

Pay equity

Women's struggles for pay equity have a long and chequered history. Equal pay decisions by Australian industrial tribunals in the late 1960s and early 1970s represented early victories for the feminist movement, but the Australian workforce remained highly sex-segregated and work in female-dominated occupations remained undervalued. Attempts to tackle the ongoing undervaluation of women's work were launched in the late 1980s and achieved some success in a series of pay equity inquiries and equal remuneration decisions commencing in the late 1990s. This case study maps the trajectory of hard-won feminist gains as well as losses and reversals in the pay equity arena over 55 years from 1958-2013.

1950s - 1960s – The ILO Convention and equal pay for equal work

International Labor Organisation (ILO) Convention No 100, providing for equal remuneration for men and women workers for work of equal value, was adopted by the ILO in 1951. In the wake of the Convention, Australian States initially introduced equal pay legislation, with this movement culminating in the adoption by the federal Conciliation and Arbitration Commission of the principle of 'equal pay for equal work' in 1969. These early provisions were limited in scope, however, applying only in the relatively rare situations in which women were undertaking the same work as men.

- ***Female Rates*** (Amendment) Act 1958 (NSW)

The Act was designed to implement ILO Convention No. 100, and required the Industrial Commission and conciliation committees in specified circumstances to insert provisions for equal pay between the sexes into industrial awards and agreements.

- ***Re Clerks*** (State) Award and other Awards (1959) 58 AR 470

NSW Industrial Commission: Full Bench

The Commission held that in order for an equal pay provision to be inserted into an award or agreement, the work performed by female employees must be of a similar or like nature and of equal value to work performed by male employees under the same award or agreement, with 'value' interpreted to mean as determined by the Commission rather than the employer.

- ***The Australasian Meat Industry Employees Union & Others v Meat and Allied Trades Federation of Australia & Others*** (Equal Pay Cases) (1969) 127 CAR 1142

Commonwealth Conciliation and Arbitration Commission: Moore and Williams JJ, Commissioner Gough, Public Service Arbitrator Chambers

Intervening women's organisations included: Australian Nursing Federation Employees Section; Australian Federation of Business and Professional Women's Clubs; Union of Australian Women; Australian National Council of Women; Australian Federation of Women Voters.

The federal Arbitration Commission adopted the principle of 'equal pay for equal work' to be phased in over three years, bringing women covered by federally registered awards into line with those covered by state awards. This decision stressed the need for work to be of "the same or like nature and of equal value". It also specified that, "notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed".

Documents cited by union parties arguing for equal pay

ILO Convention No. 100, Recommendation No. 90 of 1951, Convention No. 111 (non-discrimination) and Recommendation No. 111 of 1958.

Commission considerations

"The Commonwealth Government supplied the Commission and the parties with a document called 'Equal Pay – some Aspects of Australian and Overseas Practice' (produced by the Australian Department of Labour and National Service 1963) which everyone concerned found most useful."

The Commission also considered the state legislation of NSW, WA, SA and Tasmania where equal pay had been implemented; they considered this was indicative of community expectations towards wage equality.

The Commission stated that various women's organisations had intervened in the proceedings and "they all supported the submissions made by Mr Hawke (*Applicant's representative*)... They presented additional information, economic, social and historical in support of their overall attitudes. Emphasis was placed upon the status of women and the desirability to end discrimination against women in all forms. We were referred to existing social security legislation, particularly to the alleged inadequacy of it, and to the fact that many more married women were coming into the workforce for a variety of reasons – economic, social and technological. It was said that due to better mechanical devices many women were being relieved of the drudgery round the home and were able to enter or re-enter the workforce. Reference was also made in some detail to the struggle which certain groups of women were having to achieve a proper standard of living and in particular to a survey undertaken in 1966 by the Institute of Applied Economic Research at the University of Melbourne, commonly known as the 'Poverty Survey'".

Feminist commentary

Neutral assessments

The “principle incorporated a number of features identified as empowering in the fight for pay equity. The guidelines ensured minimal legal formality and locked the pay equity process into delivery through the award system, with the intent to remove any evidence of direct discrimination in award wages from the Australian system.” (Whitehouse et al. 2001, p.376)

Positive assessments

The case broke “through the institutionalised sexism that had marked early Australian wage fixation.” (Smith 2009, pp.654-655)

Negative assessments

The case “had limited application: few women were doing the same work as men...[t]hree years later there was general agreement that less than 20 per cent of the female workforce had received equal pay. ” (Gaudron and Bosworth 1979, pp.163-165)

“The 1969 Case did not produce the benefits hoped for... As a result of the decision, approximately 18 per cent of females in the workforce received equal pay...Once again, the vast majority of women were deprived of wage justice and the private sector retained its source of cheap labour...A feeling of dejection and what can we do now prevailed.” (D’Aprano 2001, pp.200-205)

1970s - 1980s – Equal pay for work of equal value

The limited effect of the 1969 principle of ‘equal pay for equal work’ led feminist activists back to the federal Conciliation and Arbitration Commission in 1972, where they successfully argued for the expansion of the principle to cover ‘equal pay for work of equal value’. The principle was implemented at federal and state levels and in various occupations over the following years, although arguably not as fully as it could have been, with, in a number of instances, women’s work simply being incorporated at the bottom of existing male pay scales by consent, rather than any proper consideration being undertaken of the value of the work. In 1986, feminists made an unsuccessful attempt to incorporate the American doctrine of comparable worth into the equal pay principle. Meanwhile, during the later part of this period, potential equal pay initiatives were undermined by changes to the federal industrial relation systems, in particular the move to enterprise bargaining. While feminist organisations pointed out the deleterious implications of these shifts for women workers, their concerns fell on deaf ears.

Establishment

- ***National Wage & Equal Pay Case*** (1972) 147 CAR 172
Commonwealth Conciliation and Arbitration Commission: Moore, Robinson and Coldham JJ, Public Service Arbitrator Taylor, Commissioner Brack

Subsequent to the 1969 decision, various unions and women's organisations went back to the Commission saying that only an estimated 18 per cent of the female workforce (i.e. mostly those working in identical jobs to males) had received equal pay. They asked for an extension of the principles along the lines of the ILO Convention 100.

The Commission concluded "in 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'. This means that award rates for all work should be considered without regard to the sex of the employee."

However, the minimum wage was not made equal between women and men "because the male minimum wage takes account of family considerations."

Commission considerations

The Commission at one point referred to the Women's Liberation Movement who they said "pushed for the implementation of the new principle within a 3 year period". However, there was no elaboration on their role in the decision or any other information given about any literature or documentation submitted by them.

Feminist commentary

Positive assessments

"Big changes in award rates and earnings did occur during the period 1969 to 1976 as a result of unions applying for equal pay for their members in combination with the minimum wage changes." (Short 1986, p320)

"As a result of the 1972 proceedings, the effective exclusion of female dominated industries from the ambit of the 1969 decision was removed, through the introduction of the broader principle of equal pay for work of equal value. The 1972 principle was also adopted by State industrial tribunals." (Smith & Lyons 2008, p.7)

Negative assessments

"Implementation of the 1972 decision in particular has been slow and, at present, probably only partial. The 1972 decision was apparently framed to affect female-dominated industries where previously women had been unable to achieve equal pay. The decisions of the federal and some state Commissions make it apparent that these aims were not fully achieved. The historical discrimination evident in Australia's wage fixing may still persist, particularly in female-dominated work areas, where work value has been assessed for changes over time but never for comparative work value with men to see if the original rate was discriminatory." (Short 1986, p.329)

“While significant developments have occurred through the industrial arbitration system in relation to the application of the principle of equal pay for equal work, the achievements made in the area of equal pay for work of equal value have been ad hoc and limited to particular cases.” (Burton 1991, p.126)

“It led to the wide-scale dismantling of designated ‘male’ and ‘female’ jobs and pay rates in awards. Removing the labels did not necessarily change the practice, however. Women and men still tended to do different work.” (Hunter 2000, p.11)

“But while the articulated rules changed, the entrenched social norms which influenced what constituted a fair differential were not so easily reformed. It appears that in numerous cases, instead of evaluating former female job classifications systematically, they were simply transferred to the lower end of what had been the men’s pay classification.” (Todd & Eveline 2004, p.34)

“[i]n the period between 1981 and 2003 female earnings in Australia have ranged from about 80 to 85 per cent of male earnings, the application of the 1972 equal pay for work of equal value principle notwithstanding.” (Smith & Lyons 2008, p.7)

- **National Wage Case** (1974) 157 CAR 293

Commonwealth Conciliation and Arbitration Commission: Moore, Robinson and Ludeke JJ, Deputy President Isaac, Public Service Arbitrator Taylor, Commissioner Portus

In this case the Commission granted one minimum wage for adults instead of separate male and female rates. This represented the final abandonment of the family needs concept. The Commission concluded: “we believe a strong case has been made for the claim of equal treatment of adult male and female workers in respect of the minimum wage”. The Commission thought it was not their role to determine family needs given they did not have the information to enable them to decide what the varying needs of workers were.

Feminist commentary - positive

“The equal pay decisions of 1969, 1972 and 1974 did have a substantial effect on the minimum hourly (award) wages of women relative to men, raising female award rates from 72 per cent of male rates in 1968 to 94 per cent in 1978.” (Short 1986, p.329)

- **State Equal Pay Case** [1973] AR 425

NSW Industrial Commission: Beattie P, McKeon and Sheldon JJ

This was a test case concerning the principles to be applied in making awards fixing wages for women workers. The Clerks Union applied to have the Clerks (State) Award varied and asked the Commission to adopt a new principle, that wage rates should be fixed by a consideration of the work performed

irrespective of the sex of the worker. This case referred to the federal decision in the National Wage Case the previous year and the new principle of 'equal pay for work of equal value'.

All parties agreed that the new Commonwealth principle should be adopted for the purposes of wage-fixing under the *Industrial Arbitration Act 1940 (NSW)*, but there was significant disagreement as to how the new principle should be implemented in awards and also as to the timing of the implementation.

The Industrial Commission noted that it had sought in recent years to ensure that there was consistency between its decisions and those of the Commonwealth tribunal; "[w]e believe that the time is opportune to introduce in the New South Wales system the principle of equal remuneration for men and women workers for work of equal value, meaning thereby rates of remuneration established without discrimination based on sex." The Commission held, *inter alia*, "to fix rates of wages for female employees in relation to the basic wage for adult females and to fix rates of wages for male employees in relation to the basic wage for adult males is to discriminate on the basis of sex."

The Commission held the principle of equal pay was to be achieved by granting female employees "equal pay loadings" over a period of 18 months to an amount equal to the differential figure.

Feminist commentary - neutral

"The principle of 'equal pay for work of equal value', however, is not defined with any greater specificity than in the Commonwealth case. The majority in the State decision stated '[e]qual remuneration is capable of achievement in the circumstances of today only if the level of women's wages for a particular class of work is raised to the level of men's wages for that class of work.' Although we once again encounter a certain imprecision in the use of language, 'the class of work' does suggest that no radical cross-classification comparison was envisaged." (Thornton 1981, p.473)

- ***Industrial Conciliation and Arbitration Act Amendment Act* 1975 (No. 2) (Qld)**

This Act amended the *Industrial Conciliation and Arbitration Act 1961 (Qld)* by providing that under the terms of any award, "the same wage shall be paid to persons of either sex performing the same work or performing work of a like nature and of equal value or producing the same return of profit to their employer."

