

Equal Remuneration Principle Case

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)

February 2000

MATTER NO IRC 1841/99

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

CONTACT : SUSANNE HAMMOND

INTRODUCTION

1. We note that it is now over forty years since the 1958 NSW equal pay legislation (the Industrial Arbitration (Female Rates) Amendment) Act 1958 and over thirty years since the first national equal pay case ((1969) 127 CAR 1142), and that we are now entering the next millenium and, we hope, the next stage in the evolution of equal pay understanding and approaches. We are a long way from our goal. Progress has stopped. It is time to take the next steps. We hope progress can accelerate. There is nothing so powerful as an idea whose time has come.
2. This submission expands on the Outline of Submissions and Contentions we lodged on November 5 1999. We refer to the findings of the Pay Equity Inquiry and to the basis of them in the evidence presented to that Inquiry. We also comment on the points of similarity and difference between our Contentions and Submissions and those of other parties to and intervenors in these proceedings.
3. Our Submission first briefly presents a general argument for our Contentions. Then we present an opening out of our Submissions as provided in outline on November 5 last year. Finally, we set out our proposed Principle, with supporting arguments. We will comment on the evidence of the various witnesses in this case in our closing submissions.
4. From the beginning of our submission we want to stress that we are not seeking an across-the-board pay increase for women whether based on some statistical assessment of the gender earnings gap or otherwise; we are not seeking a restoration of comparative wage justice; we are not seeking adoption of a comparable worth system that results in automatic fixing of the same remuneration for all jobs assessed as having the same value. We did not seek any of these things in the Inquiry. No other party sought these things in the Inquiry and to the best of our knowledge no party is seeking those things in these proceedings. We make this point since so much of the material presented by the employer organisations appears to assume that these things are being sought and so seeks to present arguments against the Commission adopting those approaches.
5. We agree that it is hard to know precisely the composition of the gender earnings gap and that the equal remuneration legislation and principles ought not to be used to increase remuneration where remuneration has not been affected by the sex of the workers. We agree that there are many complex issues affecting the Commission's assessment of the value of work and the Commission's fixing of rates in various occupations, industries and enterprises and that a mechanistic approach would not work to produce equal remuneration for men and women workers for work of equal value.

We know that various rates are paid across enterprises within industries, on a range of bases.

6. We also say that irrespective of the precise location of possible problems and cases and the extent of them, it is essential that a better system for dealing with equal remuneration matters is developed. We are a long way from achieving it and progress has been stalled for some time. In view of the Industrial Relations Act requirements and the ILO Convention 100 obligations, it is not optional to implement equal remuneration. We totally reject the Employers' Federation claims that the absence of cases over the last twenty years and the existence in the past and present of legislated equal pay provisions means that there is no pay inequity (p.18). In any case, industrial parties do not generally bring cases that fall outside what the legislation and current principles permit and support. The absence of cases may well indicate insufficiency of legislation and principles rather than absence of cause.
7. If the existence of legislation and the absence of litigation proved that a problem has been resolved life would certainly be a lot simpler. Legislation would simply implement itself. But facts are recalcitrant and they demonstrate the continuing existence of a substantial gender earnings gap.
8. We broadly support the Principle proposed by the Labor Council.
9. Our proposed Principle contains some additional elements:
 - specific statement that the Principle would apply to consent awards
 - a list of indicators of undervaluation
 - a list of factors relevant to establishing comparability of the value of work
 - specific identification of the application of equal remuneration to first awards and award reviews
 - specific reference to equal opportunity remedies as a means of providing equal remuneration
 - specification that consideration of the economic (including employment) effects of equal remuneration provisions be conducted along the same lines as the Commission's usual approach to assessing economic impact in line with the Commission's legislated responsibilities and usual practices (our submissions on this issue are made in relation to our proposed Principle 15.).

10. Each of these elements has been included to provide guidance for industrial parties and to facilitate consistent interpretation and application of the Principle by all Commission members.
11. Comment on each area of difference between what the Women's Organisations and Labor Council propose is included in discussion of each Principle.
12. Women's organisations in Australia have a long record of campaigning for equal pay for women including through making representations to industrial tribunals. Women's organisations presented arguments in both the 1969 and 1972 equal pay cases and have closely monitored the outcomes of those decisions.
13. The National Council of Women of Australia, WEL and UAW intervened in 1983 National Wage Case to submit that the 1972 decision had not been accompanied by proper work value exercises. The National Pay Equity Coalition in its submission to the 1988 National Wage Case pointed to inadequacies in the implementation of equal pay and asked the Commission to confirm access under the 1972 equal pay principle was still available. In 1989, the Business and Professional Women's Association reviewed implementation of equal pay decisions and specifically pointed out the need for evaluation of work and skill free of gender bias.
14. In National Wage Cases in each year since then, women's groups (at various times, the Women's Electoral Lobby, National Pay Equity Coalition and the Australian Federation of Business and Professional Women) have made submissions to the Commission regarding outstanding equal pay issues and possible implications of existing and proposed wage fixing principles for equal remuneration. Women's groups also intervened in the HPM Case and The Age and have made submissions to a range of government and parliamentary inquiries, because of the continuing concern of members of these organisations (among others) that equal remuneration for women for work of equal value still has not been implemented.
15. The Women's Groups appearing this Case also appeared in the Pay Equity Inquiry and have followed developments since the Pay Equity Inquiry Report was released late in 1998 including participating in various discussions, seminars and negotiations on the issues raised in and by the Inquiry.
16. Our concern, substantiated by the Report of the Inquiry, continues that there are still institutional and systemic barriers to the full achievement of equal remuneration, and that successive industrial legislation, systems, principles and processes replicate the problems of the previous ones. Our

concern is to see the inequity fully remedied, having regard to all its parts. Another 30 years would be another generation of workers too many.

