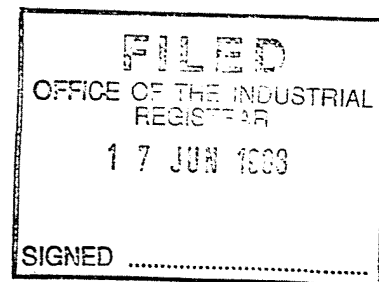


IN THE MATTER OF THE NSW PAY EQUITY INQUIRY (No. 6320
of 1997)



OUTLINE OF FINAL SUBMISSIONS



Submitted by the National Pay Equity Coalition (NPEC), the Women's Electoral Lobby (WEL) and the Association of Business and Professional Women (ABPW)

17 June, 1998

Term of Reference One

Whether work in female dominated occupations and industries is undervalued in terms of remuneration paid relative to work in comparable male dominated occupations and industries.

Our key contention is that the Inquiry should find that there is gender pay gap and that part of it arises from discrimination in setting remuneration.

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)].

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 Exhibit 271 pp 7-10, Wooden Exhibit 100 pp 2-4, Borland Annexure to Exhibit 277).

The smallest measure of earnings difference is obtained by examining non-managerial ordinary time hourly earnings (Wooden Exhibit 100 p.4). 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 Exhibit 271 pp 9-10, Whitehouse (transcript pp 826, 844), Charlesworth (transcript p1853)].

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.

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 (Haig 1992, Jones 1993, Chapman and Miller 1983, Chapman and Mulvey 1986, Miller & Rummery 1989, Drago 1989, Kidd and Viney 1991, Rummery 1992, Vella 1993, Kidd 1993, Miller 1994, Langford 1995, Preston 1997).

The Inquiry has material before it which explains the basis of HCT 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).

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 explained 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.

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

HCT assumes that women and men freely compete in the labour market and that their access to education and training and full time work that instigates 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 tertiary institutions (ABS, Cat. no 6227.0). Yet the culture of past practice is 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).

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), a profile that is not in accord with that of women in the labour market. 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 VandenHeuval 1997).

HCT also assumes that women and men will receive the same returns for the same investment. A number of the studies testing HCT point to the lower returns on human capital endowments (experience and qualifications) that women receive relative to men (Haig 1982, Chapman and Miller 1983, Gregory and Ho 1985, Chapman and Mulvey 1986, Rummary 1992, Crockett 1996 Preston 1997). HCT 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 HCT 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 credentialling arrangements (Blackmore 1993, Butler & Connoole 1993)

In addition to testing HCT 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, sex, 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 asserts

provides a measure of discrimination in earnings allocation (Rummery 1992).

The studies 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), being a union member (Miller & Mulvey 1996) and employed on a full-time basis (Wooden Exhibit 100 p.7) contribute to higher earnings (Gregory Exhibit 98 p.4). This finding needs 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 members and more likely to be employed on a part-time basis (ABS Cat. nos. 6203.0, 6278.0, 6325.0).

Despite the explanatory factors provided by these variables a significant component of earnings differences remain unexplained [Gregory Exhibit 98 p, transcript p.662). 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 to adequately 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 Exhibit 98 p (transcript p 678)]

Even where factors can be found to account for part of the gender wage disparity, this does not necessarily mean discrimination has been excluded and may only be present in the unexplained residue. For example, whether training, experience, qualifications etc are legitimate non-discriminatory factors in a specific type and situation of work depends on the circumstances. Factors such as religion and marital status which have also been put forward in some studies before the Inquiry as accounting for part of the gender earnings gap may be proxies for other factors and/or may operate in a discriminatory way.

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 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:

a) flaws in the assumptions of what constitutes skilled work.

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. These differences include the way in which skill is acquired (formal training versus on-the-job training), who possesses the skills (male/female) and in what context these skills are used (the public or private domain) (Blackmore 1993) 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). 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 1993). This has particularly 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)[McCallum (transcript p.1645), Walpole (transcript pp 1637, 1640), Burton (transcript pp1893-1894, 1923) Bennett (transcript p.1753), Sheahan (transcript p.1962)].

The definition of the paid work traditionally performed by women as 'unskilled' has also contributed to the lack of credentialling arrangements that append 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, Pocock 1988). 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 Exhibit 183 (transcript pp1294, 1396-1398).

b) the gendered nature of part-time and casual work.