Implementation

- ***Re Municipal Officers' (Tasmania) Award* 1970 [1975] 167 CAR 254**
Australian Conciliation and Arbitration Commission: Commissioner Gough

The absence of arbitrated equal pay decisions in the clerical and keyboard area was noted by the advocate for the Municipal Officers' Association. An interim equal pay increase of six per cent was awarded.

The existing relativities between stenographers and machine operators, and clerks/typists were retained pending the determination of their relative work value. The award was varied to show that clerical positions were no longer confined to male officers.

The matter of the additional allowance under the award for a 'married male junior with a dependent wife or child' was reserved for further consideration, as was the appropriate grading of stenographers and machinists. The employer's proposal for the introduction of a clerical assistant classification was not adopted.

- ***Re Municipal Officers' (Melbourne and Metropolitan Board of Works) Award*** [1976] 175 CAR 1044

Australian Conciliation and Arbitration Commission: Commissioner Matthews

The implementation of equal pay for female officers was achieved by consent, except in relation to allowances for educational qualifications currently applying to administrative officers, which the Municipal Officers' Association claimed should also be paid to administrative assistants.

The payment of qualifications allowances to administrative assistants was opposed by the MMBW which argued that no minimum educational qualification was required for appointment to the administrative assistants' scale, and that their work was considered simple and routine, including filing, transporting documents, answering simply queries, updating records etc. and was not based on the career concept of administrative officers (generally male).

The Municipal Officers Association's claim was refused, based on the arguments of the MMBW.

- ***Universities (Equal Pay) Case*** (1980) AR 616
NSW Industrial Commission: Cahill, Watson and Dey JJ

This was an application made by the Public Service Association (PSA) of NSW to integrate into the clerical scales at the UNSW the two separate keyboard scales established for stenographers and typists. Although women had now been admitted to the general clerical scale, the separate salary scales for stenographers and typists were perceived as 'female' scales. Since many women classified as keyboard operators were carrying out administrative and clerical duties equivalent to those of general clerical officers, the principles contained in the *State Equal Pay Case* had not been properly implemented. One single pay scale, it was contended, would rectify the anomalous situation of many of the female employees.

This case had come before Macken J at first instance and he had dismissed the application and held that the scales were correctly set, reflecting the skills of the employee. This case was the appeal of that decision. The issues were whether the occupation being compared was “predominantly female”, and whether the rates were depressed by reason of this fact.

The Commission held the separate (and lower) scales for the stenographer and typists were not based on the sex of the employees; instead they were based on “work-value considerations”. The Commission held that the principles of equal pay did not require the integration of all clerical salary scales at the university. However, they held that the salary adjustments made in 1973 to implement equal pay were inadequate. The Commission allowed the parties to confer and then accepted the agreed increase of 4.5 per cent for all adult classifications, with proportionate increases for juniors.

Feminist commentary - negative

This case “illustrates the difficulty in implementing formalised changes in the societal perception of the value of work done by women, for no new techniques have been developed to deal with the radical concept of ‘equal pay for work of equal value’.”

...

“In the absence of any tools of comparison, the concept of ‘work of equal value’ is left entirely at the mercy of unquestioned and unexamined individual biases in the *Universities (Equal Pay) Case* where the work of male clerical workers was accepted as per se superior to that carried out by female clerical workers.” (Thornton 1981, pp. 477, 481)

- ***Tasmanian Municipal Officers case*** (1981) 265 CAR 17
Australian Conciliation and Arbitration Commission: Deputy President Isaac

The Municipal Officers Association claimed that equal pay had not been properly implemented, as there were still separate male and female classifications in the relevant Tasmanian awards, unlike other state awards for municipal officers. The Commissioner dismissed the case, saying that a substantial pay rise had already been achieved under the equal pay decision and was evidence of equal pay implementation. A work value assessment would be needed if any comparison were to be made with other states.

Feminist commentary - negative

“But what then is the recourse for women working under awards where the 1972 principle was applied perhaps incorrectly?...The only equal pay case of this type (*i.e. the present case*) so far does not hold much hope for future cases.” (Short 1986, p.331)

- ***Re Municipal Officers’ (South Australia) Award*** 1973 [1984] 295 CAR 49

Australian Conciliation and Arbitration Commission: Deputy President Isaac

This decision discussed the revaluation of work of base level child care workers. The Commission refused to value work by applying the 1972 equal pay principle, despite evidence that it had never been properly valued, on the basis that to apply the 1972 equal pay principle would override the National Wage Principles and open up the prospect of flow-on to awards covering the bulk of child care workers.

- **National Wage Case** [1983] 291 CAR 3

Australian Conciliation and Arbitration Commission: Moore, Williams, Maddern and Cohen JJ, Deputy President Isaac, Acting Public Service Arbitrator Booth, Commissioner McLagan

The National Council of Women, the Union of Australian Women and the Women's Electoral Lobby contended that the implementation of equal pay in female occupational areas had not been accompanied by proper work value exercises.

The Commission refused to adopt the proposal that there should be provision for re-evaluation of work in female occupational areas as individual awards came up for variation or through the anomalies or inequities procedure. It held that such "large scale" work value inquiries would be inconsistent with the centralised system of wage fixation.

Feminist commentary - negative

"The Women's Electoral Lobby's request that in any centralised wage-fixing system the Arbitration Commission should provide for a re-evaluation of 'women's work' through proper work value exercises pursuant to the 1972 principles, was rejected...The ACTU was thus caught between its commitment to comparable worth and its commitment to the Prices and Incomes Accord. Centralised wage fixing had been introduced in response to the Accord, and the Commission had suggested that within that centralised system, the 1972 principles had no place. It was necessary, then, to argue that there was no inconsistency between the 1972 equal pay principles and the 1983 wage fixing principles." (Hunter 1988, p.166)

- **Science (Australian Government Employment) Award** (1985) 299 CAR 533 ("The Therapists' Case")

Australian Conciliation and Arbitration Commission: Ludeke and Staples JJ, Commissioner Caesar

"In September 1984 the ACTU adopted an Action Program for Women Workers, based on the policy developments of the previous year, and in it set out strategies for the next two years to improve the position of females in the labour market. The strategies included the intention to pursue a comparable worth claim before the ACAC." (Burton 1991, p.133)

Physiotherapists, occupational therapists and speech pathologists in the Australian Public Service argued that they should be paid the same rate as male-dominated occupations classed as scientists. Scientists were covered by the Science (Australian Government Employment) Award 1985, and were paid considerably more than therapists, who were covered by the Therapists, Professional Officers' Association, Australian Public Service Award 1985. The therapists proved that their work was of equal value to the work of the scientists: their qualifications were comparable, as was the application of scientific principles in day-to-day work and the factors of work environment, level of autonomy, responsibility, accountability and complexity of work.

In the light of this, the Full Bench determined that there was no longer any justification for excluding the therapists from the science group of employees. The reclassification of therapists to the Science Award resulted in substantial salary increases.

Feminist commentary

Neutral assessments

"The statement of the Full Bench makes no reference to the non-application of the 1972 Equal Pay Principle, so that the case became, in effect, a consideration of the implications of the apparent changes in the nature of the educational qualifications gained by therapists since about 1973." (Burton 1991, p. 139)

Positive assessments

"The potential of the [anomalies] principle was ... successfully utilised by the union in the *APS Therapists Anomalies Case* in 1985 to advance its first arbitrated pay equity claim for professional women applying the general principles of comparable worth." (Rafferty 1994, p.454)

Negative assessments

"The constraints imposed by the anomalies and inequities process (including its secretiveness), the time taken to resolve pay equity claims under the extended anomalies and structural efficiency principle process, and the perception that the process tended to discourage rather than facilitate claims for pay equity, made it the subject of criticism from unions and activists women's groups alike." (Rafferty 1994, p.458)

- ***Private Hospitals and Doctors' Nurses (ACT) Award*** 1972 (1986) 13 IR 108 ("The Comparable Worth Case")
Australian Conciliation and Arbitration Commission: Maddern and Cohen JJ, Commissioner Bain

The ACTU, acting for the Royal Australian Nursing Federation and the Hospital Employees Federation of Australia, sought to have the Federal Commission adopt the doctrine of comparable worth in interpreting the 1972 equal value principle in proceedings to vary the *Private Hospitals and Doctors' Nurses (ACT) Award*. Nurses as a group had not received any benefits from the 1972 principle due to the difficulty in establishing comparators that would be acceptable to the Commission.

The principal issue for nurses was not that female nurses were being paid less than their male comparators or that nurses under one award were earning less than nurses under another award. The ACTU's contention was that nurses received less than male workers engaged in classifications that the unions viewed as having comparable value to nursing classifications. In opposing the ACTU claim, the relevant employers, the Confederations of Australian and ACT Industries, directed their argument to the scope of the comparison that the ACTU was claiming – "the 1972 decision was only intended to be implemented in individual awards which contained different rates of pay for males and females performing the same work, or in awards where the rates for females were different from those pertaining to the same work performed in other awards."

The Commission ultimately found against the ACTU because they found the 1972 principle needed to be decided through Principle 6 (Anomalies) of the Wage Fixing Principles. This was because the applications "carry great potential for undermining the current centralised wage fixing system".

Feminist commentary - neutral

"[T]he Commission's ruling was not sympathetic to the concept of comparable worth. ... The Commission did, however, affirm that the 1972 decision was still available to be implemented... By stating this, the Commission ensured that both sets of principles – the wage-fixing and the 1972 equal pay principles – were able to be applied." (Burton et al 1987, p.xiii)

- ***Private Hospitals and Doctors' Nurses (ACT) Award*** 1972 (1987) 20 IR 420 | [austlii](#)
Australian Conciliation and Arbitration Commission: Alley and Cohen JJ, Commissioner Bain

Further to the previous case, the Royal Australian Nursing Federation (RANF) through the ACTU brought a claim before the Anomalies Conference in March 1986. After making observations in respect of each of the circumstances relied upon by the ACTU, the President stated "[a]n arguable case exists and that the rates for nurses in the above awards and determinations should be referred to a Full Bench pursuant to s 34 of the Act."

Proceedings before the Commission again commenced on 29 September 1986 and concluded on 4 March 1987.

The claims before the Commission concerned the wages, allowances and career structure of nurses whose conditions of employment are regulated by federal awards, with the exception of registered nurses employed by the Australian Government in Victoria. It was the contention of the RANF that existing wage scales for nurses did not reflect their professional standards and did not provide adequate career opportunities in the area of clinical nursing. It was submitted that the education, training and duties of nurses were such that they should receive rates equivalent to those of other professional employees within the health care industry.

This case provided the Commission with an opportunity to prescribe a national scale which could bring stability into the fixation of nurses' wages throughout Australia.

The Commission found that when all of the circumstances surrounding the claims were examined there was a problem of a special and isolated nature which constituted an anomaly within the meaning of principle 6.

The Commission ordered an increase in the rates of pay for nurses and found that in respect of nurses in the ACT and the NT and in DVA hospitals in New South Wales, South Australia, Western Australia and Tasmania there had been changes in the nature of the work, skill and responsibility which constituted a significant net addition to work requirements within the terms of principle 4 and that such changes were of a similar order to those relied upon in decisions of State tribunals. The Commission approved the concept of one national scale and career structure for nurses.

Commission considerations

The Commission commented that “[a]ll of the indications however point to a situation of no positive application of the 1972 decision in any of the consent settlements in the Commonwealth area. An examination of wage rates within the ACT, for example, indicates no advance since 1972 by nurses as compared with male tradesmen. In our opinion all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains.”

