

Equal Remuneration Principle Case

Final Submissions on behalf of:

**The National Pay Equity Coalition,
Women's Electoral Lobby, and the
Business and Professional Women's
Association (NSW)**

(the Women's Organisations)
March 2000

MATTER NO IRC 1841/99
INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH
WALES
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INTRODUCTION

The Women's Organisations' final submission consists of:

- Our opening submission as handed up to the Commission (Exhibit 9)
- Cases Cited (Exhibit 36)
- And this attachment

THIS ATTACHMENT INCLUDES

- Further submissions relating to issues and evidence raised in the Case
- Revised Proposed Equal Remuneration and Other Conditions of Employment Principle
- A table of contents to Exhibit 9
- An index to Exhibit 9

FURTHER SUBMISSIONS REGARDING ISSUES RAISED

1. The particular issues we address are:
 - The need for a specific Equal Remuneration and other conditions of employment Principle; how the proposed Principle interacts with other wage fixing Principles;
 - The scope of “remuneration”; conditions of employment; and overawards;
 - The meanings and requirements of s.23 and s.21(1)(b) including in consent matters;
 - Application of the principle outside female dominated occupations, and to men; why it would be inappropriate to apply a discrimination test;
 - Application of the Principle to enterprise agreements; flow-ons;
 - Economic issues –gender gap; employment effects.

The need for a specific Equal Remuneration and other conditions of employment Principle

2. We submit that there is a need for a separate and specific Equal Remuneration and other conditions of employment Principle. Setting new equal remuneration principles will be an important recognition that pay equity has not been achieved and an important statement of a commitment by the Commission to address it.
3. The Act provides for a Principle to be set in a State Decision under s.51. It is the Commission’s role to consider equity, justice, and public interest in making its decisions and the Commission is required under s.10 to set “fair and reasonable conditions of employment”, which cannot be achieved where remuneration is affected by the sex of the workers.
4. The evidence in this case is that pay equity still is a problem. Professor Lewis’ Statement Ex 23 p.10 included a table that showed that all the regression studies have found a gender pay gap of which some proportion is ascribed to sex discrimination and his transcript of evidence dealt with those issues (T 362,27-54; T363,12-13; T363, 44-45; T377, 110-15). Professor Lewis agreed that the male/female earnings ratio has been stagnant since the mid 1980s (T 377,42-46). Professor Gregory’s evidence is that the gender pay disparity is greater in the most female dominated occupations – there is a 13.9% pay difference for occupations that are 80% or more female, compared to a 5.7% difference overall (Exhibit 17, para 11; evidence 15 February 2000 T 306,19-22).

5. The pay equity problem is getting worse with the increasing importance of enterprise-based productivity bargaining, which has had a negative effect on women's earnings and conditions, especially for the most disadvantaged women. Mr Dennis said that the gender pay gap is widening (T 262,30-33; T 315, 37-3; T 263, 26), as did Professor McCallum in his evidence on 22 February.. That is partly because of the difficulties women experience in bargaining from their relatively less powerful positions and occupations, industries and firms. It is also related to the difficulty of measuring productivity, in Mr Dennis' evidence on 15 February 2000 (T 262,36-41). He suggested that productivity bargaining is often primarily a process in which the parties agree on how to share what money there is available and that there is a strong prospect of gender bias in the definition and measurement of productivity and in bargaining about it (T 262, 35-41 and T263, 27-28). He pointed out that there is room for gender bias in measuring even the more traditional measures of productivity relating to measured human capital, referring to employers' use of proxies for skill (eg years of education). Professor Lewis also points out that education and experience are poor proxies for skill (Exhibit 23, para 51; and T 265, 51). Mr Dennis says that the measures used in regression analyses are not able to reflect important human capital considerations, such as quality of experience (T 259,253-58).
6. The equal pay requirements before the 1996 Act were more limited than the present requirements. The Industrial Arbitration Act s.88D provisions related to equal pay within awards and excluded work usually done by women, while s.100 of the 1991 Act only applied in relation to similar work. Section 21(4) explicitly recognises that adoption of new equal remuneration principles provides a basis for a fresh consideration of equal remuneration even where equal pay cases have already proceeded in relation to the award.
7. As was established in the Pay Equity Inquiry, much of women's work has been dealt with industrially by consent, and has never been assessed by the Commission. There has been a strong disposition not to disturb consent arrangements, which has continued to affect evaluation of women's work (Bennett T498, 9-44; T500, 30-34 and 51-56)
8. There have been some inadequacies in implementation of equal pay in the past. The Clerks Equal Pay Case 1959 (In re Clerks (State) Award and Other Awards (1959 AR 470 at 480) includes discussion of equal margins following the Commission's consideration of margins for men and women in the Paint & Varnish Makers Case (1957 AR 87 at 108) to the effect that margins may not have been set according to the value of work, and may have been based on the sex of the workers.
9. Ms Smith's evidence (T 276 19-25, 284,15-19) was that in the Female Hairdresser's Case 1929 (In re Hairdressers, &c, Females (State) Award (1929 AR 39), equal margins were set for some work only (cutting), and not for the female work (hairdressing). Ms Smith pointed out that even now, there still is a failure to recognise post trade training in the award, and that the training is seen as maintaining rather than deepening the trade (Exhibit

13 paras 6 & 7). In the Universities (Equal Pay) Case (1980 AR 616)(at 263), there is evidence of gender bias in valuing keyboard work, based in part on the assumption of women wanting a shorter pay scale, as they would leave on marriage. There has been gender bias in skill assessment as the work value criteria have developed in the context of male occupations (Bennett Exhibit 38 Ann C paras 15 – 22; T 499, 55-57 and 500, 1-7) and in the approach to assessing responsibility (Bennett Exhibit 38, para 28); and in assessment of qualifications and training (para 23-26), and conditions (paras 31-32).

10. Setting new equal remuneration principles will be an important recognition that this problem has not been resolved and an important statement of a commitment by the Commission to address it. That statement is likely to encourage industrial parties to turn their minds more steadfastly – and hopefully – to addressing these important issues. The principles will also provide a most useful apparatus, assisting the parties and the Commission in identifying undervaluation. The principles proposed have all been framed in the context of the Act and would strongly support its implementation.
11. As Professor McCallum put it, it would provide a means of giving effect to the “aspirational” equal remuneration provisions in the Act, by providing real remedies to give effect to the rights the Act promises (T 431,44-52). It would address the problem directly, as he recommended rather than requiring parties to go by some more circuitous route such as a Special Case, which could accommodate but would not facilitate application of equal remuneration.
12. Professor McCallum said in his evidence on 22 February (T 432,40-44):

In my view to redress the problem of undervaluation – which I verily believe exists in female dominated occupations – and I am backed in my belief or I rely upon the findings of Her Honour Justice Glynn – we need what I would describe as a re-badging of the 1973 principles...in my view it is appropriate to re-write, re-badge and restructure those principles.
13. At T 436-7 Professor McCallum said he did not regard the existing principles and mechanisms as adequate.
14. We note the Special Case requirements that cases be dealt with by a Full Bench unless otherwise delegated by the President. We note that Special Cases are usually dealt with by single members and that delays need not necessarily occur. We do consider it important that pay equity cases should in time be dealt with as part of the ordinary work of any of the members of the Commission, even if it is seen as necessary in the early period of establishing the jurisdiction to make specific provisions about how the cases are to be dealt with (for example, initial requirements that cases be dealt with by Full Benches). Justice Glynn pointed out in the Pay Equity Inquiry Report that equal remuneration matters were inextricably intertwined with the everyday responsibilities of all members of the Commission.