Labour markets are segmented between core full-time highly paid workforces and a periphery of part-time, often casual, unsecured and low paid jobs (Doeringer and Piore 1971) which are predominantly undertaken by women. Women comprise 73.7 per cent of all part time workers while 42.7 per cent of working women (compared to 11.5 per cent of men) are employed in part time positions (ABS Cat. no. 6203.0). Some segments of part-time employment rest on a temporary and reversible reduction in the hours of a full-time job, to meet demands such as child rearing, but without career forfeiture.

The remainder are the systematic creation, due to the numerical and temporal advantages that part-time employment provides, of on-going permanent but low paid part-time jobs as a distinct labour market segment, mainly in service industries or in other areas of customer service employment (Junor 1998). Sixty five per cent of all part time jobs are located in five industries: retail trade; accommodation, cafes and restaurants; property and business services; education, and; health and community services. Almost 77 per cent of jobs in these sectors are undertaken by women (ABS, Cat. no. 6203.0) .

c) occupational segregation.

Evidence before the Inquiry has quantified an impact of occupational segregation on earnings (Wooden 1998 Exhibit 100, pp8-10, Miller 1994). Wooden (Exhibit 100 p11) for example, has recently argued that segregation is in fact justified as it is the result of women 'self-selecting' their occupations in ways that balance their participation in paid work with other aspects of their lives, particularly family responsibilities.

This standpoint was challenged on the basis that it negates the role choice is constrained by exogenous factors, including the structure and segmentation of the labour market and by custom

and practice. A further but inter-related factor is 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 [Gregory (transcript 691), Green Exhibit 271 pp12-13 (transcript 2046-2047, Whitehouse (transcript p.844))].

Evidence before the Inquiry has attempted to quantify the importance of inter-, as opposed to intra- occupational segregation [Wooden (transcript p.756), Gregory (transcript pp 680, 691-692), Rimmer 1991, Kidd 1993, Vella 1993]. There are conceptual and methodological difficulties in distinguishing each component (Lambert, Petridis, Galea 1996) as they are both mutually reinforcing.

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 have 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.

d) unionisation/bargaining power, workplace size.

Women are less likely to be a member of the union (ABS Cat. no. 6325.0) 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, DIR, 1996, Wooden 1997) (Whitehouse Exhibit). 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).

e) *industry policy.*

Institutional arrangements such as the regulation and industry policy over workplaces can act as a constraint 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.

f) *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.

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 relevant measure:

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. (Walpole; Hunter)

It is our submission the the working definition of remuneration adopted by your Honour from the ILO Convention 100 is the appropriate definition.

We continue our previous contentions as the female/male dominated occupations and industries.

Comparable should be considered in terms of comparisons of work value and not in terms of similarity of type of work. Comparability is to be established by evidence and argument before the Commission and should not be a threshold issue.

Findings

Award classification structure that does not appropriately recognise the qualifications and work of childcare workers;
Limited post-qualification career structure

Absence of access to over award payments or enterprise agreements

Absence of access to paid overtime

Reasons for undervaluation

Industry dependence on a shrinking government funding base that limits ability to pay appropriate wages

Failure to recognise and assess skills associated with child development

Alternative service providers that operate without award protection and therefore provide a cheaper service

Limitation of operating under a minimum rates award that effectively operates as a paid rates award

Poorly examined consent arrangements with regard to Minimum Rates Adjustment Process

New area of paid work that has no industrial precedent

Recommendations

- I. Opening of the award (via s. 19?) to realign the classification levels and career structure in the award
- II. Application of a payment that recognises the inability of female dominated occupations and industries covered by minimum rates awards to gain access to remuneration available in comparable male dominated occupations

LIBRARIANS/GEOSCIENTISTS

Findings

- I. Compressed classification structure that limits career and wage progression for librarians
- II. Absence of a service increment

Reasons for undervaluation

- I. Increasing feminisation of profession has diminished the status of the profession
- II. Long standing undervaluation associated with the feminisation of the profession
- III. Undervaluation of the technical aspects of the work through association with its status as a female profession

Recommendations

New classification structure to provide a more appropriate career structure and wage progression

HAIRDRESSING

Findings

Lack of post-trade classifications in award
Work inadequately described in awards
Absence of workplace agreements that recognise skill
Absence of access to over award payments or enterprise agreements
Underpayment of award rate

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 reflected in over award payments or enterprise agreements

Recommendations

Post trade qualifications and classifications in award

Application of a payment that recognises the inability of female dominated occupations and industries covered by

minimum rates awards to gain access to remuneration
available in comparable male dominated occupations