Feminist commentary - neutral

“In the nurses' case the decision to award pay increases was related to so many factors that it is impossible to determine the proportion which might be attributed to an adjustment on the grounds of non-application of the 1972 Equal Pay Principle. And it is clear, in the decision, that the amount of pay increase was very much a matter of matching what had already been determined by State tribunals.” (Burton 1991, p.138)

- **National Wage Case** August 1988 (1988) 25 IR 170 | [austlii](#)
Australian Conciliation and Arbitration Commission: Maddern J, Deputy Presidents Keogh and Hancock, Commissioners Sweeney and Lear

The National Pay Equity Coalition submitted that none of the wage fixing principles devised over the past 15 years had facilitated the implementation of the equal pay principle.

The Commission introduced a new “structural efficiency principle” under which awards were to be restructured to implement measures to “improve the efficiency of industry and provide workers with access to more varied fulfilling and better paid jobs”. Among the measures to be considered were (for employees generally):

- Establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
- Creating appropriate relativities between different categories of workers within the award and at enterprise level;
- Ensuring that working patterns and arrangements enhance flexibility and the efficiency of industry;
- Including properly fixed minimum rates for classifications in awards, related appropriately to one another;
- Addressing any cases where award provisions discriminate against sections of the workforce.

The new principle did not directly address the argument made by NPEC, although some elements could be used to promote equal pay.

- **National Wage Case** April 1991 [1991] 4 CAR 300/91 | [austlii](#)
Australian Industrial Relations Commission: Maddern J, Deputy President Keoghs and Hancock, Commissioners Connell and Oldmeadow

The Commission requested submissions on the ramifications of Accord Mark VI if adopted. (The following year saw the introduction of Accord Mark VII and the proliferation of enterprise bargaining).

The Australian Federation of Business and Professional Women intervened to urge the Industrial Relations Commission to convene a national work skills value inquiry, to review all aspects of the evaluation of a skill. They also opposed the implementation of the Accord Mark VI in relation to enterprise bargaining, on the ground of its potentially adverse effects on women.

The Commission rejected their proposal. It accepted that enterprise bargaining would “place...at a relative disadvantage those sections of the labour force where women predominate” and suggested that industrial parties should pay greater attention to this point in their future consideration of enterprise bargaining.

Feminist commentary

Neutral commentary

“The anomalies and inequities principle was dropped from the Commission’s guidelines in the April 1991 National Wage Case decision, with future claims based on alleged undervaluation of work typically performed by women to be dealt with through the commission’s normal processes, including the special case provisions.” (Rafferty 1994, p.458)

Negative assessments

“The Commission, however, rejected [the AFBPW’s] proposal, preferring to leave the restructuring process to negotiation between the industrial parties in each case. Not surprisingly then, the outcomes of award restructuring were less impressive than the aspirations.” (Hunter 2000, p.13)

- **Family Court Counsellors’ Case** 1342/1992 | [austlii](#)
Australian Industrial Relations Commission: Commissioner Smith
- **Family Court Counsellors’ Case** 55/1993 | [austlii](#)
Australian Industrial Relations Commission: Commissioner Smith
- **Family Court Counsellors’ Case** 104/1993 | [austlii](#)
Australian Industrial Relations Commission: Deputy President MacBean

Because there were three separate decisions cited (1342/1992; 55/1993; 104/1993), I split them up into those three decisions and found the austlii records of all three. As a result of that, looking at 104/1993, it does not seem to be on family court counsellors – could there be a mistake in the citation?

On behalf of the Family Court Counsellors, the Professional Officers’ Association claimed that the classification structure in use reproduced historical pay inequalities between male and female dominated professions. The Association won the case, with the result that all people employed as Counsellors within the Family Court were reclassified upwards.

Evidence was tabled showing that 82 per cent of the female-dominated counsellor profession was compressed into the lowest two levels of the five level classification structure. In comparison, 44 per cent of engineers and scientists employed by the Department of Defence and 34 per cent of science professionals in the Department of Industries and Energy were located in the lowest two levels of their structures. The Association argued that this classification compression of female-dominated professions was discriminatory.

“It is also likely that the commission recognised that the commitment of activist women’s groups to the goal of economic equality for women would ensure that the case would not go unnoticed. If this was so, the commission was correct. By November 1992 such groups, including the Australian Federation of

Business and Professional Women, the Women's Electoral Lobby and the National Pay Equity Coalition, had begun to exert pressure on the government in an attempt to ensure support for the counsellors' claim, and the commission was made aware of this activity. As both the AFBPW and WEL had a history of intervention in national wage cases, their intervention in the Family Court Counsellor's Case presided over by a national wage bench could be relied upon, and in fact, did occur." (Rafferty 1994, p.463)

Feminist commentary - neutral

"One can only speculate as to the commission's reasons for singling out the Family Court Counsellors Case from the list of thirty-five part heard matters before the commission at the time of certification of the agreement... However, it may be that the commission had a genuine public interest concern about ongoing pay discrimination against women as a social justice issue and wanted to highlight the point that this was an area of potential disadvantage under enterprise bargaining."

...

"Certainly the case heightened the awareness of activist women's groups, among others, to the minimal nature of the legislative protections."

...

"Experience gained from the Family Court Counsellors Case highlighted the need to seek changes to the legislation. The legislative protections needed to be strengthened to ensure that persons covered by a proposed agreement were fully informed of the terms of the agreement and the consequences of certification of the agreement. Confirmation was also required that women's occupations were not locked out of access to the commission for the purposes of securing equal pay for work of equal value by the terms of an agreement."

...

"the case had a lasting impact by promoting the legislative changes...including a legislative right of access to equal remuneration for work of equal value." (Rafferty 1994, 463-65)

1990s - 2000s – The federal equal remuneration provisions

In 1993 an equal remuneration provision was introduced into the Industrial Relations Act 1988 (Cth), which allowed women workers to bring equal remuneration claims directly before the Industrial Relations Commission. A series of test cases ensued, which exposed flaws in the drafting of the provision and resulted in restrictive interpretations which made the establishment of an equal remuneration case extremely difficult. Ultimately, few claims were brought and the provision failed in its remedial purposes.

- **Industrial Relations Reform Act** 1993 (Cth)

"While the Family Court Counsellors Case demonstrated that the commission was willing to meet the new challenge to investigate claims of systemic

discrimination, it also illustrated the extent to which the advent of enterprise bargaining threatens the equal pay process. The response from activist women's groups to this new threat to women's economic equality precipitated additional legislative protections in the *Industrial Relations Reform Act 1993* to safeguard the interests of women." (Rafferty 1994, p.467)

This Act amended the *Industrial Relations Act 1988* to include the equal remuneration provisions, giving effect to Australia's international obligations under the ILO Equal Remuneration Convention. The Act included s 170BC(2), which provided, *inter alia*, "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."

Feminist commentary - negative

"A notable feature of the 1993 equal remuneration provisions was the relatively small number of applications made under them, the uncertainties and limitations associated with their interpretation and application and, as a result, their failure to make a significant contribution to achieving gender pay equity." (Layton, Smith and Stewart 2013, p.142)

- ***Industrial and Employee Relations Act* 1994 (SA)**

This Act covers the State Public Sector, almost all State Government Business Enterprises and Local Government in South Australia.

Section 69 provides that

"(2) A rate of remuneration fixed by a contract of employment, or an award or enterprise agreement, must be consistent with the *Equal Remuneration Convention*."

The Convention is included as a Schedule to the Act.

- ***Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Utilux Pty Ltd*** C No. 23931 of 1995, and
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v John Sands (Australia) C No. 23932 of 1995, and
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v HPM Industries Pty Limited C No. 23933 of 1995

Australian Industrial Relations Commission: President O'Connor, Vice President McIntyre, Senior Deputy President Marsh, Commissioners Smith and Oldmeadow

These were applications under the equal remuneration provision s 170BD of the *Industrial Relations Reform Act 1993* (Cth). The Human Rights and Equal Opportunity Commission, Women's Electoral Lobby, and Australian Federation of Business and Professional Women all appeared.

The application concerning John Sands was settled by the parties in May 1996. The application concerning Utilux was settled by the parties in 1996. The HPM claim was referred to a single Commissioner (see below).

Feminist commentary - negative

“The Full Bench of the Commission was invited to lay down more detailed guidelines for the conduct of equal remuneration cases but declined to do so.” (Hunter 2000, p.22)

- ***Automotive and Metal Workers Union v David Syme & Co Limited*** (1996) Print R3273; (1999) 97 IR 374

Australian Industrial Relations Commission: Vice President Ross

This case involved comparing the work value of female Telesales Advisers and male print production employees at The Age newspaper.

The Commission found that the 1974 ‘equal pay for work of equal value’ settlement had been a compromise and did not result in the transfer of female clerical employees to the male rates at the time. There had been no evaluation of work performed by male and female workers, no comparison of the relevant male and female classifications and no consideration by the Commission of how the equal pay principle had been applied.

In the enterprise bargaining process, clerical workers had not been able to secure inclusion in the enterprise agreement on equitable terms and were not included in the agreement. They were receiving lower amounts than printing workers and more of their pay was provided as overawards.

However, in applying the legislative provision concerning equal remuneration for work of equal value, Vice President Ross held that, first, the Commission must be satisfied that there is not equal remuneration for work of equal value. The first step in doing that is to ascertain whether rates have been established without discrimination based on sex. Therefore the AMWU would need to show that the rates of pay of clerical employees had been established having regard to the gender of employees (or of a large proportion of them).

This case did not proceed to final arbitration and a settlement was reached in 1999.

Feminist commentary

Positive assessments

“The outcome of the case was that the 170 clerical workers ultimately were paid the equivalent of the tradesperson rate by increase in overaward payments.” (Hall (n.d.), p.35)

Negative assessments

“These decisions (see also *AMWU v HPM Industries* 1998) also raise a further problem with the federal provisions, which is the apparent requirement that claimants show that their current rates were established as a result of sex discrimination... [I]n light of the federal decisions, and other evidence before it, the [NSW] Pay Equity Inquiry recommended that the concepts of equal remuneration/ undervaluation and sex discrimination should be kept conceptually and structurally distinct.” (Hunter 2000, p.24)

“It had been envisaged that the legislative reference to discrimination in equal remuneration legislative provisions would give the right to equal remuneration a more substantial legal foundation. In practice, the requirement to demonstrate discriminatory processes in the determination of wages made the task of successfully claiming equal remuneration more difficult. The sex discrimination test supported a narrow form of job comparison between men and women. The legal hurdles it imposed also meant that it favoured prosecution at the level of the individual worker, or of the workplace, rather than at the level of an entire industry, sector or occupation. It was these obstacles that led to industrial tribunals in New South Wales and Queensland developing E[qual] R[emuneration] P[rinciple]s with undervaluation as a key and central concept.” (Layton, Smith and Stewart 2013, p.105)

- ***Workplace Relations Act*** 1996 (Cth)

The primary purpose of the Act was to limit the scope of federal industrial awards in favour of an emphasis on enterprise bargaining and individual contracts. The 1993 equal remuneration provisions were substantially retained.

Feminist commentary - negative

“[T]here have been very few cases brought under [the equal remuneration] provisions, and none that have actually reached a final decision by the federal Commission. ... Part of the problem is that there are only a few brief sections of the Act from which to operate. ..The federal experience illustrates why clear and comprehensive legislation and a set of facilitative principles, as recommended by the NSW Pay Equity Inquiry, are so important.”

