

IN THE MATTER OF THE NSW PAY EQUITY
INQUIRY (No. 6320 of 1997)

FINAL SUBMISSIONS

Submitted by the National Pay Equity Coalition (NPEC), the Women's Electoral Lobby (WEL) and the Australian Federation of Business and Professional Women (NSW Division).

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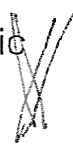
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Introduction

1. Women's organisations in Australia have a long record of campaigning for equal pay for women including through making representations to industrial tribunals. Women's organisations presented arguments in both the 1969 and 1972 equal pay cases and have closely monitored the outcomes of those decisions.
2. The National Council of Women of Australia, WEL and UAW intervened in 1983 National Wage Case to submit that the 1972 decision had not been accompanied by proper work value exercises. The National Pay Equity Coalition in its submission to the 1988 National Wage Case pointed to inadequacies in the implementation of equal pay and asked the Commission to confirm access under the 1972 equal pay principle was still available. In 1989, the Business and Professional Women's Association reviewed implementation of equal pay decisions and specifically pointed out the need for evaluation of work and skill free of gender bias.
3. In National Wage Cases in each year since then, women's groups (at various times, the Women's Electoral Lobby, National Pay Equity Coalition and the Australian Federation of Business and Professional Women) have made submissions to the Commission regarding outstanding equal pay issues and possible implications of existing and proposed wage fixing principles for equal remuneration. Women's groups also intervened in the HPM Case and have made submissions to a range of government and parliamentary inquiries, because of the continuing concern of members of these organisations (among others) that equal remuneration for women for work of equal value still has not been implemented.
4. Concern continues that there are still institutional and systemic barriers to its full achievement, and that successive industrial legislation, systems, principles and processes replicate the problems of the previous ones. 
5. We note the Labor Council's comments that it is now 29 years since the first equal pay case, and we note their comments that we are now entering the next stage in the evolution of equal pay

understanding and approaches. We hope progress can accelerate.

6. This submission will broadly address Terms of Reference. Our written document gives a full account of our arguments and the evidence relied on.
7. Our key contention about the issues under examination is that there is a gender pay gap. Further, earnings differences exist regardless of what measure is used. At least part of this gap arises from sex-based discrimination in setting remuneration. We argue that this gap cannot be fully explained in any other way. We examine these issues in paras 86-89 of our written submission.
8. We have heard from Professor Gregory that the gap cannot be explained by human capital theory, which is flawed in that it assumes that men and women compete freely in the labour market, and that their relative ability to secure the highest levels of remuneration is not influenced by factors such as access to education, training and the ability to work full-time.
9. Evidence has been provided about the impact on the pay gap of a wide variety of variables including demographics and work characteristics. While some of these variables provide some additional explanation for the gap, as Professor Gregory told us, a significant component of the earnings difference remains unexplained. This is not surprising, because such studies are not constructed to test all aspects of potential discrimination, such as assumptions about what constitutes skilled work, or whether exclusionary practices exist that may limit women's access to certain areas of work, and the impact of the domestic division of labour which conditions both women's and men's access to the workforce, as Professor Green and Dr Whitehouse explained.
10. The gap is not explained solely by occupational segregation, and Professor Wooden's view that occupational segregation is a function of women self-selecting occupations to better balance work and family is also flawed. It does not recognise the practical reality of women's lives - that "choice" is constrained by outside factors, including the structure and segmentation of the labour market and by custom and practice; as well as by the significantly greater likelihood that women will have the primary

role for domestic and family responsibilities, as a result of the domestic division of labour and inadequate child care support for working women. //

11. Both inter and intra occupational segregation are underpinned by discriminatory assumptions about the value of women's work, and by the exclusion in practice of women from higher-paid forms of work. As such, concentrating only on occupational segregation as a cause of the pay gap is an insufficient and in part misdirected response.

12. Dr Whitehouse made it clear that women's pay rates are affected by the fact that they are less likely to be members of unions and that they have less bargaining power, and as such are less likely to have access to either formal or informal enterprise agreements that provide for increases in earnings. While awards remain the dominant determinant of pay and conditions for 59 per cent of workers in female-dominated workplaces, this is the case for only 21 per cent of workers in male-dominated workplaces.

13. Other factors impacting on pay equity include institutional arrangements such as industry policy and workplace regulation, as cited in the evidence of Ms Kelly about childcare and Ms Smith about hairdressing. These can contribute to downward pressure on wage rates.

14. We contend that a major contributor to earnings differences between men and women is the employment of flawed assumptions about what constitutes skilled work. This is discussed in paras 101-103 and under Term of Reference Two in our submission. //

15. Witnesses Dr Burton, Ms Bennett, Dr Hunter and Professor McCallum have explained that the concept of skill has been socially constructed in a way that privileges the work traditionally performed by men and devalues that performed mainly by women. Work traditionally undertaken by women has been historically defined as 'unskilled', or explained in terms of the natural attributes of women, while work traditionally performed by men is defined as 'skilled', or semi-skilled'. These notions of skill are then used to justify wide differences in pay. Today, classification structures and earnings continue to reflect these //

disadvantaged female-dominated industries and occupations, for example, childcare and hairdressing. Ms Kelly points out that in the federal minimum rates adjustment process case which set the relativity for childcare workers and engineering tradespeople under the metal industry award, on the basis of the training and experience, evidence was accepted that appears to indicate that the training of the childcare workers was more extensive and more highly rated than that of the engineering tradesperson.

21. We contend that the failure to recognise essential work skills, and the undervaluation of women's skills where they are recognised, amounts to gender bias, and that this is evident in all the existing tests and mechanisms in use for ascertaining the value of work - in work value assessments, in job evaluation systems and in competency assessment. We discuss this at paras 162-182 under Term of Reference Two.

22. As Dr Burton explained in evidence, gender bias occurs in all these systems in the way women's jobs are described; how they are analysed into elements; how the relevant factors of value are determined; how these are measured and weighted; and how money values are attached to them. However, it is possible to eliminate sources of bias from assessments of work value, however they are carried out. But to do so requires a deliberate, comprehensive and sustained approach, and this has not generally occurred.

23. In fact, as Ms Short's work and Professor McCallum's evidence tells us, few assessments of the value of women's work have taken place at all. This is due in part to the predominance of consent arrangements about work valuation in the NSW industrial system. For example, implementation of equal pay in awards was largely by consent, with male union officials and male management representatives agreeing on the appropriate classifications and rates for women's work. Dr Thornton has demonstrated that in some cases, this resulted in jobs done by women being simply slotted in to the lowest award classification, which was of course paid at the lowest rate.

24. Dr Hunter, Ms Bennett and Professor McCallum have shown that even when the 1972 equal pay principles explicitly required that proper work value assessments of women's work be carried out, this was largely ignored. Where work value assessments did

occur, female classifications were compared with other undervalued female classifications, despite the principles recognising that the sex-segregated nature of the labour market might require that work value comparisons take place between female classifications and male classifications in different awards.

25. By 1983, wage fixing principles had been adopted which stringently restricted the circumstances in which the value of work could be considered. This effectively ruled out a comprehensive and fresh examination of the true value of women's work. So even in industries where the equal pay principle had not been properly implemented, there was very little scope for remedying the situation.
26. For example, award restructuring under the structural efficiency principle could not address one of the key undervaluation issues, that is, where too many skills and too wide a range of work are bundled together into one classification. The SEP process often sought to do exactly the opposite of what was required in female dominated jobs according to Ms Kelly and Ms Probert. Process work is an example of where there have been too few levels. The case study shows that hairdressing is another example.
27. Minimum rates adjustment processes also failed to address the undervaluation of women's work because, again, only very limited investigation of work value was actually done, and, again, the templates for those comparisons which were carried out were male-dominated awards which valued traditional "male" skills most highly, metals and construction.
28. Most recently of all we have seen the introduction of productivity bargaining as the primary mode of accessing pay increases. Ms Bennett and Dr Whitehouse and Professor Green pointed out that its effects on women in female dominated industries and occupations have been uneven and not necessarily positive. Women have not fared well in securing pay increases through enterprise agreements. Indeed, the high water mark for women's earnings came just before the introduction of enterprise bargaining according to ABS statistics.
29. Women have been disadvantaged in bargaining because they tend to work in areas where productivity is hard to measure,

such as service industries or the public sector, where government can exercise substantial market power and virtually set market rates. And female-dominated occupations within male-dominated industries, for example clerks working in manufacturing, have reported being excluded from sharing the productivity rewards available to their colleagues in other occupations according to the Australian Workplace Industrial Relations Survey. And of course, in many female dominated occupations bargaining power is limited and workers are less likely to be unionised.

30. Overaward payments is an area of substantial sex related pay disparity, with women getting around half the overawards men do. We examine overaward payments and market considerations at the end of Term of Reference Two in paras 244-278.
31. HREOC's inquiry into discrimination in overaward payments showed that women were more likely than men to be paid overaward payments on an individual basis and for their specific performance, while men were more likely to get overaward payments on a collective basis.
32. The HREOC Inquiry also found sex differentiated application of over award payments. In men's industries it was more common to find overawards paid to attract workers, while in women's industries it was individual merit that was more frequently rewarded. There were more overawards in unionised areas and women had less influence on employer perceptions of market requirements as they were and are less unionised.
33. Overaward payments have generally not been set by industrial tribunals although they have been taken into account in decisions about rates in awards and about absorption of increases against overawards, including in State wage cases. Overawards increasingly are being codified and formalised through enterprise bargaining, thus improving the opportunities for the Commission to consider whether the organisation-specific elements of remuneration satisfy equal remuneration and non-discrimination requirements.
34. The key issues examined in international jurisdictions in relation to the payment of market rates or supplements have been: the

information and evidence required to establish that sex-related pay disparities are based on market forces; and the justification that is required where a properly investigated and applied market loading results in sex differential pay outcomes for work of comparable value.

35. These issues are not dissimilar to those the Commission has frequently considered in setting award rates, including in making first awards. In first awards, the Commission has always been very influenced by market rates, but has also been concerned to value work appropriately and relate it properly to other classifications and awards. As Professor McCallum points out, market arguments are always going to be the backdrop for decisions of the Commission, but there comes a point where, when we see blatant inequity, we would want to address this.

36. We submit that in determining whether equal remuneration exists, the Commission is required to take account of all components of remuneration, including overaward payments. It is therefore within the Commission's responsibility to tackle the important pay equity issue of ensuring that overaward payments are not made on discriminatory bases.

37. But as Ms Bennett, Ms Walpole and Professor McCallum discuss, it will be difficult for the Commission to ensure this where the reasons for making these payments are not transparent and are not backed up by evidence. For example, if eligibility criteria for overaward payments are not explicit, then the crucial equal remuneration question of whether the payment is made on the same basis to male- and female-dominated occupations cannot be satisfactorily answered. If the market forces are to be cited as a justification for pay inequity, then the arguments relied upon in relation to the specific nature and characteristics of that market, should be explicitly - and transparently - identified.

38. That is, the mere assertion that overaward payments are made to conform with market rates, for example, is insufficient to allow the Commission to examine whether or not this has occurred on a non-discriminatory basis. If a sex-related pay difference exists as a result of an over-award payment made to male and not female-dominated occupations, then comprehensive evidence should be required to support the validity of this practice.

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39. In such circumstances, the Commission will have to require that the necessary information about the bases of the payments be provided by the employer, as soon as it is established that the payments show a pattern of sex related pay disparities. Unless this approach is adopted, equal pay cases in which overaward payments are an issue cannot succeed.

40. As Dr Hunter notes, a similar conclusion was reached by the European Court of Justice in the Danfoss Case, which stressed strongly the importance of transparency in wage fixing. The court concluded that it was essential to the integrity of the equal pay provisions of the Treaty of Rome that where a sex related disparity was established and the pay setting system not transparent, employers be required to provide information about the basis of discretionary payments.

41. Examination of the case studies has enabled us to look at impact on pay equity of not only those factors the Commission usually considers, such as industry development, industry structures, markets and capacity to pay, but also more broadly to investigate the historical legacies, the impact of institutional arrangements, workplace size and the factors that reduce women's bargaining strength.

42. The central lesson to be learned from the case studies as a group is how complex the issue of pay equity actually is, the range of causes that can be identified, the intricacy of the interaction of factors. We contend that this shows the need for a comprehensive case by case approach in implementing pay equity. As Dr Hunter stated in evidence: "A complex question deserves a complex answer".

43. We make a number of specific recommendations about the case studies examined by this Inquiry, each of which stems from a conclusion we have come to about the nature of the pay equity problem in the occupation or industry. In our written submission our analysis of and recommendations about the case studies is contained in paras 114 to 161.

44. For the childcare industry, we adopt the Recommendations of the Labor Council and consider that the following specific issues should be addressed

and application has been limited in that they do not address the fundamental factors that underlie pay inequity, such as the discriminatory assessment of the value of women's work and skills. As Dr Hunter and Ms Walpole point out, these factors are matters for this Commission.

53. The argument that EEO and access measures are adequate to deal with these matters assumes that to gain more equitable pay a worker must enter male dominated occupations and industries. This undermines the principle of equal remuneration for work of equal or comparable value.

54. We agree with Professor McCallum's view that a new principle which examines undervaluation is needed. We therefore recommend that a new pay equity principle be developed and implemented to give full effect to both the objects of the legislation and to the requirements of ILO 100.

55. As set out under Term of Reference Three, the Pay Equity Principle should contain the following elements:

- Broad criteria requiring that work value be investigated, and that rates be set by methods which are objective, free of sex discrimination (as required by the ILO Convention), and transparent in relation to factors of value employed, weightings attached, and the translation of assessed value into remuneration.
- List of factors as examples of those which might be considered in assessing work value. This list of factors would include those traditionally considered by the Commission (skill, responsibility, qualifications, conditions, experience etc.) and specifically include factors which are significant in the value of traditionally female dominated work such as interpersonal skills, nurturing, dexterity, coordination etc.
- recognition that fixing remuneration legitimately involves consideration of factors such as efficiency of the labour market (including supply/demand), working conditions (including work stress and work rate), capacity to pay (including productivity and profitability), effect on employment etc. The Principle ought therefore to specify a non-exhaustive range of legitimate considerations, but should clearly require that any such factor to

be relied upon is clearly identified, and the weight attached to it in setting remuneration is documented. The Principle ought also to require that these considerations be addressed free of sex discrimination.

56. As Professor McCallum recommended, the principle would apply whenever the Commission is exercising powers which relate to setting remuneration, including the making, variation and review of awards, approval of enterprise agreements etc, and to both consent and non-consent proceedings.

57. Access for claims under the principle would be available where it is claimed that the rates have been affected by sex discrimination, including:

- where, historically, work value margins were set on the basis of the sex of the worker resulting in undervaluation of women's work - for example, librarianship
- where operative wage fixing principles prevented examination of cases regarding equal pay implementation, historic undervaluation of women's work or changes in the relative value of women's and men's work - for example, librarianship
- where rates set were affected by sex stereotyped assumptions about women's income needs resulting in under-remuneration of women's work for its value - for example, childcare
- where lack of bargaining power and/or the form of the employment contract has contributed to incapacity to demonstrate and secure remuneration for the full range of factors of work value in female dominated work, in awards, overawards and agreements, which has resulted in undervaluing the women's work - for example, hairdressing, clothing outworkers
- where a significant informal sector has, through unfair competition against the public interest (including through transfer by employers of employment costs onto the community and increasing risks to public and employee safety), undercut rates awarded by the Commission, depressing the award rate and contributing to under-remuneration of women's work for its value - clothing outworkers, childcare

- where market rates originally affected by sex discrimination have been incorporated into industrial instruments, for example through first award setting principles and procedures - childcare
- where the exercise of market power by an employer or group of employers has led to under-remuneration of women's work for its value - clothing outworkers, possibly some public sector occupations

58. The threshold for access under the Principle should be demonstrating a gender-related pay disparity, together with evidence of either an evaluation method which shows that the work of the women and men is of equal or comparable value, or an evaluation method indicating that the rates have been affected by sex discrimination.

59. While a new principle is a crucial step, we also recommend legislative change. We contend that current IRA mechanisms and processes concerning equal remuneration are not an integrated scheme and do not amount to a full implementation of the objects of that legislation nor of ILO 100 as a result. Therefore we urge legislative amendment and discuss this under Term of Reference Three.

60. With some adjustment the amendments could mirror the Equal Remuneration Division of the Federal Workplace Relations Act. A new division should clearly articulate the relationship between its operation and the operation of other parts of the Act. It would therefore need to set out the Commission's pay equity responsibilities regarding both consent and arbitrated matters involving making, varying and reviewing awards; approving agreements; considering unfair contracts; setting Principles in State Decisions and Test Cases. We also recommend amendment of s19 to ensure its provisions apply to all industrial instruments and forms of remuneration.

