions are the junior partners in Australia’s federal system, which is dominated by the federal award coverage of the Australian Industrial Relations Commission (AIRC). This distinction has recently been reinforced by virtue of federal legislative amendments in 2005, amendments discussed in further detail in Chapter Three.

The previous two case studies outlined critical milestones in the learning about how might pay equity be achieved. This case study, focused on one particular state, adds to this story by detailing the labour law measures adopted in this state jurisdiction to address the persistent nature of the gender pay gap. These measures are relevant to this thesis because they offer a distinctive counter-point to those measures that prevail in the federal jurisdiction. The chapter is organised as a chronology, beginning with an account of the origins of the Inquiry, followed by a review of the Inquiry proceedings – including commentary on the occupational case studies that formed the heart of the Commission’s deliberations – and an account of how the new equal remuneration principle that emerged from proceedings subsequent to the Inquiry was actually weaker than that recommended by the Inquiry. The Chapter concludes with a review of the first two cases conducted under the principle and the role of the Inquiry in instigating developments in other states, together with a political analysis of events in New South Wales.

1 IRC 6320 of 1997, Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996 (NSW).
8.2 THE NEW SOUTH WALES PAY EQUITY INQUIRY

8.2.1 ORIGIN AND COMMENCEMENT

In legal terms the New South Wales Pay Equity Inquiry arose from a reference, dated 10 November 1997, from the New South Wales Minister for Industrial Relations, pursuant to s.146(1)(d) of the *Industrial Relations Act 1996* (NSW). Behind this bland legal announcement, the origins of the Inquiry were more colourful. The need for an Inquiry into the disparity between men’s and women’s earnings was a long-standing item in Australian Labor Party (ALP) policy. That policy held in part that the industrial tribunal in New South Wales would be bound to apply principles of pay equity to ensure that over time the gap between male and female pay be eliminated. Further, the tribunal was to be afforded a proactive role to investigate causes of pay disparity and to correct any imbalances arising from discriminatory practices. An additional influence was the disparity in voting patterns between women and men; at the 1991 election there was a significantly greater number of women had voted for the incumbent conservative Premier, John Fahey, compared to the then Leader of the Opposition, Bob Carr.

With the election of the Carr Labor government in March 1995, new industrial relations legislation, containing altered equal remuneration provisions, was passed (s.23 *Industrial Relations Act*). The design of the legislation was led by the newly installed Minister for Industrial Relations, Jeff Shaw, who had been Shadow Minister for Industrial Relations between 1991-1995 and a prominent labour law barrister prior to that time, being appointed Queens Counsel in 1986. Shaw recalls that at the time of the legislation there was some concern from women’s organisations that the legislation lacked sufficient focus but, in the face of sustained employer opposition, he did not wish to make the legislation more expansive because of fears that the legislation would not pass the Upper House of the New

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3 Interview Meredith Burgmann, Member of Legislative Council, New South Wales Parliament, 9 March 2005.
4 Australian Labor Policy – New South Wales Branch, New South Wales Industrial Relations Policy for the 1990s. This documentation supplied by Meredith Burgmann in interview, 9 March 2005.
5 Interview Meredith Burgmann, Member of Legislative Council, New South Wales Parliament, 9 March 2005.
6 The provisions are reproduced at Appendix Eight.
South Wales Parliament. The employer opposition was global in its nature but focused on the direction to a comparator methodology that they felt was implicit within the provisions.

On International Women’s Day in 1996 the newly elected government released a pay equity strategy which identified five key areas of government action:

- redressing the undervaluing of women’s skills and occupational segregation by providing access to other forms of remuneration;
- facilitating equitable change in the workplace;
- eliminating discrimination in industrial instruments;
- increasing access to career paths and to training;
- promoting the New South Wales public sector as a model of excellence (New South Wales Department of Industrial Relations – Women’s Equity Bureau, 1996: 6).

The statement announced by the Minister for Industrial Relations provided that the government would convene a high profile tripartite Pay Equity Taskforce. The Minister considered the Taskforce a useful way to introduce the industrial parties to the issues that would be confronted in any inquiry conducted by the Industrial Relations Commission of New South Wales. This strategy was viewed by some concern by the National Pay Equity Coalition (NPEC) who viewed the Taskforce as a potential means by which the Inquiry might be derailed. The terms of reference for the Taskforce were as follows:-

1. Investigate pay equity issues as they affect women workers in New South Wales. In particular to:
   
   i) Commission specific case studies which analyse and identify factors contributing to pay differentials between men and women’s pay.
   
   ii) review the current legislative framework for pursuing pay equity issues in New South Wales workplaces.
   
   iii) identify current policies/initiatives which impact on women’s remuneration.
   
   iv) examine the way labour markets impinge upon pay equity.

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7 Interview Jeff Shaw, New South Wales Attorney General and Minister for Industrial Relations, 14 March 2005.
8 Interview Anthony Britt, Counsel for the Metal Trades Industries Association, Australian Chamber of Manufactures and other employer organisations, New South Wales Pay Equity Inquiry, 9 March 2005.
9 Interview Jeff Shaw, New South Wales Attorney General and Minister for Industrial Relations, 14 March 2005; Interview Philippa Hall, Director General, New South Wales Department for Women, 11 February 2005.
10 NPECA, Minutes of Meeting, 20 March 1996; Interview Meredith Burgmann, Member of Legislative Council, New South Wales Parliament, 9 March 2005.
2. Advise and make recommendations to the Attorney-General and Minister for Industrial Relations on policy and initiatives for the implementation of pay equity in New South Wales. In particular, the identification of initiatives that will further implement the New South Wales Government’s Pay Equity Strategy.

3. Inform national and state working parties of the New South Wales perspective on the impact on women of developments in state and federal industrial relations systems. In particular to inform Labour Ministers Council (LMC) and Departments of Labour Advisory Committee (DOLAC) of current and emerging pay equity issues (New South Wales Pay Equity Taskforce, 1996).

The Taskforce released an issues paper in 1996, invited submissions and consultations and released a final report in March 1997 (New South Wales Pay Equity Taskforce, 1996). The Taskforce was not without some internal dissent – the Chief Executive of the Employers’ Federation, Garry Brack, labelled the Taskforce a ‘set up’\textsuperscript{11}. Concern was expressed also by NPEC that the material considered by the Taskforce lacked critical focus, a failing that had the potential to diminish the prospect of an Inquiry and was the focal point of meetings between Meredith Burgmann and the Minister for Industrial Relations, Jeff Shaw\textsuperscript{12}. Burgmann was effectively the chief proponent for the women’s organisations, being Convenor of the NPEC and a member of the New South Wales Legislative Council. An additional point of leverage was Burgmann’s membership, along with Shaw, of the ALP’s Parliamentary Left Caucus. The eleven recommendations of the Taskforce included a recommendation for the appointment of a Deputy President (Pay Equity) with specialist responsibility for pay equity in the Industrial Relations Commission of New South Wales, and the establishment by ministerial reference of an Inquiry by the Commission into work value (New South Wales Pay Equity Taskforce, 1997: 47-50).

In the final stages of the Taskforce, work commenced on the preparation of submissions to the New South Wales Cabinet, laying the groundwork for Cabinet approval of the recommendations from the Taskforce and the release of an updated pay equity strategy to be

\textsuperscript{11} NPECA, Minutes of Meeting, 23 July 1996.
\textsuperscript{12} Interview Meredith Burgmann, Member Legislative Council, Convenor, National Pay Equity Coalition, 9 March 2005; NPECA, Minutes of Meeting, 23 July 1996; NPECA, Minutes of Meeting, 28 August 1996.
announced by the Premier on International Women’s Day, 1997\textsuperscript{13}. There was concern from women’s organisations, most notably NPEC, that the government would fail to take up the recommendations of the Taskforce, primarily the recommendation for an Inquiry into work value\textsuperscript{14}. This concern formed the subject of petitioning to the Premier, Treasurer and Minister for Industrial Relations\textsuperscript{15}. The precise impact of this petitioning was uncertain, although Cabinet proceeded to endorse the recommendations of the Taskforce\textsuperscript{16} with the Government shortly thereafter announcing the Inquiry\textsuperscript{17} on the eve of International Women’s Day 1997. A revised pay equity strategy was announced at the same time\textsuperscript{18}.

The prospect of an Inquiry remained somewhat uncertain in the six months following the release of the Taskforce report. This was not a contest conducted in the public forum but one carried out in private representations by leading feminists to the Premier, the Minister for Industrial Relations and the Director-General of the New South Wales Department of Industrial Relations. The announcement of the Inquiry was not imminent, a factor that was due to the active petitioning of sections of the bureaucracy and the two peak industrial organisations in New South Wales, the Labor Council and the Employers’ Federation, against the Inquiry\textsuperscript{19}. The opposition of the Employers’ Federation was not surprising. The Employers’ Federation of New South Wales opposed all eleven recommendations of the Taskforce (New South Wales Pay Equity Taskforce, 1997: 47). Both the Labor Council and the Employers’ Federation were opposed to the open ended nature of an Inquiry, its proposed carriage by a Counsel Assisting and the opportunity for community groups, most notably women’s

\begin{footnotesize}
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\item \textsuperscript{13} IRNSW, IRC 6320 of 1997, Correspondence from Minister for Women (F. Lo Po) to Premier (R. Carr), 18 February 1997, appended by Ministerial Submission, Cabinet Minute 17-97, The New South Wales Government’s Pay Equity Strategy.
\item \textsuperscript{14} NPECA, Minutes of Meeting, 13 February 1997.
\item \textsuperscript{15} NPECA, Correspondence from National Pay Equity Coalition (F. Hayes) to New South Wales Attorney General and Minister for Industrial Relations (J. Shaw), 19 February 1997; National Pay Equity Coalition, Correspondence from National Pay Equity Coalition (F. Hayes) to Premier of New South Wales (R. Carr), 28 February 1997; National Pay Equity Coalition, Correspondence from National Pay Equity Coalition (F. Hayes) to Treasurer of New South Wales (M. Egan), 28 February 1997.
\item \textsuperscript{16} Cabinet Office New South Wales, Cabinet Decision re Cabinet Minute No. 17-97 The Government’s Pay Equity Strategy, 25 February 1997. This documentation supplied by Mary Grace in interview, 21 April 2005.
\item \textsuperscript{17} NPECA, Press Release by the New South Wales Attorney General and Minister for Industrial Relations (J. Shaw), Historic Initiative on Gender Pay Equity, 5 March 1997.
\item \textsuperscript{18} New South Wales Department of Industrial Relations – Women’s Equity Bureau (1997) The New South Wales Government’s Pay Equity Strategy, New South Wales Department of Industrial Relations, Darlinghurst.
\end{itemize}
\end{footnotesize}
organisations, to appear before it. Following discussions with the Employers’ Federation, the Labor Council met with the Minister for Industrial Relations and put to the Minister that the Inquiry be replaced by an application at a State Wage Case for a new equal pay principle\textsuperscript{20}. There were also elements within the Labor Council who, while scathing of those within their ranks who viewed pay equity as ‘what problem’, felt that an Inquiry would be sidelined – a more immediate and direct outcome would be through a direct application under the 1973 (state) equal pay principle that would provide the impetus for a newly cast principle\textsuperscript{21}.

Within NPEC, the tactics of the Labor Council were viewed as a clear attempt to ‘torpedo the Inquiry’\textsuperscript{22}. The Minister, in reply to the concerns raised by NPEC, noted that a number of issues had arisen that might impact the manner in which the government’s pay equity strategy was progressed. These issues included the application by the Labor Council of New South Wales to conduct a State Wage Case and the likely inclusion of ‘a pay equity component\textsuperscript{23}. The Labor Council was of the view that this position was firmly entrenched, even welcomed by the Minister, and was somewhat surprised to find six weeks later that the Inquiry was ‘back on’. This change of events was attributed by the Labor Council at the time to the ‘noisy minority’, comprising ‘the Parliamentary Left, women’s organisations and academics\textsuperscript{24}.

Within women’s policy sections in the New South Wales bureaucracy there was greater certainty that the combination of an ALP policy position, Cabinet’s endorsement of the recommendations and the announcement of the Inquiry, would provide sufficient political impetus for the Inquiry to proceed. There was less certainty about the model the Inquiry

\textsuperscript{19} Interview Jeff Shaw, New South Wales Attorney General and Minister for Industrial Relations, 14 March 2005; Interview Meredith Burgmann, Member Legislative Council, Convenor, National Pay Equity Coalition, 9 March 2005.
\textsuperscript{20} Interview Gail Gregory, Executive Office, Labor Council of New South Wales, 20 February 2005. Position of the Labor Council was also acknowledged by the Minister in correspondence to National Pay Equity Coalition. NPECA, Correspondence from New South Wales Attorney General and Minister for Industrial Relations (J. Shaw) to National Pay Equity Coalition (F. Hayes), 17 June 1997.
\textsuperscript{22} NPECA, Minutes of Meeting, 29 April 1997.
\textsuperscript{23} NPECA, Correspondence from New South Wales Attorney General and Minister for Industrial Relations (J. Shaw) to National Pay Equity Coalition (F. Hayes), 17 June 1997.
would follow and therefore how expansive it would be. There was persistent opposition by the peak industrial organisations to the participation of women’s organisations. The Labor Council of New South Wales opposed the intervention by women’s organisations because of a long held abhorrence, the basis of which was that such groups failed to understand the nature of the industrial process and the manner of negotiations between the major industrial parties that characterised industrial relations in New South Wales. It seemed that unionists in key positions in New South Wales held the view that there was no common ground between feminism and the union movement – any examination of pay equity and related issues reminded them bitterly of the role played by feminists in assisting the women at the centre of a discrimination claim against Australian Iron and Steel. A State Wage Case was also preferable to the Labor Council because it would be forum where they would exercise far greater control over the proceedings.

The terms of reference for the Inquiry were drafted by the Director of the Women’s Equity Bureau, Mary Grace and Gail Gregory, Executive Officer, Labor Council. They were circulated to a number of organisations, some of whom sought clarification on the investigative processes that would be relied on in the Inquiry. Although there were a number of challenges, the terms remained unamended and were accepted by the Minister. The passage of the Taskforce recommendations and then the announcement of the Inquiry reflected something of the zeal of a newly elected government but also a combination of

25 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005.
27 Australian Iron & Steel Pty Ltd v. Banovic (1989) 168 CLR 165. In this case the applicants challenged the recruitment practices of Australian Iron and Steel recruitment practices that led to very few women being employed prior to the 1980s. This had particular consequence in situations of redundancy where the company, supported largely by on-site unions, applied the ‘last-on/first-off’ rule. Due to the recruitment practices women were far more likely than men to be made redundant. Interview Meredith Burgmann, Member Legislative Council, Convenor, National Pay Equity Coalition, 9 March 2005; Interview Fran Hayes, National Pay Equity Coalition, 18 February 2005.
28 Interview Meredith Burgmann, Member Legislative Council, Convenor, National Pay Equity Coalition, 9 March 2005; Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
29 Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005; Interview Anthony Britt, Counsel for the Metal Trades Industries Association, Australian Chamber of Manufactures and other employer organisations, New South Wales Pay Equity Inquiry, 9 March 2005; Correspondence from National Pay Equity Coalition, (F. Hayes) to the Director-General, New South Wales Department of Industrial Relations (W. McDonald), 20 October 1997; NPECA, Minutes of Meeting, 1 September 1997; NPECA, Minutes of Meeting, 7 October 1997
'right people, right place, right time' - there was a well maintained network of feminists and sympathisers across key agencies who were able to support the reforms and provide the necessary impetus when obstacles presented themselves.

The news of the Inquiry was welcomed as a victory by women’s organisations. In hindsight this acclaim should have been accompanied by submissions on the terms of reference which were seen to be hastily drawn, narrow and ignorant of the dynamics of pay inequity. The only substantial clarification that had been sought by NPEC concerned the process that the Inquiry would follow. In particular, the terms of reference assumed a comparator methodology that had been problematic in the comparable worth case and would prove likewise in the HPM Case - the deficiencies in the terms revealed something of the progress that was required, even within specialist policy units, to get ‘the approach right’. Accordingly within the early days of the Inquiry the proceedings were viewed as struggling to move beyond comparisons within individual workplaces. Employer organisations, for different reasons, identified the comparator methodology as problematic as they viewed it as the means through which cross industry and cross occupations could be undertaken.

The Minister formally announced the Inquiry in October 1997 with the final terms of reference reading as follows:-

1. Whether work in female dominated industries is undervalued in terms of remuneration paid relative to work in comparable male dominated occupations and industries. The Commission shall have regard to such female and male dominated
industries and occupations as it considers sufficient to permit it to make recommendations but shall not be required to examine all such industries and occupations. In determining those industries and occupations the Commission should have regard to the needs to impose reasonable restraints on time to complete the Inquiry.

2. The adequacy of texts and mechanisms for ascertaining work value and the extent to which, if at all, they are inequitable on the basis of gender.

3. In developing recommendations as to remedial measures if necessary, consideration shall be given, but not limited to:

   (a) current work value tests;
   (b) the minimum rate adjustment process and other industrial mechanisms including productivity;
   (c) job evaluation techniques;
   (d) matters of discrimination and the *Anti-Discrimination Act 1977* (New South Wales) as provided in the *Industrial Relations Act 1996* (New South Wales);
   (e) relevant international labour and other conventions, including but not limited to ILO Convention 100 and 111 and the United Nations Convention on Elimination of all forms of Discrimination Against Women.

4. The mechanisms and processes by which pay equity matters can be brought before the Commission.

5. In the conduct of the Inquiry, and in any recommendations contained in its report, the Commission must take into account the public interest and for that purpose must have regard to:

   (a) the objects of the *Industrial Relations Act 1996* (New South Wales);
   (b) the likely effect of its decision on the New South Wales economy, in particular the need to protect the employment base of the state and any adverse impacts on employment opportunities for women; and
   (c) inter-State comparative rates.

### 8.2.2 INITIAL PROCEEDINGS

The Inquiry was conducted by a senior member of the Industrial Relations Commission of New South Wales, Justice Leonie Glynn, whose first duty on 28 November 1997 was to issue draft directions which set out the procedures for the conduct of the Inquiry, including the role of Counsel Assisting and the filing of material. Justice Glynn was a long standing member of the Commission, having first been appointed as a Conciliation Commissioner to the Commission’s predecessor, the New South Wales Industrial Commission in 1976. After being admitted to the New South Wales Bar in 1964, Glynn was made a Judge of the New South

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Wales Industrial Court in 1980 and appointed as a Judge and Deputy President of the Industrial Relations Commission of New South Wales in 1991. The appointment of the member of the Commission who would head the Inquiry had been the subject of discussions between the Labor Council and the President of the Commission, William (Bill) Fisher but was ultimately the decision of the President. The Labor Council had petitioned for Deputy President Monika Schmidt to head the Inquiry as it was their view that Schmidt would not allow the Inquiry to become too expansive. The irony of the Labor Council supporting Schmidt lay in Schmidt’s background. She had been appointed to the Commission as a Judge and Deputy President in 1993, her previous position being a partner of the law firm, Minter Ellison where she had consistently represented employers before the Commission.

The Inquiry was advertised broadly through metropolitan and regional media with Counsel Assisting advising fifty four industrial and community organisations. At the first hearing on 17 December 1997 it became clear that the early work of the Inquiry would be consumed by procedural matters. The Employers’ Federation in its initial submission opposed the role of Counsel Assisting in the Inquiry. If this submission were to be refused the Federation contended that the process of Counsel Assisting should be altered so as to have solicitors other than the Crown Solicitor instructing Counsel Assisting, given that the Crown Solicitors were also instructing the Crown. The Employers’ Federation also opposed the choice of Michael Walton as Counsel Assisting, criticising the Minister for Industrial Relations who prior

Changes to the prevailing industrial relations legislation influenced the role of the state industrial authority in New South Wales, including its judicial role. When legislative change effectively created a new industrial authority, appointments to the former authority were terminated and new appointments made. Between 1991-96 the judicial functions of the Commission were separated from the operation of the Commission, thus judicial appointees to the Commission effectively had two appointments, to the Industrial Relations Commission of New South Wales and to the Industrial Court of New South Wales. From 1996 with the promulgation of the *Industrial Relations Act 1996* (NSW) judicial appointees were appointed to the Industrial Relations Commission and to the Industrial Relations Commission in Court Session.


Interview Gail Gregory, Executive Office, Labor Council of New South Wales, 20 February 2005; also reported NPECA, Minutes of Meeting, 1 September 1997.


to his entry to Parliament had shared the same legal chambers as Walton. A member of the
industrial bar since 1986, Walton had regularly appeared for unions in state and federal
matters, and was a former Senior Industrial Officer with both the Australian Workers’ Union
and the Gas Industry Salaried Officers’ Federation. He was appointed directly by the Minister
for Industrial Relations. He had been suggested at a comparatively early stage in the
negotiations concerning the Inquiry, with support from the Labor Council on the basis that
the Inquiry would not ‘get out of hand’. Such enthusiasm was not shared by the women’s
organisations and the leaders of unions with significant numbers of women members. They
had assumed that a woman would be appointed to the role and were not confident of
Walton’s grasp of gender pay equity. In anticipation of this criticism, Patricia Lowson, a
member of the same chambers as Walton, was appointed by Walton as his assistant.

In addition to its submissions on procedure, the Employers’ Federation asked the Inquiry to
make initial rulings on the meaning to be afforded the terms ‘remuneration’, ‘comparable’ and
‘female dominated’. Justice Glynn responded that the role of Counsel Assisting would remain
in accord with the initial directions; she requested also that parties file contentions with
regard to the matters of definition raised by the Employers’ Federation. Parties were directed
also to nominate industries and occupations for consideration and investigation by the
Inquiry.

For the three feminist organisations which gave an indication of their intention to participate
in the Inquiry, these early days were an indication of the technical ardour that would be
required for effective participation in the Inquiry. The expectation of Justice Glynn and
Counsel Assisting was that participation would require appearances by the parties on all

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45 Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005;
Interview Mary Grace, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 21
April 2005.
46 As reported NPECA, Minutes of Meeting, 30 June 1997.
48 Interview Fran Hayes, National Pay Equity Coalition, 18 February 2005; Interview Alison Peters, Vice-President,
49 Interview Mary Grace, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 21
April 2005.
hearing days of the Inquiry, and Counsel Assisting indicated that he would address the Bench if representation was found to be intermittent. For community organisations this would present some challenge as the Inquiry occupied 54 sitting days, recorded in 2693 pages of transcript. One hundred and nineteen witnesses were called and 459 exhibits tabled. The NPEC, Women’s Electoral Lobby (WEL), and the Australian Federation of Business and Professional Women (AFBPW) were ultimately to handle the requirements of attendance by combining their resources, despite the initial reservations about this arrangement by the Office of Counsel Assisting.

Responsibility for coordination of the representation by NPEC, WEL and AFBPW fell to Fran Hayes, a founding member of the NPEC and an activist with fifteen years of experience with trade unions and community organisations. A number of key members of the three women’s organisations could not be identified publicly as they held positions in the state or federal bureaucracy and in trade unions. Representation ultimately fell to a core group of nine women who appeared on a voluntary basis. Assistance in advocacy preparation was provided by a member of the Bar, Chris Ronalds, who gave a weekend seminar, on a pro bono basis, on industrial advocacy practice. The office of Meredith Burgmann was made available as a central contact point for the receipt of documents and for other forms of secretarial support. The preparation of submissions fell to a larger group of women as this task did not risk public exposure. While the rostering arrangement provided some relief it was not necessarily always able to meet the demands of preparation for cross-examination of witnesses and of written submissions required regularly throughout the Inquiry.

Ultimately the parties that were to appear regularly at the Inquiry were:

- The Australian Chamber of Manufactures (ACM) (New South Wales), Catholic Hierarchy of New South Wales (Province of Sydney), Motor Traders’ Association of New South Wales, Road Transport Association, Local Government & Shires Association and the

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50 NPECA, Minutes of Meeting, 10 March 1998.
51 Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I, p. 81-83.
52 Interview Fran Hayes, National Pay Equity Coalition, 18 February 2005.
53 Interview Fran Hayes, National Pay Equity Coalition, 18 February 2005.
Metal Trades Industries Association (MTIA) (the ACM and the MTIA would in time amalgamate to become the Australian Industry Group);

Chamber of Manufactures of New South Wales (Industrial) (later to become Australian Business Industrial Ltd);

Crown in the right of the State of New South Wales, Public Employment Office of New South Wales, President of Anti-Discrimination Board, Health Administration Corporation, Home Care Services of New South Wales, Department of Education and Training;

Employers’ Federation and its affiliated organisations, including the Professional Hairdressers Association, the Aged Services Association, the Restaurant and Catering Association, the Registered Clubs Association;

Human Rights and Equal Opportunities Commission (HREOC);

Labor Council of New South Wales;

NPEC, AFBPW (New South Wales Division), and WEL (known throughout the hearings as the Women’s Organisations).

Each of the organisations adopted particular strategies to assist their participation in the Inquiry. The Labor Council and the Employers’ Federation used their in-house industrial advocates and were granted funding through the course of the Inquiry, ostensibly for education programs for their respective memberships. The Labor Council also received a transcript of the proceedings of the Inquiry free of charge. At that time the agreed strategy within the Labor Council, formulated in discussions between the Executive Office, Secretary and the Assistant Secretary, was that the Inquiry should not result in ‘anything that would pose a problem for unions….. or result in anything that was wider than what might have been arrived at through a State Wage Case’. The ACM and the New South Wales Chamber of Manufactures appointed counsel for the majority of proceedings, although the appointees had appeared frequently for the respective organisations.

54 Respectively Tim Anderson and Gail Gregory
55 Interview Kathryn Freytag, Policy Advisor, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 24 February 2005; Interview Philippa Hall, Deputy Director-General, New South Wales Department for Women, 11 February 2005,
57 At that time Peter Sams, later to be appointed Deputy President of the Industrial Relations Commission of New South Wales.
58 At that time Michael Costa, later to be appointed to a vacant position in the Upper House of the New South Wales Parliament and thereafter to be appointed to the Carr Government Cabinet.
59 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
The Crown established a Crown Working Party to formulate submissions and instruct the Crown’s appointed counsel, Stan Benson. The appointment of Stan Benson was made by the Public Employment Office within the Premier’s Department, prior to the formation of the Crown Working Party, and reflected the Crown’s role as a significant public sector employer. Benson’s previous work for the Crown had primarily involved appearances for the Crown as a respondent to applications lodged by teaching and nursing unions. The working party comprised both key policy units and departments with a significant employment role in the areas of teaching and nursing. Specifically the membership comprised: the Women’s Equity Bureau, New South Wales Department of Industrial Relations; the New South Wales Department for Women; the Public Employment Office, New South Wales Premiers’ Department; the Office of the Director of Equal Opportunity in Public Employment (ODEOPE); the New South Wales Department of Health; the New South Wales Department of Education and Training; and the New South Wales Treasury. The involvement of Treasury was a deliberate measure, designed to ensure that Treasury took the matter seriously and were appraised of all of the issues. Coordination of the working party resided with the Public Employment Office, New South Wales Premier’s Department, who seconded Elizabeth Fletcher from ODEOPE for this purpose. This appointment was a result of Fletcher’s experience with gender pay equity at the Human Rights and Equal Opportunities Commission (HREOC) where she had headed the secretariat to the Inquiry into Overaward Payments.

The formative stages of the Inquiry raised concerns within the Women’s Organisations that the Inquiry would be narrowly cast and incapable of addressing the cumulative and broad-based nature of inequity. This critique evolved in the maelstrom of preparation demanded by the initial requirements of the Inquiry and time has given it a sharper and clearer focus. Yet it essentially held three components: the lack of direction within the Terms of Reference to

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60 In turn Anthony Britt and Bruce Nettheim.
examine the relevant legislative provisions; the requirement for assessments of comparable work in sex-segregated industries without assessment of the means by which inequity may be established; and the narrow lens though which remedial measures were to be addressed. Each of these will be considered in turn.

**Existing Legislation and the Terms of Reference**

The failure of the terms of reference to explicitly require that the Inquiry investigate the potential for the relatively new legislative provisions to realise equal remuneration is best read against the provisions themselves. The key provisions in the *Industrial Relations Act* included the definition provided to pay equity in the dictionary contained within the legislation, 'equal remuneration for men and women doing work of equal or comparable value', and those provisions that provided that the Commission must ensure that awards provide for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value (s.23). Arguably these provisions constrained the investigation of equal remuneration to matters of gender pay inequity arising from the operation of industrial awards and remuneration set by awards, and not from the distribution of overaward payments. The explicit provisions concerning equal remuneration did not cite discrimination in the way of the federal equal remuneration provisions.

The equal remuneration provisions had been the subject of discussion during the passage of the *Industrial Relations Bill 1995 (NSW)*. At this stage the reliance on discrimination within the federal equal remuneration provisions was not viewed as problematic, with early reviews of the equal remuneration provisions by NPEC, observing that the scope of the remedial

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64 NPECA, Minutes of Meeting, 16 January 1998.

65 The precise terms of the key legislative provisions (s.19, s.21 and s.23) are set out at Appendix Eight. Section 21 of the legislation sets out the conditions to be provided in awards. These include equal remuneration and other conditions for men and women during work of equal or comparable value. Section 19 provides for a three yearly review of awards and includes a provision that the Commission must take into account any issue of discrimination including pay equity.
measures available to the Commission was less than that available federally\textsuperscript{66}. The same meeting also observed that the understanding afforded to discrimination within the federal legislation was not reflected in either the draft or final legislation\textsuperscript{67}.

The initial directions to the parties indicated that the Inquiry would proceed to assess undervaluation in industries and occupations selected for examination, without any prior assessment of what constituted inequity or of the means by which a finding of inequity could be established. This was a critical area as it was the contention of the Women's Organisations that the tests relied upon by industrial tribunals were gendered. Feminist analysis of the application of the work value principle by the Australian Conciliation and Arbitration Commission (ACAC) had identified gaps and inconsistencies in its application to the evaluation of women's work (Bennett, 1988; Short, 1986). Yet at the outset there was no commitment by either Justice Glynn or Counsel Assisting that assessment of the questions raised by the second term of reference was necessary for consideration of the first.

\textbf{The Requirement for Comparable Assessment}

The first term of reference rested on the premise that undervaluation would be assessed through a comparison of female-dominated work and male-dominated work. The implication that undervaluation could only be proven in this way is problematic when read against tribunal experience in conducting comparable assessment involving disparate areas of men's and women's work. The rules of comparable assessment have been filtered through the terms and interpretation of the work value principles handed down by successive state and federal tribunals. Leaving aside the debate that would take place in the Inquiry as to the meaning of 'comparable', Commission practice had indicated that comparable assessments have been conducted more readily when the areas of work in question are characterised as essentially similar. Such a construction is thus unable to address the essentially sex-segregated nature of men's and women's employment in Australia. Put simply, men and

\textsuperscript{66} NPECA, Minutes of Meeting, 1 November 1995; NPECA, Minutes of Meeting, 22 April 1996.
\textsuperscript{67} NPECA, Minutes of Meeting, 1 November 1995; National Pay Equity Coalition, Minutes of Meeting, 20 March 1996.
women largely perform different work. Thus cast, the first terms of reference precluded the Inquiry from examining the pay equity claims of teachers or nurses, two highly female-dominated areas of work, that lack straightforward or direct male comparators.

The Narrow Scope of Remedial Measures
The terms of reference also implied that the mechanisms contributing to inequity, if proven, would be the current work value tests, the minimum rate adjustment process and other industrial mechanisms including productivity and job evaluation techniques. Thus the Inquiry was not immediately directed to a broader range of determinants, including the disproportionate employment of women in small workplaces and part-time and casual employment, their lower access to overaward payments, recent wage increases arising from enterprise bargaining agreements, the absence of measures to support women combining work and family responsibilities, and the historical lower rate of unionisation of women in paid work.

8.2.3 NOMINATION OF INDUSTRIES AND OCCUPATIONS FOR INVESTIGATION BY THE NEW SOUTH WALES PAY EQUITY INQUIRY
The direction by Counsel Assisting to the parties to the Inquiry to nominate industries for investigation provoked interesting responses. Despite the industrial opportunities provided by the Inquiry, the Labor Council initially had little to offer in the way of immediate areas of investigation. A starting point had been provided by the three case studies commissioned by the New South Wales Pay Equity Taskforce research: hairdressers and motor mechanics; librarians and geoscientists in the New South Wales public sector; and child care workers and advanced metal industry tradespersons. Outside these cases the Labor Council’s request for its affiliates to nominate industries for potential investigation was met by indifference68. One explanation was the amount of evidence that was required to support the nomination. This included the nomination of particular comparator occupations and/or industries, relevant industrial instruments, the degree of sex-segregation in the comparator occupations, an

68 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
indication of current rates of remuneration and contentions as to why there was a perceived inequity. The requirement for sex-differentiated comparators also posed some tensions for particular unions. Where potential comparator occupations fell within the coverage of a particular union, exposing the undervaluation of women’s work potentially exposed the inaction of the union in seeking to remedy the matter. Union inertia was apparent also when potential comparator occupations fell within the coverage of different unions. Male-dominated unions covering these occupations had no incentive to participate in a process that was perceived as providing no direct benefit to their members.