...

“To put all of this in concrete terms, it is highly unlikely that child care workers, hairdressers, beauty therapists or clothing outworkers would be able to invoke the equal remuneration provisions of the Workplace Relations Act, since they would not have other (male) workers in the same enterprise with whom they could fruitfully compare the value of their work. Public sector librarians would have to convince the Commission that the job evaluation study comparing their work with that of geoscientists was a valid way of showing work of equal value. They may not be successful in this approach.” (Hunter 2000, pp.22-24)

- **Safety Net Review case** (1997) 71 IR 1 | [austlii](#)
Australian Industrial Relations Commission: President O'Connor, Vice Presidents Ross and McIntyre, Senior Deputy Presidents Hancock and MacBean, Commissioners Oldmeadow and McDonald

This case involved an application to increase the safety net for low paid workers. The Human Rights and Equal Opportunity Commission (HREOC) and Women's Electoral Lobby (WEL) supported the application.

HREOC further submitted that the Commission should develop a principle in order to implement fully the principle of equal remuneration for work of equal value. It requested the Commission to carry out an inquiry into work value, with an emphasis on non-gender biased methods for determining work value, in order to assist in the removal of gender based differentials in awards. WEL also argued that such differentials continued to exist and should be dealt with.

The Commission accepted that within the low paid, award-dependent group there are a disproportionate number of women. However no principle was established. Overall wages (for both men and women) increased by \$10 per week.

Feminist commentary - negative

In this case “[t]he Human Rights and Equal Opportunity Commission once more called for an inquiry into work value, with an emphasis on non-gender-biased methods for determining work value. In effect, they were asking the Commission to institute a pay equity inquiry along the lines eventually taken up by NSW, but the Commission took the view that it did not have the power to engage in such an exercise.” (Hunter 2000, p.14)

- **Automotive and Metal Workers Union v HPM Industries** (1998) 94 IR 129 (“The HPM Case”) | [austlii](#)
Australian Industrial Relations Commission: Commissioner Simmonds

This case involved male general hands and storemen and female process workers and packers in an electronics manufacturing company. An application for an order requiring equal remuneration for female workers for work of equal value was brought before the Commission. An important issue in the case was how the value of work should be ascertained.

Feminist input

The National Pay Equity Coalition, the Women's Electoral Lobby and the Australian Federation of Business and Professional Women intervened. They supported the ACTU application for findings and orders, but additionally claimed that: “In the light of the evidence on continuing perpetuation of historically based discrimination at HPM, it is further submitted that the Commission should mandate an equal opportunity program for the company

(specifically with regard to work and job design and recruitment) and review it periodically. Without this, the situation which causes the current unequal remuneration will persist or recur.” (Exhibit R1 p 12)

The parties arguing for pay equity cited Burton (1988); Windsor (1986); Windsor (1991).

Reference was made to a number of published and forthcoming documents by the Australian Government. The documentary material was summarised as indicating: it is widely accepted and understood that women are still not treated equitably in employment generally; in particular, women are concentrated in particular industries and occupations and in the lower echelons of jobs; women earn less than men in all categories of earnings; the issue of overawards and women’s access to them is a significant factor in women’s unequal earnings Australia-wide. In all major reports relating to women’s earnings it has been suggested that discrimination may play a part in the differential in women’s and men’s earnings; it has also been suggested that sex segregation and bias in the valuing of definitions of skilled work contribute to this situation. (Exhibit D16 p9).

Reference was made to the ILO Equal Remuneration Convention, the Equal Remuneration Recommendation 1951, the Discrimination (Employment and Occupation) Recommendation 1958, the Convention concerning Discrimination in respect of Employment and Occupation and Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights in relation to the meaning of the term ‘equal remuneration for work of equal value’; the ‘General Survey of the Reports on the Equal Remuneration Convention’; the HREOC ‘Equal Pay Handbook’ and the report of the HREOC Inquiry into Sex Discrimination in Overaward Payments, *Just Rewards*; and Frizell (1993).

The Commissioner’s decision

The Commissioner examined:

- whether relevant rates of remuneration were established without direct or indirect discrimination based on sex.
- whether the work of male and female workers was of equal value.
- the appropriate method of evaluating 'equal value'.
- whether the Commission has power to order that the employer establish a program of equal opportunity and supervise its implementation.

In his 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 argument within the proceedings. Three issues were in dispute. The first

concerned the direction provided by the Act on how equal value could be established. The second concerned the reliance of the ACTU/AMWU on competency standards for this purpose. The third went to the capacity of competency standards to determine work value.

Commissioner 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. He also effectively agreed with the submissions of the employers that the determination of overaward payments at HPM went beyond considerations of work value, although such considerations should not be discriminatory. In any event Commissioner Simmonds 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.

The Commission held that work value assessment was the appropriate method of establishing whether work is of 'equal value'. He also held that different remuneration paid to different classifications of worker did not amount to discrimination based on sex. The employer did not impose requirements or conditions which were indirectly discriminatory.

Feminist commentary - negative

“These decisions (see also *AMWU v David Syme* 1996) also raise a further problem with the federal provisions, which is the apparent requirement that claimants show that their current rates were established as a result of sex discrimination....[I]n light of the federal decisions, and other evidence before it, the [NSW] Pay Equity Inquiry recommended that the concepts of equal remuneration/undervaluation and sex discrimination should be kept conceptually and structurally distinct” (Hunter 2000, p.24)

- ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries*** Print Q1002 (1999)

Australian Industrial Relations Commission: Commissioner Munro

Following the failure before Commissioner Simmonds, the AMWU lodged a second application for equal remuneration for female process workers and packers at HPM Industries. The case was settled late in 1999 by a new enterprise agreement. Over 2.5 years the 44 women received the same rate of pay as applied to their male colleagues. The case also abolished the previously discriminatory wages system in which a three level performance-based wage system in effect applied to male jobs only and discretionary overaward payments to individual employees were paid almost exclusively to men.

- ***Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor*** (2002 Print PR914868) | [austlii](#)

Australian Industrial Relations Commission: Commissioner Whelan

Automotive, Food, Metals, Engineering and Kindred Industries Union v Gunn and Taylor(2002) 115 IR 358 | [austlii](#)

Australian Industrial Relations Commission: President Giudice, Senior Deputy President Acton, Commissioner Grainger

This was an equal remuneration claim in respect of female plate makers employed by a graphic design company. The company argued that since there was only one female employee concerned, an adequate alternative remedy existed under sex discrimination legislation. This argument was rejected by both Commissioner Whelan and the Full Bench.

Commissioner Whelan also held that overaward pay set by an enterprise flexibility agreement fell within the definition of ‘remuneration’.

- ***Child Care Industry (Australian Capital Territory) Award*** 1998 (C2002/5237) and ***Children’s Services (Victoria) Award*** 1998 (C2003/4271) | [austlii](#)

Australian Industrial Relations Commission: Vice President Ross, Senior Deputy President Marsh, Commissioner Deegan

This decision dealt with two applications by the Australian Liquor, Hospitality and Miscellaneous Workers Union (the LHMU). The applications sought to vary the Child Care Industry (Australian Capital Territory) Award 1998 (the ACT Award) and the Children’s Services (Victoria) Award 1998 (the Victorian Award) in relation to wage rates, classification structure, new allowances and the award titles.

The applications were based on changes in work value, with the union arguing that substantial issues had impacted on the work of child care workers, including changes in licensing, accreditation and legislative requirements; socio-economic conditions impacting on levels and patterns of child care use; and increased government and societal expectations placed on the educative role of children’s services and the importance of early childhood development. The union argued that these changes impacted on the nature of work performed, in addition to requiring increased skills, knowledge and expertise.

The Commission found that the changes in the nature of the work constituted a significant net addition to work requirements within the meaning of the work value principle, and established new relativities between child care classifications and the Metal Industry Award. The Commission stated “we accept that aligning these key classifications in the manner proposed will, of itself, result in significant wage increases.”

- ***Workplace Relations Amendment (Work Choices) Act*** 2005 (Cth)

The equal remuneration provisions in the WRA were amended to specifically require applications to make reference to a comparator group of employees, and the AIRC was excluded from hearing applications if the effect of the order sought would be to vary a minimum pay rate set under Division 2 of Part 7 of the Act.

The Act also expanded the scope of the WRA to cover the employees of all trading, financial and foreign corporations, and correspondingly limited the scope of State industrial relations legislation.

Feminist commentary - neutral

“During its operation, from 2006 to 2009, the Australian Fair Pay Commission did not make, adjust or vary any pay scales for reasons relating to equal remuneration, on the basis that it did not receive any submissions claiming that specific pay scales did not provide equal remuneration... The Australian Industrial Relations Commission remained responsible for hearing equal remuneration matters outside minimum wage setting. However, from 2005 to 2009 no equal remuneration applications were made.” (Layton, Smith and Stewart 2013, p.144)

1990s - 2000s – State pay equity inquiries and equal remuneration principles

Taking the lessons from the failure of the federal equal remuneration provision, feminist attention turned to the State industrial relations systems and the scope for a different and more productive approach at that level. The new approach was first developed in the NSW Pay Equity Inquiry (1998), which resulted in the establishment of a new equal remuneration principle by the NSW Industrial Relations Commission in 2000. The new approach focused on the historical undervaluation of women’s work, and enabled claims to be brought on the basis of undervaluation, without the need to establish prior sex discrimination in the setting of wage rates, or the existence of male workers undertaking comparable work against which the value of the women’s work could be measured. Similar Pay Equity Inquiries were held and equal remuneration principles adopted in Queensland and other states. Test cases brought under these new principles in NSW and Queensland resulted in substantial pay increases for women in female-dominated occupations whose work was shown to have been undervalued over many years.

New South Wales

- **Pay Equity Inquiry** (“The NSW Pay Equity Inquiry”)
NSW Industrial Relations Commission: Glynn J

In 1997 the Minister for Industrial Relations referred the Pay Equity Inquiry to the Commission pursuant to s.146(1)(d) of the *Industrial Relations Act 1996*.

The Inquiry considered the following:

- undervaluation of work in terms of remuneration in female dominated industries;
- the evaluation of mechanisms for ascertaining work value;
- current work value tests;
- the minimum rates adjustment process;
- other industrial mechanisms including productivity;
- job evaluation techniques;
- matters of discrimination under the relevant legislation;
- relevant conventions on labour and discrimination;
- mechanisms and processes by which pay equity matters can be brought before the Commission.

An important part of the inquiry was a series of case studies of ‘women’s work’, with an analysis of the reasons why this work had historically been undervalued, by reference to comparable male-dominated occupations. Case studies included child care workers, hairdressers and beauty therapists, librarians, seafood processors and clothing outworkers.

Submissions to the inquiry were made by the National Pay Equity Coalition, the Australian Federation of Business and Professional Women, NSW Division, and the Women’s Electoral Lobby. Exhibits tendered to the inquiry included documents provided, *inter alia*, by Gillian Whitehouse, Meg Smith, Rosemary Hunter, Sara Charlesworth, and Clare Burton.

There are extensive references to literature, including feminist work, throughout the text of the report.

Recommendations of the Inquiry included, *inter alia*:

- establishment of a new equal remuneration principle to enable claims of undervaluation to be addressed;
- amendments to the *Industrial Relations Act 1996* to promote pay equity and to ensure a distinction was made between equal remuneration and discrimination.