61. As in the WRA, there should be access for individuals to take their own cases under the equal remuneration provisions. While it is most unlikely that this avenue would be used much if at all, because of the resources required to conduct the case, it is an important principle that access to claiming the right to equal remuneration should not be entirely contingent on the

willingness and capacity of a registered organisation to take up a claim.

62. We also recommend legislative reform of the Anti-Discrimination Act under Term of Reference Three. The evidence of Mr Puplick, Ms Walpole and Dr Hunter clearly demonstrated that while the discrimination jurisdiction can provide remedies for individuals and groups affected by discrimination (including pay discrimination) it cannot address pay inequity in a systemic manner. The definitions of discrimination within the ADA are not sufficient to address equal remuneration matters.
63. Referral powers similar to those contained in the Federal Equal Remuneration Division as applied to the Sex Discrimination Commissioner, should be made available to the President of the Anti Discrimination Board. This would allow the President to refer equal remuneration matters to the IRC where the ADA is inadequate or a systemic remedy is required. The President's representation would provide one means of access for individuals and non unionised employees to the provisions.
64. Where the ADA is a more appropriate forum to pursue a pay equity matter, for example where an individual is claiming damages, there are other restrictions in the Act which are likely to hinder many cases.
65. It is submitted that the exemption under the ADA for workplaces with fewer than six employees should be removed. Women make up a significant number of employees working in small business. Retaining the exemption will continue to bar a considerable number of women workers from the provisions of the Act.
66. In addition, the definition of indirect discrimination should be amended so that it is consistent with the definition contained in the Federal Sex Discrimination Act 1984. This will assist complainants to bring these matters to the Anti Discrimination Board by providing that the onus of proof is on employers to substantiate the reasonableness of the imposed requirement or condition. This amendment would also overcome the difficulties associated with a proportionality test (of whether a significantly greater proportion of men than women can comply with a

requirement or condition) in the current indirect discrimination provision in the ADA.

67. The women's groups recommend under Term of Reference Three paras 296-98 that the Commission provide written guidance to the parties about any new legislative provisions and pay equity principle, including definitions, relevant provisions, cases and reference to relevant published work in relation to these issues. This is because Guidelines would play an important educative role, as indicated by Ms Walpole's evidence in relation to the experience with the federal commission's award reviews guide. Leadership by the Commission particularly in assisting the parties in their examination of issues in specific industrial instruments can significantly assist the industrial parties in meeting the requirements of the new Act.

68. Section 19 of the Industrial Relations Act 1996 allows for the three yearly review of awards for the purposes of removing discrimination and ensuring equal remuneration, among other matters. We recommend at paras 299-303 that this mechanism be used in the first instance to review the key low-paid female dominated industry awards against the pay equity principle.

69. Where the Commission identifies possible strategies for addressing equal remuneration issues through award reviews, it should, in subsequent reviews, investigate progress made on achieving equal remuneration. ✓ On a finding in subsequent reviews that there still is not equal remuneration for work of equal or comparable value, the IRC should assess the extent of the pay disparity based on sex, and determine an appropriate level of payment in the form of an equal remuneration adjustment, to the relevant employees.

70. We endorse the recommendation of the Pay Equity Taskforce that a Deputy President: Pay Equity with specialist responsibility for pay equity be appointed to the IRC to hear equal remuneration matters. ✓

The new Deputy President would preside with panels appointed by the President to deal with equal remuneration matters for particular awards or industries/occupations (drawn from panels already appointed for those areas) and in particular s19 review of award proceedings. This is important in helping to recognise

the significance of pay equity and discrimination matters in the IRA, and publicly demonstrate the Commission's consideration of these issues. It will also assist especially in the early stages of the operation of the Pay Equity Principle and award reviews in ensuring a consistent approach is developed which would facilitate development of guidance for the parties.

71. We submit under Term of Reference Five that the remedial measures we recommend are both in the public interest and consistent with the objects of the legislation at paras 339-358. We also discuss the economic effects of pay equity adjustments at paras 360-415.
72. Professor Green has explained that modelling the economic effects of a pay equity adjustment for women is difficult because there is limited data available about a range of crucial factors that should be included in the model. Mr Cox pointed out that estimation of economic impact could not accurately occur without knowing the size of the adjustment, how it differed between occupations, by what timetable it would be introduced, and how many workers would be affected.
73. In place of this real data, economic models are underpinned by assumptions which remove them from the reality of the labour market and the economy. As Professor Green states, scenarios can be constructed that suggest a positive impact on employment from staged pay equity adjustments. Professor Green emphasises that these models cannot provide the definitive answer, rather their usefulness is limited to contributing to our understanding of these issues.
74. Even so, it was interesting to note that the economic evidence indicates that if across-the-board pay increases of an aggregate 1 - 2 % were introduced within a short timeframe, the overall economic effects would be small and would dissipate over the longer term. Of course, it is impossible that appropriate claims could be successfully prepared and run in the Commission and increases implemented in all relevant industries in a couple of years.
75. We submit that it is impossible, at this stage, to determine the macro economic effects of pay equity adjustments on the economy and on women's employment, because the

adjustments are most likely to be phased in over time. This process would be staggered and diffused throughout the economy, presumably over a number of years, with firms employing a range of responses to combat increases in wages. Although implementation of the 1972 equal pay decisions was envisaged to occur over a three year period, it was still proceeding in many areas at the end of the three years and in some areas seven or more years later.

76. We submit that there are economic benefits to pay equity. Mr Cox and Professor Green indicated that there may be positive economic effects. As Professor Green argued, wage inequity provides a subsidy to low wage producers at the expense of higher wage and more efficient producers. Mr Card's and Mr Kruger's work shows that raising minimum wages need not increase unemployment and can assist in reversing rising inequality.
77. Professor Green outlined how earlier attempts to redress pay inequities did not have the dramatic negative consequences that were predicted at the time, and that there was, instead, evidence of employment growth.
78. He argues that the employment displacement effects of implementing pay equity would be small because women predominate in service industries which, by their nature, are not mobile, and because women predominate in labour intensive industries.
79. We conclude that it is impossible to predict precisely the effects of unknown pay equity adjustments; that the effects projected by models (based on assumptions capturing extreme parameters) could be accommodated in aggregate in the NSW economy; that there are both economic and social benefits in pay equity; and that the practical path is for the Commission to consider economic impacts on a case by case basis.

Term of Reference One

Whether work in female dominated occupations and industries is undervalued in terms of the remuneration paid relative to work in comparable male dominated occupations and industries. The Commission shall have regard to such female and male dominated industries and occupations as it considers sufficient to permit it to make recommendations but shall not be required to examine all such industries and occupations. In determining those industries and occupations the Commission shall have regard to the need to impose reasonable restraints on time to complete the Inquiry.

Definitions

80. *Remuneration*

The Commission should confirm its interim decision of April 20 in line with the ILO 100 definition

81. *Equal remuneration for men and women workers for work of equal value* means that rates of remuneration are established without discrimination based on sex in line with ILO 100.

Comparable

82. Comparable refers to comparability of value and does not require at all that work be of similar nature. The use of comparator/s may be illustrative of work value arguments but is not required to establish whether rates have been established without sex discrimination. Comparisons can be drawn without limitation and the Commission is to determine whether **comparability of value** has been established. Male comparator requirements could prevent equal remuneration being adequately addressed in some female dominated occupations, in view of marked occupational segregation by sex.

Value means value as assessed by industrial tribunals and is not confined to value to the employer (as in the 1972 Equal Pay Case 13 IR 108 p.113).

We adopt HREOC's submissions at para 24.3 exhibit 433.

Discrimination

83. The ILO 111 definition of discrimination should be adopted. Discrimination is " any distinction, exclusion or preference

impairing equality of opportunity or treatment in employment or occupation". Both the Anti Discrimination Act and the Industrial Relations Act give effect to ILO Convention 111. While the IRA specifically refers to the ADA for certain specific purposes that does not preclude a broader view of the meaning of the term discrimination in other sections where the ADA is not specifically referenced. The broader meaning of discrimination given by the ILO definition is necessary for the full effect of ILO 100 without the limitations which the ADA definitions would impose (as outlined by Puplick Ex 236, Walpole T 1635, and Hunter 228). The ILO definition encompasses the ADA definition. The industrial and discrimination jurisdictions are complementary in giving effect to the ILO 111.

84. We adopt HREOC's submissions at para 24.4 exhibit 433.

85. *Female/male dominated occupations*

Generally this would mean that a particular occupation had a preponderance of one sex or the other. The relevance of that would be that it might be part of establishing that sex of the workers is or has been a factor affecting rates. However, sex domination of an occupation is not a requirement of the legislation and it would be possible to show, for example, that rates had been affected by sex discrimination for women in male dominated occupations or in occupations which are not dominated now by one sex or the other. Where the issue of sex domination of an occupation has relevance, it should be broadly considered in terms of both the current and historic make-up of the occupation rather than by any rigidly defined proportion.

Overview

86. Remuneration is a measure of the value afforded by society to paid work. Historically industrial tribunals have utilised earnings as a measure of value. With a wider understanding of the elements of non-cash entitlements, the measure of earnings has broadened to remuneration [ILO Convention 100, s. 23 Industrial Relations Act (NSW), Part VIA, Division 2 Workplace Relations Act 1996 (Cth)].

87. The Inquiry in its investigative role has examined differences in earnings, both in the aggregate and through case studies. There are different measures of earnings and the earnings gap widens

according to the variables within the earnings ratio. These variables include the type of employees (all employees, adult employees, junior employees), employment status (full-time/part-time), the type of earnings (ordinary time, total earnings), earnings unit (weekly/hourly earnings), and employment level (managerial/non-managerial) (Green Ex 271 pp 7-10, Wooden Ex 101 pp 2-4, Borland Annexure to Ex 277). The selection of an appropriate measure depends on the purpose of the analysis. For some purposes, a yearly figure might be illuminating in showing what happens with casuals' earnings over a year. The smallest measure of earnings difference is obtained by examining non-managerial ordinary time hourly earnings (Wooden Ex 101 p.4).

88. However use of this measure needs to be accompanied by an understanding of the social and institutional factors that contribute to the under representation of women in management positions, the high proportion of women in part-time work and the additional paid ordinary time and overtime hours that are available to men (Green Ex 271 pp 9-10, Whitehouse T826, 844, Charlesworth T1853).

89. In achieving an understanding of the differences in earnings the Inquiry has examined explanations for aggregate differences in earnings and sought an understanding of the manner in which earnings are determined.

90. Evidence before the Inquiry has demonstrated that human capital theory (HCT) which is the conventional theory for examining earnings differences is unable to explain gender based differences in earnings (Gregory Ex 98 p.5, T678, Haig 1992 Ex 416, Jones 1993 Ex 416, Chapman and Miller 1983 Ex 102, Chapman and Mulvey 1986 Ex 102, Miller & Rummary 1989 Ex 231 Tab 7, Drago 1989 Ex 103 Tab 5, Kidd and Viney 1991 Ex 361, Rummary 1992 Ex 361, Vella 1993 Ex 416, Kidd 1993 Ex 416, Miller 1994 Ex 104, Langford 1995 Ex 361, Preston 1997 Ex 361).

91. The Inquiry has material before it which explains the basis of human capital theory which posits a direct and positive relationship between education and work experience on the one hand, and individual productivity and reward on the other. Individuals make choices about education as they would

investment. At the workplace, qualifications gained through education will indicate the level and nature of the skills that the individual holds and will determine the level of remuneration. As an individual's investment increases so too will the available rewards, (Blackmore 1993 Ex 102 Tab 4). On this account women's lower earnings reflect and are an objective measure of their lower level of investment in their own education, training and workforce participation. The labour market position of women is therefore 'rational' to the extent that they receive fewer 'returns' (wages and benefits) because of the fewer resources they have chosen to invest in training and work experience.

92. The Inquiry has evidence before it that has questioned the assumptions on which human capital theory is based.

93. Human capital theory assumes that women and men freely compete in the labour market and that their access to education and training and full time work that attracts higher levels of remuneration is unfettered by the division of domestic labour that allocates to them the majority of family responsibilities. Such an account fails to take account of the exclusion of women from the apprenticeship system, and the concentration of women and girls in discrete areas of the education system that were the result of discriminatory practices. Women and men now have identical participation rates in school and higher education (ABS, Cat. no 6227.0 Ex 416) although women have a different pattern of higher education courses than men. The effects of past practice are still evident. Men are more likely to hold a post-school educational qualification. In May 1996 37 per cent of all women and 47 per cent of all men held a post-school educational qualification. (ABS, Cat. no. 6227.0 Ex 416).

94. Workplace based training of a more structured nature or that contributing to an educational qualification is limited. It is more likely to be undertaken by workers employed in managerial, administrative and professional positions, by workers on higher incomes and by full time rather than part time or casual workers (ABS, Cat. no. 6278.0 Ex 416), a profile which tends to limit women's participation. While the provision of workplace training has recently shifted towards women, this comes at a time which suggests that employers were substituting away from relatively high cost training such as structured in-house training, towards

lower-cost training such as on-the-job training (Wooden and Van den Heuval 1997 Ex 416).

95. Human capital theory also assumes that women and men will receive the same returns for the same investment. A number of the studies testing human capital theory point to the lower returns on human capital endowments (experience and qualifications) that women receive relative to men (Haig 1982 Ex 416, Gregory and Ho 1985 Ex 103, Chapman and Mulvey 1986 Ex 102 Tab 12, Rummery 1992 Ex 361, Crockett 1996 Ex 416, Preston 1997 Ex 416). Human capital theory assumes that there is an even non-gendered relationship between training and ability and the allocation of a definition of 'skilled' to the work performed. Further human capital theory is underpinned by an uncritical view of credentials - most importantly the values that underpin the allocation of credentials and the areas of work that are effectively excluded from credentialing arrangements (Blackmore 1993 Ex 102 Tab 4, Butler & Connoles 1993 Ex 102 Tab 5)

96. In addition to testing human capital theory as a means of explaining differences in earnings, a number of the studies before the inquiry have examined the impact of a wide range of variables including demographics (such as age, race) and work characteristics (workplace size, occupation and industry, geography, union membership, product markets, labour markets). This combination of human capital endowments, demographics and work characteristics is titled the 'vector of productivity characteristics' that are the 'explained' component of the wage gap. What cannot be explained by these components is entitled the 'unexplained' or 'residual' component of the earnings gap. It is this unexplained or residual component of the earnings gap that theorists assert provides a measure of discrimination in earnings allocation (Rummery 1992 Ex 361).

97. The regression analyses demonstrate that human capital theory is unable to explain earnings differences. The analyses also provide insights as to the factors that contribute to earnings differences. As noted above one key factor is the different returns that women and men receive on their education and experience. The studies also indicate that a number of these variables do provide some additional explanation for the earnings gap. There is evidence before the Inquiry that indicates

that working in a larger workplace (Miller & Mulvey 1996 Ex 416), being a union member (Miller & Mulvey 1996 Ex 416) and employed on a full-time basis (Wooden Ex 101 p.7) contribute to higher earnings (Gregory Ex 98 p.5). This finding need to be read against the profile of women in the labour market who are more likely to work in smaller workplaces, less likely to be union member and more likely to be employed on a part-time basis (ABS Cat. nos. 6203.0 Ex 350, 6278.0.Ex 416, 6325.0 Ex 416).

98.Despite the explanatory power of these variables a significant component of earnings differences remain unexplained (Gregory Ex 98 p. 5, T662). This reflects both theoretical and methodological constraints. These studies are not constructed to test all aspects of potential discrimination, such as assumptions of what constitutes skilled work, exclusionary practices that may limit women's access to certain areas of work, and the domestic division of labour which conditions both women's and men's access to the workforce. On the second point aggregate regression analysis is often unable adequately to measure the interaction of variables, such as the collective impact of absence of unionisation, smaller workplaces and occupational segregation, the role that occupation or industry plays in the value that is afforded skill or the impact of the value afforded to endowments by labour market characteristics such as workplace size and union membership (Gregory 1998 Ex 98 p. 5, T678].

99.Further, factors counted as explaining part of the earnings gap may still operate in discriminatory ways - for example, marital status, having young children, age, experience, qualifications and so on may all be factors which actually reflect discrimination. Discrimination is by no means confined to the "unexplained" part of the earnings gap.

100.Thus the Inquiry has examined alternative explanations for earnings differences. The material before the Inquiry indicates that it is a number of factors that contribute to work undertaken by women being valued and paid less, as it is these factors that either singly or cumulatively provide a significant impact on earnings determination, both by tribunals and by the market. These factors include:

101. *flaws in the assumptions of what constitutes skilled work.* The concept of 'skill' has been socially constructed in a way that

training), who possesses the skills (male/female) and in what context these skills are used (the public or private domain) (Blackmore 1993 Ex 102 Tab 4) and in what industries (product markets or service industries). Thus, the work traditionally undertaken by women is defined as 'unskilled', or explained in terms of the 'natural' attributes of women, while the work traditionally performed by men is defined as 'skilled', or 'semi-skilled' (Phillips & Taylor 1980 Ex 231 Tab 10).