The criteria put forward by Counsel Assisting to assist the determination of the exemplar occupations and industries were as follows:-

Demonstrably female dominated.

Male comparator or industry.

Female/male occupation is within the New South Wales jurisdiction.

Prehistory of study in female occupation.

Occupation is defined with sufficient certainty to allow data to be obtained for female/male occupation, reasonable likelihood that evidence can be collected within the timeframe.

Total volume of evidence likely to be generated and capacity to deal with it within timeframe.

Demonstrative of particular issues, as follows:

Types of payments, including overawards, penalty rates.
Notorious for low payment of wages to females.
Affects significant number of females.
Subject of mention in processes in giving rise to the Inquiry.
Subject of pay claims based on pay inequities.
Public sector
Number of parties nominated69.

The criteria contained a number of inherent flaws. The constraint posed by the need for comparators has been explored already; the additional step of locating both comparators in the New South Wales jurisdiction did not recognise the differences that have attended

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historically the industrial coverage of men and women. Data collection on this issue was suspended by the Australian Bureau of Statistics (ABS) at the time of the Inquiry due to the difficulties posed by the shift in policy to enterprise bargaining. Data from 1990 reveals that women were more likely to be covered by state industrial instruments, while men were more likely to be employed under a federal award or agreement (Australian Bureau of Statistics, 1990b: 4). There were genuine difficulties in aligning detailed occupational earnings data, disaggregated to Australian Standard Classification of Occupations (ASCO) (Second Edition) unit codes\textsuperscript{70}, with the industrial classifications that underpinned awards. This issue continued to plague the Inquiry. Short of industry surveys, parties pursing a claim of inequity in an area of minimum rates awards were dependent on ABS earnings data to demonstrate the actual rates of pay for that occupation. Those parties were then able to provide some assessment of the level of remuneration provided by the market relative to the award rate of pay for that area of work. The use of such earnings data was contested frequently by employer organisations, as it could not be proven that the scope of the earnings survey administered by the ABS was consistent with the scope and incidence of the award in question.

In the lead up to the filing of nominations of industries and occupations, the office of Counsel Assisting expressed concern at the likely nomination by the Labor Council and the Crown of the hairdressers/motor mechanics case study initiated by the New South Wales Pay Equity Taskforce\textsuperscript{71}. Counsel Assisting indicated that inclusion of the case study would open the Inquiry to ridicule and indicated his own reservations about the legitimacy of the comparison. In blunt terms, hairdressing was not viewed as serious work. The reservations expressed by Counsel Assisting were ironically, given the purpose of the Inquiry, a metaphor for the barriers to a gender-free assessment of work value. The criticism directed at the research conveniently ignored the trade qualification basis of both areas of work and their location in the service sector, primarily in small workplaces. Yet despite an alignment of award rates of

\textsuperscript{70} As published by the Australian Bureau of Statistics.
\textsuperscript{71} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
pay there were dramatic differences in the labour market rates for hairdressers and motor mechanics, a factor that the Labor Council and the Crown felt worthy of investigation.

Ultimately twenty industries and occupations were nominated\textsuperscript{72}. The Labour Council nominated nine areas with individual unions nominating a further nine areas, nominations which were supported by the Labor Council. With the exception of unions representing child care workers and the Public Service Association, unions were indifferent to the nomination of industries\textsuperscript{73}. Five areas were nominated by more than one party and 18 nominations were supported by more than one party to the proceedings\textsuperscript{74}. The Employers’ Federation refused to nominate any industries/occupations to support their contention that pay inequity did not exist. The ACM nominated a comparison between first year enrolled nurses in New South Wales public hospitals and first year coal miners employed under the federal jurisdiction. Their point, although not explicitly stated in their supporting documentation, was to illustrate the additive impact of union activity on male earnings and to place pressure on the Crown given that the state government, through its agencies, was the largest employer of nurses in the state\textsuperscript{75}. The Council of Social Services nominated the social and community services industry.

The ACM’s nomination of coal miners and enrolled nurses, and the Labor Council’s nomination of school ancillary staff did prove to a source of consternation for the New South Wales Department of Health and New South Wales Department of Education representatives on the Crown Working Party\textsuperscript{76}. The Crown decided not to oppose the nominations as to do would be

\textsuperscript{72} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, p. 13. A schedule of the nominated industries and occupations is set out in Table A9.1 in Appendix Nine.

\textsuperscript{73} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.

\textsuperscript{74} Industrial Relations Commission of New South Wales (1998c) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume III}, p. 63-67.

\textsuperscript{75} Interview Elizabeth Fletcher, Facilitator Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Premier’s Department, 20 February 2005.

\textsuperscript{76} Interview Elizabeth Fletcher, Facilitator Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Premier’s Department, 20 February 2005.
politically counter-intuitive given that the Inquiry had arisen from a ministerial reference\textsuperscript{77}. Ultimately the school ancillary staff did not proceed beyond the nomination phase, while the coal miner/nurses case study floundered given the absence of evidence from the employer organisations and from the Construction, Forestry, Mining and Energy Union (CFMEU)\textsuperscript{78}. 

Following the filing of nominations six industries/occupations, set out in Table 8.1, were advanced by Counsel Assisting and accepted by Justice Glynn. The final choice was viewed by Justice Glynn as providing a cross section of professional, paraprofessional, skilled, unskilled, trades and non-trades positions, in manufacturing and service industries, and within the public and private sectors\textsuperscript{79}. In the course of the Inquiry a further occupation, clothing industry outworkers, was proposed by Counsel Assisting following concerns raised by Justice Glynn that the Inquiry had not dealt substantially with a female dominated industry in which the employees received lower pay and were without formal education\textsuperscript{80}.

\textsuperscript{77} Interview Elizabeth Fletcher, Facilitator Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Premier's Department, 20 February 2005.


\textsuperscript{79} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996}, Report to the Minister, Volume I, p. 16.

\textsuperscript{80} Industrial Relations Commission of New South Wales (1998c) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996}, Report to the Minister, Volume III, p. 245.
### Table 8.1: Industry/Occupations Investigated by the New South Wales Pay Equity Inquiry

<table>
<thead>
<tr>
<th>Female Comparator</th>
<th>Male Comparator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1 Child Care Workers</strong>&lt;br&gt;Private sector child care – long day care child care workers with associate diploma level qualifications employed as Advanced Child Care Worker – Qualified under the Miscellaneous Workers’ – Kindergartens and Child Care Centres, &amp;c., (State) Award 1996.</td>
<td><strong>Engineering Associate (Metal and Engineering Industry)</strong>&lt;br&gt;Engineering associates (classification C3) employed under the Metal and Engineering Industry (New South Wales) Interim Award 1990.</td>
</tr>
<tr>
<td><strong>2 Seafood Processors</strong>&lt;br&gt;Level 5 'All Others' classification under the Fish Canning &amp;c., (State) Award 1973</td>
<td><strong>Seafood Processors</strong>&lt;br&gt;Level 4 Butchering classification under the Fish Canning &amp;c., (State) Award 1973.</td>
</tr>
<tr>
<td><strong>3 Public Sector Librarians</strong>&lt;br&gt;Librarians in the New South Wales Public Service employed under the Crown Employees (Librarians) Award 1985.</td>
<td><strong>Public Sector Geoscientists</strong>&lt;br&gt;Geoscientists in the New South Wales Public Service employed under the Crown Employees (Geoscientists – Department of Mineral Resources and Development) Award 1981.</td>
</tr>
<tr>
<td><strong>4 Clerical Workers – Private Sector</strong>&lt;br&gt;Clerical workers at Level 3 under the Clerical and Administrative Employees (State) Award 1996.</td>
<td><strong>Tradesperson (Metal and Engineering Industry)</strong>&lt;br&gt;Tradespeople employed under classification C10, Metal and Engineering Industry (New South Wales) Interim Award 1990.</td>
</tr>
<tr>
<td><strong>5 Hairdressers and Beauty Therapists</strong>&lt;br&gt;Adult hairdressers and beauty therapists employed under the Hairdressers’ &amp;c., (State) Award 1996.</td>
<td><strong>Motor Mechanics</strong>&lt;br&gt;Motor mechanics employed under the federal Vehicle Industry (Repair, Services and Retail) Award 1983.</td>
</tr>
<tr>
<td><strong>6 Public Hospital Nurses</strong>&lt;br&gt;First year enrolled nurses employed under the Public Hospitals Nurses (State) Award 1990.</td>
<td><strong>Coal Miners</strong>&lt;br&gt;First year miners employed under the federal agreement at place at Mt Thorley Mines.</td>
</tr>
</tbody>
</table>

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87 *Clerical and Administrative Employees (State) Award 1996 (1997) 296 IG 619.*


90 *Vehicle Industry (Repair, Services and Retail) Award 1983 (Australian Conciliation and Arbitration Commission, Hastings C, 25 January 1984, Print F4007).*

Table 8.1: Industry/Occupations Investigated by the New South Wales Pay Equity Inquiry (cont.)

<table>
<thead>
<tr>
<th>Female Comparator</th>
<th>Male Comparator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clothing Industry Outworkers</strong></td>
<td>Metal Machinists (classification C12)</td>
</tr>
<tr>
<td>Persons, commonly referred to as outworkers, employed under the terms of either the Clothing Trades (State) Award 1994, federal Clothing Trades Award 1982, Textile Industry, &amp;c., (State) Award 1993, federal Textile Industry Award 1994.</td>
<td>employed under the federal Metal, Engineering and Associated Industries Award.</td>
</tr>
</tbody>
</table>

Source: Compiled from Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I.

Counsel Assisting was keen to pursue a pay equity case study focusing on general staff in higher education as this had recently been the subject of research initiated by the National Tertiary Education Union (NTEU) (Probert, Ewer, Whiting, 1998). This interest was contrary to the requirement for comparators within the state jurisdiction, but the case study presented the Inquiry with an already completed body of evidence. The NTEU, however, wanted to retain the research for use in forthcoming federal proceedings, and higher education was not included in the scope of the Inquiry.

8.2.4 DISPUTES CONCERNING TERMINOLOGY

The early submissions of the employer organisations, most notably the Employers Federation, concerned the interpretation of key terms. This was designed to limit the scope of the Inquiry and therefore narrow the inequity being investigated. The Federation sought to exclude overaward payments and confine the definition of remuneration to ‘award rates of pay’. Moreover the Inquiry was not obliged to follow the definition of remuneration adopted by Article 1 of the International Labor Organisation’s (ILO) Convention 100 (Equal Pay).

96 Metal, Engineering and Associated Industries Award 1998 (Australian Industrial Relations Commission, Marsh SDP, 1 July 1998, Print Q0444).
97 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
Remuneration Convention, 1951 Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value) which the Employers’ Federation contended applied only to federal regulatory measures. On this matter the Employers’ Federation was not supported by the other employer organisations represented at the Inquiry. Justice Glynn at an early point in the Inquiry (20 April 1998) adopted a working definition of remuneration which was consistent with the definition of remuneration as found in Article 1 of the ILO’s Equal Remuneration Convention. The definition of remuneration in the Convention is as follows:

For the purposes of the Convention –

(a) the term remuneration includes the ordinary, basic, minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment.

Ultimately this definition was adopted by the Inquiry's final report, as the Inquiry determined that a broad reading of remuneration had been considered in other areas of tribunal consideration, namely unfair dismissals and unfair contract. To have excluded remuneration for the purposes of determining whether pay inequity or undervaluation exists was found by the Inquiry to be ‘artificial in the extreme’.

The debate over the meaning of ‘comparable’ arose because of its inclusion in the terms of reference and the definition of pay equity contained in the legislation. The Employers’ Federation held that comparable should be defined as meaning ‘equal’ or ‘like’. Justice Glynn held that the term should be interpreted as meaning ‘able to be compared’, but that a decision as to what might be compared would accompany the hearing of each equal remuneration application. In the initial debates before the Inquiry the Employers’ Federation

100 IRNSW, IRC 6320 of 1997, Exhibit 11.
also held that ‘value’ should be held to mean value to the employer\(^{102}\). This was a proposition that had been rejected by the federal Australian Conciliation and Arbitration Commission in the 1972 equal pay case\(^{103}\) and the New South Wales Industrial Commission in the 1959 equal pay case\(^{104}\). The Employers’ Federation had raised the matter due to the use of the construction ‘comparable value’ in the New South Wales legislation and the attention given to the interpretation in the 1986 comparable worth case\(^{105}\). This matter was not addressed directly in the early rulings of the Inquiry, but formed part of the Inquiry’s consideration of the application and interpretation of previous state and federal decisions relevant to equal pay. Justice Glynn concluded that following the 1986 comparable worth case an interpretation of ‘value’ as advanced by the Employers’ Federation had not been argued or accepted in either the state or federal jurisdictions\(^{106}\).

The Inquiry received contrasting definitions of the meaning of ‘female-dominated’ and ‘male’ dominated’. The ACM held that what was meant by ‘dominated’ required not less than 65 per cent of employees of the same sex in the industry or occupation under consideration\(^{107}\). Proceedings before the Inquiry examined whether a pay equity application should face a threshold examination based on the employment balance between men and women. The Crown\(^{108}\) held that an employment threshold would preclude consideration of particular forms of undervaluation, such as that which potentially attends part-time and casual work, in industries and occupations that may not meet any proportional or numeric employment threshold. Ultimately the Inquiry was to determine that an employment threshold should not limit recourse to equal remuneration provisions, a finding that was linked to the Inquiry’s latter determinations regarding undervaluation simplicitor.

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\(^{102}\) IRNSW, IRC 6320 of 1997, Exhibit 11.

\(^{103}\) National Wage and Equal Pay Cases 1972 (1972) 147 CAR 172 at 180.

\(^{104}\) Re Clerks (State) Award and Other Awards (1959) 58 AR 470 at 485.


\(^{106}\) Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I, p. 63.

\(^{107}\) IRNSW, IRC 6320 of 1997, Exhibit 441.

\(^{108}\) IRNSW, IRC 6320 of 1997, Exhibit 459.
Following the threshold arguments concerning terminology and initial contentions the Inquiry took evidence in each of the case studies. It also took economic evidence concerning the relative earnings of men and women and the likely impact on the New South Wales economy of increases in women’s pay.

8.2.5 INDUSTRIES AND OCCUPATIONS INVESTIGATED BY THE NEW SOUTH WALES PAY EQUITY INQUIRY

**Child Care Workers**

A key focal point for the Inquiry was the research into this area of work commissioned by the New South Wales Pay Equity Taskforce\(^{109}\) and the evidence provided by the author of that research, Rosemary Kelly\(^{110}\). The Inquiry also heard direct evidence from child care employers, child care employees and training providers in the area of child care in addition to evidence relevant to the nominated comparator, engineering associates in the metal and engineering industry.

Central to Rosemary Kelly’s research and the contentions of the Crown and Labor Council in this matter was the failure of the applicable state award, the *Miscellaneous Workers – Kindergartens and Child Centres, &c., (State) Award 1996*\(^{111}\) to recognise the value of child care work. A review of the state award in 1990 had failed to recognise the different grades of qualifications held by child care workers. The relativities between this child care award and the classifications in the state metal and engineering award were different from the relativities established by the federal counterparts of these state awards. Child care workers within the state jurisdiction received lower rates of pay than those available to child care workers, with the same qualifications, in the federal jurisdiction. A 1997 review of the state award introduced a number of new classifications but crucially embedded the classifications and relativities established in the 1990 review. While the Inquiry focused more acutely on the anomalies in the state child care award, the relativity established at a federal level was not

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\(^{109}\) IRNSW, IRC 6320 of 1997, Exhibits 57, 58.

\(^{110}\) IRNSW, IRC 6320 of 1997, Exhibit 56.

accepted by the Labor Council\textsuperscript{112}, the Crown\textsuperscript{113} and the Women’s Organisations\textsuperscript{114} as reflective of the value of the work.

The contest between the parties turned on the appropriate level of comparison between metal industry classifications and child care workers, and whether competency standards could be used to align the respective positions. While the Inquiry focused on a number of positions in both industries greatest attention was directed to two classifications, Advanced Child Care Worker: Qualified in the Miscellaneous Workers – Kindergartens and Child Centres, &c., (State) Award and Engineering Associate – Level 2 (C3) in the \textit{Metal and Engineering Industry (New South Wales) Interim Award 1990}\textsuperscript{115}. Both classifications require an Associate Diploma qualification. Kelly’s work had claimed that the classifications should be aligned in remuneration because of this similarity in qualification framework and because the qualifications were aligned through competency standards at the same level in the Australian Standards Framework (ASF).

Thus the child care case study provided the Inquiry with the opportunity to examine the efficacy of competency standards as a means of establishing work value. In relation to this matter the Inquiry also had the opportunity to consider the decision of Commissioner Simmonds in the federal HPM case, the first case to test the 1993 federal equal remuneration amendments\textsuperscript{116}. In that decision Commissioner Simmonds had concluded that competency standards were not an adequate means to measure all aspects of work value. The Inquiry similarly found that the use of competency standards as a means of establishing work value in these sectors was flawed. Yet, importantly, Justice Glynn noted ‘the shortcomings of competency standards and their use in comparing work across industries should not be

\begin{footnotes}
\item[112] IRNSW, IRC 6320 of 1997, Exhibit 455.
\item[113] IRNSW, IRC 6320 of 1997, Exhibit 459.
\item[114] IRNSW, IRC 6320 of 1997, Exhibit 438.
\end{footnotes}
confused with the significance of qualifications and training as a guide to the assessment of the value of work.\textsuperscript{117}

The nature of the Inquiry enabled it to move beyond the limitations of the competency analysis that had framed part of the original contentions to find that work in child care had been undervalued. The contributory factors to this undervaluation highlighted the cumulative nature of undervaluation:

\textit{...the child care worker has been undervalued because of the gender basis for the assessment of the original classification, the failure to clearly and succinctly remove this element of assessment from the classification structure, the failure to properly value the qualifications of the child care worker, the inadequacy of the Minimum Rates Adjustment process and subsequent consent award adjustments re-evaluation the classification.}\textsuperscript{118}

The study was also important in that it highlighted other contributors to undervaluation, that the Inquiry was later to describe as the ‘wider dimensions of undervaluation’. Thus the Inquiry noted that the level of pay for child care workers needed to be viewed against the low level of unionisation, their poor access to overtime and payment for overtime, the small size of the workplaces in the sector and the service nature of the industry. These factors had contributed to the poor recognition of the training and credentials held by child care workers by way of remuneration and career paths in child care. The industrial processes had not been sufficient to recognise the changing nature of the child care industry nor to overcome normative assumptions concerning the value of work involving the care and development of young children. The Inquiry explicitly recognised that the application of the current wage-fixing wage fixing principles in relation to work value would not value the work of child care workers properly.\textsuperscript{119} This combination of findings showed that undervaluation could be demonstrated not only by comparative means but also by way of undervaluation simplicitor;

\textsuperscript{117} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister; Volume I}, p. 273.

\textsuperscript{118} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister; Volume I}, p. 274.
in simple terms this provided that the work of feminised work would be valued on its own terms\textsuperscript{120}.

\textbf{Hairdressers and Beauty Therapists}

As with the child care sector the starting point for the Inquiry was the research into this area of work commissioned by the New South Wales Pay Equity Taskforce\textsuperscript{121} and the evidence provided by one of the authors of that research\textsuperscript{122}. The Inquiry also heard direct evidence from employers, employees, union officials and training providers in the areas of hairdressing and beauty therapy in addition to evidence relevant to the nominated comparator, motor mechanics engaged in motor vehicle repair.

This case study explored different aspects of inequity from that raised by the child care case study. Both hairdressers and motor mechanics are trade occupations and the trade credential has effectively provided a degree of protection for hairdressers in terms of award rates for entry level hairdressers, when compared to entry level motor mechanics. Following the completion of their apprenticeships, motor mechanics and hairdressing effectively enjoy the same award rate of pay. However, the award in hairdressing often experienced periods where the rate lagged behind that of other trade awards because the relevant union, the Australian Workers’ Union (AWU), had not applied for the flow on of state wage case adjustments.

Further delays had ensued from the failure of the parties to agree on a number of matters following the passage of the \textit{Industrial Relations Act 1991} (NSW)\textsuperscript{123}. From as early as 1929, equal skill margins, as opposed to the base wage rate which carried forward the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{119} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, p. 272.
\item \textsuperscript{120} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, p. 276.
\item \textsuperscript{121} IRNSW, IRC 6320 of 1997, Exhibit 186.
\item \textsuperscript{122} I was a co-author of this research and as observed in Chapter Five provided expert witness evidence for the Crown during the Inquiry. IRNSW, IRC 6320 of 1997, Exhibits 183, 184.
\item \textsuperscript{123} IRNSW, IRC 6320 of 1997, Exhibit 186, pp. 36-37.
\end{itemize}
\end{footnotesize}
institutionalised inequity, had been awarded to women employed as hairdressers. Yet until 1970 there were separate awards for male and female hairdressers and there was a demarcation in the work undertaken by both men and women. Haircutting was recognised by the award applying to women hairdressers prior to 1970 as work primarily undertaken by men. It was remunerated at a higher rate than hairdressing which was viewed as largely the work of women. The disparity within the awards concerning the gendered division and remuneration of work was not resolved by the making of a single award in 1970. In that instance the work of hairdressing was not awarded parity because it was work primarily undertaken by women. Such inequity was facilitated by the relevant statute, s.88D(9(d)) Industrial Arbitration Act 1940 (NSW), which provided that equal pay could be denied if the work was usually performed by women. This issue was not resolved until 1975, following the determination of a 1973 equal pay principle for the state jurisdiction.

Yet hairdressing had always been viewed in the state jurisdiction as a trade and there had been no recent barriers to aligning the base rate of pay for hairdressing to the base trade rates for other trades. However, while the trade credential provided a degree of award protection, the rates of pay available in the market were vastly different. While different evidence was led to the Inquiry, the most recent ABS data tabled at the Inquiry noted a $153.70 difference in ordinary time weekly earnings and a $228.70 difference in total weekly earnings. This placed the issue of overaward payments directly before the Inquiry and raised a key dilemma for the Commission: hairdressing provided a very clear example that simply adjusting minimum rates in accordance with a minimum rates structure would not provide a sufficient remedy to gender pay inequity. The Employers’ Federation had argued already that the Inquiry should not concern itself with overaward payments and now

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124 Re Hairdressers &c., Females (State) Award (1929) 28 AR 39.
125 Female Hairdressers and Beauty Treatment (State) Award 153 IG 511.
126 Hairdresser doing ladies hairdressing (excluding ladies' haircutting but including such trimming as is required in connection with waving, setting and colouring of hair.
128 State Equal Pay Case (1973) 73 AR 425.
contended that the higher overaward rates of pay were not due to discrimination, nor was there any evidence of any gender basis for the differentiation.\(^{131}\) Similarly the ACM held that the differences in actual rates of pay above and beyond the award rates of pay were industry-related and could not be held to be gender-related.\(^{132}\) To this end the employer submissions were assisted by the lack of precise detail as to the component breakdown of overaward payments in motor vehicle repair.

The Labor Council\(^ {133}\) and the Crown\(^ {134}\) argued that the overaward rates needed to be read against a number of factors affecting the regulation and operation of the labour market for both occupations, factors that affected the rates of pay on offer. In motor vehicle repair there was a higher incidence of workplace bargaining resulting in both formal and informal agreements that recognised post-trade training and experience by higher rates of pay. While hairdressers and motor mechanics engaged in post-trade training to a similar extent, this recognition of additional skill, knowledge and experience was not apparent in hairdressing. Award restructuring had visited each occupational area differently. In the area of motor vehicle repair, a sector predominantly covered by a federal award, two post trade classifications had recently been inserted in the classification structure, although at the time of the Inquiry these classifications were subject to a stay order.\(^ {135}\)

These arguments resonated with the Inquiry, which concluded that the evidence highlighting the inadequacy of the existing flat classification structure and the accompanying absence of a post trade classification structure was clear and indicative of the undervaluation of the

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\(^{130}\) Interview Elizabeth Fletcher, Facilitator Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Premier’s Department, 20 February 2005.

\(^{131}\) IRNSW, IRC 6320 of 1997, Exhibit 446, p. 58.

\(^{132}\) IRNSW, IRC 6320 of 1997, Exhibit 441, paragraph 69.

\(^{133}\) IRNSW, IRC 6320 of 1997, Exhibits 454, 455.

\(^{134}\) IRNSW, IRC 6320 of 1997, Exhibit 459.

work. The Inquiry also concluded that hairdressing exhibited many of the characteristics of a female-dominated industry which created undervaluation. The industry was poorly regulated and consisted of mainly small employers employing a young workforce with high labour turnover. Union membership was low and there was a negligible level of industrial activity. Although there was a shortage of qualified staff there was an oversupply of hairdressing establishments, a clear distortion in the market structure.

The Inquiry did not recommend that the level of overawards in the motor vehicle repair industry would be applicable directly to the hairdressing industry, but proposed that the level of overawards in motor vehicle repair should inform any consideration of how post trade training could be compensated in hairdressing. Thus the Inquiry saw no barriers to tribunals making assessments of overaward payments but primarily saw that consideration as informing the construction of rates within a classification structure. Remedying inequity outside of this process was not directly recommended by the Inquiry. This was in spite of submissions that the development of a new classification structure would not reduce the gap in overaward payments between hairdressing and motor vehicle repair substantially. The Labor Council and Women’s Organisations had utilised hairdressing when asserting that the Commission should avail itself of equal pay adjustments in particular occupations, in recognition that these occupations would not secure overaward pay.

In beauty culture the circumstances presented to the Inquiry were stark. Although beauty culture had been offered as a trade course since 1985 and had been recognised as such in the award from 1989 onwards, the work was not aligned with the trade qualification in the classification and wage rates structure. At the time of the Inquiry, beauty culture was

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classified still at 92 per cent of the trade rate. This was a circumstance that had arisen because the relevant union, the AWU, had not pursued the requisite application before the Commission. The Inquiry determined that this was unacceptable, clear evidence of undervaluation of a sort that did not characterise any other trade-based, primarily male dominated work.\footnote{Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, p. 340.}

\textit{Librarians}

The Librarians’ case study was the only case study in the public sector commissioned by the New South Wales Pay Equity Taskforce. This research formed a starting point for the Inquiry\footnote{IRNSW, IRC 6320 of 1997, Exhibit 132.} as did the evidence provided by the author of that research, Di Fruin\footnote{IRNSW, IRC 6320 of 1997, Exhibit 159.}. The Inquiry also heard direct evidence from the two workplaces featured in that research, the State Library of New South Wales and the New South Wales Department of Mineral Resources.

This case enabled the Inquiry to focus on the process of job evaluation, as part of the methodology in the case study rested on this method of job comparison\footnote{IRNSW, IRC 6320 of 1997, Exhibits 136, 137.}. This prompted some concern for the Crown as there was substantial commitment in the New South Wales public service to job evaluation. Ultimately the Inquiry was to rule that job evaluation techniques were not appropriate for the determination of remuneration. This position had been advanced by the Employers’ Federation\footnote{IRNSW, IRC 6320 of 1997, Exhibit 446, p. 87.}, a somewhat ironic submission given their commitment to the use of job evaluation methodologies (Quaid, 1993: 256-257). The Inquiry determined that job evaluation failed to take into account a number of factors that would normally inform work value considerations; work conditions, hours of the work, and risks associated with the work. Nor was job evaluation capable, in the view of Justice Glynn, of the
range of considerations made by industrial tribunals before a wage increase was granted, including the capacity of an organisation to pay and market factors\textsuperscript{145}.

Despite protestations that a comparison between librarians and geoscientists was invalid, and despite it rejecting job evaluation as a method, the Inquiry held that there were sufficient factors to enable a broad-based comparison. Both are public service professionals and degree qualified with a workforce that is, compared to the wider labour market, stable and well unionised. This case study also indicated that while comparisons between different areas of work could inform the work of industrial tribunals and provide guidance on the level of undervaluation, they could also conclude that undervaluation existed, depending on whether the valuation processes in a particular area of work had been sufficient and appropriate. Indeed in this case study the Inquiry held that the work of librarians and geoscientists were both undervalued as the current rates of remuneration did not adequately reflect changes in the nature of their work, skill and responsibilities\textsuperscript{146}. The Inquiry also found that the tribunals in their more recent assessments of librarians’ work could have benefited from assessing the valuation of other female-dominated public service professionals, such as teachers.

The Inquiry also held that a number of factors contributed to the undervaluation of the work of librarians. Prior to 1960, rates of pay for female librarians had been set by reference to male librarians who held inferior qualifications, notwithstanding that the occupation was becoming progressively more feminised, with women holding higher qualifications since at least the 1930s. Thus the female rate of pay was constrained by the ceiling created by the male rate of pay. Recognition of librarianship as a profession had been resisted, a factor that the Inquiry held accounted for the lower relativity between librarians and other professional

\textsuperscript{145} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 492.

\textsuperscript{146} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 495.
public service classifications\textsuperscript{147}. A work value assessment had not been conducted since 1982 and the valuation of librarians’ work had not been adequately assessed in the consent agreements that had been ratified by the Commission since that time\textsuperscript{148}, a conclusion that contained an implicit criticism of both the tribunal and the applicant union, the Public Service Association of New South Wales. The Inquiry held that this history of undervaluation had not characterised the remuneration of geoscientists even though, as noted above, more recent changes in their work value had been neglected. Yet this comparative assessment was not instrumental to the Inquiry’s finding that librarians’ work had been undervalued. This too was to be an important contributor to the Inquiry’s latter findings as to the undervaluation simplicitor.

**Outworkers**

The procedures utilised by the Inquiry in the investigation of outworkers contained some points of departure from routine proceedings and necessitated the issue of special orders concerning procedural arrangements\textsuperscript{149}. A number of the statements made to the Inquiry by outworkers were confidential to the parties and some hearing days were closed. The Inquiry was assisted by the secondment of a senior inspector of the Workcover Authority who undertook a series of investigations, interviews and surveillance activities\textsuperscript{150}. The Inquiry therefore had access to direct evidence from outworkers, a set of circumstances not always present in industrial proceedings that included consideration of this work\textsuperscript{151}. The Inquiry also took extensive evidence on the background of the industry. This included the recent Senate Inquiry into outworking (Senate Economics Reference Committee, 1996) and evidence from the New South Wales State Secretary of the Textile, Footwear and Clothing Trades Union of

\textsuperscript{147} Industrial Relations Commission of New South Wales (1998a) *Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister*, Volume I, p. 489.


\textsuperscript{149} IRNSW, IRC 6320 of 1997, Exhibit 215.

\textsuperscript{150} IRNSW, IRC 6320 of 1997, Exhibit 345.

\textsuperscript{151} Industrial Relations Commission of New South Wales (1998a) *Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister*, Volume I, p. 529.
Australia\textsuperscript{152}, evidence that was largely uncontested\textsuperscript{153}. The Inquiry also examined a report, prepared for the Inquiry, which provided an overview of the classifications and rates of pay for clothing industry machinists and metal industry machinists\textsuperscript{154}.

The Inquiry’s findings illustrated its determination to adopt a broad approach to the concept of undervaluation. The Inquiry essentially held that undervaluation had two sources; firstly the underpayment of award entitlements to outworkers and secondly, the failure of the applicable awards to recognise adequately the skill and responsibility required of outworkers. While the Inquiry found that the inadequacy of the classifications in the relevant awards [\textit{Clothing Trades (State) Award 1994}\textsuperscript{155}, federal \textit{Clothing Trades Award 1982}\textsuperscript{156}] was sufficient to a finding of undervaluation, it also found that the work was undervalued by reference to the work of the machinists in the metal industry\textsuperscript{157}. The Inquiry accepted the evidence that the deficiency in the awards had four components. The awards did not recognise the involvement of outworkers in whole of garment production, nor did the classification structures in either the state or federal awards provide skill descriptors for levels above the trade aligned rate of remuneration. The classification structures effectively reflected a factory system of work, and lacked provisions to enable access by outworkers to the skill classification procedures in the award\textsuperscript{158}. The Inquiry dismissed out of hand the argument put forward by the Employers’ Federation in its final submissions that if the award lacked the mechanisms to value the work appropriately, then the Commission had no basis to conduct the comparison\textsuperscript{159}.