Feminist commentary - positive

“During the course of the Inquiry, pay equity activists, industrial parties and the Commission were brought together for an extended period, and were forced to listen and to take each others’ concerns seriously. The Inquiry provided a forum for the presentation of expert and case study evidence, including feminist pay equity literature and personal evidence from numbers of women about the nature of their work, which have never previously been the focus of an industrial hearing. In order to examine and cross-examine witnesses effectively, the various parties to the Inquiry had to come to grips with the unfamiliar evidence, and so did the Commission in evaluating that evidence and weighing

up the arguments put to it. Out of this discursive convergence, we have an Industrial Relations Commission identifying the barriers in its own traditional procedures to the full airing of equal remuneration claims, and making recommendations for change. We have recognition of the importance of setting up a detailed mechanism in the industrial relations system whose goal is to advance equal remuneration for the women of NSW. This is a significant achievement.”

...

“Clearly, there is enormous scope for the lessons of the Pay Equity Inquiry to inform, support and inspire fresh endeavours to achieve pay equity for women workers across Australia, where the will to pursue that goal exists.” (Hunter 2000, pp.25, 31)

“In New South Wales, the inquiry process opened up scope for pay equity advocates to argue the value of feminized skills like care and nurturing, which had been previously overlooked in wage-setting, although these opportunities were not fully realized.” (Cortis and Meagher 2012, p.379)

- ***Re Equal Remuneration Principle*** [2000] NSWIRComm 116 | [austlii](#)
NSW Industrial Relations Commission: President Wright, Deputy President Sams, Hungerford and Schmidt JJ, Commissioner McKenna

Women’s organisations that were parties to the proceedings included the National Pay Equity Coalition, Women’s Electoral Lobby, the Business and Professional Women’s Association (NSW), and the President of the Anti-Discrimination Board.

Documents considered by the Commission in their judgment included:

- NSW Pay Equity Inquiry (1998);
- Kinley (ed) (see chapter by MacDermott, ‘Labour Law and Human Rights’) (1988)

The Industrial Relations Commission established a new wage fixation principle – the [Equal Remuneration and Other Conditions principle](#) – to address applications concerning undervaluation of work the basis of gender. The Equal Remuneration Principle allowed applications to be made to re-assess work and re-evaluate the work value of an award, on the basis that:

- the rate of pay did not represent a proper value of the work under traditional work value criteria; and
- that undervaluation was in relation to the sex of those performing the work.

In assessing any gender-based undervaluation the Commission would consider the history of the award. The test did not require a finding of discrimination. Comparators might be used but were not necessary.

The Principle provided a broad range of remedies including increasing rates, changes to conditions of employment, new career paths or changes in incremental scales.

The Commission issued a Practice Direction requiring parties with their application for a consent award to file an affidavit stating on what basis the proposed award provided for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

Feminist commentary - positive

“The available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women’s earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way. The New South Wales and Queensland tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set.

One of the strengths of the concept of gender-based undervaluation is that it goes to the heart of addressing the institutional and cultural determinants of why women have generally been under-remunerated for their work. The E[qual] R[emuneration] P[inciple]s which have been developed in New South Wales and Queensland articulate important aspects of these determinants, which are acknowledged through academic and other research to have led to women’s work being undervalued and under-remunerated.” (Layton, Smith and Stewart 2013, p.9)

- ***Crown Librarians, Library Officers and Archivists Award proceedings – Applications under the Equal Remuneration Principle*** [2002] NSWIRComm 55 | [austlii](#)
NSW Industrial Relations Commission: President Wright, Kavanagh and Boland JJ, Commissioner McKenna

This case concerned the design of classification and grading structures as well as gender related undervaluation of the work of librarians, library officers, and archivists. The case was built on the findings of the case study developed for the Pay Equity Inquiry by the Office of the Director of Equal Opportunity in Public Employment, in which two points/factor job evaluation systems were applied in comparing the work of librarians and geologists. 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 the geologists had less substantive barriers to progressing through the pay steps in their award.

Intervening women's organisations included the National Pay Equity Coalition, Women's Electoral Lobby, and Business and Professional Women's Association of Australia.

Substantial increases were awarded; on average 16 per cent across classifications, up to 25 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. The work value relationships between the profession and technician occupations also were considered. The case had a significant focus on how the value of the work was to be assessed.

Feminist commentary

Neutral commentary

“the decision recognised librarians and archivists as a profession which had been subject to historical devaluation. Substantial increases were awarded (16% av). The Commission accepted sufficient commonality for one award across all worksites, leading to junior library technicians receiving an immediate 90% wage increase.” (Todd & Eveline 2004, p.21-22)

This case “establish[ed] the ‘main indicia’ of undervaluation on a gender basis: the findings of the Pay Equity Case study; the findings of Justice Glynn in the Pay Equity Inquiry; the occupation is female dominated; and the workers covered by the award have not been subject to a work value inquiry by the Commission in the past.” (Smith & Lyons 2008, p.9)

Positive assessments

“[A] great victory for Australian librarians...an endorsement of their value and their profession”

...

This case “has been a major success for the PSA, Alia and their members. For the first time librarians and archivists have been the sole focus of the selected test case for a major new piece of labour law and practice. No other employment category has yet gained the benefits of the NSW equal remuneration principle. In addition to gaining recognition of pay disadvantage, major findings on work value have also been issued and extremely important judgements about the work value effects of recent developments in our industry have been formally made. These potentially have relevance far beyond NSW, and have attracted interest from around Australia and internationally.” (Teece 2002, pp. 140, 144)

- ***State of New South Wales v Amery*** (2006) HCA 14 | [austlii](#)
High Court of Australia: Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J (dissenting)

The respondents alleged that the Department of Education had indirectly discriminated against them on the basis of their sex in breach of the *Anti-Discrimination Act 1977* (NSW) (ADA). They alleged that by reason of their family responsibilities – the burden of which falls disproportionately on women – they were unable to meet the condition of ‘statewide deployability’ to be eligible for employment as permanent teachers. This in turn prevented them from accessing the higher salary levels paid by the Department to their permanent colleagues engaged in the same work. Their pay as casuals did not reflect the value of their work, which was the same as permanent employees. The majority of the High Court dismissed the respondents’ claim.

Kirby J (dissenting)

“The principal causative factor postulated for these statistical differences [in the proportion of casual and permanent teachers who were female] was the burden imposed by sex-based obligations, such as child rearing and support of a domestic partner. Then (as now) for the most part in our society, these obligations fall upon women rather than on men. They fell on the respondents, as women, more heavily than on male counterparts who qualified as permanent teachers.” (at [114])

“Given its choice, the applicable ‘condition’ of appointment as a permanent teacher, whilst ‘facially neutral’, had the consequence of discriminating against the respondents on the ground of their sex. It was therefore contrary to the AD Act. It imposed a ‘requirement or condition’ of permanency that fewer, proportionately, of female teachers did fulfil as a matter of fact. Furthermore, because of their particular ‘family responsibilities’, fewer female teachers could fulfil the ‘requirement or condition’.” (at [128])

Feminist commentary - negative

“While *Amery* adopts a technocratic approach in the interpretation of a requirement or condition that appears to be neutral and depoliticised, its meaning is shaped by the juridical hermeneutic world which, in turn, is shaped by the shifts and turns within the broader socio-political *nomos*. This includes the neoliberal swing in favour of flexible work that is casual and precarious but which suits employers because it cuts costs. Such work is overwhelmingly feminised. Precarious work suggests a greater deference to employer prerogative, as we see in *Amery*; workers’ rights, including the non-discrimination principle, are no longer in the ascendancy.” (Thornton 2008, p.48)

“The courts in *Amery*, including ultimately the High Court of Australia, engaged in legal contortions to avoid having to deal with the fundamental question that the case posed — whether it was legitimate or reasonable for employers to pay less to workers who could not conform with the male norm (of being transferrable around the State). The case in a sense was also about the legitimacy of the ‘casual’ status of employment, another question the courts avoided. Women, who had to give up their permanent status in order to take parental leave, were disproportionately less able to comply with this transferability requirement because of their disproportionate likelihood of bearing family responsibilities and not being the primary family breadwinner. As casuals they were not able to get the same recognition of their skills and experience that was afforded to permanent teachers.” (Smith 2011, p.565)

See also Beth Gaze’s feminist judgment in *State of NSW v Amery* (Douglas et al 2014, p.424)

- ***Miscellaneous Workers Kindergartens and Child Care Centres (State) Award*** [2006] NSWIRComm 73 | [austlii](#)
NSW Industrial Relations Commission: President Wright, Vice-President Walton, Schmidt J, Commissioner McLeay

These proceedings involved competing applications for variations to the rates of pay and conditions of employment fixed by this award, which applies to pre-schools, long day care centres and other child care services such as out of school hour centres. The Full Bench was required to consider other changes sought to conditions, including the award classification structure. Whether certain rates of pay should be increased, or decreased, also had to be considered. This was the first occasion on which the Commission was called upon to consider the value of the work of child care workers and various support worker classifications covered by the award.

The expert academic evidence of the LHMU showed:

- female domination of an industry workforce reduces relative wages;
- relative low wages deter male employment into the children's services industry;
- the skills exercised by long day care staff had not been appropriately recognised by employers or industrial tribunals when wage rates were previously established;
- research evidence showed that working with young children is not "innate" to women, and is a learned skill;
- the skills demanded of long day care employees by the federal government's QIAS are often overlooked and undervalued;
- the charitable and philanthropic origins of the child care industry had ongoing consequences for the low levels of pay fixed by the Award;
- the "utilisation" rates of long day care centres had increased;

- the federal government's fee relief subsidy under the Child Care Benefit had made child care more affordable for parents, thus increasing the demand for child care; and
- survey data suggests parents place an emphasis on centre quality over costs of child care when choosing a particular centre.” (Smith & Lyons 2008, p.11-12)

The Commission found that changes had taken place at both state and federal level, with ongoing alterations in self assessment, accreditation and registration regimes and programmes. This had implications, not only for the work itself, but also for the resulting responsibilities which fall upon child care workers. While ultimate responsibility for these matters falls upon licensees and authorised supervisors, there can be no question that they have also impacted upon the work which child care workers are required to perform. These responsibilities are real. The evidence suggested that failures can have significant consequences for the financial viability of centres.

The Commission awarded increased rates of pay 4 per cent higher for those employed in long day care centres. The differential is one which also applied, by consent, to teachers employed in this industry.

Feminist commentary - positive

“The IRC of NSW 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’, and held ‘we are satisfied that consistent with the Equal Remuneration principle, a case of undervaluation on a gender basis was made’.” (Smith & Lyons 2008, p.12)

“Some of the significant features of the decision were that the applicant was not required to make a comparison with a male dominated industry, although teaching was ultimately accepted as an appropriate comparator. The Full Bench also asserted that there was no requirement to assign a precise weighting to gender based undervaluation, It was simply a question of taking into account the evidence concerning whether the work was properly valued. Equally significant, arguments that a remedy for childcare workers was not in the ‘public interest’ were able to be rejected because the Commission accepted that the work they performed was of importance to the community and to government, as evidenced by the regulation and funding of the industry.” (Layton, Smith and Stewart 2013, p.162)

- ***Industrial Relations (Public Sector Conditions of Employment) Amendment Regulation*** 2013 (NSW)

The *Industrial Relations Act* 1996 was amended in 2011 to require the Industrial Relations Commission, when making or varying awards or orders, to

give effect to aspects of government policy declared by the regulations relating to NSW public sector conditions of employment. These new Regulations, which cover public sector employees in New South Wales, declare “Equal remuneration for men and women doing work of equal or comparable value” to be one of the “paramount policies” to which the Commission must give effect.