102. These notions of skill are then used to justify wide differences in pay. Classification structures and earnings reflect these traditional notions of 'male' and 'female' work, but do not reflect the complexity or responsibility of the work actually performed (Probert Tab 13 exhibit 103). This has particular application in the industrial sphere because work value has not addressed long standing inequality and women's work, even in proceedings to promote equal pay has historically been judged against a male standard (Dickens 1991 Ex 416, McCallum T1645, Walpole T1637, 1640, Burton T1893-1894, 1923, Bennett T1753, Sheahan T1962).

103. The definition of the paid work traditionally performed by women as 'unskilled' has also contributed to the lack of credentialling arrangements that attend work undertaken by women such as the exclusion of women from the pre-dominant form of vocational training for 'skilled' workers - the 'trade' system based on the apprenticeship (O'Donnell & Hall 1988 Ex 231 Tab 9, Pocock 1988 Ex 231 Tab 11). Comparatively few areas of female dominated work were supported by vocational qualifications. Institutional arrangements such as the availability of award based post-trade classification structures and the availability of workplace overaward agreements can also provide a mechanism for the recognition of skill and experience (Smith Ex 183, T1294, 1396-1398).

104. *the gendered nature of part-time and casual work.* Labour markets are segmented between core full-time highly paid

distinguishing each component (Lambert, Petridis, Galea 1996 Ex 416) as they are both mutually reinforcing.

108. Issues of work value and exclusion can underpin *both* forms. Intra occupational segregation prevents women from accessing highly paid positions either through barriers to career progression and/or through the undervaluation of work undertaken by women when set against the occupational hierarchy. Inadequate work value mechanisms and job grading and exclusion processes contribute to jobs predominantly undertaken by women within that broad occupational category assessed as being of a lower value than jobs predominantly undertaken by men. Horizontal segregation can provide a negative impact on women's economic status if women are excluded from highly paid areas of work and if the areas of work that women are predominantly employed in are viewed as unskilled, subject to deskilling strategies and undervalued.
109. *unionisation/bargaining power, workplace size* Women are less likely to be members of unions (ABS Cat. no. 6325.0 Ex 416) and less likely to have access to either formal or informal enterprise agreements that provide for increases in earnings. There is a greater likelihood of agreements in male dominated industries, in large workplaces and in workplaces that were unionised and did not have a significant proportion of part-time employees (Morehead, Steele, Alexander, Stephen & Duffin 1997 Ex 231 Tab 8, Department of Industrial Relations 1996 Ex 103 Tab 4, Wooden 1997 Ex 353 Tab 6, Whitehouse 1998 Ex 118 Ex 120). Awards are the dominant determinant of pay and conditions for 59 per cent of workers in female-dominated workplaces compared to 21 per cent of workers in male-dominated workplaces (Morehead, Steele, Alexander, Stephen & Duffin 1997 Ex 231).
110. *industry policy* Institutional arrangements such as industrial and commercial regulation and industry policy can act as constraints on the number of workplaces in the industry or the appropriate and well funded operation of those workplaces, factors that prevent downward pressure on wage rates (Kelly 1997 Ex 57, Labour Market Alternatives 1997 Ex 186).
111. *geographic location, skill shortages* Evidence before the Inquiry has indicated that skill shortages and geography are

used as the basis for earnings premiums although skill shortages do not always provide the rationale for earnings premiums nor is the exact earnings impact of these shortages transparent.

112. We submit that the Commission should conclude that there is a gender related earnings disparity and the part of it accounted for by sex discrimination varies considerably across occupations, industries and organisations.

113. In order to consider and understand the impact of these factors, industrial tribunals and the industrial parties require a broad understanding of discrimination and the application of discriminatory practice. ILO 111 provides a measure that provides this scope:

any distinction, exclusion or preference on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation

CASE STUDY APPROACH

114. The Case Study approach taken by the Inquiry has provided an excellent opportunity to look into the detailed mechanisms that have delivered undervaluation of women's work and low pay to women in the relatively few female dominated occupations investigated.

115. In the initial stages, the evidentiary and case study focus has made consideration of the intersecting and systemic bases of gender based pay disparities difficult. Not all factors known through research to be relevant are illustrated in the case studies and it would not be feasible for all factors involved in undervaluing and under-remuneration of women's work to be demonstrated by case studies during this Inquiry. Further, time has permitted very limited inspections and a limited examination of witnesses and evidence from very few establishments. Some industries and occupations were examined in a very minimal way. The case studies should be recognised as illustrative rather than seen as determinative.

In investigating pay inequity, we have also to consider the consequences of institutional arrangements arising from the Commission's determinations, and historical protection of certain groups of male breadwinners through occupational segregation, changes over time to industrial principles and mechanisms, and the factors that reduce women's bargaining strength, at the same time as presenting the material the Commission usually considers about industry development, structures, markets and capacity to pay that are the usual business of the Commission.

116. The case studies are of course not the only evidence before the Inquiry and not all findings and propositions are referable to them. There has been a wide range of material in articles, statistics and evidence from experts on various issues which are often broader than those which could be illustrated by the case studies. The case studies and information about other industries and occupations illustrate some pay equity factors and issues and allow consideration of how they occur, operate and interact and how the issues could be addressed. However, it is open to the Commission to make findings on issues not raised in the industries and occupations examined, and/or where the case studies do not support or demonstrate the finding.

CHILDCARE/METALS: Findings

117.Markets

Evidence provided by employers and unions indicates that demand for childcare places is quite price sensitive, dependent as it is on after tax family incomes. As a result, the viability of many registered child care centres is marginal. The role of the government dominates the market in two ways, through regulation by setting standards (and staff/child ratios) for registration, as well as through provision of operating subsidies and grants crucial to the viability of many child care centres. (Hegner, Ex 46, Kynaston, Ex 54. Millane, Ex 36, Russell, Ex 38.)

118.Context

Evidence provided by Rosemary Kelly (Ex 57, 58, 61) on the composition and operation of the market for child care services showed there is overlap between the services provided by informally by workers outside the award, the family day care services, centre based child care and early childhood education centres. The overlap has the effect of reducing community recognition of the technical, interpersonal, management and child development skills required by Advanced Child Care workers in long day care centres, because their work is confused with that of less qualified workers in the family day care and informal sector.

119.The industry has recently emerged from home into the mainstream industry market, with consequent implications for definition of the work and identification of skill levels. The work itself has developed from the complex multiskilled and multi-tasking housewife and mother role, but initially differentiated from early childhood education. In the 1970s, awards were established for charity based institutions, before government regulation to improve the quality of child care centres established the requirement for child care workers to apply additional child development, management and interpersonal skills. Competition between kindergartens and day care centres contributed to perpetuation of the public image of qualified advanced childcare workers as less skilled than, rather than equivalent to early childhood education teachers. Subsequent Minimum Rates Adjustments and unscrutinised consent awards have not addressed undervaluation of the work.

120. Bargaining strength

A number of factors, each by themselves enough to weaken the bargaining power of industrial unions, are present in the situation of child care workers:

- multiple workplaces with small numbers of workers (Millane Ex 36)
- governments exercise their dominance in the market and hold down grants for services, reducing management capacity to pay (Kelly, Ex 61)
- awards are minimum rates awards, which in the absence of opportunity to achieve Enterprise Agreements or overaward payments, function as paid rates awards
- consent agreements

121. Other factors reduce the preparedness of the workforce to take industrial action, such as:

- the professional ethic of responsibility for quality of service to the children (Kelly, Ex 58, Matirena Ex 51, Konitsas Ex 53)
- Workers provide high intensity services involving close relationships with the children's families, so develop strong loyalties to their clients. They are aware of the impacts of wage increases on the user charges and child care centre viability (Bell, Ex 44,45)

Normal work loads and management practices include an expectation that advanced child care workers will perform unpaid overtime (Matirena, Ex 51; Konitsas, Ex 53)

122. The skilled nature of the work has been established through the evidence of Millane, Bell, Godhard (Ex 68), Lindgren (Ex 65) and Kelly, and site visits, particularly the evidence from the Lady Gowrie Centre. In keeping with common industrial relations practice, qualifications and training requirements were used to compare the work value of the advanced child care worker classification with the C10 metalworker.

123. It is clear from evidence in the Inquiry that some parties to the Inquiry experienced difficulty communicating about the range of child development, interpersonal communications, and management skills required by the Advanced Child Care

Workers, in the absence of a range of appropriate criteria and benchmarks for determining work value in intensive human services occupations. The absence of a full skill taxonomy for these types of work was apparent in the language used by these expert practitioners, the education experts, and the employers to describe the work. That the qualification hierarchy for child care work is not well known also hampered the Advanced Childcare workers in making the case for the value of their work.

124. The evidence in the Inquiry indicated sex stereotyping, in an implicit assumption that, on the whole, caring for healthy small children is unskilled domestic work, and that ability to perform the work is an innate sex-based characteristic of women rather than a complex set of learned skills and knowledge. However, child development is a perfect example, that occurred in the Inquiry itself, of the problems female dominated occupations in the intensive human services industries face in establishing the value of their work.

125. Undervaluation of child care work takes the form of:

- The award classification structure does not appropriately recognise the qualifications and work of childcare workers;
- The award has a limited post-qualification career structure
- Absence of access to over award payments or enterprise agreements

Absence of access to paid overtime also affects rates.

126. Recommendations

We adopt the Recommendations of the Labor Council and consider that the following specific issues should be addressed:

- The work, levels of responsibility, and skills and knowledge requirements for all types of child care workers and early childhood teachers should be fully investigated and described, for each award and its classifications.
- The career paths between the various classifications should be specified, along with qualifications requirements.
- Qualifications should be articulated, to provide a comprehensive qualifications framework for both streams of child development worker.

- The knowledge and skills framework for the core knowledge of child development work, and the associated role requirements should be established
- At the occasion of the S.19 award review, the Commission should review the alignment and definition of the classification levels and career structure in the award.

LIBRARIANS/GEOSCIENTISTS

Findings

127.Market

70% of librarians are employed in state and local government and education institutions, while only 30% of geologists are employed in the public sector. The operation of the public and private sector markets as compared through remuneration levels for junior level professional librarians and geologists were shown to be similar, although the difference in remuneration increases with level, and is more pronounced in the private sector.

128.Historical analysis of paid rates award rates of pay for mature professionals showed that the pay relativities remained constant for almost 40 years, with librarians receiving 85% of the remuneration of geologists, since the time when rates for female dominated occupations were set as a percentage of the rates for male dominated occupations of comparable work value. (Fruin, Ex 132, p,47)

129.Evidence was given by Ms Good, (Ex.138) that industrial relations mechanisms for taking work value cases prevented the PSA from taking a case that compared the work value of librarians with other public sector professions. The union was “continually frustrated by the changing wage fixing principles, including the wages pause, the wage freeze”. The option of taking a work value case through Anomalies and Inequities provisions would not allow the underlying undervaluation problem to be remedied. Ms Good’s evidence substantiates the evidence given by other organisations and by Professor McCallum (T 1645) regarding the need for new pay equity principles and mechanisms to enable undervaluation to be redressed on a collective basis.

130. The tension experienced in service industries between paying fair wages and maintaining service delivery has been demonstrated (Schmidmaier, Ex.145, Fruin Ex.132) to have been resolved in the case of librarians through historical policy decisions in the early 1900s to recruit female labour because it was cheaper. Organisational policies designed to hold down costs and explicitly to prevent females from achieving promotions were implemented in State Library organisation structures and reflected in the award, which have been largely unchanged since the 1950s.

131. The knowledge and technical skills involved in librarians' work have consistently been understated. (Schmidmaier, Ex 145). Librarians have career paths with small service increments and small promotional steps, so that experienced and qualified librarians are locked into lower paid positions in the award career structures than are comparable geologists. (Irvine Ex.141, Burnham, Ex 142, Gibbons, Ex 147, Good, Ex 138.)

132. Bargaining strength

Although librarians have relatively high union coverage, they constitute a small and relatively uninfluential group within the large public service union. The professional service ethic means that librarians are less likely to take industrial action to press their claims. Librarians reach an earnings plateau relatively early in their careers, and like nurses, many leave the profession for other better paid occupations.

133. Valuation of the work

The study demonstrated that librarians receive lower remuneration than geologists for jobs of comparable work value points, as recently measured by two different points factor job evaluation schemes, and that these results were consistent with comparisons using a third job evaluation system in 1991.

134. Reasons for undervaluation

Causes of current undervaluation of librarians work start with the fact that historical undervaluation has not been addressed. The award has a compressed classification structure that limits career and wage progression for librarians. Service increments are absent after two or three years. The effect of government dominance of the labour market for librarians has also contributed to perpetuate the undervaluation. Over the last 10

years, massive technological shifts in electronic information management have challenged the profession to redefine its core knowledge in information management (Schmidmaier, Ex 145, Irvine Ex.141), requiring a review of work value.

135.Recommendations

We adopt the Recommendations of the Labor Council and the PSA.

HAIRDRESSING

Findings

136.Market

The Inquiry was shown that different industry structures and different levels of regulation of the hairdressing and motor mechanics service industries have a major impact on the prevalence of enterprise agreements, the type and level of overaward payments, and the levels of recognition and remuneration of post trade skills. In each instance hairdressers are worse off than motor mechanics. (Smith, Ex 183). Low award rates of pay, and low levels of compliance with award rates contribute to low levels of retention (Smith, Ex 183) and to competition from the informal sector. The industry suffers from continuous skill shortages.

Context, valuation of the work

137.Post trade training is provided by both nationally and internationally accredited providers, and is dominated by private sector providers. Recognition of skill levels in the industry is hampered by the absence of a comprehensive articulated qualification hierarchy.

138.Close examination of the work of hairdressers and beauty therapists in the Inquiry showed the need for an industrially recognised skill taxonomy for creative and personal service work, to assist both employers and unions to articulate the qualitative criteria for skill recognition for creative and customer service skills. (Cordoney, Ex178, Swan, Ex.300, Roberts Ex 171).

139.The Inquiry was shown that work is inadequately described in awards (Smith, Ex 183), and that essential post trade

qualifications are regarded by hairdressing employers as “skill maintenance”, and are not recognised or remunerated, whereas the motor trades employers recognise motor mechanics’ post trade skills through higher level award classifications and additional overaward payments. This provided the Inquiry with evidence of the different treatment of men and women in recognition of value added through application of their post trade qualifications, (Smith, Ex 183). which is consistent with sex discrimination.

140. Bargaining power

The predominance of small workplaces, the absence of female organisers, and general low levels of unionisation have limited bargaining strength.

141. Reasons for undervaluation

- Increasing feminisation of occupation has led to a decline of its trade status and remuneration
- Poor evaluation of creative work in award
- Concentration in small workplaces with poor bargaining power, and low unionisation
- Skill shortages that are not generally addressed in over award payments or enterprise agreements

142. Recommendations

We adopt the Recommendations of the Labor Council

BEAUTY THERAPISTS

Findings

143. The Inquiry heard evidence that the deregulated market for beauty therapists shares most of the industry characteristics of hairdressing. Beauty therapists’ work and remuneration suffer from lack of trade status.

144. This is a new occupation. The types of work are fragmented, and the knowledge and skills base has not been properly analyzed nor adequately captured in the award, which therefore provides poor recognition. Like hairdressers, beauty therapists do not generally have access to overaward payments

145.Recommendations

We adopt the Recommendations of the Labor Council

SEAFOOD

Findings

146.The seafood industry operates with a highly sex segregated workforce. Despite technological change eliminating much of the requirement for strength for heavy lifting, occupation segregation has been maintained by management practices in work organisation and recruitment, and by custom and practice in the workplace. Privileges for male workers have been maintained through exclusion of women from historically male dominated classifications (such as supervisory work, and “heavy” work areas, which control the pace of work). The Commission heard evidence that women have been ‘kept in their place’ by intrusive and endemic sex based harassment.

147.Women as a result are crowded into areas of highest work intensity with pay dependent on the lowest piecework rates. This is characteristic of much of the food manufacturing sector.

Reasons for undervaluation

148.While deskilling of some female dominated areas of work has been accompanied by intensification of work, there have been no wage increases to compensate

149.Systems of work organisation provide for increased remuneration for male dominated areas of work through better access to overtime for butchers compared with trimmers.

150.Recommendations

That the Commission consider processes for addressing including any necessary directions to employers and unions to facilitate equal employment opportunity strategies for workplace cultural and structural barriers to pay equity. This be accompanied by employer led OH&S improvements and work design to allow women access to all areas of work, and to reduce injuries associated with trimming.

enhance the prospects of the claim succeeding (Shean T1961, 1981)

160. The single occupation focus and high union density have allowed relatively effective use of industrial mechanisms.

161. Market and other differences between export sectors and government funded service sectors, or geographic factors, have not been examined in sufficient detail to make recommendations.