15. Professor Hunter's evidence on 22 February (T 400-01) also strongly supported the development of new principles, on the basis that some of the very real difficulties experienced in the equal remuneration cases in the federal jurisdiction could be prevented by providing clear guidance for parties and the Commission. As Ms Bennett said: "Legislative requirements for pay equity cannot be implemented through gender biased wage fixation concepts but require the option of new principles sensitive to the sources of gender bias in the old principles" Exhibit 38 Ann C para 62.
16. The issue is not whether pay equity is to be addressed - the statute requires that. Equally, it is not dependent on any quantification through regression analyses of the location, bases and extent of the problem. The only real issue is whether the existing mechanisms are adequate. In the Pay Equity Inquiry, after her extensive investigation of equal remuneration issues, Justice Glynn recommended that new principles be established.
17. We submit that the existing mechanisms are not adequate, and the appropriate course is to establish new equal remuneration principles that match contemporary understandings of and aspirations about equal remuneration, and incorporate recognition of what has been learned from what has worked and what has not in the past.

Interaction of the proposed Principle with other wage fixing principles

18. We submit that the Equal Remuneration and other conditions of employment principle should form part of the wage fixing principles and that access to the proposed Equal Remuneration and other conditions of employment Principle should be available regardless of the operation of other wage fixing principles.
19. In the Water Resources Case, the Commission found that access under the 1973 equal pay principle continued, irrespective of the operation of other wage fixing principles. We consider that is the appropriate relationship of the proposed Principle to the other wage-fixing principles.

Work value principle

20. Although the current work value change principle deals with changes in work value from a specified date, we consider that there should be access under the proposed Equal Remuneration and other conditions of employment Principle for equal remuneration cases involving work value issues without a requirement to demonstrate change in work value from a specified date. This is most important in allowing historic undervaluation to be addressed, whether the undervaluation arises from the fact that cases were not taken or from the way the claims about work value were made and dealt with.

Economic incapacity principle

21. We consider that the Equal Remuneration and other conditions of employment Principle should operate without regard to the economic incapacity principle for the purpose of establishing a threshold case that a pay inequity exists. That is, it is not an impediment to the finding of pay inequity but could be a moderator as to the application of remedy. The final outcome, however, has to be the remedying of inequity.
22. We note that the CEO Group has filed various statements relating to incapacity to pay (exhibits 41, 42, 43). We consider that the appropriate approach would be for these issues to be considered in the context of a case, if one comes forward. The parties could produce and test evidence about the economics of the industry. The Commission would consider the economic effects of its decision as it is required to do under s.146.

The scope of "remuneration"; conditions of employment; overawards

23. We submit that the appropriate definition of "remuneration" is the ILO Convention 100 (Equal Remuneration Convention) definition as adopted in the Inquiry. To adopt a definition that is any narrower would deny the Commission the opportunity to deal with some areas of pay inequity that were identified by the Inquiry.
24. As has been noted, the Act does not include a definition of remuneration and the Commission has found (in *Shead v Summit Western Pty Ltd t/as Blacktown Mitsubishi* (Matter No. IRC 3627 of 1997, 24 July 1998) that the definition varies in different sections of the Act. It is appropriate to draw on the ILO definition since the ILO Convention 100 (adopted by the ILO in 1951 and ratified by Australia in 1973) has been important in NSW in relation to equal pay, as noted in Professor McCallum's evidence February 21 (T431, 54-58 and T432, 1-3). It is also important to note that the UN Convention of Elimination of All Forms of Discrimination Against Women (adopted by the UN in 1979 and ratified by Australia in 1983) includes the "term "remuneration and other conditions". We submit that this term in the later Convention, which is broader than that the terms in ILO 100, reflects the evolving understanding of the complexity of equal remuneration issues as related to all incidents of employment.

Conditions

25. We submit that the definition we propose of remuneration and the broad application of s.23 in the Act is supported by the definitions in the Act.
26. S.6 (1) defines industrial matters as “matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry”.
27. S (6)(2) provides examples of industrial matters including: (b) the remuneration (including rates of pay, rates for piecework and allowances) for employees in any industry; and (c) the conditions of employment in any industry (including hours of employment, qualifications of employees, manner of work and quantity of work to be done) and (f) discrimination in employment in any industry (including in relation to remuneration or other conditions of employment) on a ground to which the Anti-Discrimination Act 1977 applies [sex is a ground of discrimination under the ADA].
28. A broad understanding of “conditions of employment” is required to address fully the equal remuneration issues. Just as hours of work affect equality of remuneration, so too do matters such as access to overtime and provisions about access to and progression in classifications. Conditions of employment is a matter the Commission has traditionally considered in setting pay, and it is hard to see how remuneration can be set without taking account of conditions of employment. The inclusion in our proposed Principle 12 of equal opportunities remedies specifically recognises the breadth of issues affecting remuneration.

Overawards and market rates

29. Essentially, we submit that the Commission should take account of the whole remuneration related to employment as it has done on many occasions in the past. We have addressed this matter in our opening submissions and have some further observations to make in this regard. We submit that “market rates” is a term that covers payments for very varied attributes and circumstances, paid in response to diverse factors and influences.
30. The Commission inserted special loadings in Crown awards in trades classifications in the 1970s, in consideration of private sector overawards (although some private sector employees would not have received those overawards). The President has commented that in the 1970 Teachers Case, some allowance was made in the award rate for the lack of overawards (T 239,39-41).
31. Mr Dennis pointed out in his statement Exh 11 that market rates always exist within a regulatory structure and there can never be a “pure” market consideration. He sets out at para 15 of his statement the regulatory influences that affect the market factors cited by Professor Lewis in his

Statement (Exhibit 23). Mr Dennis said: "To hold up the market wage as some useful benchmark for equity and efficiency is therefore misleading" at para 16. (see also T257, 55-59 and T258, 1-5 and T259, 1-5)

32. The basis of overaward payments was a major consideration in the HPM Case (C23933 of 1995). We recognise that this case ultimately was not decided by the federal Commission so findings of facts have not been made. Our comments on this case (in which the Women's organisations appearing in this case did appear) are based on the claims put forward by the union and the employers. Regardless of whether the situation was as was claimed, the issues raised could be expected to arise in future cases. We referred to this case in our opening submissions and now make further comment on it in the light of issues raised during these proceedings.
33. 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 disabilities, 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.
34. 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.
35. 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.
36. 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.
37. 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.