\textsuperscript{152} IRNSW, IRC 6320 of 1997, Exhibit 292.
\textsuperscript{153} IRNSW, IRC 6320 of 1997, Exhibit 336.
\textsuperscript{154} I was the author of this report. IRNSW, IRC 6320 of 1997, Exhibit 336.
\textsuperscript{155} \textit{Clothing Trades (State) Award 1994} (1994) 282 IG 1.
\textsuperscript{156} \textit{Clothing Trades Award 1982} (Australian Conciliation and Arbitration Commission, Neyland C, 11 March 1983, Print F1647).
\textsuperscript{157} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 642.
\textsuperscript{158} IRNSW, IRC 6320 of 1997, Exhibit 336, pp. 17-21.
\textsuperscript{159} IRNSW, IRC 6320 of 1997, Exhibit 446, p. 75.
**Clerical Workers**

This case study focused on overaward payments. The classifications at the centre of the comparison, grade 3 of the *Clerical and Administrative Employees (State) Award 1996*\(^{160}\) and classification C10 of the federal *Metal Industry Award 1984 – Part 1*\(^{161}\), had parity at the award rates level. This parity was a relatively recent one and followed a lengthy review, presided over by Justice Glynn, of the clerical award in 1992 which had resulted in an altered classification structure.

Significant differences in pay were evident in the labour market. Data tabled by the Labor Council at the time of nomination indicated a 21.2 per cent difference in earnings\(^{162}\). Reliance on this data was not supported by the employer bodies as the categories utilised by the ABS were not entirely consistent with the industrial classifications at the heart of the comparison.

The Inquiry itself placed a greater reliance on the data available from a nominated workplace, the Maintrain workshop of A. Goninan & Co. Ltd, located at Auburn, New South Wales. The nomination of this workshop by the Labor Council was driven by two factors. Firstly, the Organisational Development Manager, Colin Edwards, was known to senior officials of the Labor Council and agreed to the workplace being nominated. At first glance this seems inconsequential. However, finding workplaces that would make themselves available to the Inquiry and possibly to inspections was difficult. Secondly Maintrain provided an example of a workplace that employed both comparators\(^{163}\). In other respects, however, the nomination was poorly advised, given that Maintrain paid overaward payments to both its trades and clerical employees. Set against the ABS data this was an unrepresentative workplace.

The irony of the Maintrain example did not end there. Maintrain had taken steps to remove what the Organisational Development Manager conceded were elements of disparities in the

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\(^{161}\) *Metal Industry Award 1984 – Part I* (Australian Conciliation and Arbitration Commission, Williams J, 27 April 1984, Print F4869). During the course of the Inquiry this was replaced by the *Metal, Engineering and Associated Industries Award 1998* (Australian Industrial Relations Commission, Marsh SDP, 1 July 1998, Print Q0444).

\(^{162}\) IRNSW, IRC 6320 of 1997, Exhibit 3.

\(^{163}\) Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
rates of pay for clerical workers, some of whom were found to have higher skills than C10 metal tradespersons\textsuperscript{164}. The starting point for this process was aligning the rates of pay for clerical employees to the rates of pay for metal tradespersons as contained in the current federal enterprise agreement \textit{A. Goninan & Co. Limited – Maintrain (Enterprise Agreement) Certified Agreement 1996-1998}\textsuperscript{165}, even though the clerical employees were not covered by this enterprise agreement. This process had resulted in some clerical employees being aligned to classification levels higher than C10. The Organisational Development Manager indicated that this process would continue as all metal trades employees were to be assessed against the newly introduced skill and competency standards in the metal and engineering industry, a process that aided by training would lead to new rates of pay for both metal trades and clerical employees\textsuperscript{166}. Thus Maintrain indicated that clerical employees would benefit from the skills standard process, a proposition that stood in contrast to the uneven outcomes for women that had arisen from the development of competency standards (Smith and Ewer, 1995). Yet the Inquiry did not consider Maintrain to be an atypical workplace and the matter was not pressed further in the Labor Council’s closing submissions\textsuperscript{167}.

\textbf{Nurses}

The cynical nature of the nomination of enrolled nurses was demonstrated by the lack of evidence led in this case study. The ACM withdrew their original coal industry workplace nomination, Drayton Coal Pty. Ltd and replaced it with Mount Thorley Operations Pty Ltd, a further consequence of the lack of involvement of the CFMEU\textsuperscript{168}. The evidence tendered to the Inquiry was limited to three witnesses and documentary evidence from the New South Wales Department of Health regarding a comparator of first year enrolled nurses employed at Royal North Shore Hospital and a copy of the 1997 annual review of the same hospital. This

\textsuperscript{164} IRNSW, IRC 6320 of 1997, Exhibit 194.  
\textsuperscript{166} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, pp. 283-284.  
\textsuperscript{167} IRNSW, IRC 6320 of 1997, Exhibits 454, 455.  
\textsuperscript{168} Interview Anthony Britt, Counsel for the Metal Trades Industries Association, Australian Chamber of Manufactures and other employer organisations, New South Wales Pay Equity Inquiry, 9 March 2005.
level of evidence fell far short of the evidence tendered in other case studies. The Inquiry diplomatically concluded that the evidence led in relation to the comparison was insufficient to establish a finding that the work of first year enrolled nurses was undervalued\textsuperscript{169}.

The Crown, the Labor Council and the Women’s Organisations, in response to the nomination, effectively ‘ran dead’ on the comparison, but the Labor Council did utilise the evidence of the NSWNA to explore how a feminised union had interpreted the application of the work value principle to women’s work. This evidence was taken up by the Inquiry and informed the Inquiry’s consideration of the inadequacies of the existing work value principle. The NSWNA, while careful not to declare that the work of nurses, particularly registered nurses, was valued adequately, asserted that they sought to exploit the work value principle in a particular way\textsuperscript{170}. An important starting point was the recognition of the professional status of registered nurses, as this credential would always provide an effective starting point in work value considerations. The NSWNA also indicated that their work value submissions primarily emphasised the technical and highly visible components of their work at the exclusion of its caring, nurturing dimensions. This approach had been deliberately adopted because a focus on the so-called ‘softer skills’ was viewed as a strategy that would reap limited results in the Commission.

The Inquiry used the evidence of the NSWNA to highlight the contribution of union strategy to undervaluation. It concluded that the relatively high rate of unionisation in nursing had assisted the Nurses’ Association to run work value cases, develop classification structures and negotiate the inclusion of permanent part-time work clauses. No such industrial campaigns had been initiated in poorly unionised areas of work examined by the Inquiry, notably hairdressing\textsuperscript{171}.

\textsuperscript{169} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 519.
\textsuperscript{170} IRNSW, IRC 6320 of 1997, Exhibit 258.
\textsuperscript{171} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, pp. 520-521.
Seafood Processors

This case study provided the Inquiry with the opportunity to assess two sex-segregated areas of work that fell within the scope of a single award. The applicable award was the *Fish Canning &c., (State) Award 1973*[^72]. The Inquiry assessed the application of that award through evidence from the Greenseas Division of H J Heinz Company Australia Limited at Eden, New South Wales. At Greenseas the award was supplemented by the *Heinz Greenseas Enterprise Improvement Agreement 1997*[^73], negotiated with the Australian Workers’ Union and relying on the award’s classification structure. The key comparisons involved employees under classification Level 4, Butchering, and Level 5, most prominently the work of ‘trimmers’ and ‘general hands’. In addition to the higher ordinary time earnings received by employees at Level 4, these employees also received significantly greater access to overtime. The system of work organisation at Greenseas had undergone significant change in 1996 following the introduction of a new production system[^74]. The work of butchering and general hands was predominantly performed by men and the work of trimming was predominantly performed by women.

This case study enabled a direct examination of the contribution of consent arrangements and the award changes made under the structural efficiency principle to the proper evaluation of the work of women. It also enabled an assessment of whether changes in work organisation, designed to modernise work practices, had contributed to dismantling occupational segregation and whether gender had been a prominent consideration in these processes. This case study was to be prominent in the Inquiry’s final conclusions as to how undervaluation should be interpreted. The findings, in this case study, were set clearly against the Employers’ Federation’s contentions that the evidence did not indicate a gender-

[^74]: IRNSW, IRC 6320 of 1997, Exhibit 149.
based inequity of pay or ‘misvaluation’ of the work of different classifications\textsuperscript{175}, contentions that were also adopted by the ACM\textsuperscript{176}.

These particular contentions most clearly demonstrated the agenda of the employer organisations. The issues arising from this case study were presented within a very narrow context of the sort usually favoured by employer organisations, given their opposition to inter-industry and inter-occupational comparisons of work. In this case study both comparators were employed in a single industry sector under a single award and enterprise agreement. Direct observation of both areas of work was possible in the workplace at hand, Greenseas, but would have also been possible in other workplaces falling within the scope and incidence of the award. Yet the circumstances of this case were not sufficient, in the submissions of the employer organisations, to justify the application of an equal remuneration principle.

The Inquiry found that there was entrenched gender segmentation of the work at Greenseas, a segmentation that had not been substantially eliminated by the introduction of the new production system and accompanying agreements between the parties to improve career opportunities, workplace flexibility and skill enhancement. The factors contributing to the persistence of the gender segmentation were held to be the cultural barriers to the entry by women into areas of work that were male-dominated and more highly paid, barriers that were enforced by the attitudes of male workers and further entrenched by sexual harassment. The justification for the historic segmentation was the ‘heavier’ nature of butchering work as opposed to the ‘lighter’ nature of trimming work. Such justification, which the Inquiry held to be limited, was no longer valid given the advent of technological change. Yet workplace practices, including the system of appointment and promotion, discouraged the movement of women into more highly paid areas in the plant, notably butchering\textsuperscript{177}. In these

\textsuperscript{175} IRNSW, IRC 6320 of 1997, Exhibit 446, p. 67.
\textsuperscript{176} IRNSW, IRC 6320 of 1997, Exhibit 441, p. 62.
\textsuperscript{177} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 700.
respects the seafood case study was powerful in its ability to draw together in a ‘single view narrative’ many of the factors that contribute to inequity. This mix of inequities in the industrial infrastructure and those promoted by workplace cultural practices was disturbing and too potent a combination for the Inquiry to ignore\(^\text{178}\).

The Inquiry held that comparison between the work of butchering and trimming highlighted the dichotomy that exists between the valuing of heavier work as opposed to dexterous, repetitive, high-speed work. Prior to the introduction of the new production system in 1996, the work of trimmers had been undervalued because it had been classified at the same level of the general hand and below that of the butchers. This situation had its origins in the simple equation of the ‘all others’ female rate with the ‘all others’ male rate in the variations that followed the 1973 State Equal Pay Case\(^\text{179}\). This long-standing failure to examine the nature of the work was not remedied by the award variation introducing structural efficiency adjustments. The enterprise agreement that came into force in 1997, following the introduction of the new production system, made no provisions for the increased intensity of work in the trimming section nor did it follow a review of the classifications of butchery and trimming. The Inquiry found that the work of trimmers continued to be undervalued by reference to the butchers and general hands. Negotiations at the time of the Inquiry concerning a new award classification structure had not remedied this undervaluation\(^\text{180}\).

The Inquiry found that a key contributor to the continued undervaluation was the consent arrangements between the parties. The Inquiry’s criticisms of the failure of the Commission to examine consent arrangements were made discreetly but were nevertheless present, particularly in relation to the Commission’s scrutiny of the structural efficiency adjustments and 1997 enterprise bargaining agreement:-


\(^{179}\) State Equal Pay Case (1973) 73 AR 425.

\(^{180}\) Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I, p. 660.
...for the structural efficiency adjustments where some independent assessments were required and apparently were not carried out. However the records do not make clear the processes involved. It appears that consent of the parties was the predominant consideration\textsuperscript{181}.

[in relation to the enterprise bargaining agreement] ...in the absence of the parties in bringing forward relevant factors upon which to test those matters, particularly in relation to the effects of gender segmentation, it is unlikely that any close examination of such matters would have occurred\textsuperscript{182}.

The Inquiry also questioned the contribution of the union to the difficulties faced by women workers at Greenseas. An examination of this issue was not possible as the regional organiser for the AWU did not attend the Inquiry at the appointed time to give evidence nor was the organiser present during the two days of inspections of the plant\textsuperscript{183}.

\textbf{Utility of the Case Studies}

The case studies, particularly those involving hairdressing, child care workers, librarians, seafood workers and clothing trade outworkers, proved to be pivotal to a change in the position of Counsel Assisting and the advocate of the Labor Council, Gail Gregory\textsuperscript{184}. The case studies provided a very necessary supplement to the general conclusions that could be drawn from the economic evidence and contributed to the ‘weight of evidence’ with which the Inquiry was confronted\textsuperscript{185}. The economic data gave an indication of the size of earning differentials but given the nature of the evidence, any conclusions about the determinants of the earnings differences were only broad and aggregate in nature. The evidence provided through the case studies provided a very clear observable narrative\textsuperscript{186}, within an industrial setting, of those factors that perpetuated, shaped and entrenched earnings differences.

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\footnotesize\textsuperscript{181} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, p. 706.
\footnotesize\textsuperscript{182} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I}, pp. 706-707.
\footnotesize\textsuperscript{183} Interview Gail Gregory, Executive Officer, Labor Council, 20 February.
\footnotesize\textsuperscript{184} Interview Gail Gregory, Executive Officer, Labor Council, 20 February; also reported NPECA, Minutes of Meeting, 10 March 1998.
\footnotesize\textsuperscript{185} Interview Anthony Britt, Counsel for the Metal Trades Industries Association, Australian Chamber of Manufactures and other employer organisations, New South Wales Pay Equity Inquiry, 9 March 2005.
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The studies also offered an effective counter to two particular perspectives of Counsel Assisting\textsuperscript{187}: that an effective utilisation of the work value principle would remedy any apparent pay equity problems; that feminist organisations were only concerned with advancing the position of ‘well-heeled women’\textsuperscript{188}. The case studies also underlined the limitations of the comparator methodology that was implicit in the terms of reference for the Inquiry and gave Counsel Assisting the confidence and evidentiary basis to ‘break past’ the constraints in the terms of reference\textsuperscript{189}. This breakthrough was reflected in the development of the concept of undervaluation through the course of the Inquiry and in the final recommendations of the Inquiry concerning an appropriate jurisdictional framework for pay equity in New South Wales.

**8.2.6 ECONOMIC EVIDENCE**

The economic evidence considered by the Inquiry fell into two categories: evidence concerning the size of the pay equity gap; and evidence concerning the economic impact of any increase in women’s earnings.

*The Gap between Men’s and Women’s Earnings*

At the outset the size of the disparity between women’s and men’s earnings was contested. The debate largely turned on the methodology employed through regression analysis to assess this disparity and the interpretations to be drawn from such data. The Inquiry took considerable advice on the contribution that regression analysis made to this area of investigation, primarily its ability to quantify the contribution of observable factors to earnings differences. The Inquiry also assessed the impact of three particular methodological considerations: whether different regression analysis research placed before the Inquiry utilised an examination of linear or Curbi linear relationships; the examination of industry

\textsuperscript{186} Interview Mary Grace, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 21 April 2005.
\textsuperscript{187} NPECA, Minutes of Meeting, 6 April 1998.
\textsuperscript{188} Interview Fran Hayes, National Pay Equity Coalition, 18 February 2005.
\textsuperscript{189} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
effects; and the inclusion or otherwise of managerial employees\textsuperscript{190}. As with other matters brought before the industrial tribunals, the parties brought competing bodies of evidence before the Inquiry. In the case of the Labor Council, financial contributions were obtained from affiliates with a particular interest in the Inquiry to fund the necessary research\textsuperscript{191}.

The Employers’ Federation submission was that the effect of occupational segregation was over-stated. If a wage differential was found to exist there were considerations of a significant nature to prevent the Commission from intervening in the matter. The Federation led evidence by Professors Mark Wooden and Helen Hughes. The early economic evidence was defined predominantly against the findings of Wooden, whose research indicated that the size of the earnings disparity that could be attributed to gender-based occupational segregation was 2.1 percentage points of an aggregate gap of 8.9 per cent in non-managerial employee hourly earnings\textsuperscript{192}. This analysis was contested largely by the evidence of Professors Bob Gregory\textsuperscript{193} and Richard Green\textsuperscript{194} and Richard Cox\textsuperscript{195}, called by either the Crown or Labor Council. The alternative submissions were in broad agreement that the effect of gender composition across occupations estimated by Wooden at 2.1 percentage points was low. These submissions were accepted ultimately by the Inquiry, concluding that a ‘larger differential will be expected where female intensity is greatest, the very area where undervaluation might represent a more significant problem\textsuperscript{196}.

The discussion over the level of occupational aggregation employed in regression analysis took the Inquiry to assessing whether inter, or intra, occupational segregation contributes to pay inequity. The Employers’ Federation utilised Gregory’s criticism of the broad level of

\textsuperscript{190} Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I, p. 95.
\textsuperscript{191} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales of New South Wales, 24 February 2005.
\textsuperscript{192} IRNSW, IRC 6320 of 1997, Exhibit 101, p.10.
\textsuperscript{193} IRNSW, IRC 6320 of 1997, Exhibit 100.
\textsuperscript{194} IRNSW, IRC 6320 of 1997, Exhibit 271.
\textsuperscript{195} See IRNSW, IRC 6320 of 1997, appendix to Exhibit 277.
aggregation utilised by the Wooden study to argue that the level of aggregation was of little consequence as research indicated that inequity arose from intra-occupational segregation. This is an area of some dispute within that part of the pay equity literature that concerns itself with econometric analysis. Gregory noted that, in part, the conclusions reached by Wooden were affected by the level of aggregation employed in the analysis, more specifically the occupational level at which the earnings data had been accessed. This consideration depended on the interpretation of the data and Gregory contended that the Inquiry’s approach to this matter should contemplate the impact of both inter-, and intra-occupational segregation. These conclusions were accepted by the Inquiry which acknowledged the contribution of both intra- and inter-occupational wage differences.

Gregory’s evidence before the Inquiry also sought to move the Inquiry away from the construction implied by Wooden, that the part of the earnings gap that should concern the Inquiry was that part that could be attributed to occupational segregation measured on an aggregate basis. Gregory asserted that the Inquiry should not necessarily concentrate on the average effect of gender or the effect of dispersion of gender composition across occupations; rather it should examine the ‘gender effect arising from the disproportionate representation of women workers’ in particular occupations. This issue was also raised by Borland who argued that the broad econometric analysis utilised by Wooden ‘assumes that any differences in skill characteristics between male and female employees are unrelated to gender-based differences in returns to those characteristics’. Thus Borland argued that gender-based differences in returns to human capital can have a cumulative impact not measured well by aggregate analysis.

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197 IRNSW, IRC 6320 of 1997, Exhibit 271, paragraphs 27, 29.
200 IRNSW, IRC 6320 of 1997, Exhibit 100, paragraph 17.
The Employers’ Federation also advanced an analysis, based on Wooden’s evidence, that tribunals should refrain from addressing any wage disparity arising from occupational segregation because women self-selected into low paying occupations on the basis of the non-wage features or non-wage compensating differentials of those occupations. Counter arguments were advanced by the Crown and the Labor Council, largely based on the evidence of Gregory, Green and Whitehouse. Gregory argued there was an absence of evidence to suggest that firstly, female-dominated occupations have better non-wage conditions, including time flexibilities, which enable employers to offer lower wages in compensation, and secondly, that women, rather than men, prefer such better arrangements in a manner that leads to occupational segregation. Green argued that Wooden had no basis to establish choice and that reference to such an argument was simply consistent with a neoclassical critique of earnings disparities. Wooden in reply argued that contrary to neoclassical proponents he assumed that occupational distribution was determined exogenously. Whitehouse similarly suggested that Wooden’s concept of choice was problematic and that the evidence concerning low-paying occupations suggested an absence of compensating conditions. Borland’s evidence, while noting that most empirical studies on the wage differential do not control for differences in the amenities or disamenities associated with employment, concluded that there is no direct evidence that the gender wage difference can be explained entirely by differences in non-wage-compensation.

In a related argument the Employers’ Federation argued that occupational choice and career breaks exercised a particular effect on wages over time. The basis for these propositions was the evidence of Wooden, who argued that earnings differentials favour female employees if the analysis is confined to employees under 30 years of age, but that earnings disparities will

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201 IRNSW, IRC 6320 of 1997, Exhibit 277, p. 43.
203 IRNSW, IRC 6320 of 1997, Exhibit 100, paragraph 16.
204 IRNSW, IRC 6320 of 1997, Exhibit 271.
206 IRNSW, IRC 6320 of 1997, Exhibit 120.
207 IRNSW, IRC 6320 of 1997, Exhibit 277, paragraph 12.
208 IRNSW, IRC 6320 of 1997, Exhibit 101, pp. 11-12.
diminish over time. The Inquiry largely focused on the impact of career breaks. The matter of wage differentials for younger employees was not tested extensively, with the Inquiry suggesting that the matter required further research\(^{209}\). Gregory’s evidence contested the contribution of career breaks to explaining the gender wage differential, advancing the proposition that while career interruptions can explain differences between the average wage of women and men it cannot explain why particular women’s occupations are paid less than others, given that the degree of career interruption is not greater for women in female-dominated occupations than for women in other occupations\(^{210}\).

Towards the conclusion of the proceedings the Employers’ Federation deployed their arguments on self-selection and career breaks to suggest that occupational segregation may be the result of, rather than the cause of, differences in men’s and women’s earnings. The proposition was supported by the proposition that workers in female-dominated occupations were over-compensated. The Federation also claimed that the payment of additional monies would only further attract women to female-dominated occupations because of the increased attractiveness of employment in those occupations\(^{211}\). The Inquiry rejected these quixotic propositions. It concluded that areas of low paid women’s work, as demonstrated by the hairdressing and outworker case studies, were attended by poor working conditions, rather than factors that compensated for the low wages received by those occupations. Similarly, career breaks do not fully, or adequately, explain the earning differences between men and women nor are the earnings differences likely to dissipate over time\(^{212}\).

\(^{209}\) Industrial Relations Commission of New South Wales (1998a) *Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I*, p. 144.

\(^{210}\) IRNSW, IRC 6320 of 1997, Exhibit 100, paragraph 20.

\(^{211}\) IRNSW, IRC 6320 of 1997, Exhibit 446, p. 30.
The Economic Impact of an Increase in Women’s Earnings

The Inquiry’s final report dryly noted that the prospect of pay equity adjustments largely drove employers to fear the Inquiry and its possible outcomes\(^{213}\). The Inquiry also concluded that many of the final submissions before the Inquiry, particularly that of the Employers’ Federation, were exaggerated and proceeded on the assumption that the Commission would award an ‘across the board’ increase in women’s pay\(^{214}\).

The evidence on the economic impact of remedial measures was contested and dealt with four broad areas: the economic impact of the federal 1969 and 1972 equal pay cases and their state jurisdiction counterparts; theoretical analysis of the impact of improvements in women’s earnings; economic models which sought to quantify the employment effects of changes in wage distribution; and current economic conditions.

In assessing the evidence on the impact of previous aggregate equal pay decisions the Inquiry concurred with the findings relied on in Professor Gregory’s evidence, utilising the findings of Gregory and Duncan (1981: 360), that female unemployment had been unresponsive to the equal pay decisions. There was considerable debate over the veracity of Gregory and Duncan’s findings, particularly the changes in the growth rate of female employment after the initial equal pay decisions and the responsiveness of the unemployment rate to the equal pay decisions. Debate over the impact of earlier pay equity decisions by tribunals became a focus for the employers to contest institutionally determined increases in women’s earnings. The employer case had two parts: increases in women’s earnings would translate directly into employment losses in female dominated jobs; and, institutionalised wage increases would be incapable of achieving pay equity as the market would realign rates.

\(^{212}\) Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I, p. 139, 153.


over time\textsuperscript{215}. The Federation’s contentions were that reductions in female employment would be facilitated by change in gender employment circumstances, including the weaker growth in female employment and labour participation in the 1990s\textsuperscript{216}. The Inquiry, however, gave weight to alternative explanations for the changes in the composition and growth of women’s employment, in particular the research presented by Borland\textsuperscript{217}, and observed that a number of submissions did not make allowance for market imperfections\textsuperscript{218}. The Inquiry also clearly considered that a number of the employer submissions relied on economic evidence which assumed that an aggregate increase would be awarded. The Inquiry viewed this as contrary to the likely case by case examination of equity claims.

The Inquiry also asserted that the weight to be afforded to economic considerations should be balanced by equity and fairness considerations and the tribunal’s self-proclaimed historical role in achieving such a balance\textsuperscript{219}. The Inquiry also gave weight to the evidence, led by the Crown, to the effect that discriminatory wages represented a sub-optimal allocation of resources and as such was a source of inefficiency throughout the economy\textsuperscript{220}. This was instrumental in the Inquiry’s consideration of the economic modelling. The Crown called evidence from Richard Cox, Director, Economic Research and Forecasting, New South Wales Treasury, which relied on a model (M2R-New South Wales) of the New South Wales economy, developed by the Centre for Regional Economic Analysis (CREA) at the University of Tasmania. The Employers’ Federation introduced material from Access Economics which relied on a model known as the AEM-Macro Model\textsuperscript{221}. To some extent the evidentiary contest through the Inquiry became one of defending the assumptions on which the models were based. In these proceedings Treasury were at some pains to ensure that the Inquiry

\textsuperscript{215} IRNSW, IRC 6320 of 1997, Exhibit 101, 446.
\textsuperscript{216} IRNSW, IRC 6320 of 1997, Exhibit 446, pp. 121-124.
\textsuperscript{217} IRNSW, IRC 6320 of 1997, Exhibit 277 which recalled the findings of Borland and Kennedy (1998).
\textsuperscript{218} Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume II, p. 310.
\textsuperscript{219} Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume II, p. 310.
\textsuperscript{220} IRNSW, IRC 6320 of 1997, Exhibit 459.
\textsuperscript{221} IRNSW, IRC 6320 of 1997, Exhibits 338, 339
considered the impacts within an appropriate framework, specifically submitting that it would be overly speculative to forecast definitive economy-wide impacts because it would be likely that any increases in pay would occur on a sectional basis. Although the Inquiry chose to view the models as complementary, each suggested different impacts on the economy. The CREA model suggested that in the long term pay equity wage adjustments would amount to a relative wage shift. Employment effects did not amount to a significant dislocation.

Submissions based on the Access Economics model suggested a negative outlook with substantial employment losses, notably three to six years after any wage adjustments.

Ultimately the Inquiry found it generally unhelpful to make broad assertions about the impact of equity-based adjustments on employment. It commented that the impacts evident from modelling were probably overestimated, for two reasons: the insensitivity of the modelling to the case by case, phased approach likely to be adopted by industrial tribunals; and the inability of models to capture the improvements in economic efficiency due to the removal of discrimination or the broader benefits of improving equity.

8.2.7 CONCLUSIONS AND RECOMMENDATIONS OF THE INQUIRY

From a somewhat limited beginning the Inquiry had embarked on an expansive consideration of a number of issues not previously canvassed by tribunals when considering pay equity. Contributory factors to this outcome included the inquisitorial basis of the proceedings, the ultimate synergy between the submissions of the women’s organisations and the Labor Council, the key role played by feminists within the state bureaucracy and an increased awareness by Counsel Assisting and Justice Glynn of the frailties in the equal remuneration provisions contained in federal labour law.

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Despite the submissions of the employer organisations, the Inquiry had in the course of the proceedings taken a considerable volume and scope of evidence. Throughout the hearings, it ensured that diverse forms of undervaluation such as those evident in seafood processing, hairdressing and child care received due recognition. The Inquiry process was also distinguished by the change in the approach of the Labor Council. From a position of opposition to the Inquiry the Labor Council’s final submissions presented a distinctive critique of the existing legislative provisions and equal pay principle. The recommendations of the Labour Council aligned with those of the Women’s Organisations and the Crown. The position of the Crown during the Inquiry owed a great deal to the role of feminists within key policy units including within the Department for Women and the Department for Industrial Relations. This transition in the position of the Labor Council was not the source of major internal debate through the course of the Inquiry and it was the Women’s Committee, rather than the Executive, who were kept well briefed. Although the incumbent leadership of the Labor Council had earlier opposed the Inquiry and assessed it to be time consuming, it was also considered 'small change'; there was no process in place for final submissions to be 'signed off'.

Counsel Assisting provided some indication of the issues that would be debated in the final report through the release of the June 1998 issues paper. It was distributed to all parties, including discussion of the concept of undervaluation, and the remedy of undervaluation for feminised comparisons without recourse to male comparators. For participants at the Inquiry this discussion paper illustrated the way in which Counsel Assisting drove the Inquiry and the questions that would be considered by it. The opposition of the Employers’

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226 Industrial Relations Commission of New South Wales (1998b) *Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister; Volume II*, p. 370.
227 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
228 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
229 Correspondence from Office of Counsel Assisting the New South Wales Pay Equity Inquiry (M. Walton), to all parties, 7 June 1998, pp. 7, 10.
Federation remained constant throughout the Inquiry and the then Director of the Women’s Equity Bureau, Mary Grace, a former advisor to the Minister, considered that Counsel Assisting took the Inquiry in directions that would provide too direct a challenge to the conservative elements within Cabinet and the Commission. This was likely to undermine any chance that the Minister would be able to win Cabinet solidarity behind the recommendations.231

The Inquiry’s conclusions and recommendations commenced with a consideration of the terms of the existing state and federal equal pay principles. The rationale for such an approach was that while both principles remained extant the case studies had raised significant issues concerning the undervaluation of work.232 Final assessment depended also on the more recent legislative attention to equal remuneration, although legislative provisions of a more restricted nature had been evident in the state jurisdiction since 1958 (s.88D Industrial Arbitration Act). The Inquiry required such an assessment so as to address the final submissions of a number of parties, prominently the Crown, the Labor Council and the Women’s Organisations which had asserted the need for a new principle.

Thus the final report contained a detailed assessment of the determination, and then interpretation, of equal pay provisions by both state and federal industrial tribunals. This review found that the federal and state principles, while similar in substance, were not identical in detail. The 1973 state equal pay principle, for example, could operate independently of the wage fixing principle procedures, a provision that was not available federally as evident in the comparable worth proceedings. The strength of the linkage to the Equal Remuneration Convention was also somewhat more evident in the state jurisdiction.233

231 Interview Mary Grace, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 21 April 2005.
232 Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume II, p. 3
The state principle applied primarily to removing the disparity between the basic wage received by women and men as it was presumed in the state jurisdiction that the skill margins for working men and women were already equally and properly fixed. This assumption was a result of a state tribunal decision in 1929 that as far as the margin for skill was concerned the principle of ‘equal pay for both sexes doing the same work’ was upheld.

The Inquiry’s final report defended the application of the original equal pay principles by both state and federal tribunals. Attention was drawn to the continued application of the principle by both tribunals, its conjunctive use with more modern work value principles and the tribunals’ preparedness to compare dissimilar work. Thus the Inquiry set some components of undervaluation against the failure of unions to avail themselves of the available measures. Notwithstanding this observation the Inquiry found that there were limitations in the application of the principles to dissimilar work, an issue that was particularly apparent in New South Wales cases as the principle had provided some deterrent to the review of skill margins.

The Inquiry concluded that both legislative amendments and a new equal remuneration principle were required to ‘make the industrial prescriptions fully effective in dealing with pay equity’. The Inquiry’s recommendation for legislative amendments concurred with the submissions of the Crown that there should be a strong comprehensive legislative base for the implementation of the Equal Remuneration Convention, the prerequisite foundation of any statutory scheme. The Inquiry did not set out the precise terms of a new principle but identified its constituent elements and the required statutory variations. The Inquiry’s

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234 At the time of the 1973 state equal pay decision wages in state awards comprises a basic wage and skill margin while federal awards contained total wages.
235 Re Hairdressers, &c., Females (State) Award (1929) 28 AR 39 at 44.
239 Set out in tables A10.1 and A10.2 in Appendix Ten.
findings were a direct rejection of the submissions of the Employers’ Federation and New South Wales Chamber of Manufactures who argued primarily that no recommendations be made. The alternative submission by the Employers’ Federation was that all pay equity provisions be removed from the *Industrial Relations Act* in addition to the restoration of the exemption of awards and agreements from the *Anti Discrimination Act 1977 (NSW)*.