BEAUTY THERAPISTS

Findings

Lack of trade status
Poor description of work in award and therefore poor
recognition
Fragmentation of the types of work of Beauty Therapists
Absence of access to overawards (Minimum rates award that
effectively operates as a paid rates award)
Limited access to productivity payments

Reasons for undervaluation

New trade
Small workplaces
Concentration in small workplaces with poor bargaining
power, and low unionisation

Recommendations

Trade status of Beauty Therapists should be recognised
Application of a payment that recognises the inability of
female dominated occupations and industries covered by
minimum rates awards to gain access to remuneration
available in comparable male dominated occupations

SEAFOOD

Findings

Highly sex segregated workforce due to structural and
cultural barriers

Concentration of women workers in areas of highest work
intensity with lowest pay

Reasons for undervaluation

Deskilling of female dominated areas of work but increasing intensification of work with no wage increases to compensate
Systems of work organisation that provide for increased remuneration for male dominated areas of work through better access to overtime for butchers compared with trimmers

Recommendations

Application of equal employment opportunity to examine cultural and structural barriers
Application of appropriate OH&S work design to allow women access to heavy work, and that reduces injuries associated with trimming
Appropriate valuation of work to address work intensification of trimmers

CLERKS

Findings

Inability of clerks to gain access to over award payments

Recommendation

Application of a payment that recognises the inability of female dominated occupations and industries covered by minimum rates awards to gain access to remuneration available in comparable male dominated occupations

CLOTHING

Findings

Non payment of award to clothing outworkers
Outworkers are not specifically classified in the award

Market 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 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 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. 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.

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. 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.

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).

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).

Since that time it has been comparatively rare that full scale work value examinations have been conducted by the Commission.

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 (McCallum, Ex. 210, paras 10-12).

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).

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). 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.

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.

Women's capacity to achieve industrial examination of the value of their work has been affected by their weaker 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.

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.

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.

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 of it is not always invested.

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

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.

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

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.

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.

Award restructuring under the SEP did not have as its focus reexamining the value of female dominated work

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

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

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

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.

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.

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.

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.

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.

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)

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.

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.

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. 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.

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.

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

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

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

A new pay equity and work value principle should be developed to ensure the effective operation of equal remuneration obligations contained in the Industrial Relations Act 1996 and to give effect to the requirements of ILO Convention 100.

The work value principle would require that the IRC assesses the value of work objectively, including a statement that work value is not to be defined solely in terms of the value of the employer. The pay equity aspect of the principle would provide the mechanism for the assessment of whether a gender-based pay disparity exists.

The principle should apply to all industrial instruments, including consent awards/agreements and enterprise agreements and all forms of remuneration, and to overaward and discretionary payments.

The principle would allow broad comparisons of work to be made by the IRC in assessing whether there is undervaluation. This includes cross industry and occupation comparisons and other relevant points of inquiry, such as, the history of the award and the impact of occupational segregation.

The principle would apply a broad definition of discrimination to allow cross occupation and industry assessments. The most appropriate definition to be adopted is that contained in ILO 111:

any distinction, exclusion or preference on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment (article 1(1)(a)).

Pay Equity Work Value Principle

The Pay Equity Work Value Principle would have to contain the following elements:

- a) 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.
- b) 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.
- c) 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 both consent and non-consent proceedings.

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

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

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

The Pay Equity Work Value Principle should also recognise 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.

The threshold for access under the Principle should be demonstrating a gender-related pay disparity, together with 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.

Amendment to the Industrial Relations Act 1996

Consideration should be given to the amendment of the Industrial Relations Act 1996 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.

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.

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 the operation of 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; setting Principles in State Decisions and Test Cases.

It is submitted that the HPM shows industrial framework deficiencies stemming from a reliance on previous practice in the assessment of work value and the application of an inappropriate test for discrimination based on sex. This lack of clarity would be overcome by a specific principle that provides an effective methodology. The proposed work value and pay equity principle would grant such a mechanism.

Equal remuneration orders would be provided for explicitly in the legislation, to ensure that for relevant employees there will be equal remuneration for work of equal or comparable value. 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.

As in the Federal Division, 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.

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

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

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.

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

Award reviews and equal remuneration adjustments

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. On a finding that there is not equal remuneration for work of equal or comparable value, and where award reclassification would not provide a remedy, the IRC should determine the extent of the pay disparity based on sex, and award an appropriate level of payment in the form of an equal remuneration adjustment, to the relevant employees.

Consideration should also be given to amendment of the Industrial Relations Act 1996 to remove s19 from the awards section of the Act and allow the provision's application to all industrial instruments and forms of remuneration.