CONTENTIONS

1 The Women's Organisations contend that the Commission should rescind the existing Equal Pay Principle and set a new Equal Remuneration Principle, as part of the wage-fixing principles. An outline of the proposed Principle is at Attachment One.

2 The Women's Organisations contend that the new Equal Remuneration Principle is necessary to give full effect to the equal remuneration provisions of the Industrial Relations Act, 1996 (NSW).

3 The Women's Organisations contend that the Commission should in consultation with the industrial parties provide Guidelines to assist the parties understanding and applying the new Equal Remuneration Principle.

The need for a new Principle and for Guidelines – the complexity of undervaluation

17. The NSW Government held an Inquiry into pay equity in which industrial parties, expert witnesses, employees, employers, educators and others participated. Through the Inquiry, Justice Glynn found that the operation of the equal remuneration principles and subsequent wage fixing principles and industrial relations processes have failed to deliver pay equity for women in some female dominated occupations and industries. As a result, Justice Glynn considered that the NSW Commission should rescind the old principle and set a new equal remuneration principle to address undervaluation of women's work.
18. The Inquiry Report shows that the forms undervaluation can take are varied, and arriving at an understanding of the factors that may have contributed to undervaluation of particular female dominated classifications or occupations is not straightforward.

19. There is a need for the Commission to provide guidance to assist the parties to come to grips with some of the complexities and attributes of women's work and of pay equity. This is in part evidenced by the persistence of the gender pay gap for 27 years since the 1973 Equal Pay Case, despite the fact that Justice Glynn found:

“it is clear that the equal pay principles are extant and in consequence capable of being applied” in NSW. (V2, p.142).

20. Nevertheless, the Inquiry has demonstrated the replication of the gender pay gap via familiar and routine operations of the industrial relations system- in various industrial processes applying to paid rates and minimum rates awards, such as qualifications based reclassifications, award restructuring, work value assessments, and despite low paid worker strategies such as minimum rates adjustments and safety net payments. With decentralised bargaining, the existing operations of the system have failed to deliver pay equity in market loadings, over-award payments and enterprise agreements.
21. In her discussion of The Wider Dimensions of Undervaluation, Glynn J acknowledges the complexities involved in understanding undervaluation, in V2, p.146:

In a number of the female dominated industries and occupations examined by the Commission, it was found that there was undervaluation of the work of female employees. I have detailed the elements of, and factors causing, undervaluation in the findings and conclusions made for each selected industry or occupation.

However, it is not possible to identify in all cases that there was a casual connection between the level of remuneration and the gender of the worker, or of direct or indirect discrimination. Moreover, the comparison with male comparators did not always add to the explanation of, or understanding of, the dimensions of undervaluation.

In the Canadian case, *Public Service Alliance of Canada (PSAC) v Canada (Treasury Board)* [1991] 14 CHRR D/341 (Ex 362), the concept of systemic discrimination is discussed. In this concept, there is a recognition that long standing social and cultural mores carry with them value assumptions, that contribute to discrimination in ways that are substantially, or entirely, hidden or unconscious, eg. assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men (para 38).

Special Case Principle not adequate, effective or appropriate for equal remuneration

22. Employers have proposed that the Special Case Principle (in its current form, or amended) is a satisfactory way to address equal remuneration cases. We disagree strongly with this proposition. Special Case matters are dealt with by Full Benches unless otherwise allocated by the President. That reflects the idea of them being out of the usual run of cases and possibly resulting in (while addressing) anomalies. Pay equity cases should be treated as an ordinary part of the industrial system, and not as “special” or anomalous matters requiring Full Benches. It is outside the concept of Special Cases that there would be a succession of them, while that is probably necessary in relation to equal remuneration.
23. The Special Case Principle has been extant since 1991 and no equal remuneration cases have been brought under it. If a case dealing with equal remuneration issues were brought under the Special Case Principle (Employers Federation Submission p.19; CEO Group proposed Principle, ABI paras 46-49) it is unclear how it would be dealt with in relation to the work value or other principles, and it is unclear what would make success more certain now than in the past. The Commission heard evidence about the difficulties experienced in equal remuneration cases under the anomalies and inequities principle (the predecessor of the Special Case principle), in relation to the Nurses Cases of 1986 and 1987. (V1 p.32)
24. Justice Glynn considered that the Special Case Principle did not provide a satisfactory avenue for equal remuneration cases (V2 p.265). Her Honour considered that in view of the complexity of gender related undervaluation:

[A] more cautious and prudent approach is to remodel the existing equal pay principles so as to deal specifically with any problem identified rather than attempting to use existing principles not specifically designed for that purpose.
25. Our consideration of equal remuneration matters in Australia and other countries leads us to conclude that equal remuneration is rarely achieved as a by-product of some other work evaluation and wage-setting process. Rather, it is only achieved when it is the specific objective – and sometimes not even then.
26. The Commission will substantially improve the prospects of the equal remuneration requirements of the Act being met by setting a new equal remuneration Principle and by providing guidance on its operation for industrial parties.