Thus the Inquiry envisaged that the equal remuneration principle would apply to all circumstances where the Commission exercises its powers and functions including awards, enterprise agreements and the resolution of industrial disputes, including those whose resolution involved a consent agreement. The inclusion of enterprise agreements was a response to the Inquiry’s observation that, unless addressed, the shift to decentralisation would limit the Commission’s capacity to monitor consistent work value. More acutely still, the Inquiry also envisaged the Commission taking an active role in the investigation of pay equity matters. In this regard the Inquiry was strongly influenced by the evidence of the case studies which had shown that the onus of proof on the applicant had resulted in cases not being run by the applicant unions. The Inquiry also reaffirmed in its recommendations that for the purposes of pay equity, remuneration should be defined to include overaward payments.

The Inquiry’s conclusions, as reflected in its recommendations on a new principle and legislative amendments, emphasised undervaluation as the threshold for establishing whether there was the basis for an equal remuneration claim. In this area the Inquiry observed explicitly the limitations of the equal remuneration provisions in federal labour law. The Inquiry explicitly rejected the test of discrimination as the threshold to an equal remuneration

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240 IRNSW, IRC 6320 of 1997, Exhibit 448, p. 4.
claim, the test that is required by provisions in the *Workplace Relations Act 1996* (Cth)\(^{243}\).

More broadly the Inquiry concluded that cases should not require the existence of, or proof of, gender causation and rejected any requirement for a causal connection between the rates of pay and some pre-existing circumstance connected to the gender of the workers concerned\(^{244}\).

In appraising the need for comparators the Inquiry determined that comparisons may be utilised but were not a necessary precondition. The Inquiry did not suggest comparisons be confined to areas of similar work, or that comparisons with other areas of female-dominated work be excluded. The Inquiry’s conclusions in this regard rested on the concept of undervaluation simplicitor and were guided by the case studies and the circumstances under which undervaluation may arise. Justice Glynn went on to indicate a profile which ‘prima facie, could indicate the possibility of an undervaluation of work based on gender’\(^{245}\):

- female dominated;
- female characterisation of the work;
- often no work value exercise conducted by the Commission;
- inadequate application of equal pay principles;
- weak union;
- few union members;
- consent awards/agreements;
- large component of casual workers;
- lack of, or inadequate recognition of qualifications (including misalignment of qualifications);
- deprivation of access to training or career paths;
- small workplaces;
- new industry or occupation;
- service industry;
- home-based occupation\(^{246}\).

If the Commission were to rely on comparative assessments the Inquiry determined that it may be appropriate to have regard to overaward payments provided that the components of

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the payments are identified properly\textsuperscript{247}. In this regard the Inquiry’s findings were somewhat obscure and ran counter to its findings in the hairdressing case study, its determination to ensure that overawards were embraced by the definition of remuneration and its concerns about the shift to enterprise bargaining\textsuperscript{248}. It noted that labour market, as opposed to work value considerations, should be excluded from any consideration of overaward payments. Yet the case studies before the Inquiry showed the difficulties in attributing overaward payments to precise categories. The Inquiry then further limited the use of overawards by noting that such payments can only be used when there is no risk of a flow on\textsuperscript{249}. This aspect of the Inquiry’s findings was the one area of concern for NPEC, as they viewed the Commission’s intervention into the area of overaward payments as pivotal to meaningful pay equity remedies\textsuperscript{250}.

Returning to the construct of undervaluation the Inquiry reinforced the prevailing orthodoxy that, consistent with the 1972 and 1973 decisions, the basis for the assessment of work should be the work value principle. The Inquiry also determined that it should no longer be presumed that proper assessments had been conducted as part of previous work value assessments, the application of the minimum rates adjustments process or the application of the equal pay principles. In this regard the Inquiry highlighted the importance of award histories as a key method of identifying undervaluation. The Inquiry diplomatically conceded that difficulties had characterised the work value assessments underlying the rates of pay and classification structures in child care, hairdressing and seafood processing\textsuperscript{251}, and argued that

\textsuperscript{246} Industrial Relations Commission of New South Wales (1998a) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, pp. 46-47.
\textsuperscript{247} Industrial Relations Commission of New South Wales (1998b) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume II, p. 177.
\textsuperscript{248} Industrial Relations Commission of New South Wales (1998ba) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume I, p. 63.
\textsuperscript{249} Industrial Relations Commission of New South Wales (1998b) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume II, p. 177.
\textsuperscript{250} NPECA, Minutes of Meeting, 9 February 1999.
\textsuperscript{251} Industrial Relations Commission of New South Wales (1998b) \textit{Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister}, Volume II, p. 252.
the new principle should explicitly emphasise gender neutral assessments of the work, reassessing the approach taken to value work involving dexterity, nurturing, interpersonal skills and service delivery.

In tackling undervaluation, the Inquiry identified the characterisation of work as ‘women’s work’, the undervaluation of the skills of women workers per se and occupational segmentation and segregation as relevant factors. The ‘wider dimensions of undervaluation’, namely the low rates of unionisation, high rates of part-time and/or casual employment, the high incidence of consent industrial agreements also needed to be addressed. This finding represented a considerable step forward. It was the first time an industrial tribunal had acknowledged the cumulative nature of inequity in the organisation of women’s labour, including both the fragmentation of women’s work through the use of precarious employment by employers and the lack of prominence afforded by organised labour to particular areas of women’s work. The Inquiry went further to recommend that a comprehensive review of part-time and casual employment should be undertaken to assess inequities between remuneration of part-time and casual employment, relative to full-time employment, particularly in feminised areas of work.

The Inquiry’s recommendations did not limit the remedies available to the Commission, only advised that a number of alternative approaches should be available: the establishment of new career paths; changes to incremental scales; and the reassessment of the broadbanding of classification or skills. The Inquiry did not specifically respond to the submissions of the Labor Council and Women’s Organisations who had argued that tribunals should be

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empowered to award equal remuneration adjustments in those cases where changes to the
classification structure would not of themselves, adequately address disparities in pay that
may largely be driven by the absence of overaward payments. Both the Labor Council\textsuperscript{256} and
Women’s Organisations\textsuperscript{257} had argued that there was considerable precedent for industrial
tribunals assessing the level of overaward payments, and specifically drew the Inquiry’s
attention to the decision of the ACAC to award supplementary payments to award-only
remunerated workers in the metal industry in 1978\textsuperscript{258}. While the claim for an equal pay
adjustment was not specifically rejected it was not accommodated; rather it was
compromised by the Inquiry’s caution on the use of overaward payments.

8.3 THE EQUAL REMUNERATION PRINCIPLE CASE

The final report of the New South Wales Pay Equity Inquiry was provided to the New South
Wales Minister for Industrial Relations on 14 December 1998 and released by the Minister on
24 December 1998. In its 1999 Pay Equity Strategy the state government identified the
report as ‘immeasurably important in mapping the way forward’ for pay equity (New South
Wales Department of Industrial Relations - Women’s Equity Bureau, 1999: 10). Through the
revised strategy the government identified two areas to be addressed throughout the course
of 1999. The first was the need to develop legislative proposals consistent with the Inquiry’s
recommendations and the second centred on work with the parties to develop a new equal
remuneration principle (New South Wales Department of Industrial Relations - Women’s
Equity Bureau, 1999: 11). In this section of the chapter I address the application for the
equal remuneration principle before the Industrial Relations Commission in New South Wales
in some detail. Prior to addressing the substantive issues placed before the Commission, I
outline changes in the representation of the parties, the fate of the proposed legislative
amendments and key arguments between the industrial parties about whether the report of
the Inquiry could be tabled as evidence in the equal remuneration principle proceedings.

\textsuperscript{256} IRNSW, IRC 6320 of 1997, Exhibit 455.
\textsuperscript{257} IRNSW, IRC 6320 of 1997, Exhibit 438.
On the 23 April 1999 the Labor Council filed an application to the Industrial Relations Commission of New South Wales for a new equal remuneration principle(s) having regard to the recommendations of the Inquiry. The application by the Labor Council consisted of three matters: the claim for an equal remuneration principle; an application for an increase in pay rates relevant to any increase that the AIRC may award in the April 1999 National Wage Case; and a new discrimination clause relative to the provisions in the *Industrial Relations Act* that provided for the review of awards.

The application for a new equal remuneration principle was scheduled before the President of the Commission (Wright J) for a series of directions hearings. Justice Lance Wright had been appointed to the Presidency of the Commission in May 1998, following the retirement of Justice Bill Fisher in April 1998. Wright had considerable experience in industrial law, being admitted to the Bar in 1979, and appointed as a Queens Counsel in 1991. Parties to the hearings included the Labor Council of New South Wales, the Minister for Industrial Relations (hereafter called the Crown), the Employers’ Federation of New South Wales, the Australian Industry Group (AIG) and Australian Business Industrial. Given their role in the Inquiry, the President of the Anti-Discrimination Board (ADB), and NPEC, WEL and AFBPW were granted intervention status at the outset of the hearings.

### 8.3.1 CHANGES IN THE REPRESENTATION OF THE PARTIES

There were changes in the representation of the parties. The advocate for the Labor Council in the Inquiry, Gail Gregory, appeared for the Labor Council in the initial directions hearings.

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259. IRNSW, IRC No. 1841 of 1999, Application for a State Decision pursuant to Section 51 of the Industrial Relations Act 1996, to address income and equal remuneration principles and consideration of National Decision/s pursuant to Section 50 of the Act.


261. The description given to IRC No. 1841 of 1999 was initially described in registry files as *Living Wage Case* but, following the removal of particular components of the application to the State Wage Case, the matter on the suggestion of the President was thereafter listed as Equal Remuneration Principle, IRNSW, IRC No. 1841 of 1999, Transcript, p. 23.

262. The AIG was an amalgamation of the former Metal Trades Industries Association and the Australian Chamber of Manufactures. Counsel for the AIG also represented the Catholic Commission for Employment Relations, Local Government and Shires Association of New South Wales, Motor Traders Association of New South Wales, New South Wales Road Transport Association and State Chamber of Commerce.
but left the employment of the Labor Council in August 1999. Consequently Gail Gregory’s
participation in the directions hearings ceased in July 1999 – a departure that from the
perspective of the employer organisations was advantageous as it resulted in a huge loss of
knowledge on ‘the unions side’, as she ‘had been the most influential person behind Walton
through the Inquiry’264. The circumstances of Gail Gregory’s resignation, while never formally
recorded, were linked to the position that she had taken for the Labor Council in final
submissions to the Inquiry, submissions that acknowledged the contribution of unions to the
undervaluation of women’s work and which called for the Commission to remedy inequity in
overaward payments. Gail Gregory’s failure to ‘shut the Inquiry down’ was explicitly
nominated as a factor for her exclusion from the succession arrangements that were put in
place following Secretary Peter Sam’s appointment to the Industrial Relations Commission of
New South Wales and the anticipated departure of Michael Costa to the New South Wales
Parliament265. For those within the Labor Council who remained sympathetic to pay equity,
Gregory’s departure also coincided with the failure to mobilise and campaign around the
issues of undervaluation that were so evident through the Inquiry266.

The change in the representation of the Labor Council took effect in the Full Bench hearings
that commenced in August 1999, where the Labor Council was represented by counsel, Adam
Hatcher, with an instructing solicitor, David Chin. The knowledge and expertise gained by the
Labor Council through the Inquiry, particularly the dynamics and exemplars of
undervaluation, was reduced effectively by this change267. The choice of Adam Hatcher was
unusual as he had little experience in matters of this type and had only recently joined the
industrial bar after previous positions with the Transport Workers’ Union, a loyal Labor
Council affiliate268. Hatcher was a barrister within the same chambers that had at one time
housed Jeff Shaw and Michael Walton. David Chin was a recent employee of the Labor

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263 Formerly known as the Chamber of Manufactures of New South Wales.
264 Interview Anthony Britt, Counsel for the Australian Industry Group and other employer organisations, Equal
265 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales of New South Wales, 24 February
2005.
266 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
267 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
Council. The briefing of Hatcher was viewed as problematic by some within Labor Council – both for his political proximity to Shaw and for his lack of experience in gender pay equity – yet such opposition did not influence the appointment which was made by the Secretary of the Labor Council, Michael Costa. The subsequent shift in the position of the Labor Council throughout the hearing for a new principle became symbolic of a limited commitment by the Labor Council to the pay equity critique advanced by Gail Gregory in the Inquiry. While she had represented Labor Council, the final position that she had submitted was not ‘owned’ by the Labor Council. In the environment of a contested application and the absence of any supportive legislative amendments, the position advanced at the Inquiry dissipated.

There were changes also in the representation of the Crown. While some thought had been given the Crown hiring Counsel Assisting, Michael Walton, in any case arising from the Inquiry, this option was rendered untenable by his appointment as Vice-President of the Industrial Relations Commission of New South Wales. Patricia Lowson, assistant to Counsel Assisting, was appointed as an assistant to the barrister, John Murphy, who was appointed to represent the Crown. As with the Inquiry the Crown’s advocate was instructed by a Crown Working Party. However, the process for finalising and approving the instructions to be provided to the Crown’s legal representatives was also tightened, relative to the process employed in the Inquiry. The departments and agencies represented on the working party remaining unchanged, notwithstanding some changes in personnel, although the New South Wales Department of Industrial Relations took over facilitation of the group, and the Director of Policy within the Department of Industrial Relations involved himself in the workings of the group. The changes invoked for the proceedings were also to have longer term ramifications. Shortly afterwards there was a requirement for all industrial policy matters that

268 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
269 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
270 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
271 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
272 Paul Lorraine.
273 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
had wages ramifications for the government as employer to proceed to the Budget Committee of Cabinet274.

The change in the operating environment of the Crown Working Party at one level reflected a greater sensitivity concerning pay equity. In some respects the change was a result of the different nature of the proceedings; the Inquiry was more expansionary in nature while the equal remuneration principle proceedings were far more determinative in nature275, a distinction that also revealed the disjuncture between the policy arm of government and the government as employer276. There was greater sensitivity concerning the content of the Crown’s submissions and increasing tension between those advising the Crown, and the Minister and his advisers277. There were also changes to the representative for Australian Business Industrial278. This had the effect of distinguishing the position of this group from that of the Employers’ Federation. In the Inquiry both of these employer organisations had presented a joint final submission.

At the directions hearings the President indicated his intention to convene a State Wage Case to address the potential application for wage increases subsequent to the April 1999 National Wage Case. The President’s proposal was that the equal remuneration component of the Labor Council application would be pursued by the Labor Council in equal remuneration principle proceedings and that the other matters identified in the Labor Council application would be addressed in the State Wage Case. The directions hearings also addressed the likely course and timetable for the equal remuneration proceedings claims. Initial debate at the directions hearings centred on two issues: the likelihood of legislative change that would

274 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005, speaking in her capacity as Senior Policy Advisor, New South Wales Premier’s Department.
275 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005.
276 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005; Interview Richard Cox, Member Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Treasury, 21 April 2005.
277 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005 (appointed Director January 1999).
278 In the equal remuneration principle proceedings Australian Business Industrial was represented by Grant Poulton.
potentially influence the content of a equal remuneration principle determined by the Commission; the admissibility of the report of the Pay Equity Inquiry.

8.3.2 LIKELIHOOD OF LEGISLATIVE AMENDMENTS

Even prior to the release of the final report of the Inquiry a contest was taking place over amendments to the *Industrial Relations Act*. Given the limitations of the legislative provisions that had been exposed in the early hearings of the Inquiry, women located in senior policy sections were advancing proposals for legislative amendments. The need for legislative change was also the subject of discussion within NPEC leading to representations to the Minister from February 1999 onwards. Some urgency was required. The Carr government was bound by legislation to go to an election in March 1999 and there was some speculation that the Minister would not see out his full term if the government were to be re-elected.

In the initial stages of these policy discussions, the response from the Minister's office was that he would await the report of the Inquiry. Yet the proximity of the release of the report, in December 1998, to the March 1999 electoral timetable meant that any discussion of legislative amendments within that timetable was pointless.

After the re-election of the government, discussion over the legislative amendments continued. The 1999 Pay Equity Strategy released by the government identified an appropriate jurisdictional foundation for pay equity as a key objective. Consistent with this direction the Department of Industrial Relations commenced a series of consultations concerning legislative amendments in March 1999. The clear expectation was that while the legislative amendments would not be finalised by the anticipated State Wage Case in April 1999 they would be put to the Parliament shortly thereafter.

279 NPECA, Minutes of Meeting, 9 February 1999.
281 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005.
282 NPECA, Minutes of Meeting, 13 April 1999; Interview Kathryn Freytag, Director, Women's Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
283 NPECA, Minutes of Meeting, 10 March 1999.
Beneath this veneer there was deep seated opposition to these measures, a dissent which revealed a shift in the government’s broader position on pay equity. The report and recommendations of the Pay Equity Inquiry had been beyond the expectations of the Carr government. There was particular animosity between the New South Wales Treasurer, Michael Egan, and the Attorney General and Minister for Industrial Relations, Jeff Shaw, with Egan accusing Shaw of misleading him over the Inquiry, particularly the manner in which Treasury evidence was utilised within the Inquiry and the final recommendations. Prior to Gail Gregory’s departure, the Labor Council through her advocacy pressed for legislative changes but found that the ‘[parliamentary] troops had been marshalled by Egan’ – there was immense paranoia about the reaction of the employers and the cost implications that would arise from wage increases for teachers and nurses. The Treasurer even threatened to put forward his own legislative amendments to constrain the Commission engaging in the wider dimensions of remuneration, although it seemed apparent that the Treasurer’s threat was simply meant as a device to lead to the legislation and the status quo remaining intact.

Within this environment the Minister’s personal commitment to the legislative amendments was uncertain. This seeming ambiguity persisted despite what appeared to be a strong indication from the President that a clear signal concerning the legislation was needed. The Minister expressed some sympathy for the amendments in meetings prior to July 1999 with the Labor Council but was not totally convinced of the need for legislative change. The

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284 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005; Interview Elizabeth Fletcher, Facilitator Crown Working Party, New South Wales Pay Equity Inquiry, New South Wales Premier’s Department, 20 February 2005; Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
285 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
286 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
287 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
288 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
289 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 24 February 2005.
290 NPECA, Minutes of Meeting, 17 May 1999.
291 Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
importance of the legislation was pressed by NPEC both in meetings with the Minister, and in correspondence with NPEC, asserting that legislative change was needed for two purposes: to ensure that the Commission was able to apply a renewed equal pay principle across all of its functions; and to ensure that discrimination did not form a threshold test for any application for equal remuneration\textsuperscript{293}. In meetings between the Minister and Meredith Burgmann, now President of the New South Wales Legislative Council, the Minister expressed some surprise at NPEC’s insistence concerning legislative change\textsuperscript{294}. The Minister also expressed some concern in briefings involving Crown representatives at the prospect of amendments to legislation, the \textit{Industrial Relations Act}, as he felt that the legislation was sufficiently reformist in nature\textsuperscript{295}.

In the face of this ambivalent support by the Minister, a Cabinet Minute was submitted to the Cabinet Office in June 1999 by the Minister for Industrial Relations, with supporting documentation prepared by the Women’s Equity Bureau, Department of Industrial Relations. The proposed legislative change did not proceed to Cabinet for a definitive determination. As is customary the Cabinet Minute was distributed to Cabinet Ministers and their departments by the Cabinet Office, but with the Minister for Industrial Relations given direction to achieve consensus\textsuperscript{296}. This process of consultation included direct discussion between the Department for Women and the Director-General of the Cabinet Office, Roger Wilkins\textsuperscript{297}. This process revealed extensive ministerial and departmental opposition to the prospect of legislative amendments\textsuperscript{298}.

\textsuperscript{293} NPECA, Minutes of Meeting, 17 May 1999; NPECA, Minutes of Meeting, 16 June 1999.  
\textsuperscript{294} NPECA, Minutes of Meeting, 17 May 1999; Briefing Notes for Meredith Burgmann for Meeting with Jeff Shaw, circa 10 May 1999.  
\textsuperscript{295} Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.  
\textsuperscript{296} NPECA, Minutes of Meeting, 29 July 1999; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.  
\textsuperscript{297} NPECA, Minutes of Meeting, 30 September 1999.  
\textsuperscript{298} Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
In response, NPEC, through Meredith Burgmann, successfully moved for the prospect of legislative change to be advanced at the September 1999 ALP State Conference\textsuperscript{299}. Some NPEC members became pessimistic about the prospect of legislative change but continued to advocate this course of action\textsuperscript{300}. Faced by Cabinet opposition to legislative change and believing that reform could occur without legislative amendment, the Minister decided not to proceed with the specific proposal or press the matter any further in Cabinet because of the strong possibility that it would be defeated\textsuperscript{301}. Leaving the legislation intact became the line of defence against the threatened Egan amendments\textsuperscript{302}. Cabinet’s position reflected something of the strength of opposition to the amendments based on the cost of the government as an employer and to business more generally. The contest within the Crown, between its women’s policy units and the Crown as an employer, became most apparent in relations to the equal remuneration principle\textsuperscript{303}. Further, the government felt under no electoral threat: having increased its parliamentary majority at the previous election, there was no longer the interest in garnering the women’s vote\textsuperscript{304}.

Against this background, the Crown, in the directions hearings in May 1999, indicated that the Minister was giving active consideration to the legislative amendments\textsuperscript{305}. At that time the Crown’s advocate indicated that legislative amendments would not be likely to occur in the current parliamentary session which concluded 22 July 1999, but would be considered in the spring session of the New South Wales Parliament commencing in September 1999\textsuperscript{306}. The Crown’s advocate indicated that the application should continue, a position that was

\textsuperscript{299} NPECA, Minutes of Meeting, 30 August 1999; NPECA, Minutes of Meeting, 30 September 1999.
\textsuperscript{300} NPECA, Minutes of Meeting, 30 September 1999.
\textsuperscript{301} Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005; Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{302} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{303} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005; Interview Anthony Britt, Counsel for the Australian Industry Group and other employer organisations, Equal Remuneration Principle proceedings, 9 March 2005.
\textsuperscript{304} Interview Meredith Burgmann, President Legislative Council, New South Wales Parliament, 9 March 2005.
\textsuperscript{305} IRNSW, IRC No. 1841 of 1999, Transcript, p. 28.
\textsuperscript{306} IRNSW, IRC No. 1841 of 1999, Transcript, p. 33.
supported by the Labor Council\textsuperscript{307}. The general expectancy concerning the legislative amendments was evident in the submissions of the Employers’ Federation, which assumed that the application for a new principle would be heard with a different legislative schema in place\textsuperscript{308}. Shortly after, the Labor Council submitted a two part application which proposed that formal hearings be set aside given the uncertainty over the legislative amendments, but that the parties be assisted, through conciliation, to resolve some of their likely differences as to the terms of a likely equal remuneration principle\textsuperscript{309}. The Crown opposed what it viewed as an application for adjournment by the Labor Council, arguing that the matter should proceed while active consideration was being given to the legislative changes recommended by the Inquiry\textsuperscript{310}.

The President indicated that the Commission could only hear the application under the terms of the current legislation, in accordance with the ‘mutual desire of the parties’\textsuperscript{311}. However, the President did in the subsequent Full Bench proceedings press the Crown about the status of any likely legislative amendments. One such exchange took place between the President and the Crown’s advocate in February 2000, ten months after the application for the principle had been filed.

\textbf{PRESIDENT;} ....As you will remember, these proceedings were adjourned at least once for a number of reasons, one of which was legislation. What has happened?

\textbf{MURPHY (for the Crown);} No decision has been made.

\textbf{PRESIDENT;} That is very informative. I do not want to be difficult, but it could be an important issue to your case and to everyone’s case that there has or has not been or there might or might not be. Obviously there is a separation of powers and I do not want to get into another area embodied in that separation of power. On the other hand in evidence, which someone may tell us was impressive – indeed everyone may tell us that that Professor McCallum’s evidence was impressive – he talked about the limitations on the Act and the need for legislative change. Where does that put us in these proceedings?

\textbf{MURPHY;} I have said all I can in relation to that apart from this. Obviously the Minister is fully aware – and I can only speak for the Minister – that this application is before this Commission and is content that the process go forward in that way.

\textsuperscript{307} IRNSW, IRC No. 1841 of 1999, Transcript, p. 31.
\textsuperscript{308} IRNSW, IRC No. 1841 of 1999, Transcript, p. 36.
\textsuperscript{309} IRNSW, IRC No. 1841 of 1999, Transcript, p. 90.
\textsuperscript{310} IRNSW, IRC No. 1841 of 1999, Transcript, p. 90.
\textsuperscript{311} Re Equal Remuneration Principle (2000) 97 IR 177 at 185.
PRESIDENT; I do not intend to issue a request for further and better particulars but I doubt that what you have given us is sufficient for the purposes of these proceedings.

MURPHY; I will pass that observation on.\(^{312}\)

While the prospect of legislative amendments was discussed openly such amendments did not come before the Parliament during the proceedings, a prospect that diminished entirely with the resignation from Parliament of the Minister in July 2000. Jeff Shaw returned to the industrial bar for a period of two years prior to his appointment as a Judge of the New South Wales Supreme Court in January 2003.\(^ {313}\) The pressure that was exerted on the Crown’s submissions, from within the government, was evident in final submissions where Crown argued that the principle it sought was not dependent on a change in legislation.\(^ {314}\)

8.3.3 ADMITTING THE PAY EQUITY INQUIRY AS EVIDENCE

At the outset of the directions hearings, the Employers’ Federation indicated that they would object to the submission of the report of the Pay Equity Inquiry as evidence in the current proceedings.\(^ {315}\) These concerns were articulated also in joint correspondence from Australian Business Industrial and the Employers’ Federation to the Labor Council and the Crown Solicitors Office.\(^ {316}\) The correspondence set out the position of these employer organisations regarding the report:-

1. That the report is not conclusive as proof or otherwise of any matter or issue in the proceedings.

2. That the Report is not evidence of the truth of the matters that appear within it for the purpose of the proceedings.

3. That the Report is not binding on the Crown.

4. That the Commission is free to make findings that are different from those in the Report.\(^ {318}\)

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\(^{313}\) Jeff Shaw’s tenure in the Supreme Court was relatively short-lived as he resigned his position in 2004.

\(^{314}\) IRNSW, IRC No. 1841 of 1999, Transcript, p. 568.


\(^{316}\) IRNSW, IRC No. 1841 of 1999, Exhibit C.

\(^{317}\) IRNSW, IRC No. 1841 of 1999, Exhibit D.
Further written submissions were made by the Employers’ Federation and Australian Business Industrial on the use that the Commission might make properly of the report\textsuperscript{319}.

Initially the Labor Council opposed the position of the employer organisations and argued that the report should be admitted as evidence and that the appropriate weight to be afforded that evidence would be subject to the deliberations of the Full Bench\textsuperscript{320}. The Crown supported the submissions of the Labor Council and argued in addition that the Commission should afford the report substantial weight\textsuperscript{321}. In reply the President indicated some surprise that any applicant would base their case 'so entirely on one report\textsuperscript{322}. Both the Labor Council and the Crown argued that if the tabling of the report was not accepted the schedule for evidence in the current proceedings would be prolonged, as a number of matters dealt with in a sustained manner at the Inquiry would be revisited by the Full Bench. The Crown argued that the admission of the report was possible under s.146 of the \textit{Industrial Relations Act}\textsuperscript{323} and the Labor Council in correspondence to the President submitted that no directions should be issued in this matter until such time as there has been a decision on whether the report is admissible as evidence\textsuperscript{324}. At further directions hearings the Labor Council continued to press for a preliminary view from the Commission about the admissibility of the report and flagged, in the face of direct criticism from the President\textsuperscript{325}, that it would give consideration as to whether it would proceed with the application\textsuperscript{326}.

In correspondence to the likely members of the Commission that would comprise a Full Bench to hear the application, the President indicated that he saw no reason for the Commission to

\textsuperscript{318} IRNSW, IRC No. 1841 of 1999, Exhibit D, p. 2.
\textsuperscript{319} IRNSW, IRC No. 1841 of 1999, Appended to Correspondence from Employers’ Federation of New South Wales to the President (Wright J), Industrial Relations Commission of New South Wales, 25 June 1999.
\textsuperscript{320} IRNSW, IRC No. 1841 of 1999, Transcript, p. 44.
\textsuperscript{321} IRNSW, IRC No. 1841 of 1999, Transcript, p. 51.
\textsuperscript{322} IRNSW, IRC No. 1841 of 1999, Transcript, p. 55.
\textsuperscript{323} This section deals with General Functions of the Commission. IRNSW, IRC No. 1841 of 1999, p. 78.
\textsuperscript{324} IRNSW, IRC No. 1841 of 1999, Correspondence from Labor Council (C. Christodolou) to the President (Wright J), Industrial Relations Commission of New South Wales, 5 August 1999.
\textsuperscript{325} IRNSW, IRC No. 1841 of 1999, Transcript, p. 129.
\textsuperscript{326} IRNSW, IRC No. 1841 of 1999, Transcript, p. 127.
issue a preliminary view of the admissibility of the report, a matter of some surprise to the Minister. It had been anticipated that the Vice-President, Justice Walton, would be included in the Full Bench, but this nomination was not pursued because of vehement opposition from the Employers Federation. The clear opposition of the President to the tabling of the Inquiry was viewed as consistent with a level of legal pedantry brought to the Commission by the President. In response, the Labor Council submitted a revised set of directions and timetable for the filing of contentions and evidence which reflected their view that the Bench should not make a preliminary view on the submission of the report.

The insistence of the Labour Council that the report of the Inquiry be admitted as evidence was not sustained. At subsequent hearings before the Full Bench (Wright J President, Hungerford J, Schmidt J, Sams DP, McKenna C), the Labor Council and the Crown indicated that they no longer pressed the position that the report be accepted as evidence. The revised position of these parties was that the report of the Inquiry be submitted to the current proceedings as a report of the Commission and that they accepted the basis of the employer parties’ submissions concerning the consideration that the Full Bench should give the Inquiry. The slippage in the positions of the Crown and the Labor Council was such that the report was finally, albeit with due judicial politeness and courtesy, defined as an impotent starting point.

Although the parties adopted different positions at one point as to the use to which the Pay Equity Inquiry might be put, there was finally a large degree of commonality in their respective approaches to that Report. The common ground was that the Full Bench was entitled to have regard to the Report and the findings contained therein; it was not, however, bound by the Report or those findings. Further, it was accepted that in a number of respects the Commission should carefully weigh the material put to her Honour before it acted upon any particular part of the Report or recommendations.

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328 Interview Jeff Shaw, Attorney General and New South Wales Department of Industrial Relations, 14 March 2005.
329 Interview Jeff Shaw, Attorney General and New South Wales Department of Industrial Relations, 14 March 2005.
331 IRNSW, IRC No. 1841 of 1999, Exhibit E.
332 IRNSW, IRC No. 1841 of 1999, Transcript, p. 142.
333 IRNSW, IRC No. 1841 of 1999, Exhibits 1, 2; IRNSW, IRC No. 1841 of 1999, Transcript, p. 149.
335 As stipulated in IRNSW, IRC No. 1841 of 1999, Exhibit D.
arising therefrom. In general terms, we accept that common position. The fact and nature of the Pay Equity Inquiry provides a wealth of information, material and considered recommendations which do indeed provide and appropriate starting point for our consideration of the material before us. It reflects a comprehensive and diverse body of evidence, representing a range of informed opinion and collected data which facilitated the Full Bench's ability to deal with the important questions before it337.

In the midst of debates as to the likelihood of legislative amendments, and the status that should be afforded the report, a number of parties filed statements of contention in line with the directions tabled by the Labor Council in May 1999 and June 1999338. The uncertainty over the legislative amendments in addition to the differences between the parties as to the reliance that could be placed on the report of the Inquiry led to the original hearing dates and timetable as submitted in May 1999 being vacated339. Surprisingly neither the Crown nor the Labour Council revised the type of evidence that they would lead in the subsequent proceedings.