Specific consideration should be given to low paid female dominated awards in the s.19 award review process. The Commission should assess whether awards apply 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; small firms; little overaward 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.

Deputy President: Pay Equity

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).

The new Deputy President would preside with IRC Commissioner panels dealing with particular awards or industries/occupations and in particular s19 review of award proceedings.

The Anti Discrimination Act 1977 (ADA)

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 in a systemic manner pay inequity.

The definitions of discrimination within the ADA are not sufficient to address equal remuneration matters. To prove sex discrimination in pay, the Act requires 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 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.

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.

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.

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

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.

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

The problems associated with gender bias in job evaluation techniques are well established. These techniques are limited in

scope in their ability to provide equitable comparisons of jobs from different areas.

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.

Bias free job evaluation techniques, therefore, should be regarded in the limited context in which they are used. The broader application of job evaluation techniques, such in the industrial framework, is not appropriate.

Other industrial relations principles

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.

It is submitted, however, that the proposed work value and pay equity principle, because of its specific focus, should be the most applicable guiding reference in relation to equal remuneration matters.

Term of Reference Four

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

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

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

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

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

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

State Decision

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

The President of the ADB 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

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, overaward payments) could fall under the unfair contracts provisions. However this is unclear as there have not yet been claims under these provisions.

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:

- (a) the objects of the Industrial Relations Act 1996 (NSW);***
- (b) the likely effect of its decision on the New South Wales economy, in particular, the need to protect the employment base of the State and any adverse impacts on employment opportunities for women; and***
- (c) inter-State comparative rates.***

Public interest

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

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.

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

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

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.

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 Act's requirements.

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.

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

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

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

A substantial minority of households 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.

Where discrimination limits economic incentives to enter and remain and progress in paid work women's lifetime earnings are reduced significantly. Reduced economic activity and reward also limits women's opportunities for reaching decision-making positions and affects their relative standing in community participation and full exercise of citizenship. This in turn 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.

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

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.

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.

The preponderance of consent arrangements in the industrial system especially in NSW has been noted in the past. This has limited the degree and kind of examination of how industrial parties have given effect to the Commission's decisions including in relation to equal pay

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 and the efforts of the parties and the Commission were not specifically directed to it or to the effects on equal pay of other changes being made. When equal pay was a

central consideration, immediately after the equal pay decisions, it was considered in terms of the basic wage component.

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.

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

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

5b) *Economic effects*

Estimating the economic effects of a pay equity adjustment for women is difficult because of the lack of information necessary to undertake the modelling.

Crucial factors about which there is insufficient information include:

- + the size of pay increases
- + method and time frame for increases
- + number of workers affected, award coverage, employment data including characteristics such as age, sex, occupation, industry, hours, earnings, non-monetary benefits, existing productivity and impact of choice of workers on it
- + awards affected
- + prospects and capacity for claims for restoring relativities

It is also difficult to come up with the macro economic effects of pay equity adjustments because the adjustment are most likely to be phased in over time.

Models are underpinned by a large range of assumptions which remove them from the reality of the labour market and the economy

A range of important economic effects need to be considered qualitatively including some where the precise size and incidence cannot be quantified in the absence of specific information about where, when and how pay equity increases might apply.

Much of the economic evidence in papers and as provided by experts has not included reliable (or any) quantification of relative contribution of factors to the gender earnings gap

Much of the concern expressed about 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. The effectiveness of comparable worth strategies is contested. The criticisms are not necessarily valid in their own terms. In any case 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.

Instead, what has been proposed by women's organisations is 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.

The 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.

Compensating differentials explanations for the gender earnings gap have not been supported by evidence about the distribution

and value of the compensating values it is claimed women choose in lieu of remuneration.

The economic evidence produced from modelling by CREA and by Access Economics (Richardson) indicates that even if there were over a short period of time, across the board increases of an aggregate 1-2% the economic effects would be small. Even these effects would be adjusted over a longer period of time. If, as is more likely, the increases occur on a case by case basis over an extended period of time, adjustments will limit any employment effects.

An 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.

It is frequently 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, jobs etc. Previous equal pay and minimum wage decisions in Australia and overseas have actually delivered employment growth

Where sex discrimination affects pay rates, the efficiency of the economy is impeded. Low wage producers are sometimes obtaining a subsidy at the expense of the community generally and of the women employees. The subsidy for inefficiency enables the inefficiency to persist, since there is not an economic stimulus for more efficient and productive activity.

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

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

5c) Inter-State rates

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, product markets etc.