38. 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.
39. 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 for setting overawards especially for the lower classification level where a greater proportion of the work value was accounted for by factors other than skills and knowledge.
40. The company pointed out in its submissions that it might have been demonstrated that the company's human resources management practices (regarding its ability to provide information about the levels and bases of remuneration, and its remuneration practices) were not sophisticated, it had not been proven they were discriminatory.
41. Mr Ray Bennett said in his revised statement to the Pay Equity Inquiry (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.
42. Where the relevant sources of value that are to be rewarded have not been appropriately measured and applied, there is room for gender-biased 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. 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 challenge 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

43. 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. We considered a range of cases from jurisdictions in other countries in our final submission to the Pay Equity Inquiry and will not repeat that material here.
44. There are some broad points arising from those cases:
 - market rates defences by employers almost always succeed in equal remuneration cases although they are not accepted as legitimising different rates of pay for men and women for the same work.
 - 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 and have at best been accepted as prima facie evidence that rates have been affected by sex discrimination
 - another significant issue is how and how validly the market has been assessed - wage discrimination issues cannot be avoided simply by reference to a market survey.
 - 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
 - market rates are sometimes discriminatory since they are built on past discrimination.
45. In relation to market rates, then, the key issues have been:
 - What information and evidence is required to establish that sex related pay disparities are based on market forces
 - What justification is required where a properly investigated and applied market loading results in sex differential pay outcomes for work of comparable value.
46. Consideration of remuneration should not be constrained to only part of the remuneration – it should include everything workers receive in respect of their employment including consideration of the conditions in which the work is done and in relation to which value is assessed and remuneration set. Neither should consideration be constrained to only some factors of value in the work. Everything workers get in consideration of their work is paid in consideration of value provided by them and all parts of that value should be considered in terms of whether each part has been assessed and the value attached to each part is affected by gender bias. Justice Glynn in the Report of the Pay Equity Inquiry recognises that it would be inconsistent with ILO Convention 100 to exclude consideration of overaward payments (V1, p.27). Justice Glynn did take account of

overawards in the case studies in the Inquiry (for example, in relation to the lack of overawards in hairdressing and the availability and bases of them for motor mechanics; the lack of overawards in childcare; the effects of market factors on the rates for geologists and librarians; overawards for clerical and production workers at Maintrain).

47. It would significantly inhibit achievement of equal remuneration to restrict consideration to only some parts of remuneration and some factors of value. Ensuring assessment of a consideration such as skill was free of gender bias would not provide equal remuneration where the gender bias and resulting equal remuneration problem is in the assessment of productivity, or market rates for the work. For consideration of equal remuneration, it does not make sense to differentiate traditional work value factors from any other factors by which value is contributed and in regard to which remuneration is paid.
48. Productivity and labour market payments may be included in awards or overawards, and reflect the value of work people do. Changes to work arrangements and practices may have resulted in increasing productivity and also resulted in people working more difficult hours, and in greater work intensification. Those productivity loadings thus do reflect increased value of work. Similarly, rates described as labour market attraction rates may actually reflect additional skills and experience not recognised in an award, or may reflect specific work disabilities (work environment, geographic locations etc.) The recognition that overaward payments in the upper skill levels of clerical work did reflect skills that had not been recognised in the award provided the basis for substantial increases in the Clerks Award in 1996 (Decision 25 October 1996 Matters IRC2335 of 1992, 384 of 1993, 1651 of 1994, 1871 of 1994 and 2367 of 1994).
49. Remuneration ascribed to a particular factor of value – whatever it is – cannot be dismissed without examination as to whether it has been assessed without gender bias. The dangers of relying on “common sense” assumptions about the conditions, skills and demands of occupations were clearly demonstrated in Mr Hatcher’s cross-examination of Professor Wooden T.456-57. Similar issues arose in Professor Lewis’ evidence (T 368,22-58, 369,1-20).
50. If the Commission allows any “black boxes” –factors that cannot be examined - in the wages system, whether they are labelled qualifications, labour market supply and demand, productivity, skills, or conditions – it is in those black boxes that gender bias will be hidden.
51. What matters is whether the assessment of each factor of value – whatever it might be – and the establishment of remuneration related to it is affected by the sex of the worker, and that where the factor has an equal or comparable value, men and women workers are remunerated equally for it.
52. There has been some concern that recognising the contribution of factors such as labour market supply and demand and productivity and profitability

of industries to remuneration could disadvantage workers in female dominated occupations. This is based on concern that taking account of value to the employer could result in further depressing wages in industries where productivity is low (perhaps because of low capital investment, limited markets, high competition etc.), or where there is oversupply of certain types of labour. (perhaps because of open entry to occupations without either industrial or regulatory control over access). Conversely, control over labour supply and high a high capital to labour ratio may make it more likely that rates will be higher, and those are more likely to be characteristics of male dominated occupations.

53. It has been the Commission's practice to take account of and weigh up both demands on workers and productivity and labour market factors, although it has not been common to specify the contribution of each factor to remuneration. There are many considerations affecting remuneration and valuing of work that are simply taken for granted by negotiating parties and applicants for arbitration (including recognition of industrial control over labour supply, supply constraints, levels of profitability of enterprises and industries). It would often have seemed unnecessary to specify factors affecting remuneration especially where they were known to and agreed by all parties. It is not always clear what claims have been accepted and what have not. The basis of the agreed position may be packaged in a particular way to emphasise some factors and not others.
54. Professor McCallum pointed out in his evidence on 22 February that work value and productivity issues are intertwined in enterprise bargaining (T433, 52-58 and T434, 1-2). He said that enterprise bargaining starts from existing rates and assumptions, however arrived at. In universities, for example, enterprise bargaining had specifically been about technological change and its effects on work value.
55. It is important that the Commission be able in appropriate cases to consider productivity factors in earnings. Treatment of productivity has varied considerably over time, from systems restricting consideration of productivity to national-level productivity increases in awards to systems where productivity improvements were significant factors in award rates to systems in which productivity has mainly been taken into account in enterprise and individual bargaining. The operation of the industrial system itself affects what is identified as productivity and how it is characterised. Where there are no opportunities for securing productivity-related increases through the tribunals, there may not be identification of work practices and so on that would equally be described as reflecting increased productivity in a system that did provide recognition of productivity. The boundaries between changes in work value and productivity improvements are not tight and have shifted over time.
56. It would be quite artificial to exclude particular aspects of work that have been remunerated simply on the basis that those aspects and factors were characterised in a particular way within the context of wage-fixing principles applying in the industrial system from time to time. The way work is

described reflects the purpose of describing it – it is described in one way in terms of assessing skills for training purposes and in other ways for other purposes. Where there is not an opportunity to bargain about it, productivity may not be identified at all. For example, clerks have on occasion not been included in enterprise bargaining and enterprise agreements and so have not had their contribution to the productivity of the enterprise assessed, recognised or remunerated. Justice Glynn particularly recognised recognition of the productivity of clerical workers and their inclusion at Maintrain in the enterprise agreement as an example of good practice, in the Pay Equity Inquiry Report.