Queensland

- ***Industrial Relations Act* 1999 (Qld)**

This new Act provided in s 60(1) that “the 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.”

Feminist commentary - negative

“No cases have yet been run under the Queensland provisions, but they are vulnerable to many of the same criticisms as the federal provisions, particularly in providing minimal guidance to parties and hence leaving much scope for argument and time-wasting over side issues, such as, for example, the meaning of the term ‘remuneration’, which is not defined in the Act.”

...

“Without an equal remuneration principle, and ideally legislative amendment to broaden the scope of award reviews, Queensland women in a similar position to those included in the NSW case studies will struggle to find an adequate remedy for the undervaluation of their work.” (Hunter 2000, pp.28-29)

- ***Worth Valuing: a report of the Pay Equity Inquiry* (2001)**

Queensland Industrial Relations Commission: Commissioner Fisher

In 2000 the Minister for Employment, Training and Industrial Relations issued a direction under s 265(c) of the *Industrial Relations Act 1999* to hold an inquiry into pay equity in Queensland.

The Inquiry examined, *inter alia*:

- the extent of pay inequity in Queensland;
- the adequacy of the current Queensland legislation for achieving pay equity;
- a draft pay equity principle which might be adopted in Queensland.

Written submissions from women’s organisation and academics included Gillian Whitehouse, and the National Foundation for Australian Women. Literature cited by the inquiry included Whitehouse (n.d.), Whitehouse (2002) and Tulloch and Conroy (1995).

The Inquiry’s recommendations included:

- s.126 of the *Industrial Relations Act 1999* be amended so that the Commission must ensure an award provides for equal remuneration for men and women employees for work of equal or comparable value;
- ss.156 and 157 of the *Industrial Relations Act 1999* be amended to reflect that the Commission must not certify an agreement unless it is satisfied that the agreement ensures equal remuneration for all men and women employees for work of equal or comparable value;
- a statement of policy be made by the full bench of the Commission to deal with pay equity matters.

Feminist commentary - positive

“The inquiries in both New South Wales and Queensland developed principles that obliged each Industrial Commission to assess the wide range of factors influencing work valuation; overturned requirements that work value be proven with reference to male-dominated comparators; and shifted emphasis from proving ‘direct’ discrimination to demonstrating ‘undervaluation’.” (Cortis and Meagher 2012, p.379)

- ***Equal Remuneration Principle – Statement of Policy*** (2002)

Queensland Industrial Relations Commission: Vice President Linnane, Commissioners Swan and Brown

This Statement was made as a result of an application brought by The Queensland Council of Unions and Others and Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B450 of 2002) pursuant to s.288 of the *Industrial Relations Act 1999*.

The Commission held that In assessing the value of work, the Commission is required, *inter alia*, to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features.

- The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.
- The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.
- Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.
- Gender discrimination is not required to be shown to establish undervaluation of work.
- Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

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

Feminist commentary - positive

“In 2007, the QIRC conducted a further review assessing the impact of WorkChoices and the effectiveness of pay equity measures introduced by earlier reforms. The Inquiry found that the ERP had been particularly effective.”

...

“The National Pay Equity Coalition and the Women’s Electoral Lobby stated that the shift in these states from [a focus on] discrimination and ‘comparable worth’ to [a focus on] the historical under-valuation of women’s work had been a major breakthrough.” (Commonwealth Pay Equity Inquiry 2009, pp. 130-31, 128)

“The available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women’s earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way. The New South Wales and Queensland tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set.

One of the strengths of the concept of gender-based undervaluation is that it goes to the heart of addressing the institutional and cultural determinants of why women have generally been under-remunerated for their work. The ERPs which have been developed in New South Wales and Queensland articulate important aspects of these determinants, which are acknowledged through academic and other research to have led to women’s work being undervalued and under-remunerated.” (Layton, Smith and Stewart 2013, p.9)

- ***LHMU v The Australian Dental Association (Queensland Branch) Union of Employers*** (2005) 180 QGIG 187 (“The Dental Assistants Case”) | [austlii](#)

Queensland Industrial Relations Commission: Vice President Linnane, Commissioners Fisher and Bechly

An application was made by the Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (LHMU) seeking an equal remuneration order under s.60 of the *Industrial Relations Act* (IRA) to increase the remuneration of dental assistants employed under the Award, and an order under s.125 of the IRA to amend that Award to provide for an extended career path, increased remuneration and additional allowances for dental assistants.

The LHMU sought firstly to establish undervaluation of the work of dental assistants by reference to work value considerations, comparison of the classification structure and rates of pay found in the *Engineering Award - State 2002 (Engineering Award)*, and comparison with wages in comparable male trades.

Literature cited by applicants included the New South Wales Pay Equity Inquiry (1998), the Queensland Pay Equity Inquiry (2001), and an analysis by Gillian Whitehouse, commissioned by the LHMU, of ABS wages and Census data, both published and unpublished, in respect of earnings by pay setting methods for Dental Assistants and selected comparator occupations. Dr Whitehouse also referred to other research (including her own) that showed that women were less likely to participate in enterprise bargaining and even where they had, female dominated agreements had delivered lower increases than male dominated agreements.

The Full Bench accepted that the work of dental assistants had been undervalued. One measure to remedy this was the establishment of a new classification structure which set relativities consistent with the Engineering Award for dental assistants and practice managers, a classification which was included in the Dental Assistants' Award for the first time.

In the view of the Full Bench this step resulted in pay equity being achieved prima facie. However, consideration also needed to be given to the second aspect of the claim which sought rates consistent with those paid to male comparators who were beneficiaries of the enterprise bargaining system. The Full Bench rejected the quantum of the claim for wage rates sought by the LHMU. It did not reject the proposition of including rates from certified agreements into an award but said that it could only do so if it was in the public interest.

The Full Bench awarded a one-off increase of 11% to dental assistants plus an annual 1.25% equal remuneration component increase to supplement pay increases from state wage cases.

Feminist commentary - positive

“We argue that the Dental Assistants’ case illustrates the capacity of the Queensland system to address a potentially significant structural contributor to the gender pay gap: the widening (and gendered) earnings gap between those covered by ‘award only’ provisions and those benefiting from enterprise-level agreements. We also argue that the case underlines the complexity of gender-bias in work valuation and raises questions about the most effective ways to identify and quantify undervaluation.” (Whitehouse and Rooney 2007, p.87)

- ***LHMU v Children’s Service Employers Association*** (2006) 181 QGIG 568 (“The Childcare Workers Case”) | [austlii](#)

Queensland Industrial Relations Commission: Deputy President Bloomfield, Commissioners Fisher and Asbury

The LHMU's claim was to establish wage rates for child care workers in Queensland that were the same as the average rates paid to workers in comparator trades such as mechanics, metal fitters and machinists, electricians, carpenters, and chemical and gas plant operators. The rates claimed in this case were not based on specific certified agreements but were drawn from an analysis of ABS wage statistics. That analysis showed that the male comparators, even in 2004 when the relevant wage statistics were last available, received substantially higher rates of pay than child care workers despite the various occupational groups holding similar qualifications.

Literature cited by applicants included the Queensland Pay Equity Inquiry (2001), the NSW Pay Equity Inquiry (1998), Keenoy and Kelly (1998), and Lyons (2003). Dr Whitehouse prepared two reports: ‘Average Earnings by Pay Setting Method (Selected 4 - Digit Occupational Groups)’ from unpublished data sourced from the *ABS Employee Earnings and Hours May 2004 survey*; and

‘Average Weekly Income for Full-Time Employees (selected 4 - and 6 - Digit Occupational Groups)’ from unpublished data sourced from the *ABS Census of Population and Housing* conducted in 2001.

The Full Bench accepted that the work of child care workers had been substantially undervalued "having regard to the historical gender-based undervaluation of the work and in light of the current objective assessment of the value of their work". The Full Bench awarded substantial pay rises, acknowledging that child care workers were paid "appallingly low wages".

The Full Bench considered that the rates awarded were a reflection of the value of the work performed by child care workers being assessed transparently, objectively and in a gender neutral way, having regard to the factors provided in the ERP.

Because of the magnitude of the increases granted the newly determined wage rates were to be phased in over a period of 2½ years.

Feminist commentary

Positive assessments

“It is also worth noting that this case in particular enabled the Commission to firmly establish the principle that a Certificate III gained for a predominantly female occupation has the same value as a Certificate III awarded to a predominantly male occupation. Possession of a Certificate III now attracts the payment of the 100% rate (C10) in the Engineering Award. The critical issue is not the length of time the qualification takes to achieve but the equivalence of the skills and competencies gained.” (Queensland Pay Equity Inquiry 2007, p.38)

Negative assessments

“The QIRC rejected the LHMU’s wage claim as being ‘excessive’ for it would ‘put at risk the public interest’.... For this reason the award pay increases granted to long day care employees by the QIRC are not as generous as the wage increases granted by its NSW counterpart. For employees holding the appropriate academic or vocational qualifications, the pay increases range from about 14 to 29 per cent.” (Smith & Lyons 2008, p.13-14)

- **Pay Equity: Time to Act** (“The Queensland Pay Equity Inquiry 2007”)
Queensland Industrial Relations Commission: Commissioner Fisher

In March 2007 the Inquiry was established to examine the impact of the federal Government’s Work Choices amendments to the *Workplace Relations Act 1996* on pay equity in Queensland. The Inquiry examined how Work Choices might impact on the labour market to exacerbate women's disadvantage in the labour market. It was thought that changes to the regulation of the minimum wage were likely to lead to increasing wage dispersion in general and hence, an increasing gender pay gap.

The Inquiry examined the following;

- the effectiveness of the outcomes of the previous Pay Equity Inquiry conducted by the Commission in 2001 in advancing pay equity;
- the impact of the federal Government's Work Choices amendments to the *Workplace Relations Act 1996* on the legislative measures addressing pay equity under the federal and State systems;
- the current and possible future impact of the federal Government's Work Choices amendments to the *Workplace Relations Act 1996* on pay equity;

- alternative models and specific policy and legislative options used in other Australian States and other countries in pursuit of pay equity;
- possible policy and legislative options for the Queensland Government to consider implementing in further progressing pay equity.

The Inquiry cited an extensive range of literature. [*open to p.7A*]

The Inquiry's recommendations included:

- that the Queensland Government actively investigate and support measures to establish pay equity benchmarks as the basis for funding the not-for-profit community sector and for purchasing outsourced services. Such measures could include providing funding and technical support for the making of a new common rule award for the community sector that contained a classification and remuneration system which was properly valued in accordance with the Equal Remuneration Principle and which took into account the inability of employees in the community sector to access enterprise bargaining;
- that the Queensland Government enact a Pay Equity Act.

- ***Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others*** (A/2008/5) (2009) ("The Queensland SACS Case") | [austlii](#)
Queensland Industrial Relations Commission: Commissioner Fisher

The Queensland Services Union (QSU) applied for a new award covering community services and crisis assistance workers. The first stage of the application resulted in the creation of the [Queensland Community Services and Crisis Assistance Award – State 2008](#) by consent.

The second stage of the application sought increased pay rates for workers covered by the new Award, to correct historical undervaluation, as well as an Equal Remuneration Component to maintain ongoing wage parity because of a lack of enterprise bargaining in the sector. Literature cited in support of the application included the Queensland Pay Equity Inquiries (2001) and (2007), the NSW Pay Equity Inquiry (1998), England et al (2001), Meagher and Healy(2005) and Briggs et al (2007).