The initial submissions of the parties, evident in their outline of submissions, had revealed some clear differences between the parties as to the need for, and content of a new equal remuneration principle. The Labor Council340, Crown341 and Women's Organisations342 all asserted the need for a new principle, one that would apply to all areas within the Commission's jurisdiction. In contrast the Employers' Federation343 and the AIG344 opposed the need for a new principle. Australian Business Industrial supported the Employers Federation and the AIG, but also submitted an alternative position that a principle could be

339 As tabled in, IRNSW, IRC No. 1841 of 199, Exhibit A.
342 IRNSW, IRC No. 1841 of 1999, Statement of Contentions and Outline of Submissions, filed on behalf of the National Pay Equity Coalition, the Women's Electoral Lobby and the Business and Professional Women's Association (NSW) (The Women's Organisations), 28 June 1999, p. 1, 5.
343 IRNSW, IRC No. 1841 of 1999, Statement of Contentions and Outline of Submissions, filed on behalf of the Employers' Federation of New South Wales, 2 July, p. 1.
344 IRNSW, IRC No. 1841 of 1999, Statement of Contentions and Outline of Submissions, filed on behalf of Australian Industry Group, the Catholic Commission for Employment Relations, Local Government and Shires Association of New
made under restricted circumstances. It was the Labor Council rather than the Commission which proposed that the parties should proceed to conciliation, chaired by a member of the Commission. The Labor Council proposal was not opposed by the other parties. The President indicated some concern about the benefits that would arise from conciliation in a period of legislative uncertainty, but did direct the parties to two days of conciliation, chaired by Justice Schmidt.

The conciliation conferences before Justice Schmidt did not resolve the differences between the Crown, Labour Council, President of the ADB and the Women’s Organisations on the one hand, and the employer groups on the other. The matter came before the Full Bench Commission in August 1999. At that stage there was a broader degree of agreement between the Crown, Labor Council, the President of the Anti-Discrimination Board and the Women’s Organisations than there was within the employer organisations. The Commission observed at this point that the employer groups ‘were at significant odds with the common ground which lay between the other parties’. It was also clear that the amended directions and timetable, comprising hearing dates agreed to in June 1999, was no longer sustainable. A new timetable was established with hearing dates established for February through to March 2000.

**8.3.4 SUBMITTING AN AGREED POSITION TO THE COMMISSION**

The equal remuneration principle proceedings differed in a number of respects from those of the Inquiry. To an extent this was shaped by the determinative nature of the proceedings, and the requirement for the Bench to determine whether a new equal remuneration principle

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347 IRNSW, IRC No. 1841 of 1999, Transcript, p. 100, 105.
349 As in the New South Wales Pay Equity Inquiry three women’s organisations, the National Pay Equity Coalition, the Women’s Electoral Lobby and the Australian Federation of Business and Professional Women’s Associations had combined their resources.
was required and the nature of that principle. Aside from this, the focus of the evidence led to the Full Bench differed from that led to the Inquiry in a number of ways. The Full Bench proceedings did not canvass to the same extent the evidence concerning undervaluation that was available to it from the Inquiry. While the Labor Council could have led evidence from the Inquiry to demonstrate the nature and application of undervaluation, it chose not to, outside of the evidence from the hairdressing case study. Rather the evidence focused significantly on what could be termed technical issues in addition to the impact of any equal remuneration principle. The technical issues included the definition of key terms, including remuneration and comparable, and the statutory construction to be afforded the provisions in the existing legislation. Like the Inquiry there was considerable evidence concerning the extent of earnings disparities between men and women, but greater attention was paid to the economic impact of an increase in women’s earnings on the New South Wales economy. Of the nineteen witnesses that appeared in the proceedings, fifteen had appeared also in the Inquiry.

During the proceedings the Labor Council commenced negotiations with the employer organisations with a view to putting an agreed position to the Full Bench. The Labor Council was motivated by a number of factors. Although no formal announcement had been made it became increasingly apparent the legislative changes would not proceed – a turn of events that would shape the principle that could be made. The lack of legislative change was considered to be highly prejudicial to any submissions that a new principle extend beyond consideration of minimum award rates and include overaward payments and workplace bargaining arrangements. In the view of those instructing the Crown’s advocate to the proceedings, the Labor Council, without the staff who had guided the submissions of Labor Council to the Inquiry, was never comfortable with the principle entering the overaward area. To do so would ‘upset the applecart’ and ‘impose an extra burden on unions’.

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351 IRNSW, IRC No. 1841 of 1999, Exhibit E.
353 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
However, the backtracking of the Labor Council was such that sufficient pressure was applied to the Council by the ACTU President, Jenny George, on the urging of Meredith Burgmann. Such lobbying was to have a limited effect.

Within the Labor Council there was some concern to ‘wrap things up’ – in the eyes of the leadership all of the work through the Inquiry had amounted to very little and the current proceedings were still drawing a significant level of financial resources – in the fees of barristers and solicitors. The Labor Council was also fearful of the Commission’s decision if it was not presented with an agreed position. From the perspective of the employer organisations, particularly the AIG and Australian Business Industrial, there was some impetus for a ‘meeting of minds’ with Labor Council as they expected that the Commission would ‘hand down something’ given the ‘weight of evidence’. Thus it was in their interest to take responsibility and try and influence the outcome and achieve something that was workable, a course of action that was more often than not acceptable to the Commission.

The negotiations between the Labor Council and the employer organisations placed some pressure on the position of the Crown, but ultimately provided a convenient option given the imbecrolio over the legislative amendments. This became clear after the Crown advocates and the Director of the Women’s Equity Bureau were carpeted by the Minister following the evidence of Professor Ron McCallum. McCallum had been a key contributor to the development of the Industrial Relations Act, having been a member of a working group advising the Minister on the design of legislation in 1995. In evidence McCallum was unequivocal in his view that the present legislative provisions were not adequate for the type

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354 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005.
355 Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 11 February 2005.
357 NPECA, Minutes of Meeting, 29 February 2000.
358 Interview Alison Peters, Vice-President, Labor Council of New South Wales, 14 March 2005.
361 Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
of equal remuneration principle proposed by the Inquiry\textsuperscript{362}. McCallum was a witness called by the Crown and the Minister was astounded that such evidence, which was so contrary to the position that had been rejected through the process of submission to Cabinet, would be introduced by his own advocates\textsuperscript{363}. The use of McCallum, described by the Minister as ‘quite something’\textsuperscript{364}, reflected something of the ‘bizarre timing of the case’\textsuperscript{365}. Consistent with the directions of the Full Bench, evidence at this stage of hearings was filed in November 1999 and circulated to all parties. McCallum’s approach to the legislation, which he viewed as inadequate for the purpose of gender pay equity, was clearly evident in his statement\textsuperscript{366}, a point not lost on key members of the Crown Working Party. This was overlooked at the time the statement was filed due to a naïve assumption that the prospect of legislative amendments would surface again. The Crown pressed forward with McCallum appearing as a witness as they were concerned that the employers would issue a summons for him to appear, if they chose to withdraw his evidence\textsuperscript{367}. An additional constraint was there had been no public announcement concerning the government’s decision not to proceed with the amendments. Although briefed prior to giving evidence, McCallum was no less forthright in his evidence during proceedings concerning the legislation’s deficiencies\textsuperscript{368}.

The prospect that the major parties to the case were considering an agreed position was ultimately the means by which the Minister’s concern over the case was appeased. The Crown was instructed to monitor the discussions between the industrial parties and ultimately not stand apart from any agreed position\textsuperscript{369} - it was ‘not for us to disrupt it [the agreed

\textsuperscript{362} IRNSW, IRC No. 1841 of 1999, Transcript, pp. 431-434.
\textsuperscript{363} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{364} Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005.
\textsuperscript{365} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{366} IRNSW, IRC No. 1841 of 1999, Exhibit 29.
\textsuperscript{367} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{368} IRNSW, IRC No. 1841 of 1999, Transcript, pp. 431-437.
\textsuperscript{369} Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 10 February 2005; Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
position\textsuperscript{370}. More broadly the relationship between the Minister, his staff and the women in the Crown Working Party soured with the Minister questioning the veracity and the trustworthiness of their advice\textsuperscript{371}. In this environment the Crown Working Party found it increasingly difficult to obtain instructions from the Minister as the Labor Council proceeded to concede on a number of key issues established by the Inquiry. There was a suspicion among members of the Crown Working Party that the Labor Council was getting ‘a steer from elsewhere\textsuperscript{372}, notably from the Minister\textsuperscript{373}. The final negotiations between the parties were notable from the perspective of representatives on the Crown Working Party for the input from Counsel, relative to policy advisers. Increasingly attention turned to how the legislation, unamended, could accommodate a equal remuneration principle, even one substantially reduced from that recommended by the Inquiry\textsuperscript{374}. As if to confirm their increasingly marginalised status the policy advisers from the Crown were referred to by the Crown and Labor Council counsel as the ‘femonazis\textsuperscript{375}.

The support of the Crown for the parties reaching an agreed position would also prove to be an effective bargaining chip in contentious budget discussions concerning the Women’s Equity Bureau. In the May 2000 state budget the New South Wales Government announced the closure of the Women’s Equity Bureau within the New South Wales Department of Industrial Relations, and transfer of any residual functions to the Department for Women. In an environment where budget funding was increasingly competitive the Department of Industrial Relations faced a financial dilemma. Senior bureaucrats in the Department of Industrial

\textsuperscript{370} Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005.
\textsuperscript{371} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{372} Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 10 February 2005.
\textsuperscript{373} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations, 10 February 2005.
\textsuperscript{374} Interview Philippa Hall, Deputy Director General, New South Wales Department for Women, 10 February 2005.
\textsuperscript{375} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales, Department of Industrial Relations, 10 February 2005.
Relations blamed pay equity and the Women’s Equity Bureau for the budgetary pressures facing the Department\textsuperscript{376}.

There was opposition from women’s organisations to the closure of the Women’s Equity Bureau and negotiations on an alternative course of action commenced in July 2000. By that time Jeff Shaw had resigned. The newly appointed Minister for Industrial Relations was John Della Bosca, a relatively recent member of the New South Wales Parliament, but someone with a long background with the ALP, having served as General Secretary of the New South Wales branch between 1990-1999. Della Bosca’s ascendancy to the Ministry was swift, a function of his party seniority and his ascendancy to a leadership position in the prevailing right faction within the parliamentary Labor party. In something of a twist, the campaign to salvage the Women’s Equity Bureau was assisted by the contribution of the Crown Working Party to what was viewed as an acceptable outcome from the equal remuneration principle proceedings, relative to what may have transpired from the recommendations of the Inquiry. The Women’s Equity Bureau with a halved budget survived until 2002 when it was abolished, to be followed by the abolition of the Department for Women in 2004\textsuperscript{377}.

Discussions between the parties on an agreed position in February 2000 were noted by the Commission\textsuperscript{378} which consented to an application for adjournment instigated by the Labor Council for the purpose of such discussions\textsuperscript{379}. Ultimately the parties advanced an agreed position to the Full Bench on a number, but not all, aspects of an equal remuneration principle\textsuperscript{380}. The Women’s Organisation submitted a draft equal remuneration principle that was independent from the other parties\textsuperscript{381}. The employer organisations had altered their original contention and agreed that a new principle was required, but one that was confined

\textsuperscript{376} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales, Department of Industrial Relations, 10 February 2005; Interview Philippa Hall, Deputy Director General, New south Wales Department for Women, 11 February 2005.

\textsuperscript{377} Interview Kathryn Freytag, Director, Women’s Equity Bureau, New South Wales, Department of Industrial Relations, 10 February 2005.

\textsuperscript{378} IRNSW, IRC No. 1841 of 1999, Transcript, p.486.

\textsuperscript{379} IRNSW, IRC No. 1841 of 1999, Transcript, p.487.

\textsuperscript{380} IRNSW, IRC No. 1841 of 1999, Exhibit 52.

to the Commission’s award making and variation functions\textsuperscript{382}. The items of disagreement were confined to two areas: the definition to be afforded to remuneration, an area of argument that impacted on the inclusion of overaward payments within the scope of the principle; and the test that the Commission should apply to any disparity in rates of pay. The Employers’ Federation argued that applicants should be required to demonstrate that rates of remuneration resulted from discrimination based on sex\textsuperscript{383}. The AIG and Australian Business Industrial argued that the test should be simply that the Commission was not satisfied that there was not equal remuneration for work of equal or comparable value and submitted that this could be inclusive of both discrimination or undervaluation\textsuperscript{384}. The Labor Council and the Crown argued that the test should be of undervaluation\textsuperscript{385}.

8.3.5 A NEW EQUAL REMUNERATION PRINCIPLE

The final decision of the Full Bench (30 June 2000) was not unanimous. The majority decision (Justices Wright, Hungerford and Schmidt, Deputy President Sams) provided for a new equal remuneration principle which departed from the recommendations of the Inquiry in a number of key areas\textsuperscript{386}. These included the meaning to be afforded remuneration, the investigative powers open to the Commission, the structure of the principle and the narrow ambit afforded to the nature of undervaluation. On these matters, the fifth member of the Full Bench, Commissioner McKenna, issued a dissenting decision. The majority decision departed from the position that was agreed largely between the parties with the exception of the Women’s Organisations\textsuperscript{387}. This departure from the agreed position was not foreseen by the former Minister\textsuperscript{388}.

\textsuperscript{386} Terms of the principle set out in full in Appendix Eleven.
\textsuperscript{387} Table A12.1 in Appendix Twelve contrasts the position of the final decision, the major industrial parties and the Women’s Organisations.

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An agreement between the parties was acknowledged to be ‘a significant matter which the Commission will take into account in considering cases advanced before it’\textsuperscript{389}. Yet the decision also noted that ‘[s]uch agreement cannot, however, be determinative of any application, especially in a case such as this where much depends upon the proper construction of the Act\textsuperscript{390}. This position of the Commission was to underline the failure of the state government to pass the legislative amendments. Effectively the evidence of the Inquiry became sidelined by questions of statutory construction and the decision reflects this. It was a ‘technical decision’ and provided little guidance as to how undervaluation might be identified and pursued\textsuperscript{391}. Assisted by the narrow scope of the evidence that had been led to it, the decision of the majority dealt far less with issues concerning the shape and form of inequity than it did with trying to reconcile questions of what was allowed by the legislation. In effect questions of statutory construction became the means whereby the Commission was able to sidestep the key questions and evidence posed by the Inquiry – ‘in some ways it was as if it never happened\textsuperscript{392}.

The eagerness for the parties to reach a consensus position and its ultimate rejection by the Full Bench needs to be read against the compromises made by the parties, primarily the Crown and the Labor Council, in the course of the proceedings. As observed in the dissenting decision of Commissioner McKenna, the effect was to put forward a position that suffered from being a ‘multi-party compromise’ and one that departed significantly from the positions advanced originally by the Crown and the Labor Council\textsuperscript{393}. The following section of this Chapter will now review two related issues: those areas where positions of the Labor Council and the Crown altered significantly through the proceedings; and those areas where the views of the Full Bench differed from the position advanced by the Inquiry.

\textsuperscript{388} Interview Jeff Shaw, Attorney General and New South Wales Minister for Industrial Relations, 14 March 2005.
\textsuperscript{389} Re Equal Remuneration Principle (2000) 97 IR 177 at 195.
\textsuperscript{390} Re Equal Remuneration Principle (2000) 97 IR 177 at 195.
\textsuperscript{391} Interview Anthony Britt, Counsel for the Australian Industry Group and other employer organisations, Equal Remuneration Principle proceedings, 9 March 2005.
\textsuperscript{392} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales, 20 February 2005.
The final decision reflected the Full Bench’s original scepticism concerning need for a new principle. During the proceedings it put to the parties that the provisions of the Commission’s existing Special Case principle enabled parties to bring cases involving equal remuneration claims before it. The terms of that principle read:

Except for the flow on of test case provisions, any claims for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the principles, will be processed as a special case before a Full Bench of the Commission, unless allocated by the President.

This principle does not apply to applications for awards consented to by the parties, which will be dealt with in the terms of the Act, or to enterprise arrangements, which will be dealt with in accordance with the Enterprise Arrangements principle.

The majority decision noted that ‘the view that any undervaluation claim in respect of women workers is currently available to be considered under this [Special Case] principle is plainly correct’. Such a conclusion partially sidelined the findings of the Inquiry which had noted that one of key arguments for a new principle was the failure of the parties to utilise the available infrastructure in order to advance equal remuneration claims. The Inquiry had recommended also that more direct measures were required to ensure that equal remuneration matters were considered in matters of consent and noted that such consideration was not always given. The majority decision records that the consensus position of the parties and interveners was that a new principle should be included in the State Wage Case principles. In this instance the majority decision viewed it appropriate to adopt ‘the consent of the parties in that respect…..an approach which Full Benches of this Commission and its predecessor have adopted on a number of occasions’.

8.3.6 DEFINING REMUNERATION

The Inquiry had adopted a definition of remuneration based on the terms of the Equal Remuneration Convention. Throughout the proceedings the Crown and the Labor Council continued to argue that the Full Bench should follow this practice, notwithstanding the

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competing interpretations of remuneration advanced by different provisions in the legislation\textsuperscript{398}. Effectively these organisations indicated that this was required so that the Commission could consider overaward payments. The Employers’ Federation asserted that the Full Bench must ensure consistency. In October 1998 the Commission had defined the meaning to be afforded the words ‘rates of remuneration’ in s.19(3)(b) as follows:

\begin{quote}
We ……express the view that in this part of the 1996 Act, properly understood, the word ‘remuneration’ must be read in the context of the phrase in which it appears – ‘rates of remuneration’. That phrase is to be understood, we think, in the sense that the word ‘rates’ is used as a limitation. In such a context the word ‘remuneration’ has a narrow meaning, being one confined to the case or monetary provisions of the award in question\textsuperscript{399}.
\end{quote}

Thus the submission of the Employers’ Federation and the other employer bodies was that the remuneration should be limited to the cash or monetary benefits fixed by the award and thus exclude overaward payments.

The majority decision concurred, indicating that remuneration may be understood as not including overaward payments\textsuperscript{400}. In doing so it determined that s.21 of the Act, while containing the term ‘equal remuneration and other conditions’, should be read against the introductory words of that section of the legislation that indicate that it is directed to ‘make an award’. Similarly the majority decision held that s.23 is confined to ‘equal remuneration and other conditions of employment’ provided in an award\textsuperscript{401}. The Full Bench also noted that if it was the Parliament’s intention that remuneration be defined in the way of the Equal Remuneration Convention, such a definition would have been incorporated into the legislation\textsuperscript{402}.

The construction advanced by the Full Bench was not accepted in the dissenting decision. Commissioner McKenna advanced the proposition that words limiting the interpretation of remuneration to award rates are not used in those provisions of the Act concerned with

\textsuperscript{397} Re Equal Remuneration Principle (2000) 97 IR 177 at 192.
\textsuperscript{400} Re Equal Remuneration Principle (2000) 97 IR 177 at 202.
\textsuperscript{401} Re Equal Remuneration Principle (2000) 97 IR 177 at 203.
rectifying gender-related inequalities, namely s.3(f), s.6(2)(f), s.19(3)(e), s.21(1)(b), s.146(2)(b) and the definition of ‘pay equity’. More specifically Commissioner McKenna’s conclusions gave weight to the ordinary meaning to be afforded to the term and the close styling of other sections of the legislation, particularly the definition of pay equity and in the provisions in s.21 and s.23 to the phraseology in the *Equal Remuneration Convention*. More acutely, the dissenting decision noted that ‘[t]he gender equity provisions would have little or no work to do if an examination of the remuneration is limited to the case of monetary benefits in an award’. The effect of this construction, as presented in the majority decision, was to limit the provisions open to the Commission to remedy the disparity in overaward payments that were evident in the hairdressing and motor mechanics case study brought before the Inquiry.

8.3.7 SCOPE OF THE PRINCIPLE AND THE INVESTIGATIVE POWERS OPEN TO THE COMMISSION

In its initial contentions to the directions hearings both the Labor Council and the Crown had argued that any new principle should be applicable in all areas of the Commission’s operations. This position was abandoned by the Labor Council and the Crown in submissions formally tabled in February 2000, where the Labour Council argued that the principle will be applied by the Commission ‘when it makes or varies an award and/or conducts a s.19 review’. The Crown argued that the principle will be applied by the Commission ‘when making, varying or reviewing awards, including consent awards’. This position further narrowed in the course of the Labor Council and the Crown reaching agreement on the scope of the principle.

408 IRNSW, IRC No. 1841 of 1999, Exhibit 4, p. 5.
410 IRNSW, IRC No. 1841 of 1999, Exhibit 48, pp. 5-12.
The scope of the principle was a key feature of the agreed position between the parties. The employer organisations had abandoned their position that there was not a requirement for a principle and the Labor Council and then the Crown, together with the employer organisations, confined the application of the principle to applications made under s.21(b) of the Act\textsuperscript{412}. The Women’s Organisations continued to press the application of the principle in all aspects of the Commission’s practice and also argued that there were investigative powers open to the Commission to ensure that the obligation imposed by s.23 of the Act was met\textsuperscript{413}. The central core of the submissions by the Women’s Organisations was that the legislation provided the Commission with the obligation of conducting inquiries to test whether the objective of equal remuneration had been met. This obligation arose not only in relation to the work in which the award applied but also to the work of comparative occupations in other instruments.

These submissions were rejected by the majority decision on the basis that the available legislative provisions\textsuperscript{414} did not empower the Commission to conduct inquiries\textsuperscript{415}, a position that drew support from the relatively recent decision of the Full Bench in its determination of the principles for the review of awards\textsuperscript{416}. In proceedings under s.21(1)(b) [application to make or vary and award], the proceedings would be initiated under application by one of the parties, primarily a union. In any event the Labor Council\textsuperscript{417} initially, and then the Crown\textsuperscript{418}, abandoned their original position thus bringing their position in line with the employer groups. The position continued to be pressed by the Women’s Organisations\textsuperscript{419} who noted that the investigative provisions were necessary to ensure that consent agreements were assessed.

\textsuperscript{411} IRNSW, IRC No. 1841 of 1999, Exhibit 53, pp. 9-10.
\textsuperscript{412} IRNSW, IRC No. 1841 of 1999, Exhibit 52, p. 2.
\textsuperscript{413} IRNSW, IRC No. 1841 of 1999, Exhibits 37, 55.
\textsuperscript{414} Specifically sections 19, 21 and 23.
\textsuperscript{415} Re Equal Remuneration Principle (2000) 97 IR 177 at 204-205.
\textsuperscript{417} IRNSW, IRC No. 1841 of 1999, Exhibit 48, p. 11.
\textsuperscript{418} IRNSW, IRC No. 1841 of 1999, Exhibit 53, pp. 21-22.
\textsuperscript{419} IRNSW, IRC No. 1841 of 1999, Exhibit 55, pp. 27-28.
properly. The rejection by the Full Bench of the available alternative construction rendered the rationale provided by the majority decision for a new principle to be rather shallow:

That [rationale] is, the significance both in policy terms and the requirements of the Act, such as ss 3(f) and 169 thereof reflecting as they do important human rights, and that wage-fixing principles in relation to the question of equal pay reflect the priority, importance and the failure hitherto of some awards to address appropriately the issue of equal pay for equal or comparable work.

The majority decision also indicated a concern that the adoption of an approach advocated by the Women’s Organisations would result in leapfrogging in award wages which would undermine the operation of the wage fixing principles. In contrast the dissenting decision noted that the obligations imposed by s.23 do not arise only on application. Moreover, the obligation imposed by this section of the legislation did not require the contested approach of the proceedings before the Commission as the Inquiry had identified a profile of industries and occupations which indicated the probability of undervaluation. Commissioner McKenna noted that there were active obligations on the Commission, implicit in both s.21 and s.23, that were particularly important in consent matters which have not necessarily reflected the value of work and may have acted to ‘perpetuate or increase gender-related inequalities in terms of remuneration and other conditions’. The assessment of work outside the award in question was consistent with this obligation.

As much as the majority decision found that there were limitations in the Commission taking an investigative role, the minority decision asserted that there were also provisions in the Act (s.163, Rule 15) which enabled the Commission to act on its own initiative. Yet the dissenting decision, in concurring with the submissions of the Women’s Organisations, found that the reasoning of the majority was not consistent with the obligation imposed by s.23. Thus the dissenting decision argued that the obligation imposed by the explicit equal remuneration

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420 Re Equal Remuneration Principle (2000) 97 IR 177 at 205.
422 Re Equal Remuneration Principle (2000) 97 IR 177 at 205.
provisions of the legislation was not mediated by way of a requirement that restricted the Commission’s role to that of determining the application of the parties.\textsuperscript{426}

No doubt there are legal arguments to support both of the statutory interpretations advanced in the decision. Whatever the merits of either approach, the contest over the appropriate statutory construction focused attention on the failure of the state to advance the legislative amendments contained in the recommendations of the Inquiry. Such amendments were proposed because of the limitations in the existing provisions which were exposed by the Inquiry. The lack of political commitment to legislative change effectively ensured that the interpretation of the legislation was as critical a feature of the case as the substance of the principle. This assisted the Crown and the Labor Council’s justification of their more recently advanced but, weakened, positions and also provided the Commission with the opportunity to interpret the existing provisions conservatively.

\textbf{8.3.8 CONSIDERATION OF ECONOMIC IMPACTS}

The majority decision expressed considerable concern about the prospect of ’catch up’ claims and leapfrogging and drew attention to the concerns of a number of witnesses including that of the employer organisation in hairdressing.\textsuperscript{427} The decision went on to note:

The Treasury concern, about which Mr Cox gave evidence, that such adjustments would lead to comparative wage justice claims can readily be appreciated. Were the result of a comparison of actual rates of pay to lead to higher minimum award rates in a female dominated industry, the result would be higher award rates than those applying to the employees with whom the comparison be made. ‘Catch up’ wage claims and leapfrogging in such circumstances would seem to be likely. This would be even more likely if some of those in the male dominated industry were not in receipt of pay rates, on an overaward basis, of at least the new award minima fixed in the comparator award.\textsuperscript{428}

Such a conclusion is notable for two reasons.

\textsuperscript{425} \textit{Re Equal Remuneration Principle} (2000) 97 IR 177 at 236.
\textsuperscript{426} \textit{Re Equal Remuneration Principle} (2000) 97 IR 177 at 236.
\textsuperscript{427} \textit{Re Equal Remuneration Principle} (2000) 97 IR 177 at 210.
\textsuperscript{428} \textit{Re Equal Remuneration Principle} (2000) 97 IR 177 at 210.
Firstly it provided a selective reading of the evidence from Treasury, notwithstanding greater caution in this evidence, compared to that presented at the Inquiry. The Treasury evidence was, as in the Inquiry, given by Richard Cox. Treasury had not commissioned any new research for the purposes of the current proceedings, thus the evidence relied on the same research that had been outlined at the Inquiry. Treasury, however, approached the proceedings differently. As with the operation of the Crown Working Party this change, in part, could be explained by the more determinative nature of the proceedings and the implications for the government given its role as a significant employer of teachers and nurses. In addition to this difference there was concern within Treasury at the Inquiry’s reliance on the evidence of Treasury to support its findings – something that had directed an unwelcome amount of attention to the evidence of Treasury and, from Cox’s perspective, revealed something of his own naiveté about industrial proceedings. It was also something of an irony because something that concerned gender equity would not normally ‘register very prominently within Treasury’. Although there was no explicit direction to reorient the shape of his evidence, Cox was aware of a broader concern within the Treasury at the role of the Commission – particularly at what was viewed as an arbitrary, uneven nature of decision making - and a sense that ‘they [the Commission] were running policy out of the Commission’.

Secondly it was an explicit rejection of the argument of the Women’s Organisations that the Commission should avail itself of ‘equal pay adjustments’ to address undervaluation that would not be countered by changes to the classification structure alone, but which would require particular measures that would address the overaward payments that women would not otherwise be likely to gain. The reasoning of the majority decision reflected a particular interpretation of the Treasury evidence, namely that any change in women’s earnings would disturb the structure of minimum rates. The decision recorded that the Minister and Labor

Council had originally contended that comparisons be drawn between the award rates of pay with actual rates which other employees performing different work received, with a resultant adjustment in the minimum award rates for the area of work that formed the focus of the application. This position was consistent with the submissions put by these parties at the Inquiry, where the Labor Council and the Crown argued that remedies for inequity should include equal pay adjustments, a remedy that would attend to the lack of overaward payments in areas of feminised work. Within the equal remuneration proceedings both organisations did exclude particular overaward payments relevant to labour market considerations from the Commission’s considerations. As the proceedings lengthened the Labour Council and the Crown placed less emphasis on this aspect of their claim; the prospect that the equal remuneration principle could be used to alter the relativities in the existing structure of minimum rates was not explicitly pressed in the final submissions of the Labor Council or the Crown.

The majority decision made it clear that comparisons between different areas of work were open to the parties and that such an approach was not a ‘novel concept’ to the Commission. Yet a comparison that relied on disparities between award and actual rate of pay as between disparate workers was distinguished from this practice. The decision held that this was because of the multi-faceted basis of overaward payments, including demand and supply conditions, workplace size, geographic location, and skill and productivity of individual employees. Such a conclusion ignored the evidence concerning overaward payments that was led at the Inquiry and in these current proceedings, notwithstanding the Inquiry’s own conclusions on this issue. Overaward payments were not broken down frequently into neat

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434 Re Equal Remuneration Principle (2000) 97 IR 177 at 211.
435 As noted earlier in this chapter and in Chapter Five I provided this evidence to these proceedings. IRNSW, IRC No. 1841 of 1999, Exhibits 12, 13, 15.
readily identified categories and were an amalgam of many factors, including additional skill training and experience, factors that were entirely consistent with the work value typically embraced by industrial tribunals. The Commission also drew attention to those legislative provisions (s.47) that directed the Commission to disregard conditions set by enterprise agreements as standard conditions of employment for other workers.\(^{436}\)

The majority decision noted that the principle did allow a party to make a case by reference to overaward payments where the award rates of pay did not properly reflect the value of work as the result of inactivity of the award parties and that this has been recognised by employers who, as a result, are making overaward payments for that reason rather than for reasons such as attraction or retention rates.\(^{437}\) Such a conclusion ignored the claim of the hairdressing sector where employers were not making overaward payments even though they were benefiting from additional training undertaken by hairdressing workers. Such undervaluation was best illustrated in that case study by reference to the award and overaward payments received by other trade-based areas of work.\(^{438}\)

The dissenting decision noted that the principle gave unnecessary weight to the economic impact that might arise from any increase in women’s earnings and ignored the location of undervaluation payments evident in differential overaward payments available to areas of work that were assessed otherwise as having equal or comparable work. The power to consider the public interest and inability to pay is already open to the Commission (ss.18, 171). To give additional consideration, is according to Commissioner McKenna, consistent with the type of reasoning evident in earlier decisions of the Commission where equal remuneration (excluding margins) was declined on the basis of the adverse employment effects.\(^{439}\)


\(^{438}\) IRNSW, IRC No. 1841 of 1999, Exhibit 15.

\(^{439}\) *Re Hairdressers, &c., Females (State) Award* (1929) 28 AR 39.
8.3.9 TEST UTILISED BY THE EQUAL REMUNERATION PRINCIPLE

The principle determined by the majority decision did provide for the pursuit of claims of gender-based undervaluation. In this respect the majority decision followed the recommendation of the Inquiry that undervaluation and not discrimination was the key determinant. The position of the Employers’ Federation, to advance a test of discrimination, was rejected again. The principle utilised the construct of work value in assessing the basis of the proper valuation of the work and noted that:

An assessment of the value of any work to which an award applies is not conducted in a vacuum but in a particular context, dealt with in the work value principle itself in para 6(c), namely in the context of other work to which the award applies and the work of any related classifications in other awards.

The decision itself suggested that this had a limiting effect, noting that ‘[t]he principle which we formulate also contains such safeguards and is approached on the basis submitted by the Employers’ Federation’. In contrast to the recommendations of the Inquiry the principle provided little guidance as to the basis of undervaluation or gender-based undervaluation. In that respect it could only be described generously as facilitative, as it failed to pursue the Inquiry’s guidance on the ‘signposts’ of undervaluation or the concept of ‘undervaluation simplicitor’. The wider dimensions of undervaluation, as canvassed by the Inquiry’s final report, were not considered explicitly by the new principle.

The decision did note that the principle permitted that appropriate comparisons can be drawn but were not required, although the Commission was to be guided by both internal and external award relativities. The agreed position of the parties had similarly not advanced a requirement for a comparator. The absence of explicit direction as to undervaluation provided for uncertainty as to how the principle would be interpreted. The Inquiry had felt the need to provide guidance. Former approaches to the valuation of women’s work had contained an inherent flaw. Work value in the Commission had historically been guided by a

443 IRNSW, IRC No. 1841 of 1999, Exhibit 52, p. 3.
male standard, exemplified by the benchmark rate of a predominantly male trade, the fitter. Women’s work lacked a similar standard and had suffered historically from their exclusion from this wage benchmark. Following the equal pay principles the proper valuation of women’s work was mediated firstly by a conservative approach to the comparison of men’s and women’s work, and secondly a lack of consistency in the treatment of work that differed from masculinist benchmarks. Justice Glynn did not cite explicitly the sameness/difference dichotomy when proposing the concept of undervaluation simplicitor, but this concept was one that sought, albeit embryonically, to realise the limitations of gendered comparative methodologies.