57. The description of work for industrial purposes inevitably is in part an artefact of the industrial institutions, principles and processes applying at the time. It would be impossible for the Commission to take the fresh and broad look at what remuneration has been based on that is required for the achievement of equal remuneration if such constraints as excluding particular factors of value that are remunerated were accepted. That is particularly so in light of the possible but unspecified and/or undocumented range of considerations about value of work on which consent awards may have been based.
58. It is these considerations that have led us to emphasise the importance of making explicit the bases of assessment of value of work and setting of remuneration. We appreciate that the Commission when it acts as an arbitrator generally already has obligations to act judicially and to give reasons for its decisions. We also recognise that most matters proceed by consent and are not arbitrated and that in those cases the bases of valuing work and setting remuneration sometimes are not made transparent and that makes examination and re-examination of them difficult and sometimes impossible. We consider that achievement of equal remuneration will be facilitated by greater transparency by industrial parties and in industrial processes generally and that transparency will be an important aspect of the educative operation of the proposed Principle and contribute to the development of better understandings of sources of gender bias in evaluating work. We note the evidence of Dr Burton in the Pay Equity Inquiry to this effect at para 116 of our Opening Submissions, Exhibit 9. Ms Bennett raised similar matters in her evidence in the current proceedings (para 27 Annexure A Exhibit 38). We also note Justice Glynn's support for greater transparency, in the Report of the Pay Equity Inquiry.
59. We recognise that our formulation of these concepts in our original proposed Principle 5 was inappropriate and have endeavoured to re-draft it to make it clear that our proposed requirement for transparency relates to the evaluation of work and setting of remuneration generally.
60. In the Enderby case (referred to in the Pay Equity Inquiry Report V2 p.108) it was decided that there were differences in the demand for psychologists and speech therapists and that those differences (properly determined without sex discrimination) justified differences in pay. However, the actual pay differences exceeded the amount accounted for by that factor. This

type of consideration of the factors of remuneration allows full scope for pay differences based on real differences in the economic circumstances in which work is done while disallowing differences in the remuneration that are based simply on assertions based on assumptions about the relative demand for various occupations, or the relative productivity of various work. We recognise that demand for occupations varies and that some enterprises and industries are more productive and/or profitable than others. Nothing in what we have proposed would inhibit appropriate consideration and weight being given to that.

61. We submit therefore that the Commission is required to take account of all components of remuneration including overaward payments in relation to equal remuneration and all factors of value that are remunerated. It will be difficult to ensure and demonstrate equal remuneration where the payments are not based on information and evidence and the bases made transparent.

Assessing the level and bases of overaward payments

62. Another issue of some concern has been how the level and bases of overawards in an industry are to be identified. We have addressed this issue in our opening submission in relation our proposed principle 12 We note that evidence has been provided in this case that surveys are a means used by industrial parties to assess overaward and total remuneration. Mr Hatton's statement (Exhibit 40) is that the overaward rates for mechanics vary considerably, with type of establishments and geographic location, additional skills from specialised training, business requirements, market forces and other factors. Ms Tiddy's statement (Exhibit 45) is that there is considerable variation across councils on, for example, number of grades per level in the classification structure, grade range of rates and number of salary steps within the salary structure. Only entry-level rates of pay are provided in the award. Thus, employees engaged in like positions at different councils may have different rates based on: method of progression (skills based, competency based, performance based, or combination); payment for extra/higher skills (eg languages); payments relating to transitional arrangements for geographic, shift, specific skills allowances, incremental progression scales from previous award; "present occupant only" arrangements; enterprise specific arrangements, and award allowances.
63. David Richardson's statement (Exhibit 44) is that the AIG's bi-annual wage and salary survey of members shows that market rates of pay vary across and within job classifications and regions.
64. These surveys show that while there are difficulties in assessing industry or occupation remuneration, satisfactory approaches have been developed for and by industrial parties. In any matter requiring evidence of overaward rates for particular industries and occupations, the bases of the surveys and other issues relating to the incidence and bases of overaward payments

might be relevant considerations, and ones the industrial system has dealt with before.

The meanings and requirements of s.21(1)(b) and s.23

65. We submit that the equal remuneration requirements of the Act impose substantial responsibilities on the Commission especially in the light of object 3(f) of the Act. The Commission is required to ensure that equal remuneration is provided where awards are made (s.23) or reviewed (s.19) or on application (s.21). The Commission is required to ensure that the rates it sets in awards do provide equal remuneration for men and women workers for the work being undertaken and this consideration is not restricted to remuneration paid under awards or comparisons within awards. If it were, there would be no basis for addressing equal remuneration in female dominated occupations.
66. We also submit that the Commission has a responsibility that may involve raising issues beyond those raised by industrial parties. In view of the high proportion of matters settled by consent in NSW, if the Commission does not raise issues with the parties, there is little prospect of improvement regarding equal remuneration.
67. We do recognise that the Commission's resources constrain its consideration of equal remuneration and other matters especially where parties are not drawing relevant information to the Commission's attention. On a practical basis we do accept that in the immediate future it is very likely that the most productive way for equal remuneration issues to be addressed will be through applications under s.21(1)(b). The equal remuneration issues are complex and some are unfamiliar, and will require in-depth examination. Developing approaches and cases should, over time, provide guidance for future consideration of equal remuneration to be addressed in the ordinary everyday work of the Commission, without a separate application, as many other matters are. However, if the Commission's consideration of equal remuneration is confined to applications, those who most need the Commission's consideration are least likely to receive it, because of their industrial disadvantage. The Act does envisage equal remuneration being addressed in award reviews under s.19, but the Commission's decision in that matter has been that s.19 is primarily about modernising awards and that it does not generally accommodate equal remuneration inquiries at the Commission's initiative.
68. Section 23 apparently deals with circumstances in which an award is made where there is not an equal remuneration application. In relation to the making of new awards (which accounts for a relatively small proportion of the matters the Commission considers) it would be appropriate for the Commission to raise equal remuneration considerations. It may be that generally in considering male-dominated occupations, that consideration often would not have to be extensive. That is because it is in female dominated work that rates have explicitly been set in the past by reference

to the sex of the workers and because not all the effect of that has been removed. There also are circumstances where equal pay may have been implemented but has been compromised in subsequent industrial arrangements. There also are situations where the value of work has been assessed unaffected by the sex of the workers and appropriate remuneration and other conditions of employment set.