In its [decision](#) the QIRC identified the factors contributing to the historical undervaluation of community services work. The wage increase awarded to community service workers included increases to basic pay rates, with reference to comparable rates in relevant certified agreements. It also included an Equal Remuneration Component to compensate for lost opportunities for collective bargaining, but with a sunset clause that allowed the increases granted by the decision to be implemented and at the same time for community services organisations, their peak body, QCOSS, employer organisations and

unions to have discussions with government about adopting the broader public service purchasing model of paying enterprise bargaining rates.

The Commission granted an increase of 6% with a phasing in period for most classifications until July 2011.

Feminist commentary - positive

“In Queensland, in a case that underpinned the pay equity claim in the recent federal *SACS Equal Remuneration Case*, the Queensland Services Union successfully applied for a new award for community services workers. The QIRC awarded pay increases to address the historical undervaluation of work, concluding gender undervaluation was at the core of the work value that had been applied to this work.” (Macdonald and Charlesworth 2013, p.576)

- ***The Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc*** (2009) 192 QGIG 46 | [austlii](#)
Queensland Industrial Relations Commission: Deputy President Swan

This case involved an application by the Australian Workers Union (AWU) to increase the rates of pay in the *Disability Support Workers Award – State 2003* (the Disability Award), applicable to disability support workers in the community (non-government) sector.

The AWU and the respondent Queensland Community Services Employers Association tendered an agreed statement of facts, demonstrating consensus that the work of employees covered by the Disability Support Workers Award had been historically undervalued for similar reasons to community services workers. Literature cited in support of the application included *Industry Employment Outlook for the Community Services Sector* (Department of Employment and Workplace Relations) and the Queensland Pay Equity Inquiry (2007).

The QIRC awarded pay increases to employees at every level. In deciding new pay rates, the QIRC gave consideration to two relevant comparators: the newly created [Queensland Community Services and Crisis Assistance Award – State 2008](#), and the *State Government Departments Certified Agreement 2006*, noting that much of the work performed in the community sector is very similar to that performed by Queensland Government services, but is much lower paid.

Victoria

- ***Advancing Pay Equity: their future depends on it*** (2005) (“The Victorian Pay Equity Inquiry”)
Victorian Pay Equity Working Party: Commissioner Whelan

In 2004, the Minister for Industrial Relations announced the establishment of a Pay Equity Inquiry to identify the extent of the gender pay gap in Victoria, and to investigate the factors contributing to the continuing differences in pay rates between men and women in Victoria.

Based on the research findings, the Working Party's Report summarises:

- the scope and impact of the gender pay gap in Victoria;
- what measures have worked in other states and overseas jurisdictions;
- which of these measures could be implemented in Victoria, given its unique regulatory framework for industrial relations;
- the operation of its equal opportunity legislation.

The report contains extensive references to literature, including feminist work. The Report recommended, *inter alia*, the following:

- a Plan of Action for Pay Equity which can be integrated with and work alongside other government initiatives;
- the establishment of a Pay Equity Unit to assist government agencies, employers, employees and unions to understand and analyse where pay inequity exists and to develop mechanisms to address it;
- action at a workplace level as part of the normal enterprise level mechanisms for job assessment and workplace bargaining;
- legislative change via the *Equal Opportunity Act 1995* (Vic), and via representations to the Federal Government.

Western Australia

- ***Labour Relations Reform Act* 2002 (WA)**

This Act amended s.6 of the *Industrial Relations Act 1979* to state that one of its objects is “to promote equal remuneration for men and women for work of equal value.”

- ***State Wage Case* 2003**

WA Industrial Relations Commission: Commissioners Coleman, Beech and Gregor

The Commission determined that there was no scope for an equal remuneration principle to be inserted as part of the State Wage proceedings, and that the Wage Fixing Principles are not suited to addressing issues of gender pay equity, as applications under the existing Wage Fixing Principles would be likely to result in lengthy and costly arguments about the applicability of the Principle(s) which would delay or ultimately prevent the consideration of the undervaluation of women's work.

- ***Report on the Review of the Gender Pay Gap in Western Australia* (2004)** (“The Western Australian Pay Equity Inquiry”)

Independent review for the Minister for Consumer and Employment Protection: Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, University of Western Australia

In April 2004, the Minister for Consumer and Employment Protection commissioned an independent review of the gender pay gap. The review examined:

- recent research dealing with the gender pay gap;
- the capacity of the State Wage Fixing Principles to close the gap;
- the efficacy of voluntary strategies;
- the role of the *Minimum Conditions of Employment Act 1993*, and strategies for training.

The Report drew on submissions, interviews, the knowledge and views of a key reference group, and an extensive review of existing research literature. [*open to p.7B*]

The following recommendations, *inter alia*, were made:

- due to the Wage Fixing Principles being not well suited to addressing issues of gender pay equity, the *Industrial Relations Act 1979* (WA) should be amended to establish an Equal Remuneration Part that can be applied with a high degree of certainty in assessing undervaluation on a gender basis;
- the *Industrial Relations Act 1979* should be amended so as to clarify how the Act can improve gender pay equity via award modernization and enterprise bargaining;
- a Pay Equity Unit and a high level Steering Committee should be established.

Feminist commentary - positive

“Western Australia undertook a review of the gender pay gap in 2004. Following this review, the Pay Equity Unit was established in the Labour Relations Division of the Department of Consumer and Employment Protection in February 2006. The role of the Unit is to implement selected recommendations made by the Review.” (Queensland Pay Equity Inquiry 2007, p.83)

- ***Labour Relations Legislation Amendment Act 2006* (WA)**

This Act amended the *Industrial Relations Act 1979* (WA). It introduced section 50A, which enabled the Western Australian Industrial Relations Commission to determine minimum wages, and adjust rates of pay under awards whilst having regard to a new set of specified criteria, including that wage orders “provide equal remuneration for men and women for work of equal or comparable value”.

- ***Industrial Relations (Equal Remuneration) Amendment Bill*** 2011 (WA)

This Bill proposed to include provisions in the *Industrial Relations Act 1979* (WA) that would allow employees covered by the state industrial relations system to make claims to the Commission for equal remuneration orders. In her second reading speech, the Hon Alison Xamon stated:

“WA has the largest gender pay gap in Australia. For every dollar earned by a man in WA, a woman will earn less than 72 cents... Of great concern to me is that, despite recognising the issue for decades, successive governments have failed to make any real inroads into reducing WA’s gender pay gap. While the national gender pay gap has remained relatively constant for the last two decades, the gap in WA has worsened.”

“[A] greater proportion of women than men are paid the minimum wage and it is vitally important that consideration be given to equal remuneration when setting the minimum wage... The authority of the Western Australian Industrial Relations Commission to hear pay equity cases also remains in question, which is the principal reason I am introducing this bill.” (Hansard, 20 October 2011)

However, the second reading of the Bill was not agreed to in August 2012.

Tasmania

- ***Women in Paid Work Task Force*** (1999)

The Taskforce was established by the Tasmanian government to examine issues for women working in both the public and private sectors. Its terms of reference included consideration of the findings and recommendations of the NSW Pay Equity Inquiry and their relevance and applicability to Tasmania.

The Taskforce concluded that the existing industrial system, modified to allow the identification and rectification of undervaluation, would provide the most effective means of addressing pay inequity. It recommended, among other things, that the Tasmanian Industrial Commission establish an equal remuneration principle to enable working women to find a remedy for the undervaluation of their work.

- ***Tasmanian Trades and Labour Council*** (T8413 of 1999)
Private Sector Awards and Tasmanian Chamber of Commerce and Industry Limited (T8483 of 1999) (2000)

Tasmanian Industrial Commission: President Westwood, Deputy President Johnson, Commissioner Watling

The Commission included an equal remuneration principle in the new state wage fixing principles, to guide members of the Commission and the parties

when dealing with applications, including applications to vary awards, regarding pay equity.

The Chair of the Women in Paid Work Task Force and the Anti-Discrimination Commissioner intervened in the case. Reference was made to their submissions, as well as to the Report of the NSW Pay Equity Inquiry and to ILO Convention No. 100

The new pay equity principle provided, *inter alia*:

- 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 that the value of the work should be ascertained 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.
- A prior assessment by the Commission (or its predecessors) of the value of the work, 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.

2010s – The Fair Work Act 2009 (Cth) and its aftermath

The gains of the State Pay Equity Inquiries and equal remuneration principles have been curtailed by the expansion of the scope of the federal industrial relations system first introduced in the Work Choices legislation in the mid-2000s and consolidated by the Fair Work Act 2009 (Cth). As a result of these changes, most private sector workers as well as public sector workers at federal level and in Victoria and the Northern Territory are covered by the federal industrial relations system, with State systems having only a residual role in relation to State government and local government employees. The Fair Work Act includes a revised equal remuneration provision and a pay equity inquiry and undervaluation test case have been held at federal level, but their results appear narrower than the State equal remuneration principles.

- **Fair Work Act 2009 (Cth)**

This Act incorporated new equal remuneration provisions. Part 2-7 Equal Remuneration expanded the concept of equal remuneration to include equal remuneration for work of equal or *comparable* value. The Act also removed the requirement for the applicant to demonstrate (as a threshold issue) that there had been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

In addition, the 'minimum wages objective' of the *Fair Work Act* includes that Fair Work Australia must take the principle of equal remuneration into account

in establishing the safety net of minimum wages, and the 'modern award objective' includes the same requirement in relation to the making of modern awards and the statutory National Employment Standards.

The Act further expanded the scope of the federal legislation to cover all non-government employees; Commonwealth, Victorian and Northern Territory government employees; and Tasmanian local government employees.

During the second reading debate on the *Fair Work Bill 2008*, Ms George stated:

"I am delighted to read that the bill will strengthen equal remuneration provisions by including in the objectives to the act the principle of equal remuneration for work of comparable value. This recognises the limitations historically in the application of the equal pay for work of equal value principle, as it has been applied historically. In my view, this provides great scope for the union movement to continue addressing the gender pay gap that I referred to earlier. The four-yearly reviews of awards and the possibility of work value claims usher in a new era of opportunities for unions covering predominantly female workers who, as we know, have had their skills and experiences traditionally undervalued. This will help to right that historic injustice. In my view this is a historic bill, ushering in a new national system of workplace relations for private sector workers." (Hansard, 2 December 2008)

Feminist commentary - neutral

Administrative changes to support FWA in equal remuneration matters were only put in place much later with the establishment in 2013 of a pay equity unit to assist with research associated with any equal remuneration applications. The *FW Act* equal remuneration provisions seemingly represent the problem of unequal pay as a problem of industry and occupational segregation and of the undervaluation of women's work, in that they embed a concern for equal remuneration in some of the key wage-setting mechanisms of the Act. Assessing the practical potential of these provisions requires some examination of their operation, and of the problem representations adopted by FWA in their decisions and by the other parties engaged in the industrial relations processes." (Macdonald and Charlesworth 2013, pp.572-573)

- ***Making it Fair: Pay equity and associated issues related to increasing female participation in the workforce*** (2009) ("The Commonwealth Pay Equity Inquiry")
House of Representative Standing Committee on Employment and Workplace Relations

In 2008 the Minister for Workforce Participation, the Hon Brendan O'Connor MP, requested that the House of Representatives Standing Committee on Employment and Workforce Participation inquire into and report on the causes

of any potential disadvantages in relation to women's participation in the workforce including, but not limited to:

- The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues;
- The need for education and information among employers, employees and trade unions in relation to pay equity issues;
- Current structural arrangements in the negotiation of wages that may impact disproportionately on women;
- The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation;
- The adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours; and
- The need for further legislative reform to address pay equity in Australia.