Term of Reference Two

The adequacy of tests and mechanisms for ascertaining work value and the extent to which, if at all, they are inequitable on the basis of gender.

Existing tests and mechanisms not adequate

162. Existing tests and mechanisms for ascertaining the value of work are inequitable on the basis of gender to the extent that they do not adequately recognise or measure the value of women's work. The same gender bias problems emerge whether pay rates are determined through work value assessments, job evaluation systems or competency assessment (Burton, Ex 242, paras 5, 64-74; transcript p.1921:30 -1922:10). The sources of gender bias in all systems relate to how jobs are described; how they are analysed into elements; how the factors of value are determined; how they are measured; how they are weighted; and how money values are attached.

163. Equal remuneration requirements recent

Until recently, the Commission and the parties have not been required by law to provide equal remuneration for work of equal value. Thus, much of what now needs to be fixed for the objectives of the IRA and the ILO 100 to be achieved was lawful at the time it was decided or done.

164. Effects of consent arrangements

The predominance of consent arrangements in the NSW industrial system, in relation to all means of assessing the value of work, has on occasion operated to the detriment of women workers (Hunter T1746, Bennett ex 233, McCallum T1657). Historically women have been largely absent from the decision making positions in unions, employer organisations and industrial tribunals which have negotiated about their interests, although this situation is slowly changing. That has limited access to taking cases about undervaluation of work even where the then current principles might have allowed them. Women would often have had limited influence in their unions to secure the priority for their issues and resources required for cases to be prepared and run.

165. The consent arrangements facilitate the incorporation into industrial instruments of sex stereotyping leading to undervaluation of women's work, with those assumptions barely examined by a third party (Bennett Exhibit 233). On some

occasions, women's interests have been subsumed in broader industrial concerns about possible effects on relativities in male dominated work and the implications of them, preference for avoiding arbitrated settlements and preserving agreement among the negotiating parties.

166. *Work value historically based*

Historically, work value assessments of women's work have not been free of sex discrimination. Assessments have been overtly influenced by a sex-specific, family needs-based approach to setting the basic wage, and the legacy of this gender-based pay discrimination continues to be felt in female-dominated occupations and industries (Hunter, Ex 232; McCallum, Ex 210, para 8).

167. Further, the factors of value and the weightings accorded to these factors in the traditional work value tests used in industrial tribunals in Australia reflect most strongly the structure of what was valued and recognised as productive in male dominated occupations especially (since the late 1960s) those in manufacturing industries (Burton, Ex 242, paras 6-24; Hunter, Ex 232).

168. The work value criteria have been varied and widely interpreted. It has been acknowledged that the process of assessing work value is subjective and very influenced by the perspectives, knowledge and values of arbitrators (Hutson exhibit 409). It was acknowledged in the Metal Trades Award Case (1937 37 CAR 176 p. 183) that the fixation of margins must of necessity be arbitrary and that there was no measuring rod for ascertaining the relative value of skilled, semi-skilled and unskilled labour. An assessment could only be based on consideration of past practices and changes in methods of production.

169. In the Metal Trades Work Value Case 1967 (121 CAR 587 - Print B2916) the Commonwealth submitted that skill is something of a completely different order from manual dexterity (p.805), a view shared by a member of the Bench, who stated that process workers "handle machines the operation of which calls for manual dexterity rather than technical skill (p.743). A proposal to introduce another classification in the female dominated areas was rejected on the grounds that it might create factory jealousies to which women were assumed to be

prone (p.642) although it was acknowledged the process worker classification covered a wide variety of skills and tasks.

170. Commissioner Winter said:

There was some ground for considering...that with regard to the process workers working in the domain of the miniature in electronic and electrical component processing, the female was more valuable than the male in certain classifications (p.796)... In this domain it is not too much to say that the reality is that the female process worker usually warrants a higher wage than her male counterpart (p.888).

171. *Effects of exclusionary processes*

There were two processes involved in the masculine monopolisation of skills:

- the exclusion of women through discriminatory award clauses from jobs and from apprenticeship training; and
- the non-recognition of women's skills (shallow skill taxonomies and small margins). Thus both horizontal and vertical relativities were depressed in women's classifications. EEO approaches have been proposed for the first issue (although very limited success has been achieved). The second issue is one of classification and evaluation and is very much before the current Pay Equity Inquiry.

172. *Influence of social context*

The interpretation of work value principles has always been influenced by the social context of the time (Bennett exhibit 233). It was inevitable that assessment of the value of women's work would be affected by sex stereotyping and lead to undervaluing of the work. The members of tribunals and the industrial parties were (almost entirely) men of their times. The skills and challenges and work disabilities of the work in female dominated occupations have often been considerably less likely to have been experienced by, or understood by, or familiar to, the industrial parties and the Commission members than those characteristic of male dominated work.

173. The specification and measurement of work value has been so broad that there was room for perspectives and values about the social position of women to colour assessments of value of work. This was evidenced in the librarians case study, where the highly skilled work of classification and cataloguing was downgraded in assessment to clerical work. In male dominated scientific occupations, sophisticated classification and taxonomy work is highly valued because of the precision, carefulness, breadth of knowledge, accuracy and analytic ability required.

174. The Commission acknowledged in the Nurses Case (Re Private Hospitals and Doctors Nurses (ACT) Award 1971 (1987) 20 IR 420) that the work of nurses had been undervalued because it was female dominated.

175. *Work value examinations rare*

Since the equal pay cases it has been comparatively rare that full scale work value examinations have been conducted by the Commission. Hutson (exhibit 409) shows that work value cases were becoming increasingly numerous and progressively more complicated culminating in the 1967 Metal Trades Work Value Inquiry. The work value assessments led to proliferation of margins for differentiated classifications of work. Hutson also explains that work value cases were partly a response to the comparative wage justice pressures which meant that an increase in a benchmark award would progressively be transmitted by established relationships into other awards.

176. The timing of the equal pay cases, wage indexation and the wage fixing principles meant that women's work had not been properly and fairly integrated into the old framework of comparative wage justice relativities and the margins established through the work value cases up until the late 1960s by the time that system came to an end. However, future wage systems took that framework as a point of departure and allowed only claims about **changes** in work value and limited other anomalies and inequities and special case processing.

177. *Limitations from wage fixing principles*

Wage fixing principles in place since the equal pay decisions have limited re-examination of possibly discriminatory work evaluations and fresh consideration of the value of that work - for example, the restriction of work value claims to those involving work value changes from a point in time (McCallum,

Ex. 210, paras 10-12; L Bennett exhibit 233; L Bennett transcript p 1754).

178. Many service occupations, in which women are mainly employed are not necessarily effectively described and analysed in terms of the factors of value and weightings in traditional work value tests (Burton, Ex 242, transcript 1905:33-56). Caring skills including managing dependency have probably been undervalued compared with physical skills (Bennett ex 233; Walpole T 1640).

179. *Impact of sex stereotyped assumptions*

Rates in female dominated work previously done in the unpaid domestic or voluntary sector of production have been depressed in the paid workforce by sex stereotyped assumptions about skills and about women's needs to earn their own independent incomes. In these cases, market rates are depressed and industrial arrangements built on those rates perpetuate the discriminatory assessment of value in the market (Burton, transcript p.1908:39-1909:6). Work which is done in domestic-like contexts is less visible as work and is often undervalued especially in relation to its client service, communication and interpersonal skills (Charlesworth T1853, Burton ex 242).

180. This is an issue for childcare workers and the influence of the domestic sector is still felt in the relationship of the lower paid family day care workers with childcare workers covered by awards. The relationship of the domestic and informal sector to the market sector may contribute to the low rates of pay in the clothing industry. This may also be areas where employers use their market power to depress rates, in dealing with groups of the most disadvantaged employees with few other prospects of employment because of family care responsibilities, language difficulties, cultural practices limiting participation in work outside home etc. (Exhibit 315 Senate Economics Committee Report).

181. Job classifications in these situations are likely to be undifferentiated, at least initially, reflecting the integrated way such services are provided outside the market rather than the institutionally based approach of streaming levels and types of skills into different classifications with varying remuneration. There are many female dominated occupations in which

classifications are quite or relatively undifferentiated (including hairdressing – exhibit 186).

182. Evidence before the Inquiry shows that sex discrimination has influenced assessments of relative value of work of men and women in the implementation of the equal pay decisions and in subsequent industrial matters including minimum rates adjustments and award restructuring under the structural efficiency principle.

183. *Women's industrial position*

Women's capacity to achieve industrial examination of the value of their work has been affected by their less powerful industrial position including lower union membership, less influence and decision-making positions in unions, lower representation in positions in industrial tribunals and in industrial relations roles in public and private sector employing organisations and in employer organisations, greater concentration of employment in small workplace and part time and casual work.

184. Thus, women's ability to correct outcomes of industrial processes had been limited and over time, as new systems and principles build on what is already established, the historically established relativities and rates can come to seem legitimated and become harder to change. At the same time there is potential for each successive development to compound the disadvantages already established (for example, where percentage wage increases provide significantly more money to better paid workers than to those who are lower paid through undervaluation of their work).

Impact of women's employment characteristics

185. Other characteristics of women's employment have also affected their ability to claim work value and secure remuneration for it, including design of work processes and jobs, and concentration in labour intensive service sector work.

186. Women have also been in occupations with less control over entry to occupations, less formally recognised training contracts and arrangements, less and fewer and lower level qualifications. Their workforce participation has been more likely to be broken and their experience less. They have been excluded from some occupations and crowded into other less valued by legislation

and custom and practice. Occupational sex segregation is maintained in workplace culture in many workplaces long after legislative barriers have been removed through practices such as sex based harassment and discriminatory recruitment and promotion and occupational streaming. These issues are graphically demonstrated in the Djokic (p.1601) and Horne and MacIntosh (p.1633) Cases as outlined in the evidence of Ms Walpole, transcript 23/4/98.

187. *Government as employer*

In professional occupations women have been concentrated in the public sector based professions such as teaching and nursing which are the lowest paid professions although women's share of professional occupations is broadening and increasing now (Crockett ex 416)

188. Where the government is the main employer of particular types of labour, it can effectively determine market rates for the whole occupation. It is possible for governments to use their market power to keep rates down especially in areas where the number of people employed means that any increase would have to be factored into government budget strategy and/or where alternative employment is very limited.

189. *Monopsonistic labour markets*

Some areas of government employment have monopsonistic characteristics in the terms in which that concept has been discussed by Cox and by Borland (exhibit 277), and in the article by Dickens, Machin and Manning (exhibit 273).

190. In monopsonistic labour markets, there is potential for increases in rates to be accompanied by increases in employment, since further increases in supply are elicited by the increased pay and the rates previously were below the market value of the work. This can occur up to the point where demand is filled. However, in public sector employment determination of demand is essentially political and productivity measurement is also very difficult.

191. The occupations in which women have been concentrated have often been those in which activities which did not attract much recognised work value were concentrated, while components of value tended to be concentrated more in male dominated occupations (eg higher level skills, heavy work,

responsibility for people and/or money). There has been substantial downward pressure on rates and acknowledged work value by sizeable informal sectors associated with some female dominated occupations including childcare, hairdressing and clothing outwork. These occupations have not been effectively regulated by both licensing and industrial regulatory systems. For example, in hairdressing licensing requirements were reduced in 1990 (exhibit 186).

192. *Service sector*

Women's employment has been concentrated in the service sector. Service sector industries generally have low capitalisation and a greater share of costs is accounted for by labour. Compared to more highly capitalised industries (like mining), it has been harder to achieve pay increases in labour intensive areas.

193. *Need for transparency*

The essentially subjective aspects of work evaluation mean that it is crucial that assumptions made and perceptions about the nature of work, the factors of value, their weightings and rewards for them be highly specified and transparent. In that way, the Commission and the industrial tribunals can identify sources of sex discrimination affecting pay.

194. There has been some resistance in the past to requiring great specificity in the work value process since it could limit the flexibility often required to resolve disputes, and facilitate bargaining, negotiation and industrial manoeuvring sometimes broader than the matter under consideration. Greater specificity has also been seen as possibly imposing rigidities producing unwanted effects on work organisation related to prioritising and enlarging and claiming whatever factors and activities would attract most value and remuneration

195. *Need for good knowledge and understanding of the work*

It is important that industrial parties and the Commission inform themselves broadly about the work in question when work value is being considered. It may be necessary to bring into the process a range of community perspectives as well as the industrial parties and would often be necessary for the work to be observed. As Burton (exhibit 242) has explained whatever the system for evaluating work, it is only as good as the description of what the work is.

196. This process would lead progressively to reduced reliance on systems and methods which are more likely to result in discriminatory outcomes and so contribute to progress in meeting the requirements of the IRA and the ILO 100.

197. *Not comparative wage justice; not comparable worth*

We are not arguing for restoration of comparative wage justice. We are not arguing for a comparable worth system in which an assessment and rating by some system (points/factor, skills/qualification hierarchy) automatically is translated directly into a set and identical pay rate. We are arguing for assessment of women's work on a case by case basis according to its value without sex discrimination.

Equal pay cases

198. Equal pay for equal work was introduced in 1969 by a decision in a Test Case in the federal Commission. The decision was broadened in 1972 to providing equal pay for work of equal value. During the case the Commission was told that only 18% of women had benefited from the 1969 decision because of the limited number of women doing the same work as men. Employers supported equal pay as a matter of social and economic justice. The NSW Commission adopted the equal pay principles broadly in its 1973 decision. A very useful account of the development of industrial jurisprudence and legislation relating to work value and equal pay has been provided to the Inquiry in exhibit 32.

1972 decision

199. The 1972 decision contained the following elements (as summarised by the Australian Commission in *Australian Manufacturing Workers Union and Others v Alcoa of Australia Limited and Others* 23 January 1996 exhibit 429) :

- It was to apply to all awards
- The Commission defined equal pay for work of equal value as fixation of award rates of award wage rates by a consideration of work performed irrespective of the sex of the worker
- The Commission said the automatic application of any formula which sought to bypass a consideration of the work performed was inappropriate to the implementation of the

principle. However, preexisting award relativities could be a relevant factor in appropriate cases

- Work value comparisons were to be made, where possible between female and male classifications in the award under consideration. [Failing that comparisons could be made with comparable classifications in other awards]
- The value of the work referred to worth in terms of award wage or salary fixation not worth to the employer.
- Consistent with normal work value practice it was for the arbitrator to determine whether differences in the work performed were sufficiently significant to warrant a differentiation in rate and also whether restrictions on the performance of work by females warranted any differentiation in rate based on the relative value of the work.

200. The Commission has said:

It is clear that the principles established in the 1972 Equal Pay Case and indeed subsequent work value principles enunciated by the Commission from time to time were and are referable to ensuring fairness and equity in award wages. These exercises are undertaken by the Commission by way of an assessment of wage rates for work within classifications in the relevant award and wage rates for relevant classifications in other awards. With limited exceptions work value exercises have not been undertaken in relation to overaward payments p.159

201. The Commission went on to say:

It is clear from those principles that it is not open to the Commission to automatically apply an equal pay for work of equal value approach or as it was referred to earlier a “formula” without undertaking an examination of the work in question and an assessment of its worth in money terms.

We should indicate, however, in this context the Company’s argument that they value the work of certain employees more highly than that of others is as a matter of principle, at odds with the approach of the Commission when undertaking any work value exercise. It does not take into account the value the Company places on the work in question. The validity of this approach should be clear in that the setting of award rates is by reference to the relativity of work of equal

value vis a vis rates within the award and those for comparable classifications in other awards. P.160

202. *Comparisons outside award rare*

However, research by Christine Short (tab 6, Exhibit 230) shows that very few work value investigations were carried out as part of implementing equal pay. Implementation of equal pay in most awards was by consent, with male union officials and male management negotiations agreeing on the appropriate placement and rates for women workers classifications. Margaret Thornton (tab 3, exhibit 353) argues that women were often simply transferred onto the award as the lowest classification.

203. Although the decision did allow comparisons outside the award, these rarely occurred. Where they did, female classifications were compared with other undervalued female classifications. The high level of occupational segregation meant that in many female dominated occupations there were not available comparators within the award.

204. *Women's earnings improved*

The pay increases from the equal pay cases did improve the earnings of women relative to men significantly. However, they operated mainly to remedy the part of the pay gap historically established by the sex differentiated basic wage rather than through an objective re-evaluation of the value of women's work. The work value component traditionally reflected in margins was not fully examined to identify undervaluation. It may be that the 1972 equal pay decision had its greatest effect in male dominated and mixed occupations rather than in female dominated occupations.

205. Part of this problem arises from industrial parties taking the short cut of consent agreements about work value rather than the investigations contemplated by the Commission's decision.