69. In considering in a female dominated award whether an award would provide equal remuneration, the Commission could consider generally, how comparable (in value) work is treated rather than considering a particular award/s. That could involve analysis of the key factors in remuneration and consideration of how those factors of value are assessed and remunerated in other areas of work across a range of industrial instruments irrespective of whether the work is similar in nature. What is important is consideration of the value of the work, not the comparisons (if any).
70. The indicators of likely undervaluation in female dominated work as identified in the Pay Equity Inquiry Report provide a useful checklist as a starting point for exploration of undervaluation in any particular award and that is why we have included them in our proposed principle. Many of the factors identified are precisely those that explain the absence of cases and/or the lack of success in claims.
71. Justice Glynn's preference for dealing with equal remuneration matters by inquiry on some occasions where possible was a proposal based on past Commission practice. Justice Glynn gives the example of the 1970 Teachers Case. We note that the Commission has power under s.162(j) to inquire into any industrial matter on its own initiative. A recent new award case in which the Commission raised matters with the parties that parties had not themselves raised was in the Riverina Enterprise Award application, where Justice Walton requested the parties to provide some information in relation to the application of s.23 (specifically, information about the sex composition of the workforce). While in a male-dominated enterprise award the investigation might often be rather truncated, some awards would require more investigation.
72. We submit that providing equal remuneration increases will not effectively transform minimum rates awards to paid rates contrary to s.406 (1) (which provides that conditions of awards are minimums) where the award is based on overawards in another area. Equal remuneration adjustments in the way the Labor Council – and we – have proposed them would almost always provide a minimum rate that would be below some overawards in the applicant occupation and it is proposed that equal remuneration adjustments could be absorbed against overawards. In any case, the rate provided would still be a minimum rate and overaward payments could still be made. The relationship proposed between the equal remuneration adjustment in an award and any overaward payment is contrary to the concept of paid rates awards.

Consent

73. We submit that it is essential that equal remuneration issues be considered in consent applications.
74. We note that consent was tested until the 1990s and the parties had to satisfy the Commission that applications were consistent with operative principles and legislation. The Commission could reject applications where it was not so satisfied. This process sometimes involved hearing evidence and submissions even where there was agreement. A possible model could be the requirements imposed in the Commission's Rules regarding enterprise agreements, requiring the provision of information in affidavits, which the Commission could test. It would be important that such a process were not simply a rubber stamp and that the Commission did on occasion question the parties about their affidavits.
75. Important issues would include:
 - the history of valuing of work and setting of remuneration for the work under the award including identification of factors of value;
 - information about how equal pay had been implemented; and
 - information on the sex distribution of the workforce including trends over time.
76. These issues would also be important where applications were not by consent.
77. We do consider that some of the proposals Ms Bennett made in her Exhibit 38 (paras 44 and elsewhere) are worth further consideration including in appropriate circumstances reference to experts in relation to gender bias in evaluating work..
78. Ms Bennett has noted in her Statement and in evidence (Exhibit 38 Ann C para 60; T498-501) that there has been:

[H]eavy reliance in industrial jurisdictions on rate setting reflecting a process of agreement and negotiation between the parties rather than an exhaustive review by the Commission. In the equal pay area, this process has produced uneven, incomplete and at times clearly gender biased results"
79. Ms Bennett commented further on this issue at paras 39 and 41. (see also T498-501)

Why it would be inappropriate to apply a discrimination test; whether the Principle should be restricted to female dominated occupations

80. We submit that a discrimination test should not be imposed in equal remuneration matters.
81. We submit that it would be inappropriate and outside the requirements of the Act and the ILO Convention 100 to impose a discrimination test in equal remuneration matters. A test based on the ADA (in application of s.169 (1)) would be far too narrow. The criterion of "reasonableness" is a test in relation to indirect discrimination but should not apply regarding equal remuneration. It has been noted that the term "discrimination" in s.3 (e) is broader than in s.169. In keeping with the Commission's s.19 decision, discrimination can have its ordinary meaning. The concept of systemic discrimination was found in the Pay Equity Inquiry to be a more appropriate consideration in equal remuneration matters, since it comprehends the interrelated operation of a system of apparently non-discriminatory arrangements having discriminatory effects (v2 p124). (see also Hunter T406, 37-40 and T407 5-17).
82. In equal remuneration matters, it can be difficult to find who is the doer of discrimination, especially where gender-related disadvantage arises from an omission. Applicants may have made claims that are too limited to provide equal remuneration, based on assessments of relative bargaining power. The perpetrator of discrimination may not be any individual. The discrimination may arise from an amalgam of institutional practices of industrial parties and tribunals. Establishing exactly when and how discrimination occurred could be difficult – sometimes impossible – and ultimately unproductive especially since what is relevant is the remedy.
83. The equal remuneration provisions do not provide any remedy for the past discrimination other than a means of providing equal remuneration in the future. The absence of retrospective application or punitive provisions is likely to contribute to being able to secure and implement real remedies and is consistent with the meliorative orientation of the provisions and inconsistent with requirements to locate a particular perpetrator of discrimination. This approach recognises that gender-affected valuing and remunerating of work itself is a mischief requiring remedy and the equal remuneration remedy requirement does not have to be established by proof of a discriminatory cause. These matters are clearly set out in Professor Hunter's Statement Exhibit 24 and in her evidence in this case (T.406-07).
84. We submit that it would be inconsistent with the requirements of ILO Convention 100 and the Act to impose a discrimination test or to restrict the application of the Principle to female dominated occupations or to men. The Act contains other provisions relevant to addressing discrimination that in part overlap equal remuneration provisions but operate separately from them. Sams DP has raised a situation of an award under which male cleaners may work more hours than female cleaners and earn a lower hourly rate. Without commenting on the specific situation, in the absence of specific consideration of the award and its history, in a general way, we would consider that the male cleaners could have grounds for an equal remuneration claim and both the female and male cleaners could have

grounds for an action in relation to sex discrimination in the award. While the male cleaners might point to their work being of equal value to the female cleaners and their rate being lower, the female cleaners might point to the disadvantage of not being able to earn as much as the male cleaners because of the award specification of fewer hours.

85. We submit that what is required for a remedy to be provided is simply that it be established that there is not equal remuneration for men and women workers for work of equal value. That could be established in various ways, including demonstrating that the sex of the workers had affected valuing of work and setting of remuneration; and that there were groups of men and women workers doing work of equal or comparable value who were not receiving equal remuneration and other conditions. In the latter case, we submit, the reason(s) that there is not equal remuneration do not have to be proven.
86. The Commission is required to be satisfied on the **balance of probabilities** that there is not equal remuneration. As we have set out in the principle we propose, there are many remedies that could be appropriate. It may be that rather than directly setting rates, in some circumstances the Commission would provide as a remedy that the value of work and remuneration be set by a method that is free of gender bias, and/or through a particular process.
87. We have not been able to locate equal pay cases for men in our search of cases and literature relating to the jurisdictions in other countries or in Australia and we do consider that almost all cases will relate to women and most to female dominated occupations. The reason that is so is that some occupations and especially the female dominated industrially disadvantaged ones, have continued to be affected by Australia's past history of explicitly sex-based wages. (Gregory T314, 28-40)
88. The underlying principle in relation to the equal remuneration provisions is that no one ought to be disadvantaged through treatment of them on the basis of attributes (such as sex) that are irrelevant to their work. Professor Hunter's evidence (T 399) sets out the human rights basis of equal remuneration. It would be inconsistent with that basis for men to be excluded from the operation of the principle.