The dissenting decision noted the compromised nature of the principle proposed by the major parties and the absence of direction to industrial parties as to what might be appropriate areas for consideration in an equal remuneration claim. Commissioner McKenna noted that such signposts were considered important by Justice Glynn in the Inquiry’s report. Such guidance was evident in the principle proposed by the Women’s Organisations, although the alternate decision noted that the breadth proposed by the Women’s Organisations ‘may be viewed as attempting to over-extend the existing statutory provisions – and to bridge the perceived shortcomings’. This guidance included that part of the principle proposed by the Women’s Organisations in relation to those areas where the valuing of the work was affected by the sex of the workers, the relevant factors that may assist establishing comparisons and the remedies open to the Commission.

8.4 APPLICATION OF THE NEW SOUTH WALES EQUAL REMUNERATION PRINCIPLE

The newly determined equal remuneration principle has not been tested significantly although as noted in Chapter Four the principle has been denied to employees of constitutional corporations since the introduction of the Work Choices amendments in March 2006. This is not to deny that the equal remuneration principle has been cited in proceedings where the

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applicants have lodged their application under different provisions of the legislation or with recourse to a different principle(s) of the Commission. These proceedings illustrate the potential for the principle to shape tribunal practice in a wider variety of proceedings than those that explicitly concern equal remuneration. In this section of the chapter I provide an overview of two applications that sought explicit application of the principle and which were the subject of extensive arbitral proceedings. These applications concern public sector librarians and private sector child care workers. These proceedings provide insights to the Commission’s and the industrial parties’ interpretation of the principle.

8.4.1 PUBLIC SECTOR LIBRARIANS AND GEOLOGISTS

The first detailed proceedings to give consideration to the principle arose from an application by the Public Service Association of New South Wales (PSA) and concerned the design of classification and grading structures as well as the gender related undervaluation of the work of public sector librarians, library officers and archivists. In addition to the equal remuneration principle the PSA also sought recourse to the Special Case principle (principle 10) of the wage fixing principles, and s.10 of the Industrial Relations Act. The case was built on the findings of the case study developed for the Pay Equity Inquiry by ODEOPE, in which two points/factor job evaluation systems were applied in comparing the work of librarians and geologists. The case study was inclusive also of the award structures and histories, career paths and remuneration for both areas of work. The study found a difference of nearly 20 per cent between rates for a Senior Librarian Grade 2 and a Senior Geologist year 4; and, that geologists had less substantive barriers to progressing through the pay steps in their award.

The Pay Equity Inquiry found clear evidence of undervaluation of the work of female librarians and resistance to full recognition of librarianship as a profession. The Pay Equity

445 IRNSW, IRC No. 1841 of 1999, Exhibit 55, Respectively parts four, seven and twelve of the principle proposed by the Women's Organisations.

Inquiry concluded that rates for librarians had been set on the basis that librarians were not qualified professionally. The value of the work had not been assessed by the Commission for a considerable period and there had been changes in the value of the work that had not been recognised by revaluation and/or through new classification. The Pay Equity Inquiry noted that the historic nexus between librarians and teachers had been broken and a full work value assessment would be needed to establish the appropriate relationship.

Through the Pay Equity Inquiry Justice Glynn questioned the appropriateness of the comparisons between librarians and geologists, and the appropriateness of job evaluation for the fixation of salaries. Job evaluation was found to exclude factors such as market factors, performance, physical environment and conditions, requirements such as working away from home, manual dexterity, physical capacity, hours of work and particular risks and dangers. Each of these factors was identified as, on occasions, legitimately accounting for some part of remuneration. The varying relationships between job evaluation points and pay within and across agencies and occupations were also questioned. The Inquiry’s findings on job evaluation in this case study were a strong contributory factor to the recommendation that industrial tribunals continue to rely on the construct of work value in assessing the value of work in relation to applications for equal remuneration.

The case study submitted to the New South Wales Pay Equity Inquiry (Fruin, 1998) and the Pay Equity Inquiry findings about undervaluation of librarians’ work provided a partial basis for agreement between industrial parties that there was gender-related undervaluation of librarians’ work. This assisted the cause of the applicant and was a welcome development given that there was division within the PSA over the running of the application and the resources required to support it. The issue of whether the work was undervalued was not contested between the parties and the Full Bench were not required, in this application, to provide further guidance than that available in the decision that determined the equal

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remuneration principle as to what is required to establish gender-related undervaluation. It was accepted that it was appropriate to compare the work of librarians with other public sector-based professions and it was relevant that librarians were paid less than other professions where work value had been assessed by the Commission in setting rates. Relevant factors in the comparison were the requirement for a bachelor’s degree or equivalent for entry and career progression based on experience and merit-based appointment for promotion. The Commission noted that evidence had not been provided that the work of librarians was of equal value to the comparators. The case involved direct inspections by the Commission at several worksites\textsuperscript{449}.

Substantial increases were awarded; on average sixteen per cent across classifications, up to twenty five per cent for some classifications. The Full Bench found that library and information professions were comparable to other professions including scientific officers, psychologists, and lawyers. Professional associations were recognised as the key authorities regarding qualification levels and work standards for the profession\textsuperscript{450}. The work value relationships between the profession and technician occupations were also considered. The case had a significant focus on how the value of the work was to be assessed. The Commission accepted that there was sufficient commonality in the professional and technical work across several worksites and several employers for one award to cover the work despite submissions to the contrary.

\textbf{8.4.2 PRIVATE SECTOR CHILD CARE WORKERS}

Encouraged by the outcome of the public sector librarians proceedings, the trade union with industrial representation for staff employed in long day child care centres, the New South Wales branch of the Liquor Hospitality and Miscellaneous Union (LHMU), made an application to the Industrial Relations Commission of New South Wales to determine a new \textit{Miscellaneous

\textsuperscript{448} NPECA, Minutes of Meeting, 14 March 2001; NPECA, Minutes of Meeting, 16 May 2001
\textsuperscript{449} Re Crown Librarians, Library Officers and Archivists Award Proceedings – Application under the Equal Remuneration Principle (2002) 111 IR 48 at 64
Workers’ Kindergartens and Child Care Centre (State) Award. This application, filed in July 2004, excluded degree qualified early childhood education teachers, who are covered by the Independent Education Union.

The application relied heavily on the equal remuneration principle and sought rates of pay that were beyond rates applicable in federal child care awards, rates that had been varied in 2005 to reflect changes in the value of the work and which had been realigned by the federal industrial tribunal to rates in the federal Metal Engineering and Associated Industries Award, resulting in increases in rates of pay of between 1.2 and 14.7 per cent. In assessing how the credentials of child care workers should be valued relative to other occupations with similar credentials the federal tribunal noted:

Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer’s submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Childcare work is demanding, stressful and intrinsically important to the public interest.

The LHMU application highlighted the contentions that would be relied on in support of the claim. These contentions went not only to the historic undervaluation of the work and the feminised nature of the industry, but also to the normative assumptions that the union claimed impacted negatively on the valuation of the work. Thus the application noted that child care is an industry based on skills associated with the care, nurturing and development of children, and this has been predominately carried out by women. Industrial tribunal
valuations of the work had reflected normative assumptions about the value of childcare work based on gender\textsuperscript{454}.

The evidence led by the LHMU identified that female domination of an industry workforce reduces relative wages and that relative low wages deter male employment. The rates in the initial awards determined by industrial tribunals had not adequately recognised the skill level of the work, including that working with young children is not ‘innate’ to women, and is a learned skill. Rates had been improperly set and had not kept pace with the skills demanded by accreditation and regulatory requirements. In this regard the LHMU’s evidence noted that the charitable and philanthropic origins of the child care industry had ongoing consequences for the low levels of pay fixed by the award. In noting the altered nature of the sector the evidence also addressed the increased utilisation rates of long day care centres, and the impact of the federal government’s Child Care Benefit on child care affordability\textsuperscript{455}.

On 7 March 2006 a Full Bench of the Commission upheld the LHMU’s application. The Full Bench noted in its decision this was the first case it was ‘called upon to consider a fully contested application brought under the [Equal Remuneration] principle\textsuperscript{456} and held ‘we are satisfied that consistent with the Equal Remuneration principle, a case of undervaluation on a gender basis was made out on the evidence\textsuperscript{457}. As to the viability of comparator-based evidence and methodology when assessing the valuation of a heavily feminised industry, the Commission agreed with expert evidence which has noted that ‘the uniqueness of the work of child care workers, limited the usefulness of selecting any particular male dominated industry as a “comparator”’\textsuperscript{458}.

\textsuperscript{454} Cited by Notice of Major Industrial Case, filed by Liquor Hospitality and Miscellaneous Union, New South Wales Branch, 21 July 2004, IRC No. 5757 of 2004 [This documentation supplied by LHMU upon request, 4 October 2004].
\textsuperscript{455} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 308-310.
\textsuperscript{456} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 290.
\textsuperscript{457} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 328.
\textsuperscript{458} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 309.
The Commission noted that ‘child care workers are generally perceived to have low pay and low status’\textsuperscript{459}. The Commission asserted that this low pay did not reflect the value of the work and observed that one reason for the relative low pay was some employers ‘maximise their profit levels’ despite ‘the importance to our society of the work which the predominately female child care workers employed in this State perform’\textsuperscript{460}. The Full Bench further remarked that this position persisted despite the entry into the industry of at least one substantial corporate employer with a rapidly growing business throughout New South Wales ‘generating very substantial and growing profits for its shareholders’\textsuperscript{461}. The Commission concluded that while it may be ‘difficult to detect gender-based undervaluation’ no witness supplied explanations that challenged the evidence or the findings of the Pay Equity Inquiry\textsuperscript{462}. In its decision, the Commission addressed those aspects of employer submissions which asserted that even if undervaluation and work value change were to be established by the evidence, any change in wage rates would disturb relativities with key benchmark awards. Such benchmarks included the \textit{Metal Industry Award}\textsuperscript{463} and compromised the Commission’s Minimum Rates Adjustment Principle. The Full Bench noted that this introduced ‘an artificial consideration into an assessment of the proper rates for child care workers’\textsuperscript{464} and to do so ‘would elevate the Minimum Rates Adjustment principle to an overriding principle, imposing a limitation upon the proper assessment of the value of work, even when it has changed or when it has been undervalued’\textsuperscript{465}.

In applying the equal remuneration principle the Commission went beyond the wage rates that applied federally, noting that this outcome ‘is reflective of the different nature of the case made out in these proceedings on the evidence led’\textsuperscript{466}. The Commission decided to break the perceived nexus with relativities in the \textit{Metal Industry Award} and to consider the

\textsuperscript{459} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 309.
\textsuperscript{460} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 328.
\textsuperscript{461} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 329.
\textsuperscript{462} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 329.
\textsuperscript{463} Including its more recent iterations such as the \textit{Metal, Engineering and Associated Industries Award}.
\textsuperscript{464} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 335
\textsuperscript{465} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 335.
\textsuperscript{466} Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 339.
value of the work in the context of awards applying to teachers, utilizing rates of pay for two year trained teachers\textsuperscript{467}. As a result the decision of the Full Bench granted substantial and staged pay increases for long day care workers employed in New South Wales, ranging from 11 per cent to about 50 per cent. A comparison between award weekly wage rates, prior to and following the decision, and the percentage increases, awarded by the Commission is shown in Table 8.2.

Table 8.2: New Long Day Care Weekly Wages, Miscellaneous Workers Kindergartens and Child Care Centres (State) Award 2006

<table>
<thead>
<tr>
<th>Classification</th>
<th>Old Award Rate\textsuperscript{468} ($)</th>
<th>New Award Rate\textsuperscript{469} ($)</th>
<th>Pay Increase ($)</th>
<th>Pay Increase (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textit{Child Care Worker}</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 1</td>
<td>524.80</td>
<td>611.28</td>
<td>86.48</td>
<td>17.6</td>
</tr>
<tr>
<td>Step 4</td>
<td>538.40</td>
<td>633.47</td>
<td>95.07</td>
<td>21.5</td>
</tr>
<tr>
<td>\textit{Advanced Child Care Worker}</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 1</td>
<td>549.30</td>
<td>639.82</td>
<td>90.52</td>
<td>16.5</td>
</tr>
<tr>
<td>Step 4</td>
<td>572.20</td>
<td>676.00</td>
<td>103.80</td>
<td>18.1</td>
</tr>
<tr>
<td>\textit{Advanced Child Care Worker (Diploma Qualified)}</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 1</td>
<td>616.50</td>
<td>687.94</td>
<td>71.44</td>
<td>11.6</td>
</tr>
<tr>
<td>Step 4</td>
<td>634.80</td>
<td>842.78</td>
<td>207.98</td>
<td>32.8</td>
</tr>
<tr>
<td>\textit{Centre Coordinator}</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 1</td>
<td>568.50</td>
<td>774.48</td>
<td>205.98</td>
<td>36.2</td>
</tr>
<tr>
<td>Step 3/4</td>
<td>603.00</td>
<td>834.87</td>
<td>231.87</td>
<td>38.5</td>
</tr>
<tr>
<td>\textit{Centre Coordinator (Qualified)}</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 1</td>
<td>643.30</td>
<td>950.77</td>
<td>307.47</td>
<td>47.8</td>
</tr>
<tr>
<td>Step 3/4</td>
<td>678.70</td>
<td>1011.16</td>
<td>332.46</td>
<td>49.0</td>
</tr>
</tbody>
</table>

Source: Calculated from \textit{Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award 2006} 359 IG 843 at 880; \textit{Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 335}

For some of the participants of the Inquiry, the low utilisation of the principle reflected the ranking of gender pay equity, as a marginal issue, within union strategy\textsuperscript{470}, albeit with some

\textsuperscript{467} \textit{Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State) Award (2006) 150 IR 290 at 340.}
\textsuperscript{468} Applicable as at 28 August 2005.
sympathy to the resources required to run a successful gender pay equity claim. In
determining strategy, unions respond to those claims that can be prosecuted easily and to
members that might pose a challenge to the incumbent trade union leadership\textsuperscript{471}. Even in feminised unions contemporary pay equity claims are more likely to be raised through a
minority section of the membership or through a sponsor, rather than through mainstream
membership channels\textsuperscript{472}.

\section*{8.5 PAY EQUITY DEVELOPMENTS IN QUEENSLAND, TASMANIA,
VITORIA AND WESTERN AUSTRALIA}

The New South Wales Inquiry and the new equal remuneration principle in New South Wales
has been the basis of investigations of gender pay inequity in other state industrial relations
jurisdictions. Developments in Tasmania, Queensland, Western Australia and Victoria are
reviewed briefly here to demonstrate the impact of the developments in New South Wales on
other jurisdictions.

\subsection*{8.5.1 TASMANIA}

Guided by the developments in New South Wales, the Tasmanian government established a
Women in Paid Work Task Force in December 1999. The Taskforce was governed by terms of
reference beyond gender pay equity, but appointed Commissioner Patricia Leary to examine
the application of labour law developments in New South Wales to Tasmania\textsuperscript{473}. The
Taskforce duly adopted a key finding from the New South Wales Pay Equity Inquiry - that the
existing industrial system, modified to allow the identification and rectification of
undervaluation, would provide the most effective means of rectifying gender pay inequity\textsuperscript{474}.

\textsuperscript{469} Applicable as at 1 March 2008. \textit{Re Miscellaneous Workers’ Kindergartens and Child Care Centres &c., (State)
Award 2006} 359 IG 843.

\textsuperscript{470} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales 20 February 2005; Interview Fran
Hayes, National Pay Equity Coalition, 18 February 2005.

\textsuperscript{471} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales 20 February 2005; Interview Fran
Hayes, National Pay Equity Coalition, 18 February 2005.

\textsuperscript{472} Interview Gail Gregory, Executive Officer, Labor Council of New South Wales 20 February 2005.

\textsuperscript{473} At this time Commissioner Leary had joint appointments with the Australian Industrial Relations Commission and
the Tasmanian Industrial Commission.

\textsuperscript{474} The applicable human rights legislation in Tasmania is the \textit{Anti-Discrimination Act 1998} (Tas) which prohibits both
direct and indirect discrimination on a number of attributes including sex.
The Task Force recommended that the Tasmanian Industrial Commission issue an equal remuneration principle to provide a mechanism for working women to find an adequate remedy for the undervaluation of their work (Tasmania Department of Premier and Cabinet, 2000: 47-48). Submissions on a new equal remuneration principle were made to the review of wage fixing principles that commenced as a result of the 1999 State Wage Case\textsuperscript{475}. In July 2000 the Tasmanian Industrial Commission subsequently included an equal remuneration principle\textsuperscript{476} in the state’s new wage fixing principles\textsuperscript{477}. In comparative terms the Tasmanian principle was more closely aligned to that available in New South Wales rather than that which was subsequently determined in the Queensland jurisdiction. The principle, while not restricted by the operation of other wage fixing principles, only applied to applications for the making or varying of an award and provided an extremely limited scope for the investigation of overaward payments. The principle focused on the proper valuation of the work and provided for the consideration by the Commission of whether the past valuation of the work had been affected by the gender of the workers.

\textbf{8.5.2 QUEENSLAND}

A Pay Equity Inquiry\textsuperscript{478} was conducted in Queensland by Commissioner Glenys Fisher of the Queensland Industrial Relations Commission in 2000, reporting in March 2001. The Inquiry’s terms of reference specifically provided that the Queensland Inquiry assess the application of the findings of the investigations in New South Wales to the Queensland jurisdiction. The Inquiry also took evidence on a separate case study, focusing on the work of dental assistants, with a twofold objective: to provide the parties to the Inquiry with the opportunity to analyse, assess and work value in a gender neutral way by unpacking the skills of a female-dominated occupation; and to provide the parties with the opportunity to comment on the elements of a draft pay equity principle (Queensland Industrial Relations Commission, 2002: 103). This procedural framework assisted in refining the principle ultimately

\textsuperscript{475}\textit{Hearings commenced in July 1999 and continued until April 2000.}
\textsuperscript{476}\textit{Terms of the principle set out in full in Appendix Fourteen.}
\textsuperscript{477}\textit{State Wage Case 1999 (Tasmanian Industrial Commission, Westwood P, Johnson DP, Watling C. 6 July 2000).}
recommended by Fisher in the final report, while the Inquiry found that its investigation of the work of dental assistants was assisted by an analytical framework that comprised the identification of the so-called 'softer skills' associated with feminised work; the history of wage determination and work value assessment; the level of union activity; and forms of employment within the sector.

The final report of the Queensland Pay Equity Inquiry recommended both legislative amendments and the introduction of a new principle to be effected through the industrial system. The report adopted the position of Justice Glynn in recommending that the most effective means of reform would be by way of labour law rather through the claims lodged under anti-discrimination legislation. In contrast to New South Wales, the prospect of legislative amendments was not subject to extensive opposition. The Queensland parliament passed legislative amendments to the *Industrial Relations Act 1999* (Qld) in line with a recommendation of the Inquiry, to the effect that the Queensland Industrial Relations Commission must ensure that all awards and agreements provide equal remuneration for men and women workers. The legislative changes also addressed specifically the meaning to be afforded to remuneration, such that remuneration is defined as an employee's wage or salary and not confined to minimum award rates. The *Industrial Relations Act* now provides that the Queensland Industrial Relations Commission may make any order it considers appropriate to ensure employees covered by the order receive equal remuneration for work of equal or comparable value (s.60).

The principle ultimately declared by the Queensland Industrial Relations Commission was more expansive than that in New South Wales or Tasmania, an expansiveness assisted by the preceding legislative amendments. The principle provided a more proactive role for the Queensland Industrial Relations Commission in satisfying itself that the principle of equal

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478 B1568 of 2000 following a ministerial direction under s.265(c) of the *Industrial Relations Act* to the Queensland Industrial Relations Commission.

479 The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on twelve grounds including sex.

480 By way of the *Industrial Relations Amendment Act 2002* (Qld).

remuneration had been met. The principle was more explicit in nature, specifically identifying the features of an occupation or industry that might have contributed to undervaluation. These features reflected the findings first aired by the New South Wales Pay Equity Inquiry and included the degree of occupational segregation, the disproportionate representation of women in part-time and 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 this type. To assist organisations with equal remuneration applications before the Queensland Industrial Relations Commission, the Queensland government established a resource fund, a policy initiative that has not yet been matched by other state jurisdictions.

Applying the Queensland Equal Remuneration Principle

The first application heard under the Queensland equal remuneration principle concerned dental assistants covered by the relevant state award. The union, the Liquor, Hospitality and Miscellaneous Union (LHMU) Queensland Branch, made the application in 2003 and it was opposed by the relevant employer association. Given the use of dental assistants as a case study within the Queensland pay equity inquiry, it was not surprising that this occupation was identified as the first to test the new equal remuneration principle. In reaching its decision in this case, the Commission noted 'the absence of precedents in this or other jurisdictions made it difficult for the parties to determine how to conduct their respective cases'. The wage increases determined by the Commission comprised two parts. The first reflected the Commission’s view that the work of Dental Assistants be aligned with the tradesperson rate in the Metal Industry Award. The second element reflected the Commission’s concerns that wage increases of this magnitude ($63.60 per week or about 11 per cent) would not remedy pay inequity due to Dental Assistants’ lack of access to, or participation in enterprise bargaining. To this end the Commission determined an Equal Remuneration Component.

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482 The terms of the principle are set out in full in Appendix Thirteen.
483 Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and The Australian Dental Association (Queensland Branch) Union of Employers (2005) 180 QGIG 187 at paragraph 40.
1.25% of the base rate per annum, but at the same time attempted to limit the opportunities for flow-on by observing that a claim for equal remuneration would be determined with regard to its own circumstances and if inequity was established 'its rectification will require a unique response'\textsuperscript{485}.

The second application to seek an explicit application of the equal remuneration principle arose in December 2003 and concerned an application by the Queensland branch of the LHMU to the Queensland Industrial Relations Commission to vary the Queensland \textit{Child Care Industry Award – State 2003} (the Award). The grounds for the Queensland branch of the LHMU's application were similar to that filed in New South Wales and included that the occupation of child care fits the profile that indicates undervaluation. Thus the union noted that child care work is characterised as female and carried out in small workplaces. The wage rates in the award reflected the lack of effective work-value outcomes and that child care qualifications are inadequately recognised because child care is a new industry with new occupations involving 'soft' – traditionally female – skills which have not been properly valued\textsuperscript{486}.

A range of factors prolonged the proceedings and the Commission would not hand down an 'interim' decision until March 24, 2006 and a final decision on 27 June 2006\textsuperscript{487}. This time span was not only a result of the contentious nature of the claims. The proceedings were required to move past challenges to each member of the constituted member of the Full Bench, as well as changes to the Full Bench caused by changes in administrative responsibilities within

\begin{itemize}
\item \textsuperscript{484} Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and The Australian Dental Association (Queensland Branch) Union of Employers (2005) 180 QGIG 187 at paragraph 84.
\item \textsuperscript{485} Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and The Australian Dental Association (Queensland Branch) Union of Employers (2005) 180 QGIG 187 at paragraphs 192-193.
\item \textsuperscript{486} Application for an Equal Remuneration Order Pursuant to s.60 and to Amend the \textit{Child Care Industry Award – State 2003}, filed by Liquor Hospitality and Miscellaneous Union, Queensland Branch, 24 December 2003 [This documentation supplied upon request by LHMU, 4 October 2004].
\item \textsuperscript{487} Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children's Services Employers Association, Queensland Union of Employers and Others (2006) 181 QGIG 568; Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children's Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318.
\end{itemize}
the Commission. The Commission found the work performed by childcare workers has been historically undervalued based on the gender of the workers. The Commission held that the conditions under which the work was performed had not been adequately taken into account in the past when the value of the work was assessed. The evidence submitted by the LHMU concerning the gender undervaluation of the work was accepted 'without reservation' by the tribunal. The wage increases granted by the Commission were similar to the award wage increases granted by the AIRC in the federal work value proceedings and were therefore below the wage increases granted by its New South Wales counterpart. The Queensland tribunal offered three reasons for this departure. The first was that two year trained teaching rates, relied upon in New South Wales, was not an extant classification in Queensland teaching awards. On this point the Queensland tribunal did not cover the broader point made in proceedings in New South Wales, that being that the appropriate nexus was relativity with teaching work, rather than work in the metal industry. The second was that the LHMU claim did not address the absence of overaward payments received by child care employees; in the eyes of the tribunal there was no evidentiary basis to grant an Equal Remuneration Component as was the case in the dental assistants proceedings. The third reason rested on the weight given to the Commission to competing considerations. The Commission held that achieving pay equity needed to be balanced against the interest of ensuring children’s services are affordable and accessible to parents. Consequently, the Commission rejected the LHMU’s wage claim as being ‘excessive’ for it would ‘put at risk the public interest consideration’. For employees holding the appropriate academic or vocational qualifications, the pay increases ranged from 14 per cent to 29 per cent.

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488 Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318 at 319.
489 Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318 at 353.
490 Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318 at 356.
491 Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318 at 360.
492 Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and Children’s Services Employers Association, Queensland Union of Employers and Others (2006) 182 QGIG 318 at 362.
8.5.3 WESTERN AUSTRALIA

The Western Australian Pay Equity Inquiry was announced in April 2004 with its final report tabled in November 2004. Unlike the preceding pay equity inquiries, the Inquiry was not conducted through the Western Australia Industrial Relations Commission, but through academic researchers at the University of Western Australia (Todd and Eveline, 2004). The report contained recommendations which focused on three areas; regulation, voluntary strategies, and training. The report noted that women in Western Australia were, on average, paid less than men in Western Australia and less than women elsewhere in Australia (Todd and Eveline, 2004: 18). The report noted that multiple factors contributed to the pay gap, hence the remedies identified by the Inquiry extended beyond the industrial relations system.

The recommendations identified the need for amendments to the *Industrial Relations Act 1979* (WA) to establish equal remuneration provisions to be applied in assessing undervaluation on a gender basis. The recommendations provided that the provisions have effect to the making of awards and orders, the registering of industrial agreements, in addition to other applications brought by the parties or by the Western Australian Industrial Relations Commission on its own motion (Todd and Eveline, 2004: 55). The recommendations also asserted the need for legislative provisions which made it clear that equal remuneration provisions were not restricted by the operation of wage fixing principles and which free the Commission from any assumption that previous applications of the wage fixing principles have been free of assumptions based on gender (Todd and Eveline, 2004: 61). The report recommended the establishment of a fund to assist organisations which press or respond to cases taken under the new equal remuneration provisions (Todd and Eveline, 2004: 8, 33).

The *Minimum Conditions of Employment Act 1993* (WA) was identified as an important regulatory mechanism in the pursuit of gender pay equity. Recommendations identified the need for the Western Australia Industrial Relations Commission to take into account the impact of minimum wage determination on gender pay equity (Todd and Eveline, 2004: 67). The recommendations also addressed a range of measures to assist women’s retention and
quality of participation in the labour market, including paid parental leave, and focused on implementation of workplace gender pay audits to be mandatory and part of annual reporting requirements in the public sector and voluntary in the private sector (Todd and Eveline, 2004: 49-53).

Following consideration of the report the Western Australian state government established a Pay Equity Unit in the Labour Relations Division of the Department of Consumer and Employment Protection in February 2006. The unit is charged with the responsibility for implementing selected recommendations of the 2004 review. This includes the development of resources to raise awareness of gender pay equity and to assist its identification. The resources include advice on how to conduct gender pay equity audits, and post-audit plans, the latter being directed to initiatives to remedy any gender pay inequities identified by the audit (Western Australia Department of Consumer and Employment Protection, 2006).

8.5.4 VICTORIA

The Victorian Pay Equity Inquiry, announced in March 2004, confronted a different set of circumstances from that of other state inquiries. In 1996 the Victorian Government referred its industrial powers to the Commonwealth, by way of the Commonwealth Powers (Industrial Relations) Act 1996 (Vic). The Commonwealth accepted a referral and enacted the Workplace Relations and Other Legislation Amendment Bill (No. 2) 1996 (Cth). The referred industrial powers were given effect in Part XV of the Workplace Relations Act. As a result of these legislative provisions Victorian employees who were not employed under federal awards, certified agreements and Australian Workplace Agreements, fell within the provisions of Schedule 1A of the Workplace Relations Act.

In 2003 the Victorian State Government enacted the Federal Awards (Uniform Systems) Act 2003 (Vic). At section 52 of that Act a further reference was made to the Commonwealth for the making of an award or order or declaring any term of an award or order to be common rule in the State of Victoria for an industry. The Commonwealth gave effect to this referral in
the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth). As a result of these legislative changes, federal award provisions were extended to Schedule 1A employees and Schedule 1A as a source of regulation of employment conditions in Victoria became redundant. As a result of the referral of the industrial power by the Victorian Government, the AIRC is the only body with power to prescribe pay and conditions for workers in Victoria. It consequently has the power to deal with gender pay inequity in Victoria by making equal remuneration orders consistent with the federal equal remuneration provisions (Union Research Centre on Organisation and Technology, 2005: 16, 67).

In June 2004 a tripartite Working Party chaired by Commissioner Whelan of the AIRC was established to oversee the Inquiry which reported to the Victorian Government in March 2005. Among a series of recommendations the Working Party recommended that the Victorian Government should advocate a review of the equal remuneration provisions in the *Workplace Relations Act* to identify provisions which required clarification or amendment and to advance a more effective legislative model for equal remuneration for Victorian workers. The recommendations provided for a newly established Pay Equity Unit to commission a series of case studies designed to identify the determinants of gender pay inequity in Victoria. In identifying industry and occupational areas for investigation the Working Party recommended that regard should be had to the New South Wales Pay Equity Inquiry’s observations concerning the contributing factors to undervaluation. The Working Party also recommended that the Pay Equity Unit develop a model for workplace gender pay audits. Mindful of the international evidence concerning voluntary pay equity audits, the Working Party recommended that the government should assess how effective voluntary pay equity audits had been and examine whether a system of proactive and mandatory gender pay audits for Victorian workplaces is required (Victorian Pay Equity Working Party, 2005: 11-25).

Advice to the parties concerning gender pay equity audits formed the focus of state government initiatives in the wake of the Inquiry. Financial assistance in the form of research and administrative support was provided to industrial parties in the finance sector to conduct...
8.5.5 DEVELOPMENTS IN STATE JURISDICTIONS FOLLOWING AMENDMENTS TO THE *WORKPLACE RELATIONS ACT 1996* (CTH)

In Chapter Four I outlined the changes in federal labour law legislation which affected the new understandings of gender pay equity developed in state jurisdictions and detailed by this chapter. A key component of that legislation\(^{493}\) is that it excludes the operation of ‘a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value’ for employees who fall within the federal jurisdiction. This matter is taken up in the final chapter of this thesis, but in this section of the chapter I outline the response of the Queensland Industrial Relations Commission, which following a directive from the Queensland state government, undertook a second inquiry into gender pay equity, reporting 1 October 2007. The scope of this inquiry was limited to examining the impact of federal legislative amendments on pay equity in Queensland, and specifically the new pay equity jurisprudence developed in that state. In this respect the Inquiry observed what aspects of the decisions in the cases involving dental assistants and child care workers survived the federal amendments.

The Inquiry noted that a number of employers bound by the dental assistants’ decision are not constitutional corporations and therefore the decision survives in full for these employers. For employers who are covered by constitutional corporations the Equal Remuneration Component of that decision has not survived the transfer of these employers to the federal jurisdiction. The Equal Remuneration Component of the pay rates for dental assistants is absent from pay scale summaries that currently inform the Australian Pay and Conditions Standard (Queensland Industrial Relations Commission, 2007: 39). In contrast the majority of employers in the child care industry are constitutional corporations and therefore employees of those corporations fall within the federal jurisdiction. The Inquiry assessed that the wage

\(^{493}\) s.16(1)(c) *Workplace Relations Act*. 
increases granted by the Queensland Industrial Relations Commission will survive their transfer to the pay scales in the Australian Pay and Conditions Standard, but that the improvements in conditions of employment that also informed that decision will not, because they were granted following the operative date of the work Choices amendments (Queensland Industrial Relations Commission, 2007: 39).