Literature cited by the Inquiry included

- Charlesworth & Robertson (2012)
- Charlesworth & Whittenbury (2007)
- Charlesworth et al (2009)
- Short & Nowak (2009)
- WIRE Women's Information (2010a) and (2010b)
- URCOT (2005).

Written submissions were provided, *inter alia*, by Christine Short, Michael Lyons, Meg Smith, National Pay Equity Coalition and the Women's Electoral Lobby Australia. Witnesses included Michael Lyons, Meg Smith, Patricia Todd, and Sara Charlesworth.

The Inquiry recommended, *inter alia*, the following:

- That for the removal of any doubt, the definition of equal remuneration for work of equal or comparable value in the *Fair Work Act 2009* be supplemented with a signpost note confirming that the concept of equal remuneration includes the valuation of dissimilar work of equal or comparable value.
- That s.3 of the *Fair Work Act 2009* be amended to state that equal remuneration for men and women employees for work of equal or comparable value is an explicit object of the Act.
- That the President of Fair Work Australia, by promulgation, enunciate an equal remuneration principle and set out how this principle is to be applied (e.g. work evaluation, comparisons across industries including similar and dissimilar work) in all contexts.

- That s.156(4) be amended to include evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.
- That s.157 be amended to ensure consistency with s. 156 and include a definition of “work value reasons” that are reasons justifying the amount that employees should be paid for doing a particular kind of work
- That the Government elevate pay equity to be a clear objective of modern awards.
- That s.134 of the *Fair Work Act 2009* be amended so as to require that an award must provide for equal remuneration for men and women employees for work of equal or comparable value.
- That the *Fair Work Act 2009* be amended to impose a legal obligation on the parties in a negotiation of a single or multi- enterprise agreement that the negotiation and the agreement must include bargaining to achieve pay equity as defined by the Act.
- That the Minister introduce an Act to establish a specialist pay equity unit within Fair Work Australia as a central point for pay equity monitoring, development and application of pay equity audits, and development of pay equity plans.

Feminist commentary - neutral/negative

“The Pay Equity Inquiry conducted in 2008–09 ... adopted a broad approach that acknowledged the complexity of the issues underlying the gender pay gap. It produced 63 recommendations in the areas of industrial relations legislation, antidiscrimination legislation, the establishment of a pay equity unit, administrative approaches to pay equity (for example, relating to superannuation and industry assistance), data collection and research, ‘women’s choices’ and cultural dimensions. Of these recommendations, 11 related to changes in what was at the time a proposed *FW Act* and another seven were directly concerned with the operation of the Act. Other recommendations were directed to the valuing of skills in traditionally feminised jobs and the inclusion of an equal pay goal in the modern awards that underpin employees’ pay and conditions and in the collectively bargained enterprise agreements that are the primary instruments establishing many employees’ actual wages and conditions. These recommendations construct unequal pay as a problem that is embedded within industrial arrangements, including through industrial and occupational segregation, historical undervaluation, women’s lack of bargaining power and high levels of part-time employment.” ...

“The drafting of the *FW Act* does not appear to have been influenced by the Pay Equity Inquiry process and, by the time the inquiry report was published in November 2009, the *FW Act* had been in place for some months. The report recommendations do not appear to have been considered in the recent *FW Act* review and the Government did not formally respond to the inquiry until May 2013.” (Macdonald and Charlesworth 2013, p.571-72)

- **Equal Remuneration case** [2011] FWAFB 2700; (2011) 208 IR 345 (“The Commonwealth SACS Case No 1”) | [austlii](#)
Fair Work Australia: President Giudice, Vice President Watson, Senior Deputy President Acton, Commissioner Harrison, Commissioner Cargill

The Applicant sought an equal remuneration order applying to employees in the social, community, and disability services industry throughout Australia. Fair Work Australia (FWA) found employees in the social and community services (SACS) industry were predominately women and generally remunerated at a level below that of employees of state and local governments who performed similar work.

- Literature cited by the applicants included the NSW, Queensland, Victorian, Tasmanian and Western Australian Pay Equity Inquiries; Cortis et al (2009) and Briggs et al (2007).

FWA found gender played a role in creating the gap between pay in the SACS industry and pay in comparable state and local government employment and held:

- any equal remuneration order should take the form of a percentage addition to rates in a modern award.
- it was not appropriate to endorse any percentage or other relationship between wages resulting from an equal remuneration order and wages in state and local government agreements.
- an equal remuneration order should provide absorption of overaward payments.
- an equal remuneration order should stand alone rather than forming part of an award, so that the benefits of the order would be protected by the terms of *Fair Work Act 2009* s.306.

More generally, the Commission:

- declined to issue a formal statement of principles on the basis that this would be premature and run the risk of limiting the discretion available under Part 2-7 FWA
- held that there is no requirement to demonstrate discrimination as a threshold to an equal remuneration claim
- held that there is no requirement to reference a specific male comparator group
- adopted undervaluation as a key part of the approach to assessing equal remuneration claims, with a requirement to establish that the asserted undervaluation is linked or attributable to gender
- gave no indication that it would depart from its traditional reliance on work value as a means of assessing the value of work.

See the 2012 decision below for the final order.

- **Equal Remuneration case** [2012] FWAFB 1000; (2012) 208 IR 4465 (“The Commonwealth SACS Case No 2”) | [austlii](#)
Fair Work Australia: President Giudice, Senior Deputy President Acton, Commissioner Harrison, Commissioner Cargill; Vice President Watson (dissenting)
 - FWA said “this is a highly unusual case, unprecedented by international standards, in which the applicants are seeking to use the concept of equal remuneration for men and women workers to achieve significant above-award wage increases for both men and women workers in an entire industry. The case is seen as a test case of the equal remuneration provisions of the Act. These features require a very careful and rigorous approach to be adopted by Fair Work Australia.”

In their joint submission in support of an equal remuneration order, the applicants and the Australian government cited Cassells et al (2009) and Briar and Junor (2011).

The majority of FWA largely accepted the submission that care work could be used as a proxy for gender-based undervaluation.

- The majority found: “We are prepared to make an equal remuneration order in the terms indicated. Such an order will ensure that for the employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.” Orders were made to increase wages between 19% and 41%, to be phased in over 8 years.

Feminist commentary

Neutral commentary

“The Federal Government’s announcement, subsequent to the 2011 decision, that it would fund its share of the increased costs was undoubtedly a critical step in the successful resolution of this case.” (Todd & Preston 2012, p.261)

Positive assessments

“The 2012 Decision will result ultimately in a substantial increase in remuneration for the SACS workers, but it is tempered by the FWA ruling that the increases be phased in over eight years. The SACS case is testament to the improved equal remuneration provisions introduced by the *Fair Work Act 2009* which are a very positive development. This particular case was distinctive in its comparison of work in the non-government sector with similar work being performed by employees in the government sector.” (Todd & Preston 2012, p.261)

“Important to the logic of the decision was the characterization of SACS work as ‘care’. This is significant as care has rarely been recognized by industrial tribunals and has now been acknowledged as a factor contributing to the undervaluation of female dominated work....The wage outcomes announced in February 2012 have consolidated the historic interim decision’s recognition of the undervaluation of care. It remains to be seen how unions, employers, governments and Fair Work Australia will build on this to more fully achieve gender pay equity in the coming years.” (Cortis and Meagher 2012, p.383-384)

Negative assessments

“In its direction as to the framing of any remedy...the Full Bench effectively imposed an empirical requirement on the applicants, requiring submissions as to what proportion of the undervaluation could be attributed to gender... [T]he ASU used a research study to assess the proportion of caring work evident at each classification level in the Social, Community, Home Care and Disability Services Award 2010. Caring work, both direct and indirect, was then used as a proxy for gender. Whether a proxy-based methodology is accessible or appropriate for all applicants, however, is a point of some debate.

[T]he available research on gender pay equity identifies the complexity of separating gender from a range of other reinforcing and interconnected considerations that shape women’s earnings. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way.

In New South Wales and Queensland, tribunals have taken the view that the assessment of equal remuneration claims involves balancing a number of considerations, and that it is not always possible to identify the extent of gender-based undervaluation in a forensic manner. This disinclination by State tribunals to mandate a proportionate identification of gender-based undervaluation is linked to what those tribunals have assessed as a key task, namely assessing the current value of the work in question and ensuring that the minimum rates of pay for it have been properly set. ...

One of the strengths of the concept of gender-based undervaluation is that it goes to the heart of addressing the institutional and cultural determinants of why women have generally been under-remunerated for their work. The ERPs which have been developed in New South Wales and Queensland articulate important aspects which are acknowledged through academic and other research to have led to women’s work being undervalued and under-remunerated. This approach is in contrast to an empirical or proportionate weighting methodology, which may not be entirely capable of identifying and addressing gender-based undervaluation and which may unwittingly rely on benchmarks and established norms and practices that have been established in relation to male workers.” (Layton, Smith and Stewart 2013, p.110-11)

- **Commonwealth Pay Equity Unit** established (2013)
Fair Work Commission

The Fair Work Commission established a specialist Pay Equity Unit to undertake pay equity related research and provide information to inform matters relating to pay equity under the *Fair Work Act 2009*, including:

- equal remuneration applications under s.302 of the *Act*
- annual minimum wage reviews
- the four-yearly reviews of modern awards

The immediate research priorities of Pay Equity Unit were:

- to commission a research report into equal remuneration under the *Fair Work Act 2009*
- to collect data on pay equity matters, and
- to review current pay equity research and catalogue available data for use in research.

Feminist commentary - positive

“The ongoing search for further explanations in the Australian context has been highlighted recently in the role of a new Pay Equity Unit to be established within the Fair Work Commission... The provision of specialist pay equity expertise within the Fair Work Commission is to be welcomed and may well provide some impetus for it to be considered seriously in the exercise of the Commission’s duties. To do so, however, will require a deeper understanding of the pay equity problem than the Commission has demonstrated to date.” (Macdonald and Charlesworth 2013, p.586)

- **2012 State Wage Order Pursuant to Section 50A of the Act** [2012] WAIRC 00345
WA Industrial Relations Commission

In the course of its decision the WAIRC noted the now very limited ability of WA legislation and decision-making to reduce the gender pay gap in that State:

“The gender pay gap is calculated by reference to all industries in WA, however we do not set a minimum wage which applies across all industries in WA. The State Wage order can apply only to the small minority of the private sector workforce in WA. The lack of any measurable reduction in the gender pay gap in WA following the \$29.00 per week increase to the minimum wage we ordered in 2008 leads inevitably to the conclusion that the gender pay gap in WA is unlikely to be reduced by any order that can issue from these proceedings: the overriding effect of the Fair Work Act [2009 (Cth)] makes it likely that the coverage of the State Wage order is insignificant for this purpose. There is nothing to suggest that the gender pay gap for the small minority of employees in WA who are covered by the State industrial relations system is

significantly different from the gender pay gap for the majority of employees in WA who are covered by the national industrial relations system.” (at [54])

- **State Wage Case 2009** (T13471 of 2009)
Tasmanian Industrial Commission

The Commission agreed to abolish most of its wage fixing principles on the basis that they no longer serve any relevant purpose. But it retained a pay equity principle, allowing applications to be made for the making or variation of an award to implement pay equity.

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