Application of the Principle to enterprise agreements

89. We submit that the proposed principle would apply to enterprise agreements in that account could be taken of remuneration under enterprise agreements in consideration of remuneration in occupations and industries.
90. We recognise that the proposed principle does not allow the Commission to alter the terms of an enterprise agreement to bring about equal remuneration unless the terms of the agreement are discriminatory in the terms specified in the Act. We do consider that the legislation needs to be

changed and point out that neither of the two equal remuneration cases taken so far in the federal jurisdiction could be taken in the NSW jurisdiction, because they both deal with equal remuneration problems relating to enterprise agreements. We submit that s.47 does not prevent enterprise agreements being taken account of (unlike the situation under the 1991 Act). We do note that the Commission has taken account of enterprise agreements in an industry in setting award rates in its decision in *Re Transport Industry (State) Award IRC 5261/1996*.

91. We note that the Labor Council has indicated that it may seek further consideration of the application to enterprise agreements of any new Equal Remuneration and other conditions of employment Principle arising from these proceedings (T 170,30-40), and consider that could greatly enhance the operation of the Principle. We agree with Professor Hunter's evidence that in Australia's split system (with centralised and enterprise level wage fixing) implementation of ILO 100 requires that equal remuneration be implemented at both levels (T.404-05).

Flow-ons

92. We submit that the core of the proposed principle, that work should be valued and remunerated without gender effects, is itself a significant protection against flow ons. Once the value of work had been set in award where a comparator was used as part of establishing value and/or remuneration, the new award would establish the appropriate rate. If there were further movement in the comparator, it would have no necessary implication for the original applicant award. If there were to be a claim for further increases for the applicant, they would have to be made out freshly, on the basis of the value of the work.
93. We have addressed arguments about "ratcheting" in our opening submission.
94. We also consider that the Labor Council's proposal that equal remuneration adjustments be separately specified in awards provides a measure of protection against flow-on of equal remuneration adjustments in situations where the equal remuneration adjustments may alter relativities. It will be necessary for achieving equal remuneration that some relativities do change. Provisions allowing for increases to be phased in and for award increases to be absorbed by overawards could also address concerns. The Commission could also require that changes to relativities within the award and in relation to other awards are justified; and require that the Commission be satisfied that there is no likelihood of wage or condition leapfrogging. Ms Steer proposed such an approach in her evidence on 21 February (T 356, 46-52) and safeguards along these lines have been incorporated into the proposals in Exhibit 50.
95. We stress again that we are not advocating a comparative wage justice system, or a comparable worth approach, or any other approach that would automatically transmit rates or increases in one occupation to another.

Consideration of each matter in relation to the value of work will provide a powerful protection against flow-ons.

Economic issues –extent of gender gap; employment effects

96. We submit that there is more than enough evidence for the Commission to find, on the balance of probabilities, that there is a gender earnings gap and that part of that gap cannot be explained other than by the sex of the workers. There could be a Principle on equal remuneration as part of a general framework of industrial and human rights even if there were no demonstrated gender earnings gap. Some, however, might argue that it would be a waste of resources and a useless cluttering of the wage fixing principles to have a Principle if there were not a finding that there is such a gender earnings gap. Part of this gap is unexplained other than by gender, and this is addressable and appropriate to be addressed by the Commission. We therefore submit that the Commission should make such a finding.
97. We submit this gap is most usefully considered and addressed at the level of specific occupations.
98. During this case, concerns have been raised about whether the unexplained residual gender differential after various factors have been considered actually does reflect sex discrimination. Professor Wooden in his evidence (T 455,31-46) raised whether the absence of a gap for the under 30s means that later cohorts will not have a gender gap, or whether the gap emerges after the age of 30 as women leave the workforce for childrearing. Mr Dennis points out in his evidence (T 262,12-18; 267,47-54) that time series data would have to be reviewed to assess whether the absence of a gender earnings gap among the under 30s was a new situation or had been so for a long time. Professor Wooden agreed that time series data would be necessary to assess that (T454 ,21-42). Another possible explanation could be that in some women's occupations, there are not prospects for continued improvement in earnings after a few years in the work, although extra experience and knowledge may still be being accrued.
99. Professor Lewis (T 377) and Professor Wooden in their statements and in their evidence (T 448,38-40_ both show there is an unexplained gender earnings gap. Mr Dennis pointed to the need to distinguish factors in the gender gap that are and are not addressable by the Commission. It is evident from the discussion of the regression analyses presented by the various economists in this case and in the Inquiry that consideration of the gender earnings gap has mainly been in terms of the part of the gap associated with gender segregation.
100. There has also been a great deal of evidence in the Inquiry and in this case that some assessment of other factors such as qualifications, and experience can reflect gender-stereotyped assumptions. For example, qualifications in female dominated occupations may be valued and remunerated less than in male occupations. Further, women in various occupations may receive lower returns from their qualifications and experience than men do. This

adds additional weight to the proposition that consideration of equal remuneration and other conditions cannot be restricted to female dominated occupations.

101. Professor Gregory stated that it is the specific occupations that should be considered (Exhibit 17; paras 18 and 24; evidence T309, 16-30 and T314, 26-34) rather than occupational segregation in aggregate. Professor Wooden in fact agrees that where market failure has occurred in that sex of the workers is affecting the rates of pay, it is appropriate for industrial tribunals to intervene (T 453,22 –454,5). Professor Lewis said in his evidence on 21 February that discrimination warrants intervention by tribunals (T 364,20-24; 378,10-28). Professor Lewis agreed that a central purpose of the award system and industrial regulation is to modify market outcomes (T 364-65,58, 11-3). He agreed that if impediments to women's full participation in the labour force could be identified and addressed, there would be overall benefit to the economy (T 390-91).
102. No evidence was presented in support of the claim that "compensating differentials" (attractive non-remuneration elements of women's jobs) account for women's lower earnings (Lewis' claim (Exhibit 23 para 47)). The difficulties in identifying what is to be compensated for, especially where that is simply assumed, are clearly demonstrated in Mr Murphy's cross-examination of Professor Lewis (T 385-88). Professor Gregory notes the lack of such evidence and says he would be surprised if compensating differentials did account for women's lower earnings (Exhibit 17 para 17). The "compensating differentials" argument was also rejected by Mr Dennis (statement, paras 9-12).