The Inquiry also assessed that the federal equal remuneration provisions were, following the Work Choices amendments, characterised by further ambiguity as to the scope of the AIRC’s powers. The Inquiry was referring here to those provisions in the federal legislation that preclude the AIRC from dealing with particular applications where the basic periodic rates of pay, or basic piece rate of pay if the applicant employees(s) are entitled to a higher rate of pay than the rate of pay the group would be entitled to under the Australian Fair Pay and Conditions Standard and the comparator group is entitled to a rate of pay equal to, but not higher than, the applicable guaranteed rate of pay under the Standard. The Inquiry noted that in its view the AIRC can only deal with a claim relating to ‘basic rates of pay where the applicant female employees were, pre-Work Choices, award and agreement free or received only pre-reform award wages while the comparator male employees were covered by a pre-reform agreement’ (Queensland Industrial Relations Commission, 2007: 50).

The Inquiry noted that the widened scope of federal industrial law curtailed the capacity of state industrial jurisdictions to provide an industrial response about pay equity. Given this finding the Inquiry canvassed the policy and legislative action that the Queensland government could take to exercise an impact on gender pay equity for employees of constitutional corporations. The Inquiry recommended that new legislation be passed which would require all employers in Queensland with fifteen or more employees to submit pay equity plans. The Inquiry tailors its recommendation in this regard to what is identified as the most viable aspects of the pay equity model used in Quebec, Canada (Queensland Industrial Relations Commission, 2007: 99-111).
The status of these recommendations is now uncertain following the election of a new federal Labor government in November 2007. The new government has committed to amending significant sections of the Work Choices amendments, although the precise detail of its amendments as they impact the equal remuneration provisions of the federal legislation are presently undisclosed (February 2008). Amending legislation was introduced to the federal parliament 13 February 2008, the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. These amendments address primarily the abolition of Australian Workplace Agreements, the introduction of a recast no-disadvantage test, and new provisions concerning award modernisation.

8.6 CONCLUSION

The equal remuneration principle determined by the Industrial Relations Commission of New South Wales was a significant advance in the institutional measures available to remedy gender pay inequity. Beyond events in New South Wales, the principle and the investigations that preceded it have prompted developments in other states. Given the prominence of state awards for women and the limitations of federal equal remuneration provisions exposed by the HPM proceedings this was a key development. Yet the principle is narrower than the formative New South Wales Pay Equity Inquiry that preceded it, an outcome that has been shaped by the complex terrain of capital-state-labour relations on which pay equity questions are settled.

The Inquiry largely owed its existence to the organising and mobilising of feminists in women’s organisations, who in concert with researchers and sympathetic union activists and feminists within the state bureaucracy, built a case for an Inquiry with a sympathetic Minister for Industrial Relations. This political campaign and strategy emerged from outside the formal union movement. Additionally the advent of the Inquiry and the subsequent Principles case represented the typical pattern of pay equity advocacy and reform. Despite the intricacies of

494 Pre-reform in this context means prior to the passage of the Work Choices amendments.
the industrial processes, feminists over many generations have done their work well, to the extent that the state cannot publicly deny the cause of gender pay equity.

The procedural basis of the Inquiry, unlike a traditional case, provided for the submission of evidence that explored all potential determinants of the undervaluation of women's work. The Inquiry found that there were limitations in the application of both the federal and state equal pay principles to dissimilar work, an issue that was particularly apparent in New South Wales cases as the current state-based equal pay principle had provided some deterrent to the review of skill margins. The Inquiry concluded that both legislative amendments and a new equal remuneration principle were required to make the industrial prescriptions fully effective in dealing with pay equity. The combination of statutory amendments and the introduction of a new principle was linked to the Inquiry's key conclusions on the measures that would effectively remedy the type of undervaluation of feminised work presented through the Inquiry. Thus the Inquiry envisaged that the equal remuneration principle would apply to all circumstances where the Commission exercises its powers and functions including awards, enterprise agreements and the resolution of industrial disputes, including those whose resolution involved a consent agreement. The Inquiry’s conclusions, as reflected in its recommendations on a new principle and legislative amendments, placed emphasis on undervaluation as the threshold to establishing whether there is the basis for an equal remuneration claim. Thus the Inquiry explicitly rejected the test of discrimination as the threshold to an equal remuneration claim, the test that is required by provisions in the Workplace Relations Act.

The state government did not take up the recommendations of the Inquiry to pass legislative amendments and in this vacuum the Labor Council filed an application to the Industrial Relations Commission for a new equal remuneration principle(s), having regard to the recommendations of the Inquiry. The Labor Council demonstrated little appetite to pursue vigorously the application and the recommendations of the Inquiry and sought a consensus position with the employer organisations. This process involved the Crown and the Labour
Council abandoning a number of their original contentions. The state government found the recommendations of the Inquiry to be something of an unwanted intrusion, and sought to limit the affront it caused to employers, by not promoting the required legislative amendments, while maintaining some credibility on pay equity issues.

Shielded by the state government’s decision not to pass legislative amendments the final (majority) decision of the Full Bench in the equal remuneration principle case provided for a new equal remuneration principle that departed from the recommendations of the Inquiry in a number of key areas. The principle does, however, provide for the pursuit of claims of gender-based undervaluation. In this respect the majority decision takes up the recommendation of the Inquiry that undervaluation and not discrimination is the key determinant in any claim to equal remuneration. The Commission confined the application of the principle to the making and variation of awards. It also determined that remuneration was to be understood as not including overaward payments, a restriction that limits the provisions open to the Commission to remedy the disparity in overaward payments between areas of work that have otherwise been assessed, as per award rates of pay, to be equal. The principle does not incorporate the dimensions of undervaluation identified by the Inquiry.

The Commission, the state government and the industrial parties pursued a minimum course of action in response to the evidence of the Inquiry and the Inquiry’s recommendations. While the parties declared a commitment to the objective of the equal remuneration, the determination of the state and the industrial parties to limit the scope of the equal remuneration principle illustrates the obstacles that confront effective pay equity reform. The ambit of the principle is confined to minimum award rates of pay, rather than market rates of pay, and the principle provides little direction to remedy the undervaluation of part-time work, an undervaluation that is evident in the segregation of part-time work opportunities in low paid areas of work.
The developments in New South Wales therefore demonstrate the uneven and contentious nature of gender pay equity reform. That noted, the principle determined by the Industrial Relations Commission of New South Wales overcame a number of the problems inherent in federal equal remuneration provisions only to be archived legislatively by the passage of recent labour law amendments. The implications of these two developments for gender pay equity reform and the optimum design of labour law measures pay is taken up in the following chapter when the findings of this case study are assessed against the research questions set for this thesis.
CHAPTER NINE: CONCLUSION - FINDINGS AND FURTHER RESEARCH

9.1 INTRODUCTION

The previous three chapters have examined particular landmarks in Australian gender pay equity reform. What understandings about how gender equity might be achieved can be drawn from these case studies and where do we position these understandings against previous learning and knowledge about gender pay equity? The task of this chapter is to answer these questions. It commences with an outline of the four questions tested by this thesis and a summary of the findings of each of the three case studies. The findings are then assessed against the research questions set for this thesis, a discussion which is concluded by recommendations about further research.

This thesis has tested four questions regarding gender pay equity.

1. AUSTRALIA INITIATED A DISTINCT METHOD FOR ADDRESSING GENDER PAY EQUITY, VIA THE 1972 EQUAL PAY FOR WORK OF EQUAL VALUE PRINCIPLE. TO WHAT EXTENT DID THIS OPEN A NEW DOOR ON GENDER PAY EQUITY?

2. AUSTRALIA’S SHIFT TO A FEDERAL, STATUTORY, RIGHTS-BASED DISCOURSE OCCURRED IN 1993. WITH WHAT RESULT?

3. STATE INDUSTRIAL RELATIONS JURISDICTIONS HAVE IDENTIFIED NEW WAYS OF ADDRESSING GENDER PAY EQUITY. WITH WHAT RESULT?

4. IN AUSTRALIA PAY EQUITY REFORM MADE ITS FIRST LANDMARK ADVANCE AT THE END OF THE LONG POST-WAR BOOM. THEREAFTER ATTEMPTS TO ADVANCE PAY EQUITY VIA ARBITRAL INSTITUTIONS TOOK PLACE AGAINST A BACKGROUND OF RAPID SHIFTS IN SOCIAL, ECONOMIC AND GENDER RELATIONS. HOW DID THESE DEVELOPMENTS INFLUENCE INITIATIVES IN PAY EQUITY JURISPRUDENCE?

These questions and a consequent range of issues have been examined through an analysis of three case studies:

§ The Comparable Worth Case C No. 2219 of 1985. An application by the Royal Australian Nursing Federation to vary the rates of pay for nurses in the Private Hospitals’ and
Doctors’ Nurses (ACT) Award 1972. This application was refused and was followed by a second application made under the anomalies and inequities provisions of the prevalent wage fixing principles (A No. 257 of 1986).

The HPM Case C No. 23933 of 1995. An application by the Automotive, Food, Metals Engineering, Printing and Kindred Industries Union for orders requiring equal remuneration for work of equal value at HPM Industries. This application was refused and followed by a second application (C No. 21025 of 1998) which did not proceed to arbitration.

The New South Wales Pay Equity Inquiry IRC No. 6320 of 1997. A reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996 (NSW). The Inquiry was followed by the New South Wales Equal Remuneration Principle IRC No. 1841 of 1999. An application for a state decision pursuant to Section 51 of the Industrial Relations Act, to address income and equal remuneration principles and consideration of national decision/s pursuant to Section 50 of the Act.

These case studies represent three landmark events in the recent history of efforts to achieve gender pay equity in Australia.

### 9.1 Comparable Worth Proceedings

The nominal focus of these proceedings was the continuation of the 1972 equal pay for equal principle and its status relative to the wage fixing principles determined by the Australian Conciliation and Arbitration Commission (ACAC). These issues were considered but were adjoined by a third issue which became a key focus of the proceedings; the application of the concept of comparable worth to Australian labour law.
The case revealed a political fracture between organised labour and women’s organisations about how the ACAC should assess whether the 1972 principle had been applied properly. The case also highlighted the consequences of organised labour failing to seek the revaluation of feminised work on the basis of inter-award, as opposed to intra-award, comparisons in the period immediately following the 1972 principle.

The decision of the ACAC in this matter emphasised the institutional attachment of the Commission to its own logic, in the shape of the wage fixing principles, relative to the entitlement to equal pay for work of equal value. It narrowed the opportunities through which the 1972 principle might be utilised. It limited pay equity applications to the Commission’s anomalies and inequities provisions, symbolically consigning equal pay to the status of an aberration, rather than a systematic fact. The ruling closed off further development of the 1972 principle, in particular by dismissing the use of comparable worth as a means of activating that principle.

9.2 HPM PROCEEDINGS

The HPM proceedings featured the only application for equal remuneration orders to be determined by final arbitration. These proceedings arose from an application made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) on behalf of process workers and packers employed at HPM Industries. The application was refused and a subsequent application settled without recourse to final arbitration. A key focus of the cases was the interpretation of recently introduced legislative provisions, including the tests that applications would be required to meet if equal remuneration orders were to be granted.
When women looked to the Australian industrial system for further advances in jurisprudence in the mid 1990s, the basis on which such cases proceeded had changed thanks to the inclusion of a statutory right to equal pay, courtesy of 1993 amendments. These amendments relied for their constitutional force upon an ILO Convention, which in turn brought into the Australian system of labour law a reference to discrimination as a source of unequal pay. This constitutional head of power compromised the relationship between the equal remuneration provisions with other key sections of the *Workplace Relations Act* because the intervention of the federal Commission rested on a presumption of an industrial dispute, as defined in the legislation. Applications made under the equal remuneration provisions are not founded on such grounds because the head of power derives from the Australian Parliament’s external affairs powers; thus they could not be used as the basis of a variation to a multi-employer award.

Rather than widening the scope for equal remuneration claims, the reference to discrimination in the equal remuneration provisions, and in turn the Commission’s interpretation of them in the HPM proceedings which required applicants to demonstrate that disparities in earnings have a discriminatory cause, tightened the grounds on which equal remuneration claims might be heard. This imposed an additional requirement, beyond the existing requirement to demonstrate that the work at hand was equivalent. This discrimination test favoured resolution of equal remuneration claims by reference to a comparable male group – in other words, it was (ironically) highly sexist, in that women in paid work needed to prove themselves equivalent to men. The poor conduct of the case also highlighted organised labour’s struggle with the politics of gender pay equity.

Finally, the proceedings illustrated the difficulties facing pay equity jurisprudence as wider social and economic changes unfolded. At the time, the relevant tribunal was increasingly focusing on setting *minimum* wage rates, as a result of a public policy discourse increasingly informed by
neo-liberalism and globalisation. Although the equal remuneration provisions gave the Commission powers to intervene in the setting of paid rates, these sat at odds with the general direction of public debate and policy.

9.3 NEW SOUTH WALES PAY EQUITY INQUIRY, EQUAL REMUNERATION PROCEEDINGS

The New South Wales Inquiry was a wide-ranging investigation of gender pay equity, including an assessment of the measures in the New South Wales industrial jurisdiction to address the gender pay gap. The Inquiry was followed by determinative proceedings to assess the requirement for a new equal remuneration principle and its scope.

This case showed that it was possible for women’s groups and organised labour to ‘learn the rules of the game’, and thereby achieve significant jurisprudential advances. The equal remuneration principle determined in New South Wales and followed in other jurisdictions was a significant advance in the institutional measures available to remedy gender pay inequity. Yet the principle is narrower than that proposed by the formative New South Wales Pay Equity Inquiry that preceded it, an outcome that was shaped by the complex terrain of capital-state-labour relations on which pay equity questions are settled.

The Commission, the state government and the industrial parties pursued a minimum course of action in response to the evidence of the Inquiry and the Inquiry’s recommendations, perhaps reflecting the opposition to the Inquiry in the first place. While the parties declared a commitment to the objective of equal remuneration, the determination of the state and the
industrial parties to limit the scope of the equal remuneration principle illustrated the obstacles that confronted effective pay equity reform.

Despite these lost opportunities the development of the concept of undervaluation in the New South Wales equal remuneration principles provided an approach capable of disrupting the limitations of the sameness/difference dilemma implicit in rights-based discourses. The test did not revert routinely to a male standard. Comparisons within and between occupations and industries were not required in order to establish undervaluation of work. Undervaluation could be demonstrated by showing that current rates of pay were not in accord with the tribunal’s assessment of the value of work.

9.4 THE PATHWAY TO PAY EQUITY: AUSTRALIAN EVIDENCE ASSESSED

The project of gender pay equity reform in Australia following the long post-war boom pay equity has been accompanied by a series of competing discourses. This has comprised both a right to equal remuneration and a series of institutional arrangements and relationships that compromise this right. This relationship is not necessarily axiomatic. Developments in the state jurisdictions identified a way forward, even allowing for the circuitous path that preceded their establishment. These initiatives were though swamped ultimately by the latest instalment in the project of neo-liberal reform.

This history highlights institutional failure which has class and gender dimensions. Its class contours cannot simply be attributed to the jurisprudential location of Australia’s equal pay measures. Equal pay has been regulated historically by the institutions of labour law. Against the background of Australia’s social settlement, detailed in Chapter Four, these initiatives have always been mediated by class relations. Australia’s formative system of industrial regulation
involved a reliance by organised labour on the state to guarantee increases in wages and conditions. Compulsory conciliation and arbitration mediated historically the capacity of employers to depress the price of labour and also involved organised labour’s acceptance of this settlement and their mobilisation around wage earner security. It is the balance of these class relations that have shifted; the basis of the class settlement has been recast in favour of capital and in a way that is prejudicial to gender pay equity being claimed. In this brave new world capital remains resistant to revaluing the price of feminised labour. Thus this recast settlement has gendered consequences which are evident also in the masculinist construction of labour law institutions and their processes. It is these dimensions that underpin also the resistance to redressing the institutional and cultural determinants of rates of pay and the weakness of measures nominally directed to this task.

The institutional failure is shaped by an uncertain competitive environment, but this relationship is not identified here as one where labour law institutions were simply, or uniformly, passive partners or recipients. We can not simply believe that pay equity would be guaranteed but for the challenges of a globalising and fractious economy. In less uncertain times the prospects for reform were strongest when the right to equal pay was supported by a particular set of institutional arrangements which congealed the right to equal pay with the process of minimum rate determination in industry awards. Institutional failure prevented these opportunities being taken up in full measure and since that time labour law has been confronted by a globalising economy and conservative political hegemony. Australian labour law has responded to this environment in a specific and conscious way by weakening its formerly strong focus on minimum and industry wage determination and reshaping the institutions that regulate the labour market.

Having established this framework I turn to each of the research questions. The nature of each of the first three questions facilitates concentration on a particular case study. The fourth
research question enables a broader discussion which leads to conclusions concerning the state of pay equity regulation and the optimal design of that regulation.

Prior to discussing each of the research questions I will review briefly the concept of rights-based approaches to equal pay which were initially outlined in Chapter Three. I reprise this concept here because each of the case studies examines a particular formulation of a legally-based rights based discourse. The right to equal pay is an example of a rights-based legal discourse which seeks to extend the rights of men to include women. Yet while rights-based discourses provide a basis for harnessing political demands on the state and the market, their utility is questioned within feminist theorising. Key to the critique of rights-based approaches is whether such discourses simply privilege women claiming equality on the basis of male norms. This constraint is termed the sameness/difference dilemma; in the context of equal pay, a woman is only recognised as being discriminated against, on the basis of sex, when her work is assessed as being the same, or of equivalent value, as a man. Thus while rights-based discourses may provide a right to equal remuneration, they may not necessarily involve the means to contest structural inequalities within the labour market and may disrupt gender as an ongoing site of activism and change.

1. AUSTRALIA INITIATED A DISTINCT METHOD FOR ADDRESSING GENDER PAY EQUITY, VIA THE 1972 EQUAL PAY FOR WORK OF EQUAL VALUE PRINCIPLE. TO WHAT EXTENT DID THIS OPEN A NEW DOOR ON GENDER PAY EQUITY?

The 1972 equal pay for work of equal value principle, in concert with the 1969 equal pay for equal work principle, removed the explicit dimensions of a gendered system of wage determination where sex was an explicit criteria in wage fixing. By these actions the equal pay principles heralded a new phase in gender pay equity reform in Australia. The success of the principles in this objective can be traced to their distinct design, in particular their link with Australia’s system of wage determination. This limited an approach to pay equity that would
focus otherwise on a right to equal pay. At the same time this phase of gender pay equity reform failed to develop a jurisprudence that was capable of recognising and equitably valuing feminised work.

In the review of regulatory measures in Chapter Four I observed that the precise incorporation of women’s right to equal remuneration for work of equal value, within labour market regulation, varied with national context. International law, in the form of ILO Convention 100, provided a starting point for a number of the regulatory measures in nation states but considerable diversity has characterised the way in which nation states have responded to the framework provided by Convention 100. In Australia the right was embedded initially in federal labour law by way of the 1969 and 1972 industrial principles; these principles shaped the wage determination of federal industrial tribunals, and complemented Australia’s then centralised system of wage determination. Australia’s path was a distinct one, given that the passage of the two equal pay principles was so intricately connected to the substantive and procedural standards that comprised Australian labour law. Substantive standards are those which directly regulate employment relationship through such mechanisms as the minimum wages and other regulated ‘floor of rights’, in Australia’s case through its system of industrial awards. Procedural standards are those which provide an underlying legal foundation to assist collective negotiation. These standards enabled the arbitration and/or conciliation of industrial disputes and the regulation of industry bargaining.

The construction of the right to equal pay in Australia has to be read against the nature of the state apparatus in Australia in dealing with industrial matters. This included the creation of industrial tribunals, an aspect of intervention by the Australian state that enabled these tribunals to take on a lawful, objective form. This particular institutional arrangement was an outcome of Australia’s class settlement; within Australia’s market economy capital’s capacity to price labour
was mediated by the operation of industrial tribunals. The distinctiveness of the 1969 and 1972 reforms lay in the institutional arrangements through which gender pay equity relief could be sought and granted. Applications were directed through a centralised system of industry awards, itself a function of Australia’s legacy of centralised wage determination. In Australia gender pay equity initiatives were grafted onto existing wage fixing mechanisms - the system of centralised wage fixing and collective industrial awards presided over by industrial tribunals. This particular formation mediated the liberalism implicit in the rights-based discourses and provides some insight as to Australia’s distinctive approach to equal pay. In contrast to the equal pay mechanisms developed initially in Canada, United States and the United Kingdom, claims for equal pay were made on a collective rather than an individual basis and involved the determination of work value in industry wide awards. Thus an effective claim was not dependent on an individual woman claiming equal pay for work of equal value on the basis of a comparison with a male worker in a single workplace. Rather it rested on a comparison of the work value of occupational classifications of work in the context of wage determination within an industry wide award.

In Australia the wider construction of equal pay for work of equal value was introduced only three years after the 1969 principle of equal pay for equal work. The 1969 principle represented a breakdown in the gender settlements that had characterised Australian wage fixing from the time of the 1907 Harvester decision. The narrow prescription of equal pay for equal work was relatively straightforward, particularly in a system of collective wage determination, where the remedy was easily accessible by way of industry award variation. The 1972 principle provided for equal rates where equivalence in work value could be demonstrated across different areas of work, an objective which posed new issues. In short, how should equivalence be assessed where work was different? The 1972 principle proved to have a less straightforward application than the 1969 principle, a course of events that underpinned the comparable worth proceedings reviewed
in this thesis. This less than straightforward approach invoked two key criticisms of rights-based approaches: one, that feminised work was assessed against an implicit male standard; and two, that rights-based approaches failed to recognise the different starting points of men and women.

The comparable worth proceedings concerned not only the application to Australian labour law of the concept of comparable worth, but also the continued availability of the 1972 principle in the wake of new wage fixing principles. The proceedings highlighted the Commission’s and organised labour’s struggle with the standard against which feminised work should be judged. Determinations of work value had cohered primarily around masculinised areas of work – witness the metal trades fitter - a systemic feature shaped by gendered features of labour market participation, and Australia’s system of apprenticeship and training. The applicants identified comparable worth rather than work value as the measure of assessing work equivalence. In doing so they intended to draw attention to what they termed the implicit male standard in wage setting, but they also failed to acknowledge the elasticity with which the Commission had applied historically the concept of work value, an elasticity that could have been utilised for the purposes of the comparable worth application.

The ACAC’s decision in the comparable worth proceedings reaffirmed the extant nature of the 1972 equal pay for work of equal value principle, and the work value principle as the means of assessing whether the requirements of that principle was met. Despite this reaffirmation the proceedings advanced a very tentative jurisprudence, underlined by the Commission’s avowed reluctance to use the 1972 principle to conduct the types of cross-award and cross-industry work value investigations that were necessary to redressing the valuation of feminised work. Such investigations were not precluded entirely but were seen to be a measure of last resort. On this logic the gender pay equity position of nurses was assessed by reference to other nurses. Accordingly the tribunal’s ability to reach decisions about the equitable valuation of this area of
feminised work was limited. The jurisprudence that emerged from the comparable worth proceedings failed to provide marker points to enable the valuation of the existing but different work undertaken by women and men. Consequently the opportunity to advance Australia’s gender pay equity jurisprudence beyond the distinctive initiative provided by the 1969 and 1972 principles was lost.

So in conclusion, the 1972 principle did ‘open a new door’, but its institutional interpretation also limited the gains that could flow from it. This structural limitation was exacerbated by more turbulent social and economic trends.

2. AUSTRALIA’S SHIFT TO A FEDERAL STATUTORY, RIGHTS-BASED DISCOURSE OCCURRED IN 1993. WITH WHAT RESULT?

Australia introduced a legislative right to equal remuneration for work of equal value in 1993. This was the first occasion that a right framed in these terms had been introduced federally. Equal pay had been legislated previously in state industrial jurisdictions but it had focused on the narrow construction of equal pay for equal work. The failure of the 1993 legislative provisions is witnessed by the absence of any equal remuneration orders made under those provisions. Indeed only one case has proceeded to final arbitration. This failure 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; in turn, this exposed gender pay equity reform to the weaknesses of rights-based discourses.

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 has made the task of success claiming equal remuneration more difficult. The direction to discrimination and its interpretation by the tribunal supports 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 mediated the liberalism implicit in rights-based discourses because it 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.

A more expansive interpretation of discrimination may have been available to the federal Commission. Justice Glynn whose findings in the New South Wales Pay Equity Inquiry, followed Commissioner Simmonds’ decision in the HPM proceedings, adopted a different interpretation of the legislative reference to discrimination, and the connection between the provisions and the ILO’s Equal Remuneration Convention. Glynn noted that the Equal Remuneration Convention ‘requires the establishment of equal remuneration, being the provisions of equal remuneration for work of equal value with such establishment to be free of discrimination based on sex. It does not erect as the governing criteria discrimination per se\(^1\). Glynn’s interpretation was that the reference to the Convention did not import a test of discrimination simplicitor, but simply required a prospective test, namely that any future rates determined by the tribunal be free of sex bias.

While a different interpretation of the reference to discrimination might have been available to the federal tribunal, Commissioner Simmonds’ interpretation still stands in federal labour law. The HPM proceedings indicated the narrow grounds on which a claim for equal remuneration could be granted. This outcome also exposed a jurisprudence which could not advance effectively the

\(^1\) Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(1)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume II, p. 89.
1972 principle. The 1993 legislative provisions did not replace the 1972 principle; the latter remained available to the parties and Commissioner Simmonds used its reference to work value as justification for his nomination of this method to assess equivalence in work. In this area the HPM proceedings highlighted the recurrent flaws in how the applicants sought to demonstrate equivalence of work value. Following the failed use of comparable worth in 1986, the applicants in the HPM proceedings sought a reliance on competency standards, rather than work value.

This point of methodological contention goes directly to a key criticism of rights-based legal discourses that affirm equality where women can demonstrate a ‘sameness’ to men, but are ambivalent or overly restrictive as to how ‘difference’ from men should be assessed, measured and valued. The HPM proceedings identified work value as the method of assessing work equivalence. Yet the use of work value criteria had not been well advanced in the aftermath of the 1972 principle and there was a limited case history as to how work value could be utilised to disrupt and move beyond the masculinities and femininities embedded in the valuation of work. With a more developed case history, work value might have been applied successfully to assess the work equivalence of the process workers, packers, general hands and storepersons classifications which were at the subject of the application in the HPM proceedings.

Even if equivalence had been established this platform would have been insufficient on its own for the case to have been successfully prosecuted. This outcome would have only been achieved if the difference in earnings between the classifications, whose work was assessed as equivalent, was found to arise from sex discrimination. This discourse was overly formulaic and failed to contest the undervaluation of feminised work, or to assess the direct and tacit means by which undervaluation may be embedded in the classification, organisation and remuneration of work. The value of male work set the standard, and the means of assessment against that standard, the discrimination test, has proven to be incapable of assessing the dynamics of undervaluation.
In conclusion, the 1993 statutory amendments have failed to generate a single equal remuneration order. This failure is due to the construction of the provisions and their interpretation, the latter exacerbated by the absence of any principle as to how the provisions might be applied more usefully. These institutional weaknesses have been compounded by a withering assault on many of the foundations of Australian labour law, particularly its system of minimum and collective wage determination.

3. STATE INDUSTRIAL RELATIONS JURISDICTIONS HAVE IDENTIFIED NEW WAYS OF ADDRESSING GENDER PAY EQUITY. WITH WHAT RESULT?

The determination of a new equal remuneration principle in New South Wales was a response to the inadequacies in federal gender pay equity jurisprudence. The route to the principle was an uneven one, highlighting both the contested nature of gender pay equity, and also the contrasting patterns of industrial relations reform between the federal and state jurisdictions. The developments in New South Wales were followed to differing extents in other state jurisdictions, most notably in Queensland. The newly cast equal remuneration principles in New South Wales and Queensland provide an effective means to address the limitations in rights-based discourses. The advantage of these approaches lies in their test of undervaluation, a construct capable of disrupting the limitations of the sameness/difference dilemma reviewed in Chapter Three and earlier in this chapter. The advances in New South Wales and Queensland have been utilised by applicants to gain wage increases in both the public and private sectors.

The contrasting approaches between federal and state jurisdictions highlight the complexity and diversity in the sets of institutions that comprise the state. At the time that the equal remuneration principles were determined in New South Wales and Queensland, industrial awards retained primacy as the principal instrument of wage determination in these state jurisdictions. This aspect of wage determination gave greater impetus to recast equal remuneration principles,
that could be utilised to review minimum rates of pay in industry awards. The principles in New South Wales and Queensland conjoined a system of industry award wage determination in those two jurisdictions. Clearly in these jurisdictions centralised wage fixing and the arbitral powers of the tribunal had not been dismantled, at that stage, in the way of the federal jurisdiction. These features of Australia’s original class settlement remained resilient and partially intact within this jurisdiction. The path to the new principle in New South Wales demonstrated however that effective jurisprudence was not easily achieved. The state responded to pressures arising from more gender relations for credibility on the issue of gender pay equity, but was constrained in the ambit of any resultant new equal remuneration principle by capitalist interests. Substantive equality would still be mediated through the prism of capital social relations.

The development in New South Wales also highlighted the adaptive quality of feminist agency. Unlike the comparable worth and HPM proceedings, the Commission was not petitioned to dispense with the construct of work value. The construct of work value could not be held to account for the undervaluation of women’s work. What was more at issue was the lack of work value investigations of feminised areas of work and also the gendered application of the criteria established by members of the Commission in past proceedings.

Thus the principles in New South Wales and Queensland emphasised the importance of new assessments of work value. The Queensland Equal Remuneration Principle directed that industrial tribunals consider whether there has been adequate weight 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. It was recognised also that the different starting points of men and women in the labour market may have shaped the value of feminised work. The Queensland Equal Remuneration Principle, in particular, noted that aspects of women’s labour market participation may have influenced the valuation of their work. These included the degree of occupational
segregation, the disproportionate representation of women in part-time or casual work, women’s low rates of unionisation and their low representation in workplaces covered by formal or informal work agreements.

The test of undervaluation marked a clear division in practice between state and federal tribunals and highlighted a feature of rights-based discourses that is debated within feminist theorising. It was not clear that provisions based on a test of sex discrimination, as they occur in the federal jurisdiction, had the capacity to assess whether there has been undervaluation of work on the basis of gender. The equal remuneration principles in New South Wales and Queensland overcame the assumption of earlier rates being set correctly, but did not require that the applicant parties demonstrate that the rates have been set incorrectly because of sex discrimination. A careful industrial history of how the work in question has been valued was an important way of establishing undervaluation. The history needed to deal with how the traditional criteria of work value - especially skill, qualifications, and working conditions - have been approached by industrial parties and tribunals. Showing undervaluation required demonstrating that significant elements of work value have not been taken into account nor given enough weight in evaluating the work. The recourse to undervaluation addressed failures in the prior assessment, characterisation or valuation of feminised work. This test of undervaluation, as deployed in the New South Wales and Queensland jurisdictions, 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, where the applicant can demonstrate the rates of pay have been set properly.

How then is the New South Wales experience assessed? In the state jurisdiction of New South Wales, and following New South Wales in Queensland, the right to equal remuneration has been buttressed by equal remuneration principles that are founded on the construct of undervaluation.
Of the approaches reviewed in this thesis the construct of undervaluation most clearly meets the challenge posed by the critics of rights-based discourses. The approach as developed and implemented in these particular jurisdictional contexts enables examination and remedy of the institutional and cultural determinants of rates of pay and does not necessarily test the validity of those rates of pay through reference to embedded masculinised norms and practices. Through conjoining the right to equal remuneration to wage determination in industry awards these institutional measures have recognised that reform is most effectively advanced by collective and aggregate means.

4. IN AUSTRALIA PAY EQUITY REFORM MADE ITS FIRST LANDMARK ADVANCE AT THE END OF THE LONG POST-WAR BOOM. THEREAFTER ATTEMPTS TO ADVANCE PAY EQUITY VIA ARBITRAL INSTITUTIONS TOOK PLACE AGAINST A BACKGROUND OF RAPID SHIFTS IN SOCIAL, ECONOMIC AND GENDER RELATIONS. HOW DID THESE DEVELOPMENTS INFLUENCE INITIATIVES IN PAY EQUITY JURISPRUDENCE?