206. *NSW experience*

Similarly in NSW, the Commission had said in the Female Hairdressers Case [1929] AR 39) that work value margins were to be set according to the skills and not the sex of the worker. However, in the Paint and Varnish Makers Case [1957] AR 108, the Commission identified causes for concern as to whether margins had in fact been set on the value of the work not the sex

of the worker. In the NSW Commission's 1973 equal pay decision [1973] AR 425, it was provided that the rebuttable presumption could be made that margins had been set without regard to sex so implementation of equal pay would not be delayed.

207. Similar considerations apply regarding the minimum rates adjustment process. The specified template awards did not include awards reflecting female dominated work so comparisons had to be made with metals and building work. Despite acknowledgment that comparisons did not have to be of work of like nature, the template can have a distorting effect on how adequately work is described and analysed.

208. There was not a clear specification of how comparisons were to be made. There were very few investigations of the work people actually do which means assessments of value can be based on partial information about the nature of work and interrelation of activities and conditions.

209. It may be that the appetite of industrial parties and the industrial tribunals for work value inquiries had been blunted by the large number of work value cases and their increasing complexity in the period 1957-67, especially since apparently parties were variously dissatisfied with different aspects of the large scale metal trades work value inquiry (Hutson ex 409)..

210. *Job evaluation*

Job evaluation methods share many of the same deficiencies as those outlined above regarding traditional work value tests. This reflects the shared importance in the systems in assessments of skill, responsibility and qualifications. Formal job evaluation systems can, however, operate to make clearer the factors considered and weights attached to them especially where points factor systems are used. That can facilitate identification of sources of sex bias and discrimination. (Burton ex 242, T 1894)

211. *Guidelines developed*

Guidelines have been developed for controlling sex bias in design and implementation of job evaluation systems and these can assist in revealing and addressing and minimising discriminatory impacts. However, it is also clear that considerable time and effort and care is required for job

evaluation to meet the standards of the guidelines and sufficient time and effort are not always invested. This has been considered at length in several cases in overseas jurisdictions – for example, *Ontario Nurses Association v Regional Municipality of Haldimand-Norfolk* (no 6) [1991] 2 PER 105, Pay Equity Hearings Tribunal Ontario, Canada; *Evesham v North Hertfordshire HA and Secretary of State for Health* DCLD 33 EOR 76; *Hayes & Quinn v Mancunian Community Health Trust* DCLD 29 EOR 70; *Armco Steel* (exhibit 351).

212. Not appropriate as sole basis for pay setting

Since job evaluation systems are primarily designed for ranking jobs in organisations in relation to their value to employers, they do not provide an appropriate basis for directly and solely setting remuneration in Australia's industrial context.

213. The Commission can in making industrial instruments take account of other factors which are not well dealt with by job evaluation methodologies, such as working conditions. In the *Armco Steel Case*, the court found that the Hay system did not take account of seniority, merit, and differentials on "factors other than sex". It has been recognised that points factor job evaluation systems as used in Australia do not take account of working conditions. Since the purpose is to evaluate the job, it does not take account of individual performance. While the systems do build in market adjustments they do not always do so in a transparent way. It has also been considered that the systems are biased to consideration of white collar and managerial jobs. Some have seen the systems as unsupportive of team work and promoting Taylorist work organisation since the individual job is the unit of analysis, value and reward. The Hay system has also been criticised as placing too much significance on responsibility for money and on supervision. (Burton exhibit 242) Job values are strongly affected by the accountability biases of the existing hierarchy in the organisation.

214. Structural efficiency principle award restructuring

In some female dominated occupations, structural efficiency exercises did not result in appropriate recognition of post trade training, qualifications and skill.

215. To the extent that recognition of further skills and training depended on formally recognised qualifications, some female dominated occupations were disadvantaged by the lack of articulated formally accredited courses and by the relative absence of arrangements for recognising and accrediting prior learning and already achieved competencies.
216. To the extent that SEP focused on restructuring relationships among award classifications, it could not address one of the key issues in female dominated work, that too wide a range of work and skills are bundled in one classification. Rather than streamlining the award by reducing the number of classifications, what was really required for appropriate recognition of the range of work in the classification and its proper relationship to other work (within and outside the award) was unpacking the classification into differentiated components and classifications. Where this did not occur, substantial aspects of value in the classification were overlooked and the classification not properly related to others in the award (Probert, tab 13, exhibit 103; Kelly exhibits 57, 58, 59).
217. Award restructuring under the SEP did not have as its focus reexamining the value of female dominated work.
218. *Competency assessment*
Competency assessments have not been used generally for setting rates of pay although the metals competencies are attached to the award and other awards include position descriptors. Standards and components vary across industries. Industry bodies vary considerably in their approach to the standards. The standards are based on what is expected to be known or can be performed rather than what is known or done.
219. There has not been agreement of industrial parties and government especially training authorities that competency standards are appropriate means of grading work and skill for industrial purposes
220. Many of the same concerns have been raised about competency standards as a basis for considering work value as have been raised about traditional work value assessments and job evaluation, including the adequacy of job descriptions, the lack of specificity about factors and weightings, and the validity of the bases for selection and weighting of factors and attaching

remuneration to them. All these areas can give rise to gender bias.

221. Competency specifications do not provide a good framework for considering the value of work where the skills and knowledge components are limited and the value of work is located more in conditions, specific effort or work stress or work rate etc. However, competency standards can improve specification of knowledge, skills and activities jobs require and in that way improve transparency in evaluating work.

222. *Minimum rates adjustments*

The use of MRAs in NSW has been limited. The implementation of it was left in the hands of industrial parties without the specific stimulus provided in the federal jurisdiction of tying MRAs to safety net increases.

223. MRAs still have some potential usefulness in providing an industrially familiar way which has been part of wage fixing principles for some time for dissimilar work to be compared.

224. Weaknesses in MRA application to date in both federal and state spheres relate to the problems of relying for comparative benchmarks on the template awards which were in male dominated areas and in the limited investigation of work actually done. The template makes it likely that unions seeking increases will draw as close comparisons as they can with the skills etc. of male dominated work. Shean explained how work value cases in nursing focused mostly on the scientific and technical skills rather than the caring and interpersonal skills (T 1962).

225. *Special Cases, Anomalies and Inequities*

These principles have not provided and cannot provide for reopening consideration of work value in historically undervalued areas of women's work.

226. By their definition, they have been confined to narrow comparisons and required to have limited cost consequences for the work in question and for other occupations (McCallum, Transcript, p.1647)

227. Where special cases have not been able to be negotiated by consent, they have had to meet the standard of scrutiny of the Full Bench.

228. *1986 Nurses Case*

The stringent conditions attached to establishing anomalies and inequities were demonstrated in the 1986 Nurses Case (Re Private Hospitals and Doctors Nurses (ACT) Award 1971 (1987) 20 IR). To have the equal pay matter heard, it had to be established that the case satisfied the requirements for finding an anomaly, that the work value arguments could be developed within the “change in work value” principle and that the inequities claimed fell within the stringent requirement of that principle (that people doing the same work received different pay). The case may well have been structured differently in the absence of the requirement for it to fit within the then current principles. It is impossible to know whether cases in other areas did not proceed because they could not satisfy those requirements despite there being valid equal pay arguments based on historic undervaluation.

229. Felicity Rafferty (exhibit 231 tab 4) describes the effects of these principles on the capacity of unions to run successfully equal pay cases, referring to several cases in professional areas of the federal public service.

230. *Relationship of equal pay principles to other wage fixing principles*

The relationship of equal pay principles to other wage fixing principles in place from time to time has often been unclear. Where the continued operation of the equal pay principle was not specifically included in the decisions on principles, it may well have been considered that access for equal pay cases was no longer available. In the Water Resources Case outlined in exhibit 32, the Commission notes that the current principles did not specifically provide for equal pay cases, and suggests that equal pay cases would have to be subject to the constraint of the other principles although ultimately the Commission decided that the equal pay matter could be dealt with on its own terms.

231. *Librarians*

In NSW, the PSA was “continually frustrated by the changing wage fixing principles including the wages pause” in

trying to take a work value case comparing the work of librarians with public sector professions and the case that could possibly be taken under the Anomalies and Inequities Principles would not have remedied the historic underlying discrimination (Good, Statement, exhibit 138)

232. In the Therapists Case the Anomalies Conference agreed that the 1969 and 1972 decisions had not been not applied for physiotherapists, occupational therapists and speech pathologists in the Australian Public Service. In their claim for inclusion in the science group the emphasis was on qualifications (including course duration, entry requirements, curriculum content) rather than work level descriptors. The focus was not on equal pay but on change in educational qualifications since 1973. (Print G1499 1985 p.2)

233. In the Social Workers Case, the inequities principle required comparison of like work (Rafferty, ex 231, tab 4). It was established that social work was the lowest paid profession through comparison with counsellors and psychologists but the required focus on similarity of work limited application of the case.

234. *Productivity bargaining*

Productivity bargaining has not worked well for generating pay increases in female dominated occupations. In NSW women are only a quarter of those covered by enterprise agreements. Dr Whitehouse (ex 118), Professor Green (ex 271) and Ms Bennett (ex 233) point out difficulties for women in enterprise bargaining. Professor Wooden also considers enterprise bargaining has specific effects for women because of the high proportion of part timers.

235. *Productivity hard to measure*

Many female dominated occupations are in areas where productivity is hard to measure including outside the market sector - for example, in the public sector where productivity is conventionally set by economists at zero and in many service sector occupation. Productivity can be especially difficult to measure where the key differentiation is service quality and services are purchased by government from community or private sector on behalf of the end users.

236. *Clerks excluded*

For some female dominated occupations (eg clerks) industrial bargaining has resulted in their exclusion from sharing through enterprise agreements in the rewards for productivity of the organisations in which they are employed (DIR Enterprise Bargaining Report 1995, Exhibit 103 Tab 2).

237. Gender inclusive assessment and consistency across the enterprise in identification and distribution of productivity are important aspects of ensuring women can benefit from enterprise bargaining. There is a need to ensure the spread of occupations at the workplace is covered and support and ancillary occupations are included.

238. *Bargaining power*

In many female dominated occupations bargaining power needed to win recognition is limited and there are few opportunities to bargain although productivity and productivity improvements are being generated.

239. *Centralised wage fixing*

Centralised wage fixing has contributed to the relatively high level of pay equity of Australian women compared with women in many other countries (Whitehouse exhibit 118, T815-16; Walpole T1617; Bennett exhibit 233). As the industrial system in Australia is becoming more decentralised, improvements in the gender earnings gap have stopped. The high water mark for women's earnings was just before the introduction of enterprise bargaining.

240. *Public sector bargaining*

Gillian Whitehouse's work demonstrates that centralised wage fixing contributes significantly to higher levels of pay equity. Whitehouse also shows that another significant factor is a greater proportion of public sector employment (tab 5, exhibit 353), in which there has been a substantial decline in Australia over the last ten years. (Also Gregory Transcript 679, 689-90).

241. The situation of public sector occupations regarding productivity bargaining is complex. Governments exercise substantial market power over many public sector occupations, and virtually set the market rates. In many of these occupations it is hard to demonstrate productivity. Pay rises have substantial budget implications where the occupations are relatively numerous. Ray Cavenagh's evidence (ex 400) was that

teachers pay has been as significantly affected by political considerations as much as industrial ones. Crockett shows that teachers are now the only profession where earnings are below the value the human capital variables would indicate compared with other professions.

242. For some occupations, enterprise bargaining is impractical and not meaningful since the occupations are spread across many workplaces and produce their outputs within a system of service delivery (eg teaching and nursing) and there are significant benefits in maintaining common structures and conditions.

243. In some areas of the public sector, governments have been keen to see the public sector workforce covered by enterprise agreements as part of overall government industrial relations strategy. There has been increasing questioning of paid rates awards which some claim have contributed significantly to the relatively higher pay equity ratio in the public sector. However, there are also other public/private sector differences in other relevant human capital variables including qualifications, educations and skills.

244. *Overawards and the market*

In applying State decisions and setting rates for particular occupations, industries and firms, the Commission has taken account of market considerations including labour market supply and demand, and economic circumstances of industries and organisations including capacity to pay, profitability, productivity etc.

245. Market considerations have been especially important in making first awards. Higgins J said in the *Marine Cooks Case* 1908 2 CAR 55:

It is not for me to find a scientific basis for the distinctions in the wages paid to the various skilled employees as between themselves and the unskilled, and one another. The distinctions made may perhaps be traced to the operation of monopoly in greater or lesser degree; but the fact that they exist and are recognised in the practice of society is sufficient for me, in a practical inquiry with the view of settling disputes...I have no right to formulate, no right to apply any novel ideas...In this case I have very little

guidance...except in the practice of the employers themselves p.65

246. Overawards became a more important part of wage determination after the Second World War. Overaward provided a market adjustment mechanism, particularly in capital intensive industries where there was capacity to pay, a shortage of skilled labour as a result of the war and a climate of rapid growth.

247. Employers have also paid overawards relating to a wide range of factors including firm specific knowledge and/or experience, individual performance, organisation or group productivity, loyalty or long service payments, morale building bonuses etc. as noted by the Full Bench in the 1997 Safety Net Review Decision 73 IR 200.

248. *Discrimination in overawards*

Overaward payments is an area of substantial sex related pay disparity, with women getting around half the overawards men do (Pay Equity Issues Paper Exhibit No.192) HREOC's report on discrimination in overawards *Just Rewards* (MFI A) also shows that women are more likely than men to be paid overaward payments on an individual basis and for specific performance while men are more likely to get overaward payments on a collective basis. It does appear that discretionary payments favour men, possibly because of perceptions about what contributes to and indicates productivity and who is in an industrial bargaining position to succeed in claiming remuneration for achieved productivity. Part timers and some casuals have done badly in access to overaward payments (Bennett ex 233; Whitehouse T835)

249. The HREOC Inquiry also found sex differentiated use of overawards in that attraction rates were paid more for men's industries, merit more in women's industries. There were more overawards in unionised areas and women had less influence on employer perceptions of market requirements as they were and are less unionised.

250. Overaward payments have generally not been set by industrial tribunals although they have been taken into account in decisions about rates in awards and about absorption of increases against overawards. Overawards increasingly are being codified and formalised through enterprise bargaining,

thus improving the opportunities for the Commission to consider whether the organisation specific elements of remuneration satisfy equal remuneration and non-discrimination requirements.

251. *Overawards at HPM*

The basis of overaward payments was a major consideration in the HPM Case C23933 of 1995. HPM claimed that payments above the award and the enterprise agreements were made to workers on a variety of bases, including firm specific knowledge, long service, physical effort, particular work disability (sweeping up syringes), and the need to pay a specific rate to attract the required labour in some classifications. The union claimed that the payments (which went almost entirely to men and not to women) were sex discriminatory. While there were many reasons for which men might be paid overawards, there appeared to be almost none for payments for women.

252. The union claimed that firm specific knowledge was significant in classifications which did not get the overawards as well as those which did, that there was no consistent application of the criteria of payments for experience and so on. The union also claimed that the market survey on which ostensibly the overawards for general hands were paid was not a valid basis for payments. The survey was some ten years old, very small scale and informal and had applied to only one classification. Turnover data showed that the purpose for the payment, attracting and retaining suitable labour apparently had not been achieved by making the payments.

253. In this case, the market loading paid to general hands subsequently was also claimed by storemen but was not extended to the process workers and packers. In this situation, the fact that the female dominated classifications were prepared to work for the lower rates meant their eligibility for extra payments on the same basis as the male dominated classifications was not examined.

254. This case has raised several significant issues about over award payments. The specific issue is whether the payments were being made on discriminatory bases thus obstructing equal remuneration for women workers.

255. Women were prepared to work for less and so their possible entitlement to extra payment was not systematically examined

by HPM. The investigation of market rates was very limited and its application as justification for payments made questionable. The factors valued were not all demonstrably related to the productivity of the company or workers while other factors which demonstrably did contribute to productivity (such as the dexterity of process workers, the sole selection test criterion for their classification) were not rewarded.

256. Knowledge of the company's components and products was rewarded in some classifications and not in others. In any case, the evidence about how knowledge was assessed showed the process was inconsistent and incomplete. In general measurement of the factors ostensibly providing the basis for extra payments was very limited, inconsistent across classifications, partial and of quite doubtful validity.

257. Issues also arose about whether skills and knowledge already had been or could be recognised through the competency framework suitably adapted for the company. Commissioner Simmonds considered that in the absence of any agreement to use the competency framework for assessing the whole pay rate including the overaward, it was not a suitable basis especially for the lower classification level where a greater proportion of the work value was accounted for by factors other than skills and knowledge.

258. The company pointed out in its submissions that it might have been demonstrated that the company's human resources management practices were not sophisticated, it had not been proven they were discriminatory.