Employment effects

103. Mr Dennis also points out (para 18) that, as acknowledged by Lewis (in Lewis' Statement Exhibit 23 para 60) that there are many regional and occupational labour markets, which increases the likelihood of there being some monopsonistic labour markets (those in which wages may be increased without adverse employment consequences since existing wages are below the economic value of the work).
104. It has been pointed out that there can be improvements in the efficiency of the labour market from equal remuneration adjustments. Professor Wooden and Mr Cox both agreed that this was so in their evidence on February 22. Mr Cox says (T 428,49-56) that:

[T]he presumption is that there might be some more scope in occupations with significant discrimination to effect pay increases without having such a negative employment impact because employers are in some sense getting some kind of economic or financial benefit out of that

discrimination so, in principle, they can afford to pay higher rates to those groups without having to reduce levels of employment.

105. Professor Wooden agreed that if occupations are low paid and high paid because of gender, it would reflect a problem in the market (T453, 33).
106. Inefficient labour markets in hairdressing have resulted in shortages and poaching, as well as high wastage rates from the trade. Ms Smith said in her evidence on 16 February (and in her Statement, Exhibit 13 Attachment 1, p.9) that Board of Vocational Education and Training figures established long term and acute shortages especially of experienced hairdressers. This situation could be improved by equal remuneration adjustments. Mr Dennis discusses how substitution might work in hairdressing in ways other than directly causing demand and employment to fall (paras 19-24) and notes that if all hairdressers received wage increases simultaneously, there would be little reduction in demand or employment (para 25). Mr Swan said in his evidence on 22 February that there had been shortages of hairdressers for years. He also said that previous responses to price increases would have been reflected in slower employment growth in the industry rather than shedding of labour.
107. In our proposed Principle 14, we say that the Commission should require specific evidence of any claimed effects of equal remuneration on employment or the economic situation of occupations, industries or enterprises. The possible economic and employment effects of equal remuneration have been extensively addressed in these proceedings and in the Inquiry, albeit primarily at an aggregate and abstract level. We consider that the Commission's obligations under s.146(2) of the Act should be addressed as they are in other proceedings, on the evidence presented. If no party presents evidence of economic effects, it can be presumed that no party considers there are economic effects that have a bearing on the matter, especially since economic and employment effects are such a constant high priority and high profile consideration for industrial parties.
108. Mr Dennis in his Statement Exhibit 11 para 32 said:
Demanding that discrimination be identified and benefits of remedial action exceed the costs would be "an over-extension of the role of economics". Rarely in public debate is the desirability or otherwise of democracy, freedom of expression, freedom of religion, or even polygamy or slavery subject to 'cost-benefit' analysis".
109. We think this is a useful reminder that economics can shed some light on the types of decisions to be made and suggest some possible consequences. As we have heard in this case, there is some considerable uncertainty about the extent and nature of pay equity problems or the consequences of addressing them. Many of those uncertainties can be reduced or resolved in consideration of specific rather than aggregate cases. In the end, the decisions to be made are not determined by economics. In relation to equal remuneration, there already is legislation in place requiring equal remuneration. It is an important human rights consideration, and matters

very much to working women. It is an objective that has wide public support in survey after survey. We are here dealing with how, not whether, equal remuneration is to be achieved.

Conclusion

110. Our submission and indeed those of the Crown and the Labor Council, have dealt with important questions and issues that have to be considered in taking the next step forward in remedying pay inequity.
111. Your Honour the President has commented that "the experience is that it is hard to get an answer to hard questions"(T503, 42-557). We submit that this is true for pay equity. For thirty years the question has been posed and only partially answered. The question before this Commission, is the most difficult question yet put - to resolve gender related undervaluation, multifaceted in its reasons and multifaceted in its answers.
112. Ms Bennett said in the exchange referred to above that the level of difficulty in providing an answer is not a reason not to ask the hard questions. We strongly agree.
113. The hard questions are definitely before this Commission and this Commission has before it the next steps toward the answer.
114. We ask the Commission to take the next steps in developing equal remuneration mechanisms that match our evolving understanding of the nature and extent of equal remuneration problems. Much progress towards equal pay has been made through the Commission's and the industrial parties' efforts since Miss Audrey Turner appeared for the Australian Federation of Business and Professional Women's Associations in the 1949-50 Basic Wage Case, a case in which the ACTU incorporated an equal pay claim. That history of that progress shows that when the Commission has had a role in equal remuneration matters, the results have been much better than where matters are dealt with without the Commission's supervision.
115. This case is a great and historic opportunity to provide those mechanisms and guidance for industrial parties and to provide an authoritative statement of the continuing relevance of the issues and new ways of addressing them in the current context.
116. If it please the Commission, these are our submissions.

Revised Proposed Equal Remuneration and Other Conditions of Employment Principle

1. The Equal Remuneration and other conditions of employment Principle applies to all aspects of the Commission's jurisdiction as provided in the Industrial Relations Act including in consent matters.
2. Access to the Equal Remuneration and other conditions of employment Principle will be available on a case by case basis. Consideration of whether rates have been affected by the sex of the workers, and of whether remuneration for men and women workers is equal where work is of equal or comparable value, will not be restricted to industries or occupations that are or have been characterised by majority female employment.
3. The Equal Remuneration and other conditions of employment Principle does not require that it be demonstrated that differences in remuneration of men and women workers for work of equal value are caused by sex discrimination, however defined.
4. It shall no longer be the presumption that rates of remuneration have been properly assessed, having regard to either the Equal Pay Principles or proper work value assessments. What is required is appropriate assessment of value of the work, unaffected by the sex of the workers, and equal remuneration for men and women workers for work of equal or comparable value. That assessment and setting of remuneration in relation to it must be based on real and cogent evidence about the value of work.

Consideration of whether valuing of work has been affected by the sex of the workers is broad and relevant matters include:

- (a) whether there is some "female characterisation" or labelling of work;
- (b) whether there is some under-rating or undervaluation of the skills of women employees per se;
- (c) whether occupational segregation or segmentation has adversely affected remuneration; and
- (d) whether there are features of the industry or occupation that may have influenced the valuation of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, low representation in workplaces covered by formal or informal work agreements and the incidence of consent awards/agreements.

It is not required that changes in the value of work from any particular point in time be shown.

5. The assessment of the value of work is required to be transparent, objective, and unaffected by the sex of the workers.

Assessment of the value of work can include:

- (a) traditional work value components such as skill, responsibility, qualifications and conditions of work (including the work environment and the context in which work is carried out);
- (b) productivity, and labour market factors.

6. Where the value of work of men and women workers is assessed as equal or comparable across the various components of remuneration, equal remuneration and other conditions must apply for the men and women workers doing work of equal value.

7. Comparators are not required to establish the value of work. Where comparators are used, they may be drawn across occupations and industries, irrespective of the form of industrial regulation or employment contract. Several comparators may be used. Comparisons are not restricted to similarity of work.

Relevant factors in establishing comparisons include:

- (a) the history of the occupation or industry;
- (b) award histories and the pattern of award variation and development;
- (c) the availability of credentialling arrangements;
- (d) institutional arrangements that impact upon occupational markets, such as regulatory schemes; and
- (e) the comparable circumstances of other occupations and industries in relation to matters such as education, training, qualifications and competencies.