Australian gender pay equity reform in the post-industrial economy has taken place against a backdrop of a breakdown in traditional gender and class settlements. Within Australia the breakdown in established gender settlements was evident in the removal of institutionalised sex discrimination in the setting of wages, new legislative commitments to equal remuneration and the increased participation of women in paid work. Increased feminist agency and the increased representation of women in the state, including in feminist state agencies was significant also. The shift in traditional class settlements was evident in the weakening of Australia’s centralised system of conciliation and arbitration, the incremental and radical shift to individual and workplace forms of bargaining, and through these measures, changes to minimum wage setting arrangements. This shift in class settlements carried gender dimensions because of women’s greater reliance on industry award arrangements for the determination of the wages and working conditions.
The interweaving of these changes to class and gender relations has imparted an uneven impact on Australian gender pay equity jurisprudence, and the means through which gender pay equity could be claimed. Through feminist agency and in concert with organised labour Australian women sought to 'learn the rules' of industrial jurisprudence, from which they were marginalised. The rules were amended to recognise women's right to equal pay within Australia's system of centralised wage fixing and industrial award determination. Applying these rules highlighted the barriers that confront the recognition of feminised work, while coincidentally the institutional arrangements that shape industrial jurisprudence had altered. In short the rules of industrial jurisprudence were now different and the means to claim equal pay had far less purchase in this new landscape. This pattern, repeated over three phases of pay equity reform, illustrates the way in which women have played a game of catch up in their pursuit of effective gender pay equity jurisprudence.

Before turning specifically to the uneven development of Australia’s gender pay equity jurisprudence I return briefly to the wider sociological dynamics of social, economic and gender relations which were reviewed in Chapters Two and Three. In seeking an understanding of gender pay equity this thesis recognised the influence of class and gender as formations, at times complex and contradictory, in the operation of power. This recognition was accompanied by an understanding of the influence of historical composition and institutional context. The state legitimises the dominance of capitalist social relations, but this process of legitimation is complex and variable and exercised through different institutional arrangements, including labour market regulation. Yet while the state supports capitalist socialist relations, feminist agency has also left its mark. Reform to labour law has been utilised to remove barriers to women's labour market participation, and also to enshrine the right to equal pay, and to equal opportunity. However, there remains an unevenness in women’s position with the labour market, a position that recent rounds of restructuring and ordering reshaped into new forms of inequality (Walby, 1997: 65).
This restructuring includes an increased reluctance on the part of the state to impose national or legislative ‘constraints on the deployment of capital’ (Coates, 2000: 251), as well as the removal or partial dismantling of structures that provided effective forms of minimum wage determination (Thornton, 1990: 34).

Prior to gender pay equity reform in 1969 and 1972 Australia’s federal industrial relations jurisprudence was characterised by institutionalised sexism. This barrier was partly reversed (successfully by international standards) by the same system of centralised conciliation and arbitration that had so effectively promulgated lower rates of pay for women. The advent of the 1969 and 1972 principles was an illustration that feminist agency and feminist influence within organised labour had gained some purchase within labour law. Pay equity reform would be addressed most effectively by directly amending the institutional apparatus for collective wage fixing, by way of two new wage fixing principles. The outcomes generated by the 1969 and 1972 principles were facilitated by their proximity to Australia’s system of wage determination which remained highly centralised. In this way Australian’s principle was a highly distinct form of a rights-based legal discourse. The comparable worth proceedings recognised an attempt by feminists and organised labour to extend Australia’s gender pay equity jurisprudence and to address the valuation of highly feminised sectors of work. This attempt failed, in part due to poor execution, and also because the methodology employed, comparable worth, was a departure from the established path of calculating work value.

The weak jurisprudence that emerged from the comparable worth proceedings also reflected the strength of competing discourses, namely the primacy of the wage fixing principles relative to the entitlement to equal pay for work of equal value. At this time a new set of rules within Australian labour law was emerging. Wage fixing principles provided binding guidelines for a system of wage fixation and in the Accord era sought to circumscribe the level of increases that would arise
by way of centralised determination. In the comparable worth proceedings the Commission
determined that claims under the 1972 principle could not operate independently of the wage
fixing principles. Applicants seeking to claim their right to equal pay were required to travel a
circuitous and ultimately heroic route by successfully providing evidence of an anomaly and/or
inequity that was consistent with the terms of an increasingly narrowly cast anomalies and
inequities principle. Equal pay applications were not precluded and the state affirmed its support
for the 1972 principle. Yet equal pay applications could not be systematically pursued in their
own right. Applicants were required to align their application with the anomalies and inequities
provisions, and later the special case provisions, of the prevalent wage fixing principles.

Thereafter Australia embarked on what was a contradictory phase of gender pay equity reform.
In 1993 the state supported the introduction of a federal legislative right to equal remuneration
for work of equal value. This was a new articulation of a rights-based legal discourse in federal
industrial jurisprudence and intended to remove any ambiguity as to the legitimacy of that right.
Yet its introduction was unaccompanied by the means to support its application or to articulate
its relationship with the 1972 principle, which remained extant. The legislative right, framed as it
was, also introduced a new rule in that applicants were required to demonstrate that any
disparities in earnings for work determined to be equivalent had a discriminatory cause. In the
HPM proceedings the technical execution to apply this new right was poorer than that evident in
the comparable worth proceedings. With no concession to those proceedings the applicants
asked that the tribunal utilise a new method, competency standards, for appraising work value.

This weakness in execution aside, the application was confronted also by the general neo-liberal
direction of industrial relations policy, and the partial dismantling of Australia’s original class
settlement. This introduction of the 1993 amendments coincided with key changes in Australia’s
labour law measures, primarily through the state privileging enterprise over industry award
settlements. This was consistent with the direction of labour law reform internationally, but the key point here is that the changes fragmented further the links between Australia’s gender pay equity measures and its system of collective wage determination. No longer did the equal remuneration provisions coalesce with the primary method of wage determinations as was the case when the 1969 and 1972 principles were determined. The federal Commission retreated into a reduced set of functions. No longer were industry awards to be a progressive industrial instrument. Rates in industry awards would only be amended by the Commission seeking to ensure that an adequate 'safety-net' of minimum rates was in place. Instead, the primary instrument for wage determination would be enterprise agreements, a change that lessened the capacity for intervention on behalf of the interests of women workers.

The wider changes to labour law also introduced key nuances in how the right to equal remuneration could be claimed. In Australia’s system of labour law, applicants always had to claim their right to equal remuneration and demonstrate that the test of equal pay was unmet. In the immediate aftermath of the passage of the 1969 and 1972 principles, this was accommodated by an application to vary industry awards. The comparable worth proceedings demonstrated that while equal pay applications could still be processed by way of industry award applications, they were directed to claim that right by demonstrating an anomaly and/or an inequity. Only through these means could the tribunal grant wage increases that fell outside the discipline of the wage fixing principles. Access to the remedies available through the 1993 amendments was again by way of application, yet with a key distinction. Due to the constitutional underpinning of the provisions the right to claim equal remuneration and seek a variation to a multi-employer industry award was compromised. Given the reliance of women on award regulation, the capacity of the equal remuneration provisions to address gender pay equity was reduced if award based remedies fell outside the operation of the provisions. Again due to the construction of the provisions, applicants could not invoke the intervention of the Full Bench of
the AIRC as recognition of the importance with which the tribunal should approach matters of equal remuneration. It might be possible to attribute these flaws as simple technical shortcomings in the drafting of the 1993 legislative amendments, but they coincided with the development of enterprise based approaches to wage determination. In this process the apparatus once available to applicants to exercise reform at an industry level was dismantled.

The third phase of gender pay equity reform was initiated in state industrial jurisdictions. Feminist agency accompanied by an uneven degree of support from the state and organised labour was instrumental to the development of a new jurisprudence for equal pay applications in New South Wales and Queensland. These approaches rested on the construct of undervaluation. Their advantage over the approaches that preceded their introduction can be traced to this foundation and also to its 'connectedness' with the underlying dynamics of gender pay inequity. The measures in these jurisdictions recognised the need to ground their application in the instruments of industry and minimum wage determination. Applicants could invoke the operation of the principle in seeking a variation to an industry award, a course followed by applications that followed the passage of the equal remuneration principles in New South Wales and Queensland. This institutional feature recognised the reliance of women on minimum rates of pay and their disproportionately low engagement in workplace bargaining.

The effectiveness of these positive developments in state jurisdictions has been contained by the advent of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cwlth), which amended the federal *Workplace Relations Act* and made comprehensive changes to Australia's system of labour law. Specifically the right to gender pay equity has been countered by a competing right, namely the state legitimising a 'national' workplace relations system that emaciates the state jurisdictions. By way of the Work Choices amendments the 1993 equal remuneration provisions have been retained, although slightly amended. However federal labour law legislation, following
the Work Choices amendments, specifically excludes access to the new understandings of gender pay equity developed in state jurisdictions. Federal amendments dismantled the residual system of federal awards and an employee’s right to collectively bargain, and privileged the employer’s right to bargain directly with individual employees. Within a vastly expanded federal industrial jurisdiction, Australia’s pay equity jurisprudence is reduced to a rights-based discourse of nominal benefit only.

9.5 THE STATE OF PLAY

Given that the right to equal remuneration remains embedded in federal labour law the Australian state would seem to have responded positively to the demands for equal pay. This is because a pay equity framework including a rights agenda is held by the state to be in place. This continued inclusion of the right to equal pay partially silences feminist claims on the state and confirms the erosion of Australia’s early system of wage determination. Yet while gender is ‘named’ in the legislation it is ignored effectively thereafter. The particular construction of the right to equal remuneration in federal labour law challenges gender pay inequity only weakly. It lacks the capacity to contest the standards and institutions associated with the valuation of work, and it is unable to acknowledge women’s differences without compromising the right to equality or equal value (Wajcman, 1999: 15). The retention of the equal remuneration provisions provides only a nominal right to equal pay for work of equal value because they are based on a test of sex discrimination and following amendment now explicitly require a comparison against a ‘comparator group of employees’. This explicit reference to a comparator group was introduced by way of the Work Choices amendments, and represents a retrograde step given the findings of pay equity inquiries in state jurisdictions, and the construction of new equal remuneration principles in those jurisdictions. These investigative and arbitral proceedings found that validating the undervaluation of women’s work by reference to a comparable male group was flawed, because it should not be assumed that either ‘female’ or ‘male’ rates of pay were set properly by
reference to work value in the first place. Gender pay inequity is not necessarily a result of overt
discrimination, and thus a ‘comparator’ approach is never likely to uncover the source of the
inequity. Thus the federal provisions cannot address adequately the issue of why women receive
a lower level of income from their qualifications and experience in comparison to men, and
cannot address thoroughly the issue of undervaluation of the work performed by women because
of gender based stereotypical assumptions regarding the concept of ‘skill’.

Because the federal system of industrial regulation is even more disposed to workplace and
individual agreement regulation, the utility of the equal remuneration provisions for collective and
industry remedies is more uncertain than at the time of the HPM proceedings. This change places
a significant constraint on the AIRC’s ability to make equal remuneration orders that remedy pay
inequities on an industry basis, a constraint exacerbated by the current legislation’s restrictions
on the applications that the AIRC can hear under the provisions. Yet the impact of Work Choices
on gender pay equity goes beyond the inadequacies of its explicit gender pay equity provisions.
Work Choices does not ‘deregulate’ the labour market by taking the state out of the employment
contract. These changes have been enacted not through deregulation but through re-regulation
and new regulation. The centralised state apparatus has remained in place but involves new
forms of ordering. Work Choices massively redefined the presence of the Australian state, and
intensified its interventions in important ways. The federal labour law institutions developed by
the state in 2006 and 2007 differ from those established in 1904 and lack the requirements for
open hearings and collective representation that formed the base of earlier industrial regulation.
The state has reconfigured rather than withdrawn its intrusion into the labour market. This
reconfiguration influences the scope and quantum of substantive standards including wages and
hours of work, and also procedural standards. In procedural terms, the capacity for the
conciliation and arbitration of substantive standards, or industrial disputes concerning those
standards, is reduced, and gives way to workplace agreements being assessed simply by a series
of agencies, against a checklist. This change enables employers to enjoy greater discretion in the
determination of wages and conditions. The basis of the class settlement has been rebalanced in
the interests of capital and women’s bargaining position is particularly vulnerable because they
have been excluded historically from wage-bargaining processes. Thus they are placed poorly to
engage in the new dynamics of wage negotiations at the workplace.

9.6 THE OPTIMAL DESIGN OF PAY EQUITY REGULATION WITHIN
LABOUR LAW

What then is the optimal design of pay equity regulation within labour law? The right to equal
remuneration for work of equal value is a key starting point and remains an important foundation
in capturing feminist claims on the state and the market. Yet it remains an insufficient remedy if
unaccompanied by institutional arrangements that enable it to appropriately examine and value
the paid work contributions of women and men. Similarly its utility flounders if it is countered by
a series of alternative institutional arrangements that strip it of any functionality. These claims
are evident in the weak pay equity jurisprudence that has emerged from the fracturing of the
proximity between Australia’s measures for addressing gender pay equity, and its system of
collective wage determination. The determination of award wages was a foundation of wage
determination in Australian labour law. They retain purchase for the significant proportion of
women who remain bound by minimum awards or their post Work Choices equivalent, and also
through the way in which award rates of pay can inform the rates of pay in enterprise
agreements. The investigations that preceded the determination of new equal remuneration
processes in New South Wales and Queensland demonstrated that award rates of pay can
constitute an undervaluation of feminised work and that award rates of pay should not be
accepted as fair at face value.
These findings demonstrate the requirement for pay equity remedies to apply at the level of industry settlement. This option was denied by the particular construction of the 1993 legislative amendments at the time when the tribunal’s award determination powers were in retreat. The availability of industry remedies lessens the burden that is implicit in pay equity relief only being available at the level of the individual claimant, or through women at a single workplace.

The availability of applications for pay equity remedies at the level of industry settlement addresses the intersection of the right to equal remuneration with other key tenets of labour law. Tribunals also require effective constructs and principles for determining equal remuneration claims. The right to equal remuneration applied through a test of sex discrimination is incapable of capturing the undervaluation of work. Alternatively, undervaluation is an accessible construct that can be demonstrated without immediate and necessary recourse to masculinised areas of work. It acknowledges and enables the remedy of deficiencies in the prior assessment, characterisation or valuation of feminised work. It also recognises that a broad range of structural inequalities can impact on the valuation of work.

**9.7 FEMINIST ACTION AND FURTHER RESEARCH**

In this section of the chapter I detail recommendations concerning further research and address the problem of nominal rights to gender pay equity in a post-industrial world. A number of these recommendations are shaped by a degree of contextual and policy uncertainty. Australian labour law presently stands at a cross roads. Federal labour law, and indeed much of state labour law was transformed by the advent of the Work Choices amendments by a conservative federal government. A new Labor government has recently been elected (November 2007) with a policy commitment to dismantle components of Work Choices. This process has commenced although the complete legislative program to implement such changes is unknown.
Prior to detailing the recommendations which turn to a significant degree on political opportunity I turn to an agenda for feminist action.

**Patriarchy as an Analytical Category**

The case studies revealed a strong story about the roles of men in the various institutional settings that was quite apart from the masculinist construction of these institutions and their processes. This was evident in the commitment of the mostly male AMWU leadership to a system of competency standards as the means of assessing work equivalence in the HPM proceedings. It was also evident in the circumstances that surrounded Gail Gregory’s departure from the Labor Council at the commencement of the equal remuneration proceedings in New South Wales and the resistance of the (mostly male) New South Wales Cabinet to the prospect of legislative amendment. These influences were not necessarily clearly defined. The commitment to competency standards was not without support from the female advocates who carried forward the HPM application but they were conscious of the AMWU’s organisational commitment to this competency standards and the approach to industrial organisation that they represented. Gail Gregory too acknowledged her own early resistance to the prospect of an Inquiry, a view that was shaped by Labor Council culture and practice.

To attribute these events to patriarchy is academically unfashionable. As observed in Chapter Two patriarchy as an analytical concept is subject to criticism in two key areas. Pollert (1996) assessed that ‘gender’ has wider explanatory purchase than ‘patriarchy’, a position which I supported. Nor was Pollert comfortable with identifying patriarchy as a system because it had no material basis or dynamic. The second area of criticism can be traced to feminists influenced by postmodernism who aligned patriarchy with a form of theorising that relied on universal,
essentialist and taxonomic explanation, thereby being eschewed by such theorists. I have
previously acknowledged these criticisms elsewhere in this thesis and in this chapter I have
advanced a framework that views class and gender as modes, at times complex and
contradictory, in the operation of power.

Nevertheless the evidence of the case studies makes a compelling argument for patriarchy to be
given renewed analytical attention. Further research should be directed to:

§ the utility of patriarchy as an analytical category. Within this broad framework the
research should assess whether feminism loses some traction by examining power
through the prism of gender rather than patriarchy. A second area of investigation should
centre on whether feminist research endeavour, in its growing awareness of the
contingency of claims concerning group identity, fails to encompass the acuity of power
imbalance between men and women.

Researching Undervaluation

Pay equity campaigns are bolstered by research that assesses undervaluation in women’s
employment. This research was a key contributor to the work of the New South Wales Inquiry
and subsequent applications addressing the undervaluation of librarians and private sector child
care workers in New South Wales and dental assistants in Queensland. Further research should
be directed to identifying areas where women’s employment is undervalued. This research
should include the following:
the compilation of an industrial history which will also provide a foundation stone for
other aspects of the research. This should involve the analysis of timelines for the
movement of rates for key classifications, assessing changes in the relativities between
classifications and examining previous work value assessments. This aspect of the
research should also examine the regulation of occupational entry points;

§ an assessment of earnings, disaggregated by sex and hours of work, and the breakdown
of those rates into components of cash and non cash components;

§ an assessment of the employment profile of the industry/occupation disaggregated by
hours of work, contractual arrangements, workplace size, degree of unionisation;

§ a review of the training and credentialing frameworks that operate within the
industry/occupation and their history;

§ an assessment of the work using work value criteria as an initial analytical framework;

§ establishing the applicable government regulation such as the provision of individual or
workplace licences.

**Constitutional Head of Power**

The existing right to equal remuneration in federal labour law is founded under the external
affairs power of the Constitution. In this way Australia’s signatory status to the ILO’s Equal
Remuneration Convention can be recognised in federal labour law. The form of this particular
construction compromised the relationship between the legislative provisions concerning equal
remuneration and other key sections of the legislation. In a pre-work Choices environment this
stymied the intervention of the Full Bench of the AIRC and the ability of applicants to use the
equal remuneration provisions to exercise a variation to an industry award. The legislation as it
stands cites the notion of ‘rates of remuneration established without discrimination based on sex’
by way of explicit reference to the ILO’s Equal Remuneration Convention. As demonstrated
through the HPM proceedings this notion has carried a problematic interpretation in Australian labour law. Further research should therefore be directed to:

§ examining whether the equal remuneration provisions can be founded under the external affairs powers but legislatively positioned in a way that does not impede the AIRC or applicant parties recourse to these provisions in conjunction with other provisions of the legislation;

§ examining whether the equal remuneration provisions can be founded under the external affairs powers, but constructed in a way that provides that the reference to ‘rates of remuneration established without discrimination based on sex’ implies a prospective test and requires that the tribunal establishes rates of pay that reflect an appropriate valuation of the work that is free of sex-bias;

§ examining whether the equal remuneration provisions are better founded under an alternative power, the corporations power. This research would examine the impact of removing Australia’s signatory status to the ILO’s Equal Remuneration Convention as an explicit reference point within federal law, but assess the advantages that may accrue from expressing the right to equal remuneration in a manner similar to that in the

*Industrial Relations Act 1999* (Qld). This legislative provision carries the following features: there is no reference to ‘rates of remuneration without discrimination based on sex’; the provisions apply to all industrial instruments within the functions of the Queensland Industrial Relations Commission; and there is no requirement for a comparator group of employees.

*Conjunction of Federal Equal Remuneration Principle with Federal Legislative Provisions*
The developments in the state jurisdictions detailed in this thesis were assisted, particularly in the Queensland jurisdiction, by the conjunction of legislative provisions with an equal remuneration principle to guide the tribunal and the industrial parties in the application of the provisions. Such a construction is absent in federal labour law. While the 1972 equal pay for work of equal value principle remains extant it cannot provide detailed guidance to the tribunal in the application of the provisions, introduced in 1993, because it preceded those provisions.

The content of the equal remuneration principle bears further consideration. Clearly the understandings concerning gender pay equity developed in state jurisdictions, and articulated by way of new equal remuneration principles, are more capable of addressing gender pay equity than available in current federal law. However, there are differences between the principles developed in New South Wales and Queensland. The Queensland Equal Remuneration Principle has application to a wider range of industrial instruments and more explicitly references what have previously been described as the dynamics of undervaluation.

Further research should therefore be directed to:

$s$ examining whether there are any barriers within federal labour law to a federal industrial tribunal determining an equal remuneration principle to guide the implementation of the nominal right to equal remuneration;

$s$ examining whether the provisions that distinguish the Queensland Equal Remuneration principle from that developed in New South Wales are advantageous to the project of gender pay equity reform and can usefully inform the development of a new federal equal remuneration principle. A starting point for this research will be the second pay equity inquiry conducted by the Queensland Industrial Relations Commission in 2007.
Restitution of Industry Settlements

Gender pay equity is enhanced if there is a strong central coordination of wage determination including minimum wage settlement. Within Australia this was carried forward through a program of industry awards, a program that lost impetus with the rise of neo-liberal industrial relations policy, and which was dismantled by way of the Work Choices amendments.

Further research should therefore be directed to:

§ assessing the most appropriate means to restore industry settlements and minimum wage determination within federal labour law. This research will also need to examine the means of returning rates of pay and classification descriptions from the present location within Australian Pay and Classification Scales.

9.8 CONCLUSION

This thesis presents new knowledge concerning gender pay equity and provides a foundation for further research. It has examined gender pay equity regulation in Australian labour law and established that this regulation has a number of weaknesses. These weaknesses have class and gender dimensions. Women’s right to equal remuneration has been compromised by changes to Australia’s class settlement and there is a resistance to redressing the institutional and cultural determinants of rates of pay and the weaknesses of measures directed to this task. The right to equal remuneration needs to be conjoined to wage determination in industry settlements. It requires also accompanying institutional measures that enable examination and remedy of the undervaluation of women’s waged labour without recourse to masculinised norms and practices.
PRIMARY DATA

ARCHIVAL DATA – AUSTRALIAN INDUSTRIAL REGISTRY (AIR)

C NOS. 2219 AND 2271 OF 1985, APPLICATION BY THE ROYAL AUSTRALIAN NURSING FEDERATION TO VARY THE PRIVATE HOSPITALS’ AND DOCTORS’ NURSES (ACT) AWARD 1972 RE RATES OF PAY FOR NURSES (COMPARABLE WORTH PROCEEDINGS)

File Material, C Nos. 2219 and 2271 of 1985
Application by the Royal Australian Nursing Federation to vary the Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972 re rates of pay for nurses.
Application by the Hospital Employees Federation to vary the Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972 re rates of pay for nurses.
Correspondence from Deputy President (M B Keogh) to President (Moore J), Australian Conciliation and Arbitration Commission (ACAC), 28 October 1985.
Correspondence from Executive Producer, Women’s Film Unit, Film Australia (D. Torsch) to Deputy Industrial Registrar, Australian Conciliation and Arbitration Commission, 25 October 1986.
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Exhibits, C Nos. 2219 and 2271 of 1985

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Exhibits, A No. 257 of 1986

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Correspondence from Australian Council of Trade Unions (J. Doran) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 19 June 1996.
Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to HPM Industries (J. Horan, E. Arena, D. Wang), Metal Trades Industries Association (J. Smith), Metal Trades Federation of Unions (J. Brunskill), Australian Manufacturing Workers’ Union (R. Fortescue), Australian Council of Trade Unions (J. Doran), 23 February 1996.
Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 15 March 1996 including as attachment report titled, Progress of Equal Pay Claim at HPM since conference before Commissioner Oldmeadow on 20 December 1995.
Correspondence from Australian Manufacturing Workers’ Union (D. Cameron) to President (O'Connor J), Australian Industrial Relations Commission, 31 May 1996.
Correspondence from Australian Manufacturing Workers’ Union (E. Maiden) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 25 June 1996.
Correspondence from Australian Manufacturing Workers’ Union (H. Delaney) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 11 November 1996.
Correspondence from Australian Manufacturing Workers’ Union (D. Oliver) to Commissioner Simmonds, Australian Industrial Relations Commission, 2 February 1999.
Correspondence from Director General, New South Wales Department of Industrial Relations (K. Boland on behalf of H. Bauer) to Commissioner Oldmeadow, Australian Industrial Relations Commission, 21 June 1996.
Correspondence from Metal Trades Industries Association (R. Boland) to President (O'Connor J), Australian Industrial Relations Commission, 16 May 1996.
Correspondence from Metal Trades Industries Association (R. Boland) to President (O'Connor J), Australian Industrial Relations Commission, 27 May 1996.
Correspondence from Metal Trades Industries Association (R. Boland) to Commissioner Simmonds, Australian Industrial Relations Commission, 25 February 1997.
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Inter-Office Memo, from Commissioner Olmeadow to Commissioner Simmonds, Australian Industrial Relations Commission, Re C No. 23931 of 1995, 17 February 1997.


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Correspondence from Australian Council of Trade Unions (J. Doran) to the President (O'Connor J), Australian Industrial Relations Commission, 20 May 1996.

Correspondence from the Australian Council of Trade Unions (J. Doran) to President (O'Connor J), Australian Industrial Relations Commission, 21 May 1996 appended by Australian Council of Trades Union submission in s.108 proceedings.

Correspondence from Metal Trades Industries Association (R. Boland) to President (O'Connor J) Australian Industrial Relations Commission, 20 May 1996, appended by MTIA submission in s.108 proceedings.


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Correspondence from Australian Manufacturing Workers’ Union to Commissioner Simmonds, Australian Industrial Relations Commission, 2 February 1999.

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NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Special Branch Council, 3 March 1988.

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NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Council Meeting, 28 March 1990.

NBAC, RANF-ACT Branch, Z209, Box 171, Minutes of Royal Australian Nursing Federation-ACT Branch Stop Work Meeting, 3 April 1990.

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Minutes of Meeting, 27 November 1995.
Minutes of Meeting, 20 March 1996.
Minutes of Meeting, 22 April 1996.
Minutes of Meeting, 17 June 1996.
Minutes of Meeting, 23 July, 1996.
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Minutes of Meeting, 14 March 2001.
Minutes of Meeting, 16 May 2001.

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Correspondence from National Pay Equity Coalition (F. Hayes) to the Director-General, New South Wales Department of Industrial Relations (W. McDonald), 20 October 1997.
## INTERVIEWS

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<td>Roger Boland</td>
<td>Director Industrial Relations, Metal Trades Industries Association&lt;br&gt;Advocate for the Metal Trades Industries Association in HPM proceedings</td>
<td>Judge, Industrial Relations Commission of New South Wales</td>
<td>15/2/2005</td>
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<tr>
<td>Anthony Britt</td>
<td>Barrister-at-Law, Sir Owen Dixon Chambers.&lt;br&gt;Counsel, Metal Trades Industries Association, Australian Chamber of Manufactures, the Catholic Commission for Employment Relations, Local Government and Shires Association of New South Wales, Motor Traders Association of New South Wales, New South Wales Road Transport Association and State Chamber of Commerce during the New South Wales Pay Equity Inquiry&lt;br&gt;Counsel, Australian Industry Group, the Catholic Commission for Employment Relations, Local Government and Shires Association of New South Wales, Motor Traders Association of New South Wales, New South Wales Road Transport Association and State Chamber of Commerce during the New South Wales Pay Equity Coalition</td>
<td>Barrister-at-Law, Sir Owen Dixon Chambers.</td>
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<tr>
<td>Jennifer Doran</td>
<td>Senior Industrial Advocate, Australian Council of Trade Unions&lt;br&gt;Advocate for the Australian Council of Trade Unions through HPM proceedings</td>
<td>Senior Policy Advisor, Office of the Premier of Victoria</td>
<td>18/5/2005</td>
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<td>Elizabeth Fletcher</td>
<td>Secretary to the Inquiry into Sex Discrimination in Overaward Payments, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission (which preceded the 1993 federal equal remuneration amendments)&lt;br&gt;Policy Advisor, Premiers Department of New South Wales (at the time of the New South Wales Pay Equity Inquiry)&lt;br&gt;Facilitator, Crown Working Party, New South Wales Pay Equity Inquiry</td>
<td>Senior Policy Advisor, Premiers Department of New South Wales</td>
<td>20/2/2005</td>
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<tr>
<td>Kathryn Freytag</td>
<td>Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission (at the time of the 1993 federal equal remuneration amendments)&lt;br&gt;Policy Advisor, Women’s Equity Bureau, New South Wales Department of Industrial Relations (at the time of the New South Wales Pay Equity Inquiry)&lt;br&gt;Through the above period Member, Crown Working Party, New South Wales Pay Equity Inquiry&lt;br&gt;(from January 1998 onwards) Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations&lt;br&gt;Facilitator, Crown Working Party, Equal Remuneration Principle Proceedings</td>
<td>Senior Policy Advisor, Premiers Department of New South Wales</td>
<td>10/2/2005&lt;br&gt;24/2/2005</td>
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</tbody>
</table>
| Philip Gardner      | Industrial Officer, Royal Australian Nursing Federation (ACT Branch)  
Advocate for the Royal Australian Nursing Federation through the comparable worth and following anomalies and inequities proceedings                                                                                             | Solicitor, Ryan Carlisle, Thomas                                                                                                | 18/5/2005         |
| Mary Grace          | Director, Women’s Equity Bureau, New South Wales Department of Industrial Relations (from March 1997 – December 1998)  
Through the above period  
| Gail Gregory        | Executive Officer, Labor Council of New South Wales  
Advocate for the Labor Council during the Wales Pay Equity Inquiry and through initial directions hearings in the Equal Remuneration Principle proceedings.                                                | Executive Director, Human Resources, Department of Ageing, Disability and Home Care.                                                                 | 20/2/2005         |
| Philippa Hall       | Senior Policy Advisor, Sex Discrimination Unit, Human Rights and Equal Opportunities Commission (at the time of the 1993 federal equal remuneration amendments)  
Deputy Director-General, New South Wales Department for Women (at the time of the New South Wales Pay Equity Inquiry and Equal Remuneration Proceedings)  
Member, Crown Working Party, New South Wales Pay Equity Inquiry  
Member, Crown Working Party, Equal Remuneration Principle proceedings                                                                 | Director, Pay and Employment Equity Unit, New Zealand Department of Labour                                                  | 11/2/2005         |
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<td>Fran Hayes</td>
<td>National Pay Equity Coalition Convenor of Women’s Organisations during the New South Wales Pay Equity Inquiry</td>
<td>Labour Market Consultant</td>
<td>18/2/2005</td>
</tr>
<tr>
<td>Emma Maiden</td>
<td>National Research Officer, Australian Manufacturing Workers’ Union Advocate for the Australian Manufacturing Workers’ Union in HPM proceedings</td>
<td>Australian Services Union, Social and Community Services Branch</td>
<td>21/2/2005</td>
</tr>
<tr>
<td>Kathy McDermott</td>
<td>Director, Equal Pay Unit, federal Department of Industrial Relations (at the time of the Inquiry into Sex Discrimination in Overaward Payments) Policy Advisor, Federal Minister for Industrial Relations (at the time of the 1993 legislative amendments) Assistant Secretary, Policy and Small Business Division, Department of Workplace Relations and Small Business (at the time of the HPM proceedings), Group Manager, Evaluation Group, Australian Public Service Commission</td>
<td>7/12/2005</td>
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<tr>
<td>Alison Peters</td>
<td>Vice-President, Labor Council of New South Wales Pay Equity Inquiry and Equal Remuneration Principe proceedings State Secretary, Australian Services Union (Social and Community Services Division)</td>
<td>Deputy Assistant Secretary Labor Council of New South Wales</td>
<td>14/3/2005</td>
</tr>
<tr>
<td>Jeff Shaw</td>
<td>New South Wales Attorney General and Minister for Industrial Relations, New South Wales Pay Equity Inquiry and Equal Remuneration Principe proceedings</td>
<td>Consultant, Jones Staff &amp; Co</td>
<td>14/3/2005</td>
</tr>
<tr>
<td>Name</td>
<td>Position relevant to case proceedings</td>
<td>Current Position at time of Interview</td>
<td>Date of Interview</td>
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**Documentation supplied by participants during interview**


Application for an Equal Remuneration Order Pursuant to s. 60 and to Amend the Child Care Industry Award – State 2003, filed by Liquor Hospitality and Miscellaneous Union, Queensland Branch, 24 December 2003. This documentation supplied by LHMU upon request, 4 October 2004.
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