259. Important issues relate to possible tensions between the Commission's traditional reluctance to involve itself in overaward matters and the requirement imposed by the IRA and the ILO 100 for all components of remuneration to be free of sex discrimination.

260. The Commission has generally considered that the award framework was the appropriate place for setting out the factors and values of work common across the organisations in an occupation or industry. More firm specific, work group or individual factors and values were to be dealt with by overawards and more recently by enterprise agreements. Thus,

there was a component of collective skills and work value and a component providing flexibility for local conditions and needs.

261. It is however possible for there to be the necessary consideration of whether market loadings are discriminatory without the Commission determining the appropriate bases on which extra payments are appropriate in various product and labour markets.
262. Ray Bennett says in his revised statement (exhibit 331 pp 3-4) that employers draw on market information from employer organisations, industry contacts, information casually obtained from ill defined sources, newspaper ads, previous salary, experience and skills, relativities with others, market situation of the company, values and attitudes of the employer. He says that economic theory suggests that an employer can and should pay wages on the basis of the marginal revenue product of labour, in the derived demand approach (with demand for labour being derived from the organisation's market). However, the assessment of the value of marginal revenue product of labour or of productivity is extremely complex. Where the outcome is sex related pay differences, more than an assertion to the effect that wages have been set on a market basis should be required.
263. The HREOC Equal Pay Handbook (MFI 'A') sets out a range of ways in which discrimination can enter into overaward payments and market loadings. It also provides some principles and guidelines on avoiding discrimination. The key considerations in avoiding discrimination are objectivity and consistency, transparency and validity in specification, measurement and application of factors for reward.
264. Where the relevant sources of value which are to be rewarded have not been appropriately measured and applied, there is room for discriminatory assumptions. Only where the process of identifying and measuring factors can be documented is it possible to demonstrate the claimed non-discriminatory basis for the payment (knowledge, skill etc.) is applied and accounts for the sex related pay gap.
265. Weighing up the value of work as assessed by comparisons with what others do and are paid, with employers interests in setting their own remuneration systems to attract and reward what they regard as critical for the operation of their businesses,

is a long standing dilemma for industrial tribunals. The dilemma is essentially no different in the pay equity context than in others except that there is a legal requirement that the balance cannot be struck on the basis of gender.

266. *Equal pay cases – other jurisdictions*

Cases referred to in this section are in exhibit 351.

These issues have been extensively litigated in jurisdictions around the world. While the legislation and jurisprudence differs from country to country, some broad threads can be drawn through the logic of the decisions of the courts. Certainly, no precedent value is claimed for cases from other countries, whether common law countries or not. However, the decisions show what the courts concerned (often the highest courts of the country) decided on particular issues.

267. Market rates defences by employers generally succeed although they are not accepted as legitimising different rates of pay for men and women for the same work. The greater the degree of difference between the comparator occupations, the more likely it is that the pay difference will be found to be about some factor other than sex. It was found in *Glenn v GMH* that the market was not “a factor other than sex” and that supply and demand does not legitimate lower pay for women as women; and that neither is it lawful to pay women less simply because they accept less (a range of authorities is cited in the case).

268. The decision notes that “factors other than sex” as contemplated by the House of Representatives are many – shift differentials, restriction on time and day and hours, lifting or moving heavy objects, experience, training ability, red-circling of specific jobs. The court held that “factor other than sex” related to specifics of a job, individual characteristics or specific business circumstances. This approach is widely followed, that consideration of the basis on which sex differentiated payments are made has to be considered specifically and the factors have to be specific.

269. *Comparable worth*

It has been noted by US courts many times that comparable worth arguments (that discrimination exists where employees of different sexes received disparate compensation for work which may be of the same value but does not attract the

same rate in the market) have never been accepted as sole proof of sex discrimination in pay rates (for example, *Bohm v Hartz*; *Lemons*; *Christensen*; *American Nurses Association at al v State of Illinois*; *AFSCME*). Comparable worth studies have at best been accepted as prima facie evidence that rates have been affected by sex discrimination.

270. *Necessity of relying on market rate setting*

An issue attracting considerable discussion in cases is whether it has to be proved by an employer that reliance on the market is **necessary** for the business including in relation to wage levels necessary to attract labour (*Bohm v Hartz*: *Craik*). In *Langston Bradley v Pizacco*, business necessity was held to mean that there was a manifest relationship of the apparently discriminatory practice to the employment in question and there was no alternative to the practice, and if the company's ability to perform its primary function requires the practice. Similarly in *Isiah Ross Jr et al v Buckeye Cellulose Corporation*, the issue was found to be whether the practice serves in a significant way the legitimate employment goals of the employer. In *Rainey v Greater Glasgow Health Authority* it was held that it was legitimate to pay more to attract necessary labour in areas of shortage.

271. *Validity of market assessment*

Another significant issue is how and how validly the market has been assessed and in *Bohm and Hartz* it was held that wage discrimination issues cannot be avoided simply by reference to a market survey. In *Chang v University of Rhode Island*, the court noted that information on how the salary survey has been used was not provided as part of the market rates defence based on salary surveys. A regression analysis of 32 factors in the gender pay gap was conducted. The market rates defence was rejected partly on the basis that statistics showed discrimination in salary at hire with URI paying more to men. The court noted that gender based disparities at hire possibly were subsequently distended by across the board increases under collective bargaining agreements.

272. It has been acknowledged in a range of cases that the market can be discriminatory and that stopping perpetuating discriminatory operation of it is what equal pay legislation was intended to do (*Beall v Curtis*). In *Futran v Ring Radio*, it was found that economic benefits to the employer can justify pay

differentials (a range of authorities is cited). However, expected economic benefits could not justify sex disparities in starting rates. The company was found to have unlawfully paid the woman less to attract her, because of her weaker bargaining position.

273. *Past discrimination*

Market rates are sometimes discriminatory since they are built on past discrimination. In *Kouba v Allstate Insurance Company*, the court held that

The Act renders sex discriminatory wage rates violative regardless of whether they are more or less discriminatory than the rates paid by a previous employer...A resort to a so-called market rate where the market rates is itself a reflection of historical discrimination against women will not be considered a sufficient justification under the Equal Pay Act. (a range of other authorities is cited)

274. Taking account of previous salary for new hires without adequately considering content and responsibility of the previous job can perpetuate discrimination. In the *Manhart Case*, it was found that hours and responsibilities would have to be considered to determine whether lower pay for women based on prior salary would be discriminatory.

275. *Conclusions on market rates*

The key issues have been:

- A. What information and evidence is required to establish that sex related pay disparities are based on market forces
- B. What justification is required where a properly investigated and applied market loading results in sex differential pay outcomes for work of comparable value.

276. *First awards*

These are issues the Commission has frequently considered in setting award rates including in first awards. In first awards, the Commission has always been very influenced by market rates but has also been concerned to value work appropriately and relate it properly to other classifications and awards.

277. We submit that the Commission is required to take account of all components of remuneration including overaward payments

in relation to equal remuneration. It is the Commission's responsibility to ensure that whatever their basis, overaward payments are not made on a discriminatory basis. It will be difficult to do so where the payments are not based on information and evidence and the bases made transparent (Hunter 1708; Enderby v Frenchay Ex 351 Tab 13). In those circumstances, to carry out its equal remuneration responsibilities the Commission will have to require that the necessary information about the bases of the payments be provided by the employer as soon as it is established that the payments show a pattern of sex related disparities.

278. Unless this approach is adopted, equal pay cases in which overaward payments are an issue cannot succeed. A similar conclusion was reached by the European Court of Justice in the Danfoss Case, which stressed strongly the importance of transparency in wage fixing. The court concluded that the requirement for employers to provide information about the basis of payments where a sex related disparity was established and the pay setting system not transparent was essential to the integrity of the equal pay provisions.

Term of Reference Three

In developing recommendations as to remedial measures if necessary, consideration shall be given, but not limited to: current work value tests;

- . *the minimum rates adjustment process and other*
- . *industrial mechanisms including productivity;*
- . *job evaluation techniques;*
- . *matters of discrimination and the Anti-Discrimination Act 1977 (NSW) as provided in the Industrial Relations Act 1996 (NSW);*
- . *relevant international labour and other conventions, including but not limited to International Labour Organisation Conventions 100 and 111 and the United Nations Convention on Elimination of all forms of Discrimination Against Women.*

Jurisdiction

279. The IRC is the most appropriate jurisdiction for dealing with equal remuneration as it is able to address these matters in a systemic manner. It is contended that a collective and prospective approach to equal remuneration is essential to ensure the removal of pay inequity from industrial instruments.

Overview

280. Equal employment opportunity and social justice policies and practices, as well as providing women workers with greater access to male dominated occupations and industries, are not adequate measures to address the equal remuneration requirements under the IRA. Although EEO and other such policies are extremely important, their progress and application has been limited.

281. They will not address the fundamental factors that underlie pay inequity, such as, the discriminatory assessment of the value of women's work and skills. The argument (raised by ACM in their Outline of Submissions) that EEO and access measures are adequate to deal with these matters assumes that to gain more equitable pay, a worker must enter male dominated occupations and industries. This undermines the principle of equal remuneration

for work of equal or comparable value.

Pay Equity Principle

282. The Pay Equity Principle would have to contain the following elements:

- Broad criteria requiring that work value be investigated, and that rates be set by methods which are objective, free of sex discrimination (as required by the ILO Convention), and transparent in relation to factors of value employed, weightings attached, and the translation of assessed value into remuneration.
- list of factors as examples of those which might be considered in assessing work value. This list of factors would include those traditionally considered by the Commission (skill, responsibility, qualifications, conditions, experience etc.) and specifically include factors which are significant in the value of traditionally female dominated work such as interpersonal skills, nurturing, dexterity and coordination.
- The principle would apply whenever the Commission is exercising powers which relate to setting remuneration, including the making, variation and review of awards and approval of enterprise agreements, and to both consent and non-consent proceedings.

Access under the Principle

283. The threshold for access under the Principle should be demonstrating a gender-related pay disparity, together with evidence of either an evaluation method which shows that the work of the women and men is of equal or comparable value, or an evaluation method indicating that the rates have been affected by sex discrimination.

284. Access for claims under the principle would be available where it is claimed that the rates have been affected by sex discrimination, including:

- where rates set were affected by sex stereotyped assumptions about women's income needs resulting in under-remuneration of women's work for its value
- where lack of bargaining power and/or the form of the employment contract has contributed to incapacity to demonstrate and secure remuneration for the full range of factors of work value in female dominated work, in awards, overawards and

agreements, which has resulted in undervaluing the women's work

- where a significant informal sector has, through unfair competition against the public interest (including through transfer by employers of employment costs onto the community and increasing risks to public and employee safety), undercut rates awarded by the Commission, depressing the award rate and contributing to under-remuneration of women's work for its value
- where market rates originally affected by sex discrimination have been incorporated into industrial instruments, for example through first award setting principles and procedures
- where the exercise of market power by an employer or group of employers has led to under-remuneration of women's work for its value.

Amendment to the Industrial Relations Act 1996

285. The *Industrial Relations Act 1996* should be amended to strengthen its equal remuneration provisions to ensure that full effect is given to object 3(f) of the Act and to ILO Convention 100.

286..Appropriate amendment to the *Industrial Relations Act 1996* would provide a more integrated framework for ensuring that equal remuneration claims can be effectively brought before the Commission and that principles and guidance on addressing pay equity underpins the jurisdiction.

287. Commission responsibilities and legislation

With some adjustment the amendments could mirror the Equal Remuneration Division of the Federal *Workplace Relations Act 1996*. This Division has only been used once in the ongoing HPM matter. It should clearly articulate the relationship between its operation and other parts of the *Industrial Relations Act 1996*. It would therefore need to set out the Commission's pay equity responsibilities regarding both consent and arbitrated matters involving making, varying and reviewing awards; approving agreements; considering unfair contracts; and setting Principles in State Decisions and Test Cases.

288..The first case brought under the federal equal remuneration provision in the *Workplace Relations Act* was the HPM matter, which was flawed in a number of ways. Women's groups submit

that the HPM case shows deficiencies in the industrial framework which stem from a reliance on previous practice and criteria in the assessment of work value (likely to result in undervaluation of women's work) and the application of an inappropriate test for discrimination based on sex.

289. Commissioner Simmonds also pointed out difficulties in properly ascertaining the relationships between the equal remuneration provisions and other parts of the Act, and lack of clarity about the operative definition of discrimination. The case overall has demonstrated the need for principles and guidance to support the equal remuneration provisions.

290. This lack of clarity would be overcome by the proposed pay equity principle providing an effective mechanism for making out an equal remuneration claim and establishing whether industrial instruments meet the equal remuneration requirements.

Type of orders

291. Provisions would need to address the type of orders that could be made and the powers open to the IRC to provide for an immediate or progressive introduction of equal remuneration orders. A broad range of orders should be open to the Commission, in view of the complex and multi-faceted nature of equal remuneration issues (as set out by Ms Walpole in exhibit 209 and the *Peeling the Onion* speech attached to the Statement).

292. The diversity of factors giving rise to equal remuneration issues is also a reason that a new principle is required, addressing the range of matters canvassed in the Inquiry, which are broader than could be demonstrated in a Test Case on a single industrial instrument.

ILO Conventions

293. As in the Federal Workplace Relations Act, the new equal remuneration provisions should be underpinned by the ILO 111 and ILO 100 Conventions. ILO 111 would be applied in relation to its definition of discrimination, as referred to earlier.

294. ILO 100 provides the appropriate definition for 'remuneration' in article 1(a):

'the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable either directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's

employment.'

295.The ILO 100 definition of equal remuneration should also be applied to the provisions, that is:

'equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.'

IRC guidance

296.The IRC should provide written guidance to the parties developed for and in consultation among the industrial parties regarding the new legislative provisions and pay equity and work value principle, including definitions, relevant provisions and cases and reference to relevant published work in relation to these issues.

297.The proposed reforms will provide additional responsibilities for the parties and the IRC. Guidelines would play an important educative role.

298.Leadership by the Commission, particularly in assisting in the examination of issues in specific industrial instruments can significantly assist the industrial parties in meeting the requirements of the new Act. Ms Walpole's evidence indicated the importance of the role played by the federal Commission in encouraging development by the parties of materials which would assist them in coming to grips with requirements of new legislative requirements.(Walpole,Ex.209).

Award reviews and equal remuneration adjustments

299.Section 19 of the *Industrial Relations Act 1996* allows for the three yearly review of awards for the purposes of removing discrimination and ensuring equal remuneration. This mechanism should be used in the first instance to review key low paid female dominated industry awards for pay equity, using the proposed broader approach to this assessment.

Application to all industrial instruments and forms of discrimination

300.Consideration should also be given to amending *the Industrial Relations Act 1996* to remove S.19 from the awards section of the Act and allow the provision's application to all industrial instruments and forms of remuneration.

.Characteristics of female dominated occupations and industries

301.Specific consideration should be given to low paid female

dominated awards in the s.19 award review process. The Commission should assess whether awards applying to industries or occupations, where if there are pay equity issues, they are unlikely to be brought before the Commission including industries and occupations with the following characteristics:

- poorly unionised;
- higher concentrations of part time and/or casual work;
- high proportion of small firms;
- high dispersion of occupation across workplaces
- little over award or enterprise bargaining;
- award relationship to going rates highly variable - including areas where awards are of limited relevance including those where the market might be valuing factors which should be recognised in extra classification levels;
- poor record of compliance issues regarding awards and industrial regulation generally.

Greater supervision by the Commission

302. Since these are characteristics which are likely to mean that effective access to industrial mechanisms may not have been possible the Commission may need to provide a greater level of supervision as to how industrial instruments relate to the equal remuneration requirements. There may be need for supervised implementation of minimum rates adjustments, award restructuring, work value investigations, reviews of relationships of awards and enterprise agreements and over award arrangements, and other industrial mechanisms. Some equal remuneration problems might be solved by more active consideration of these available mechanisms.

Equal remuneration adjustment

303. Where the Commission identifies possible strategies for addressing equal remuneration issues through award reviews, it should, in subsequent reviews, investigate progress made on achieving equal remuneration. On a finding in subsequent reviews that there still is not equal remuneration for work of equal or comparable value, the IRC should determine the extent of the pay disparity based on sex, and recommend an appropriate level of payment in the form of an equal remuneration adjustment, to the relevant employees.

Deputy President: Pay Equity

304. As was recommended by the Pay Equity Taskforce, a Deputy President: Pay Equity with specialist responsibility for pay equity be appointed to the IRC to hear equal remuneration matters (Recommendation 1, Report of the NSW Taskforce, March 1997).

305. The new Deputy President would preside with IRC Commissioner panels dealing with particular awards or industries/occupations and in particular S.19 review of award proceedings.