8. Comparisons within and between occupations and industries may be used for guidance in ascertaining appropriate rates of remuneration.

9. The Commission will ensure that equal remuneration for men and women workers for work of equal or comparable value is provided in first awards including those based on existing rates and conditions, and that valuing of work and setting remuneration is not affected by the sex of the workers involved.

10. The Commission will consider during award reviews whether there is equal remuneration for men and women workers for work of equal or comparable value and whether assessment of the value of work or setting of rates is affected by the sex of the workers, especially in low paid, female-dominated, industrially weak occupations and industries.

11. Where necessary in the exercise of its jurisdiction the Commission may require the parties to address issues bearing on equal remuneration and other conditions of employment and encourage the industrial parties to cooperate in enquiring into the factors and bases of evaluation and remuneration (consistent with s.162(2)(j) of the Act and the Commission's other powers under the Act).

12. Remedies may include:

- (a) reclassification of work;
- (b) the establishment of new career paths;
- (c) changes to incremental scales;
- (d) reassessment of the broadbanding of classifications or skills;
- (e) reassessments of definitions;
- (f) amendment of generic descriptions of work which do not properly describe the value of work;
- (g) changes to rates of remuneration including through orders to ensure equal remuneration and other conditions of employment, and equal remuneration adjustments;
- (h) changes to work practices to ensure equal employment opportunities in order to bring about equal remuneration and other conditions of employment.

13. The Equal Remuneration and other conditions of employment Principle operates irrespective of the operation of other wage fixing principles.

14. Where the Commission is considering the economic effect of decisions under this Principle, economic impacts will be considered on the same basis as in any of the Commission's decisions, consistent with the requirements of the Act. In particular, the Commission will require specific evidence regarding any effect claimed on employment or the economic situation of particular occupations or industries or of the New South Wales economy generally. Where the Commission determines that equal remuneration increases should be phased-in over a period of time or otherwise less than fully and directly applied the Commission will explicitly state its reasons for its decision.

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3. Past efforts have focussed on the award system and good progress has been made in that area of remuneration involving minimum rates of pay. However, much lower levels of pay equity exist in relation to overaward payments. These overaward payments may be in the form of formalised enterprise agreements or informal collective workplace agreement. 16

4. The International Conventions do not restrict 'remuneration' to any component of what workers receive for their labour and the broader meaning of 'remuneration' has been adopted in the 1996 Act. The broad meaning is necessary to give effect to the ILO Convention. 18

5. In some awards the requirements of the 1973 Equal Pay Principle have not been properly applied. In others, the broader requirements of the 1991 and 1996 Acts have not yet been fully applied. Inclusion of pay equity as an object of the 1996 Act shows that account is to be taken of it in all parts of the Act. 18

6. Equally, the International Conventions do not except from equal remuneration requirements any industrial arrangement under which any component of remuneration is paid. 19

7. While it certainly is desirable for there to be further amendments to the Act to clarify some of the matters that were contentious during the Inquiry, it is submitted that the principle proposed by the Women's Organisations can be made under the existing legislation and that if that principle were made in the terms outlined, further limited progress toward equal remuneration could be made. 21

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3. Consistent with the ILO Convention 100, the Equal Remuneration Principle does not require that it be demonstrated that differences in remuneration of men and women workers for work of equal value caused by sex discrimination, however defined.	40
4. Consideration of whether valuing of work has been affected by the sex of the workers is broad and relevant matters include: (a) whether there is some "female characterisation" or labelling of work	44
(b) whether there is some under-rating or undervaluation of the skills of women employees per se	44
(c) whether occupational segregation or segmentation has adversely affected remuneration	44
(d) whether there are features of the industry or occupation that may have influenced the valuation of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, low representation in workplaces covered by formal or informal work agreements and the incidence of consent awards/agreements	45
5. The assessment of the value of work is required to be transparent, objective, and unaffected by the sex of the workers. Transparency means making clear the steps in reasoning and the balancing of considerations in the decisions of the Commission. Assessment of the value of work can include: (a) Traditional work value components such as skill, responsibility, qualifications and conditions of work (including the work environment and the context in which work is carried out) (b) Productivity, and labour market factors	46

6. Where the value of work of men and women workers is assessed as equal or comparable, across the various components of remuneration, equal remuneration must apply. 49

7. Because of the historic undervaluation of some female dominated work, it is not to be assumed that past valuing of the work is appropriate and unaffected by the sex of the workers. Therefore, what is required is appropriate assessment of value of the work unaffected by the sex of the workers and equal remuneration for men and women workers for work of equal or comparable value rather than assessment of changes in work value and related remuneration changes from any particular point in time. 50

8. Comparators are not required to establish the value of work women do. Where comparators are used, they may be drawn across occupations and industries, irrespective of the form of industrial regulation or employment contract. Several comparators may be used. Comparisons are not restricted to similarity of work. Relevant factors in establishing comparisons include: (a) the history of the occupation or industry (b) award histories and the pattern of award variation and development (c) the availability of credentialling arrangements (d) institutional arrangements that impact, upon occupational markets such as regulatory schemes (e) the comparable circumstances of other occupations and industries in relation to matters such as education, training, qualifications and competencies. 51

9. Comparisons within and between occupations and industries may be used for guidance in ascertaining appropriate rates of remuneration. 53

10. The Commission will ensure that equal remuneration for men and women workers for work of equal or comparable value is provided in first awards including those based on existing rates and conditions, and that valuing of work is not affected by the sex of the workers involved. 54

11. The Commission will consider during award reviews whether there is equal remuneration for work of equal or comparable value and whether assessment of the value of work or setting of rates has been affected by the sex of the workers, especially in low paid, female-dominated, industrially weak occupations and industries. 55

12. Where necessary the Commission will identify relevant awards for an equal remuneration inquiry and will encourage the industrial parties to cooperate in such an inquiry. Where cooperation is not forthcoming, the Commission will use its powers to ensure necessary information is available and appropriate remedies are provided. 55

13. Remedies may include: (a) Reclassification of work, (b) The establishment of new career paths, (c) Changes to incremental scales, (d) Reassessment of the broadbanding of classifications or skills, (e) Reassessments of definitions, (f) Amendment of generic descriptions of work which do not properly describe the value of work, (g) Changes to rates of remuneration including through orders to ensure equal

remuneration and equal remuneration adjustments, (h) Changes to work practices to ensure equal employment opportunities 56

14. The Equal Remuneration Principle operates irrespective of the operation of other wage fixing principles. 62

15. Where the Commission is considering the economic effect of equal remuneration decisions consideration will be on the same basis as considering economic impacts of any of the Commission's decisions, consistent with the requirements of the Act and the international Conventions. In particular, the Commission will require specific evidence regarding any effect claimed on employment or the economic situation of particular occupations or industries or of the New South Wales economy generally. Where the Commission determines that equal remuneration increases should be phased-in over a period of time or otherwise less than fully and directly applied the Commission will explicitly state its reasons for its decision. 63

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