The Anti Discrimination Act 1977 (ADA)

306. It is submitted that while the discrimination jurisdiction can provide remedies for individuals and groups affected by discrimination (including pay discrimination), the Equal Opportunity Tribunal does not have the power to make orders to vary the rates of remuneration across awards or agreements, and thereby address pay inequity in a systemic manner.

307. The definitions of discrimination within the ADA are not sufficient to address equal remuneration matters. To prove sex discrimination in pay, the Act almost invariably would require the use of a comparator doing work that is the same or similar in nature. The provision substantially confines comparisons to those working under the same employer.

Referral powers

308. Referral powers similar to those contained in the Federal Equal Remuneration Division as applied to the Sex Discrimination Commissioner, should be made available to the President of the Anti Discrimination Board. This will allow the President to refer equal remuneration matters to the IRC where the ADA is inadequate or a systemic remedy is required. It will also enable, with representation, individuals and non unionised employees access to the provisions.

309. Where the ADA is a more appropriate forum to pursue a pay equity matter, for example where an individual is claiming damages, there are other restrictions in the Act which are likely to hinder many cases.

Removal of exemptions for organisations with less than 6 employees

310. It is submitted that the exemption for complaints under the ADA relating to organisations with fewer than six employees should be

removed. Women make up a significant number of employees working in small business. Retaining the exemption will continue to bar a considerable number of women workers from the provisions of the Act.

Amendment to definition of indirect discrimination

311. The definition of indirect discrimination should be amended so that it is consistent with the definition contained in the *Federal Sex Discrimination Act 1984*. This will assist complainants bring these matters to the Anti Discrimination Board by providing that the onus of proof is on employers to substantiate the 'reasonableness' of the imposed requirement or condition. This amendment would also overcome the difficulties associated with a proportionality test to prove effect in the current indirect discrimination provision.

International Conventions

312. It is submitted that the International ILO and UN Conventions that Australia is a signatory to provide legal obligations for the implementation of the standards they provide. Hence, earlier proposals in this submission that the relevant ILO definitions be used in this context.

313. Compliance with these international obligations requires the application of Convention articles to Australia and provides the reference point for the development and implementation of the necessary mechanisms to achieve pay equity.

Job evaluation techniques

314. The problems associated with gender bias in job evaluation techniques (especially points/factor systems) are well established. These techniques are limited in scope in their ability to provide equitable comparisons of jobs from different areas.

315. Job evaluation is a management driven technique designed to rank employees in a workplace. Whilst it may provide some information which is useful, it affords a restricted assessment of the work value of any particular occupation as it is constrained by the circumstances of the particular organisation. This is particularly problematic for occupations spread across a wide range of organisations.

316. However, the systems can play a role in making explicit factors and weightings and so can help in identifying gender bias in design and implementation of the systems.

317. Where they are used, job evaluation techniques should be

required to be demonstrably free of gender bias. It is not appropriate for job evaluation systems to be used to set pay directly since the relevant considerations by the Commission are broader than those in the systems.

Competency assessment

318. Competency standards are still too poorly developed as a system to provide a comprehensive underpinning for skills assessment although they do make a contribution.

319. In many female dominated occupations, the standards are not fully developed or recognised and suitable training and recognition support has not been developed. The competencies are generally not attached to award and agreement classifications and the linkages are contested.

320. In occupations where a substantial proportion of the value of work is not based on skill and knowledge, competency standards will have limited capacity to reflect the value.

321. Similar difficulties occur regarding gender bias in description and analysis of work, unpacking of knowledge and skills, specification of competency standards, assignment of competency standards to appropriate levels in the competency standards framework and to the Australian Qualifications Framework, and with appropriate classifications in industrial instruments, and equal access to bias free competency assessment for individuals. Where adequate skills taxonomies have not been developed, and where qualifications are not recognised or articulated, recognition of female dominated work value is hampered.

Reference point

322. Competency standards will continue to provide a reference point for assessing skills and knowledge and probably will play a bigger role in that and in industrial recognition of the value of work when further development and testing of them brings better acceptance of their use. Effective integration of training and recognition arrangements will also affect how valuable workers and industrial parties and training authorities and provides find the competency standards.

Other industrial relations principles

323. Other Principles, such as, Special Case, Structural Efficiency, Minimum Rates Adjustments, and Anomalies and Inequities go some way in addressing pay inequity and should continue to be

applied with reference to equal remuneration objectives.

324. It is submitted, however, that the proposed pay equity principle, because of its specific focus, should be the most applicable principle for equal remuneration matters.

325. The difficulties with confining work value considerations to work value changes since a particular point have been outlined in Term of Reference Two. Proposed changes are outlined above under the Pay Equity Principle.

Term of Reference Four

Mechanisms and processes by which pay equity matters can be brought before the Commission.

326. *The Industrial Relations Act 1996* provides a range of mechanisms by which pay equity matters can be brought before the Commission, as outlined below:

327. Definition

“Pay equity” is defined in the Act’s dictionary as “equal remuneration for men and women doing work of equal or comparable value”. ILO 100 defines equal remuneration for men and women workers for work of equal value as rates established without discrimination based on sex.

328. Awards

The Commission is required on application to set equal remuneration in an award (s.21(1)(b)). The Commission must, whenever it makes an award ensure it provides for equal remuneration (s.23). The Commission is to have regard to pay equity when it reviews awards under s.19 every three years. Award reviews alone are unlikely to lessen the pay equity gap (McCallum, Ex.210, paras 24-26).

Approving agreements

329. The Commission must satisfy itself that enterprise agreements comply with the *Anti Discrimination Act* (s.35). Rule 41 requires that a comparison and compliance statement be provided by affidavit, including a statement that the proposed agreement complies with the NSW Anti-Discrimination Act. The Commission said in the recent Enterprise Agreements Principles Test Case that something more than a mere assertion that the provisions of the ADA have been complied with is required and that relevant aspects of the negotiations and the agreement itself must be referred to (IRC 5032 of 1996, pp.44-45).

Dispute settling

330. Pay equity is an industrial matter (s.6f) and can be the subject of the dispute which the Commission has powers to settle.

Varying industrial instruments

331. The Commission can vary an industrial instrument at any time to remove unlawful discrimination (s.169(4)).

State Decision

332. The *Industrial Relations Act 1996* provides for the setting of a pay equity standard through a State decision on pay equity (s.49). This avenue is not available to groups of women or single unions (McCallum, Ex. 210, para 28).

Consideration of discrimination

333. The President of the Anti Discrimination Board can seek leave to address the Commission on discrimination issues in a range of matters (s.34(2)(d), s.167(2), s.169(4)(b) and s.187(d)). In some circumstances, eliminating discrimination from industrial instruments would contribute to pay equity.

Unfair contracts

334. The Commission can make orders and provide remedies regarding unfair contracts (ss.105-110). Conceivably, in some circumstances a contract denying pay equity could be regarded as unfair, especially in the light of the objects of the Act, particularly 3(f). Payments made outside industrial instruments which nonetheless form part of the contract of employment (for example, over award payments) could fall under the unfair contracts provisions. However this is unclear as there have not yet been claims under these provisions.

335. These measures in the IRA do not provide an integrated scheme for achieving pay equity, and as such do not amount to a full implementation of either the relevant objects of the Act, or the Equal Remuneration Convention.

336. Women's groups therefore submit that while most of the elements of the scheme required are already present in the Act, it will be simpler and clearer for new legislation to integrate them. Important further elements needed include provisions allowing historic under-valuation to be remedied and processes by which the Commission can examine industrial instruments to ensure that they comply with the equal remuneration requirements. This will be particularly significant for the most disadvantaged female dominated occupations in industrially weak areas.

337. It will also be important for the interaction of the various provisions to be specified and guidance provided for the parties, in the light of the confusion and difficulties which have arisen in the past as to how equal pay provisions relate to other areas of wage fixing and legislation.

338. It is recommended that there be:

- specific pay equity provisions and principles and guidance;
- pay equity to be addressed in relation to other legislative provisions and principles;
- specification and guidance to be provided about how they interact; and
- structured review processes.

Term of Reference Five

In the conduct of the Inquiry, and in any recommendations contained in its report, the Commission must take into account the public interest and for that purpose must have regard to:

the objects of the Industrial Relations Act 1996 (NSW);

the likely effect of its decision on the New South Wales economy, in particular, the need to protect the employment base of the State and any adverse impacts on employment opportunities for women; and

inter-State comparative rates.

the Objects of the Industrial Relations Act (NSW)

Public Interest

339. The Commission's responsibilities for taking account of public interest are based on its role specified in the *Industrial Relations Act 1996*, in relation to the industrial system generally.

340. Not all important considerations potentially relating to the Commission's decisions can be fully specified and legislatively articulated and public interest provisions allow them to be considered where relevant.

341. However, not all parties are represented, or represented effectively and quickly by registered organisations and specific measures may be required to ensure certain issues are addressed.

342. The Commission also has a responsibility for considering the broader economic and social effects of its decisions beyond those of the immediate industrial parties. The Commission must have a broad perspective on how the industrial system is working, while the primary responsibility of registered organisations is promoting the interests of their own members

The Objects of the Industrial Relations Act 1996

343. The scheme of the *Industrial Relations Act 1996* shows that through a variety of mechanisms, including how the Commission exercises its powers, the industrial relations system is to take specific account and active measures in relation to pay equity and discrimination.

344. Giving full effect to the pay equity provisions of the 1996 Act

requires the Commission to revisit matters decided under previous more limited legislative regimes as well as to ensure that future decisions meet the requirements of the Act.

345. Consideration of discrimination issues in the industrial legislation commenced with the 1991 Act and has been broadened in and woven through the 1996 Act, with significant responsibilities for the Commission in preventing and eliminating discrimination.

346. Restructuring the industrial framework in line with these changes is an important part of modernising industrial arrangements, in keeping with current legislative standards related to equity and non-discrimination.

347. The NSW Government has endorsed the ratification by Australia of several ILO and UN Conventions requiring that pay and conditions be determined, free of sex discrimination. It recognises the need to give effect to the Conventions in the State jurisdiction as part of Australia's obligations for implementation of the Conventions.

348. An important principle of the ILO and UN Conventions is that social and political equality cannot be fully achieved without economic underpinning.

Justice Mary Gaudron has said:

Equality is a meaningless abstraction unless it is founded on economic security and economic strength. (quoted on back of Just Rewards, MFI'A').

349. A substantial minority of households and individuals depend entirely on women's earnings. Women's earnings contribute an increasing proportion of household income, a development which has been assisted by the Commission's equal pay decisions.

350. Where discrimination limits economic incentives to enter, remain and progress in paid work, women's lifetime earnings are reduced significantly. Reduced economic activity and reward also limit women's opportunities for reaching decision-making positions and affects their relative standing in community participation and full exercise of citizenship. This affects women's capacity to secure the institutional and legal arrangements which would properly address their interests and provide for full participation on an equitable basis in all areas of society.

351. Women who are underpaid relative to the value of their work have their overall life opportunities and choices downgraded.

352. It is a matter of industrial history that in the past wages were specifically set according to the sex of the wage earner. That history has not entirely been remedied. The validity, relevance and legitimacy of the industrial framework is decisively affected by undervaluation of women's work.

353. A fair and relevant award and agreement framework contributes significantly to industrial fairness and efficiency, as has been recognised by the Commission's efforts and those of the parties in relation to significant transformations in the industrial framework, especially over the last ten years.

354. In the past, consent arrangements have been common in the industrial system especially in NSW. This has limited the degree of scrutiny of the way industrial parties have given effect to the Commission's decisions, including in relation to equal pay.

355. Apart from the brief period following the equal pay decisions when equal pay itself was the focus of attention, equal pay has not been the central concern of the industrial parties. Efforts of the parties or the Commission were not specifically directed to it or to the effects on equal pay of other changes. When equal pay was a central consideration, immediately after the equal pay decisions, it was considered only in relation to the basic wage component.

356. The adjustments required are not achievable as a by product of award by award changes. An overall context more conducive to pay equity is required, in the light of the limited progress made in the last two decades.

357. The classifications structures in awards covering women's work often do not recognise extra skills, training and experience beyond those required at basic entry level. This means that in some cases, the extra value of work is recognised only in over award payments or enterprise agreements which may mean that recognition of productivity depends on bargaining power. In others, the additional value is often not remunerated at all.

358. Women's employment has some general characteristics which make effective access to the industrial relations systems and processes more difficult.

359. *TOR 5b) The likely effect of its decision on the New South Wales economy, in particular, the need to protect the employment base of the State and any adverse impacts on employment opportunities for women*

The Limitations of Modelling the Economic Impact

360. The evidence brought before this Inquiry have lead women's groups to conclude that estimating the economic effects of a pay equity adjustment for women is difficult because of the large amount of information necessary to undertake the modelling.

361. It is also difficult to come up with the macro economic impact of pay equity adjustments because the adjustments are not likely to be phased in over time.

362. As a consequence responses from the expert witnesses on this issue have ranged from the possibility of economic growth to the creation of massive distortions in the economy.

363. It is simply not possible to know what the economic impact is likely to be because a number of crucial matters still remain unknown or unclear. These are set out below:

Size of pay equity adjustment unknown

364. First, the size of the pay equity adjustment to be awarded is not known at this stage. Clearly the amount of the payment will have a direct bearing on the magnitude of the economic effect whether positive or negative. In his statement Cox (Exhibit 277 page 7) claims that:

'it is expected that the size of pay equity adjustments will differ and may differ quite considerably between occupations. The required adjustments could be quite large for some occupations'

Method and time frame

365. Second, the method and time frame chosen to award the payments has yet to be determined. Should this take place over a longer period, on an award by award basis, the result would be expected to be different than if an across the board payment, as in national or State wage cases, was made. Cox (Exhibit 277 page 5) says that this uncertainty makes any estimation of the economic effects difficult because:

'the time period over which such adjustments might take place is also uncertain, though were they to be dealt with on a case by case basis it seems unlikely that they could be very rapid. In fact they may well take years rather than months. This uncertainty makes it difficult in advance to produce precise costs of the possible impacts in the way that can be done for national or State wage cases.'

Lack of data

366. Third, the lack of accurate award coverage and employment data means that it is impossible to estimate the number of workers likely to be affected by any claim. In his statement Cox (Exhibit 277 page 5) claims that:

Consideration must be given to the scope for pay outcomes to be effected through the available industrial instruments, being primarily the award setting process. However, because this could vary considerably between occupations, and because there is a dearth of accessible data on award coverage, over award payments by occupation and the composition of average earnings measures in terms of award and over award components this is extremely difficult'

367. In his discussion of an optimal model Green (Exhibit 271 page 29) states that to model pay inequity and the impact of attempts to remove it requires information about the following data and interrelationships. Such as:

'extensive and accurate data on employment by age, sex, occupation, industry, hours earnings and non monetary benefits ... it is important to understand how employers choose workers (and) the effect of a choice of workers on overall productivity ... will workers earning more money increase their expenditure and create demand for more workers?'

368. This information is not available and casts doubt on all models used to estimate the economic impact of pay equity adjustments.

Extent of application

369. Fourth, it is also unclear whether all or only some awards or other instruments would be affected. This will be further complicated if arguments for adjustments are to be made on a case by case basis.

Effort to re-establish relativities

370. Fifth, whether workers in male dominated industries, not affected by the claim, would seek to re-establish relativities that existed prior to the pay equity adjustments. This would broaden the range of flow on effects and complicate estimations of the economic effect of pay equity adjustments. This could be disallowed by the principle

Size of the gender gap

371.Finally, the actual size of the gender pay gap is contested terrain. This obviously has an important bearing on the aggregate economic impact of the adjustment. Various estimates of the size of the gap exist. Preston claims that the adjusted for hours differences is 9.1%.Norris estimates that females earn 90% of the hourly full-time non-managerial male earnings (in Green, Exhibit 271 page 9) while Green (Exhibit 271 page 10) is more cautious stating that:

‘All that can be said with confidence is that the annual gender earnings gap would be greater than the 9 or ten percent gap identified by Preston and Norris for weekly and hourly earnings’.

372.Cox also finds various estimates of the gender pay gap depending on how it is measured, but that for full-time adult workers only, the gender pay gap is still in excess of 15%. Wooden provides the most cautious calculation with a ‘bottom end’ estimate of the gender gap of 2%. The significant differences in the actual size of the pay gap which can be attributed to gender discrimination further complicates estimations of the economic impact of pay equity adjustments.

The Usefulness of the Models

373.In response to this paucity of information the witnesses’ models are underpinned by a large number of assumptions which remove them from the reality of the labour market and the economy, thus making their estimates questionable.

374.Green (Exhibit 271 page 28) claims that as a result the usefulness of these models must be limited to contributing to our understanding of these issues rather than providing the answer. He adds (Exhibit 271 pages 28-9) that:

The model desired by the Commission to determine the extent of the inequity of pay in NSW and to estimate the macro economic effect of its removal is beyond the scope of any economist ... the body of knowledge concerning the detail of economic behaviour is not sufficiently developed, and even if it were, the necessary data is not available for a reliable analysis’.

375.This is because (Exhibit 271 page 41):

‘the task of accurately predicting the impact on the NSW economy of an increase in women’s wages is a virtually impossible one. What can be said though is that macro economic conditions are generally favourable at present.

Whilst the group who will be asked to pay for these higher wages, the employers, will no doubt argue the 'economy' cannot afford such a rise, such claims would seem unjustified in the wider economic context.'

376. The economic evidence produced from modelling by CREA and by Access Economics (Richardson Exhibit 338) indicates that even if there were across the board increases of an aggregate 1-2% over a short period of time, the economic effects would be small and would dissipate over the longer term.

Arguments presented in the Inquiry

377. Much of the economic evidence presented in the Inquiry has not included reliable (or any) quantification of the relative contribution of factors to the gender earnings gap.

378. A range of economic arguments have been presented in the Inquiry, from optimistic to pessimistic about the effects of pay equity adjustments.

Denial of gender based pay discrimination

379. To begin with, not all witnesses agreed that gender based pay discrimination exists. Thus their predictions of the effects of pay equity adjustments were unlikely to suggest that economic benefit would be derived from adjustments. This follows the 'why fix it if it isn't broken' argument.

380. Stinson (Exhibit 280 page 1) for example, admitted that on average, women had lower earnings than men yet argued that these did not 'demonstrate inequity due to women's disadvantaged position in the labour market'. Rather he claimed that differences at the aggregate levels were a result of the younger age profile of women workers, the fact that they worked fewer hours per week and that they were under-represented in the peak earnings period of 30-45 years of age. While he presents data to this effect, his approach remains unconvincing because he fails to provide an assessment of the relative contribution of the factors to the earnings gap or how they might be interrelated. His statement then tells us more about the profile of women workers than whether or not a gender pay gap exists.

Labour force characteristics

381. Hughes (Exhibit 329) on the other hand, finds that the continuing differences in men and women's earnings are a result of differences in their labour force characteristics, primarily the

absence of women from highly paid trades and allied occupations. While she rejects comparative worth on the basis that it has negative employment effects, she provides little substantive evidence to support her claim.

382. The concept of 'choice' put forward by Hughes (Exhibit 329) and Wooden (Exhibit 101) suggests that women are in some way responsible for their lower earnings and that through increased education and training, their relative pay would improve. This approach ignores the reality of the highly sex segregated nature of the Australian labour market.

False assumptions

383. Much of the concern expressed about the possible operation and effects of pay equity increases has been based on criticisms of across the board pay equity increases or comparable worth approaches and experiences of other countries.

384. Hughes' statement (Exhibit 329) for instance, sets up a dichotomy between centrally prescribed earnings and those determined by the free market. As no party in the Inquiry seeks to redefine the method of wage determination to either of these extremes, but to redress imperfections in the Australian labour market, her analysis does not apply.

385. Across the board pay equity increases and directly applied comparable worth based increases, or fully administered wages systems, based on rigid comparators have not been proposed by any party in this Inquiry.

386. The intent of the Inquiry is to identify and remedy, through pay equity adjustments those factors which impede the operation of the Australian labour market and have produced unequal outcomes for women. These inherently unjustifiable forces of the market, such as inequalities in bargaining power and the persistent undervaluing of women's work, need to be countervailed so that market forces can actually operate more efficiently. Thus the role of intervention, through the Inquiry and its associated pay equity adjustments is to correct the distortions in the market, not to advocate a movement to a centrally planned wages system, as Hughes suggests is the case.

387. The Women's organisations have proposed that the Commission consider, on a case by case basis, whether women's rates have been determined free of sex discrimination, using an approach to valuing work and setting pay built on those used by

industrial tribunals in Australia.

388. The notion of choice is also supported by Wooden, who employs an explicitly neoclassical framework, stating that women prefer certain types of work and certain types of employment conditions, without presenting any evidence to support his claim. This follows from his view that there is no real inequity between men and women's earnings once human capital characteristics are considered.

Lack of evidence

389. Wooden's statement (Exhibit 101) is further flawed by the fact that many of his claims are not supported by data or empirical evidence. For instance, whether women actually prefer to work shorter hours or whether this is a necessity brought about by their family responsibilities, whether they desire to work in lower paid industries because they are compensated by 'unmeasured benefits' and whether women need to work in industries where there is little risk of injury, are all unsubstantiated assertions. Without the appropriate data to corroborate his claims, they merely appear as a justification for the status quo rather than an explanation of it.

Estimates of costs flawed

His estimation of the effects of pay equity adjustments are similarly flawed as they have been constructed using historical data which is inadequate as Green states (Exhibit 271 page 36).

Pay equity as stimulus to growth

390. Green and Cox's statements are the most sympathetic to the idea that pay equity adjustments to women workers may actually stimulate economic growth and as a result have a positive effect on employment in the long term. Cox's position however, has not been without its detractors. Richardson (Exhibit 338) has criticised the modelling which underpinned much of Cox's work, claiming that the assumption that there will be no impact on unemployment is flawed. In his statement, (Exhibit 277 page 8), Cox has been candid about the limitations of the data indicating that:

'Borland's paper was never intended to provide any firm conclusions regarding aggregate impacts'

391. He argues that the value of Borland's work, through his microeconomic approach, is that it demonstrates that the relationship between pay equity adjustments and the flow on

effects to other markets is very complex and may in fact differ significantly across occupations. For instance, in some cases employers may absorb the increase in labour costs by seeking to improve workplace productivity while in others, an increase in costs may lead to a fall in employment but those remaining will be better off to the extent of the wage increase. These complex and often contradictory responses, both within and between occupational groups demonstrate that accurately modelling the adjustment process remains problematic.

Assumption of across the board increases

392. The extent to which attempts to redress pay inequity for women might give rise to increases in male dominated awards also remains unknown at this stage. There certainly is no current wage fixing provision which allows automatic flow-ons. Case by case consideration by the Commission should curb any initiatives in this direction. If efforts were made to restore relativities through overaward bargaining, the Commission could take account of that when next it dealt with the award or agreement.

393. This is further complicated by the fact that these modelling exercises assume an across the board increase, rather than a case by case approach which we would argue is more practicable. Further to the argument that the modelling exercises are of only limited value to the Inquiry, Izmir (Exhibit 411 page 5) states that the impact of pay equity adjustments are likely to have been overestimated because:

- they do not capture any improvements in economic efficiency due to the removal of discrimination (correcting 'market failure'),
- they do not allow for the possibility that the Industrial Relations Commission may fine-tune the introduction of pay equity measures, thereby reducing the economic impacts
- they do not capture the benefits of improving equity
- they may overestimate the effectiveness of the Industrial Relations Commission in changing the relative remuneration of male and female dominated occupations'

Economic arguments for reducing pay inequity

394. Of all the statements to the Inquiry, Green's is perhaps the most optimistic. He argues that a reliance on neoclassical economic and

human capital theory fails to explain the true measure of the earnings gap in Australia and challenges the economic arguments for continuing inequity and propositions that women are not disadvantaged in the labour market. Instead, he maintains that there are sound economic arguments for reducing the amount of wage inequity, primarily that wage inequity is unlikely to increase economic efficiency and performance in the long run. In his dismissal of the neoclassical economic explanations provided by Wooden he concludes that:

‘the work of Wooden is a useful contribution to the economic debate surrounding pay inequality, as a guide for policy formulation it is inadequate and misleading. The unrealistic assumptions of the neoclassical model, combined with the real limitations on data, serve to isolate the conclusions of Wooden’s work from the realities of the Australian labour market. Furthermore, the conclusions Wooden draws from this modelling attempt are not consistent with his own results and underlying assumptions’ (Exhibit 101 page 43)

395. Economic benefits of pay equity also include improving efficiency and productivity in the economy, in allocation of labour to occupations and industries and organisations, in more closely relating rewards and productivity, stimulating labour supply and retention, supporting increased skill and training investment, stimulating consumption, and economic activity and in some circumstances stimulating further employment.’

396. Overall Green finds that the economic models need to be used with caution because:

‘scenarios can be constructed that would suggest a positive impact of staged female pay adjustments on employment. These scenarios are no more than that, but they have at least as much if not more validity than the case alleging a negative impact’ (Exhibit 271 page 42)

Remedying Gender Based Pay Discrimination and The Effect of Pay Equity Adjustments on the NSW Economy and Women’s Employment

397. As discussed it is impossible, at this stage, to come up with the macro economic effects of pay equity adjustments on both the

economy and women's employment because the adjustments are most likely to be phased in over time. This process would be staggered and diffused throughout the economy, presumably over a number of years with firms employing a range of responses to combat increases in wages. Although implementation of the 1972 equal pay decisions was envisaged to occur over a three year period, it was still proceeding in many areas at the end of the three years and in some areas seven or more years later.

398. For some firms, adjustments may mean a reduction in employment or decisions to delay further employment or others plans to increase productivity may be pursued. At the end of the Inquiry, it is not known which of these approaches will be taken up, by how many firms and to what extent.

399. Estimating the flow on effects is also impossible because it would require information about how the increase in wages would flow through into the cost structures of firms and whether these costs could be or would be absorbed. This means that despite the predictions of economic downturn following the decision from some statements, the impact will probably only be known in retrospect.

400. In light of this, a range of sources suggest that the negative effect of pay equity adjustments may not be great as some would suggest and may in fact be positive. For instance Cox concludes that:

'in the long run, the pay equity adjustments amount effectively to a wage shift rather than an aggregate wage increase. Such a shift can actually bring about some gains for the national economy because of the attendant capital creation that is brought about in those industries that gain'. (Exhibit 277 page 13)

401. There is also a legitimate argument to be made that employers will always claim that the time is not right to award wage increases to workers. There is little justification as to why wage increases (which may in any case serve to improve the market's efficiency and competitiveness) should be quarantined when firms accept increases in other input costs such as rent and supplies. There has also been no evidence presented as to why the existing competitive structure of firms must remain fixed when all other variables are subject to change.

Pay inequity favours inefficient firms

402. It is important to note that by not remedying the imperfections in

the market marginal or low wage producers continue to enjoy a subsidy that other higher wage firms can not access (Green, Exhibit 271 page 3). In effect then, a continuation of wage inequity provides assistance to some firms at the expense of others. The effect of the claim will be felt most by these marginal producers why rely on lower wages to maintain competitiveness. Higher wage and more efficient producers are less likely to be penalised by the claim because they will have a greater capacity to absorb the claim. Under these conditions, redressing wage inequality will actually provide an incentive for the market to become more efficient by encouraging a better allocation of resources when labour is remunerated at its true value.

403. Previous dire predictions have proved wrong

404. It has frequently been the case that predictions of disastrous economic consequences associated with increases in pay have not been proved in the event, sometimes because the predictions were not soundly based, sometimes because other economic closures and adjustments were made, including redesigning working arrangements, production and work processes. If properly addressing equal remuneration were to have the consequences claimed, the size of the discrimination -related gender pay gap must be very substantial indeed.

405. The relationship between raising minimum wages and employment is not as straightforward as employers and some economists would suggest. A positive result of increasing wages may be to reduce turnover at the workplace, thus reducing the cost of training new employees and creating a more stable and productive workforce. There are also arguments that employers' choices to hire or reduce staff numbers are not made purely on the basis of wage costs. Further, the economy as a whole is unlikely to benefit from pursuing a low wage, low productivity strategy.

406. In their study of the impact of raising the minimum wage in the US Card and Krueger (Exhibit 421) conclude that:

‘the evidence is not singularly agreed that increases in the minimum wage increase unemployment’ (p.1)

407. In fact, their study found that increases in the minimum wage had a positive effect on employment or no effect at all. They claim the evidence for this is just as compelling as the evidence which shows it has an adverse effect. They also found that raising the minimum wage reduced the wage dispersion and so contributed to

the reversal of rising inequality.

408. Similar arguments about the cost to the economy of wage increases for low paid workers were made during the living wage case. Here a range of studies were submitted that found that contrary to the claims of employers and their representatives that the living wage claim would have dire effects on their firms, and the economy the claim could actually have a positive effect on both employment and the economy.

Previous equal pay decisions

409. With regard to the impact of previous equal pay decisions, female employment appeared to be remarkably unresponsive to the equal pay decisions and that rather than 'pricing women out of jobs', there was actually a boom in women's employment. This view is supported by Green (Exhibit 271 pages 36 & 42) who also found that:

'Economic history does tell us ...that earlier attempts to redress pay inequity in Australia did not have the dramatic consequences that were predicted at the time', and that 'there is actual evidence in the past of employment growth following equal pay and minimum wage decisions in Australia and overseas.'

410. In his conclusion, Green states while the size of the effect, positive or negative, can not be predicted with certainty, that:

'There are however many factors which would suggest the economic effects would be small. For example, women predominate in the service industries. Service industries, by their very nature, are not very mobile. It is unlikely then that a rise in NSW women's pay will see NSW's service sector replaced by Victoria's. Secondly, women typically work in labour intensive industries' (Exhibit 271 page 44)

411. Despite the fact that the actual quantum or impact of the adjustments can not be specified, Green (Exhibit 271 page 3) concludes that the fairness and equity in pay determination which results from a pay equity adjustment would also result in greater efficiency in the use of capital and labour.

412. A fundamentally important concern before the Inquiry is how to ensure that pay equity increases are effectively made and maintained so as to produce a long term improvement in women's earnings relative to men's for work of equal value.

413. The women's groups argue that the most appropriate way for economic effects of pay equity increases to be considered is for the Commission to take account of effects on employment, viability of firms and industries, efficiency of the labour market (supply/demand etc.), capacity to pay, other industry circumstances - as well as work value assessed in terms of demands on workers including factors skill, qualifications, responsibility and conditions. Only in those circumstances can consideration of economic effects be really based on facts about particular occupations and industries, including facts about how the value of women's work has been assessed.

414. A balanced assessment of the economic effects of pay equity increase must include the benefits of pay equity. These include increased purchasing power and increased economic security and independence for women who obtain wage increases.

415. It should also be recognised that pay equity adjustments would not take place in a vacuum, they are an essential part of the fairness and equity objectives which are central to the creation of a egalitarian and cohesive society. These social objectives should not be considered secondary to pursuing economic outcomes.

5c) Inter-State rates

416. The appropriate way for the Commission to take account of comparative interstate rates is on a case by case basis, where it is relevant. In that situation, specific information can be obtained and considered with the scrutiny necessary to establish comparability for comparison, including different occupational and award structures and classifications, training arrangements, licensing provisions, labour supply/demand considerations and product markets.

Conclusion

417. Your Honour, the women's groups appreciate the opportunity to participate in this Inquiry, which is the most substantial investigation Australia has seen into pay equity problems and solutions.

418. It has offered women's groups and industrial parties a chance to try to come to some common understandings through evidence, expert opinion, workplace investigations and reasoned argument in unravelling this very complex area and finding practical, effective

mechanisms for pay equity.

419. The Inquiry has had over 40 hearing days since February, with evidence from some 100 witnesses, including workers, unions, employers, and eminent experts in education and training, sex discrimination law, industrial relations, equal employment opportunity and economics.

420. We have over 450 exhibits and transcripts of evidence run near 3000 pages.

421. Your Honour, the evidence clearly shows that assessments of the value of women's work have historically been based on stereotyping, outdated ideas about women's needs for their own incomes (Justice Higgins said in 1919 a woman's income might be needed for her to buy a new dress), and on an underestimation of the real demands and difficulties and conditions of women's work. These views were considered normal in their time, and they largely went unchallenged. Today however we recognise these sorts of assumptions as "sex discrimination" and it is unlawful for decisions disadvantaging women to be based on them.

422. The last relics of bygone times and attitudes need to be removed for us to have a fair, efficient and up to date industrial system, a system that repairs the damage of the past and sets us up fairly for the next century. The role of modernising the system is a familiar one for the Commission, as is the responsibility for seeing that it works according to the law and in the public interest.

423. We hope the Commission will show strong active leadership in these very real problems. There has been no improvement in women's earnings relative to men's this decade and very little in the decade before that. It is very clear that this problem will not fix itself over time. The real concern should be not about the terrible economic consequences which are claimed if equal pay is implemented - these fears have been shown to be based on little but ideological scaremongering - but about how to bring about some real and lasting progress towards a goal that has been publicly endorsed for so long. The Equal Pay cases took place over 25 years ago. As Justice Mary Gaudron said:

"We got equal pay once, then we got it again, and then we got it again, and now we still don't have it."

424. We call on the Commission and the NSW Government to take the initiative and to bring a modern and practical approach to pay equity for women in NSW.

425. Your Honour, this Inquiry represents an opportunity for decisive action to move this economic justice and human rights issue forward. In the next century - just 2 years away, in the NSW jurisdiction, women may finally achieve equal remuneration for work of comparable value.