SUBMISSIONS

1 The Industrial Relations Commission held a Pay Equity Inquiry in 1997-98 under a reference by the Minister. That Inquiry found that:

(a) There is an unexplained gender-correlated difference in the earnings of men and women workers when account has been taken of various differences in work value factors

27. Her Honour, Glynn J, considered economic analysis as to the existence of gender wage differentials between male and female dominated occupations. In the report, she quotes extensively from economists, and agrees with Professor Gregory in her main conclusions:

In the words of Gregory:

All the work that we do shows that when you try and measure the attributes of men and women in terms of their education, age and experience, they do not get paid the same amount in the labour market. We then show after you take into account all the different attributes there is still a pay gap there (V1, p.116).

28. In the Inquiry, all the experts, including Gregory, Borland, Wooden, Whitehouse and Bennett agreed that there is a gender wage differential, although they differed as to the factors which contribute to it, and the size of the gap. Justice Glynn further concluded:

However, the analysis by Wooden, Gregory and other analysts such as Miller represent the high point of economic analysis of this kind and, within available methodologies, continue to suggest the existence of wage differentials based on gender.

In my view, the significance of the conclusions as to gender inequality in wage differentials identified in the economic analyses I have referred to cannot be brushed aside on the basis that some further analyses or research might either lead to different results, or even narrow them. I agree with the statement of Professor Gregory made during cross examination:

So it is possible that the differential we are seeing still today is partly - is a result of continuing undervaluation of women's skills. Is it possible that that is a factor?

A: Yes. That is what people are implying I think when they talk about the occupational segregation. They are saying that there is

something about those activities and those occupations where women are disproportionately represented which gives them lower rates of pay after you take into account all the sorts of things like size of industry, education.... Now if you tell me some other credible factor which was associated with female occupations it could be responsible but it has to be something associated with the females and the occupations and at that time most obvious to think about is the females and occupation itself (V2, p.122).

(b) In five case studies examined in detail by the Commission, there was gender-related undervaluation of the work done by women.

29. In regard to the Childcare occupation, Her Honour, Justice Glynn noted:

The childcare industry is one of the female dominated industries that typifies the poorly paid nature of work which is performed predominantly by women... The child care worker has been undervalued..." (V1, p.249)

30. In regard to hairdressers and beauticians, Justice Glynn summed up her reasons for finding undervaluation as follows:

I have discussed the award history for hairdressers and I have noted that there was a gender basis for the assessment of rates of pay, at least in an early stage of the making of that award. Furthermore, I have noted the significant defect in the structure of that award which recognises only a single classification, omits any reference to a career path and does not adequately recognise greater acquisition of skills through training and qualifications. I have noted that the equal pay principles have not been fully applied to this award (V1, p.387).

More significantly, I consider that the setting of rates of pay in this female dominated area does exhibit many of the characteristics of a female dominated industry that create undervaluation (V1, p.387).

As I have noted from the evidence, the industry consists mainly of small employers employing a young workforce with a high labour turnover. There is a shortage of qualified staff. Union membership is low and there is a low level of industrial activity. There is a lack of regulation in the industry, particularly in relation to beauty therapists, and as I have already noted there is a lack of overaward payments and recognition for post trade qualifications and skills, and, in the case of beauty therapists, recognition of trade qualifications and skills. As Ms Smith noted, there is a tendency to treat post trade training as maintaining the trade rather than deepening the trade, a tendency to

the contrary of that exhibited in the area of motor mechanics. (V1, pp387-8).

31. In regard to undervaluation of the work of librarians, her Honour summarised:

The evidence demonstrates that the rates of pay received by librarians have been over a long period the lowest of all public sector professionals, (V1, p.461).

This more recent history of the wages and conditions for librarians commencing with the 1973 Award indicates that in the last quarter of a century no case has been arbitrated by the Commission which involves full consideration of work value of librarians. The circumstances of the 1985 Award, while clearly a consent award, provide no basis for inferring, nor does it make obvious, any true work value assessments of the work performed by librarians, (V 1, p.469).

32. Her Honour concludes:

It follows that I consider the work of librarians is undervalued, (V1, p.490).

33. In regard to Outworkers, Her Honour found:

The work undertaken by outworkers is undervalued. This arises in two ways. Firstly, outworkers are undervalued as a consequence of the underpayment of their award entitlements. Secondly, they are undervalued in terms of the classifications that apply under the current Clothing Trades Awards. The work is also undervalued by reference to the selected metal industry comparator, (V1, p.642).

34. Her Honour, after investigating work of men and women in seafood processing, concluded:

The undervaluation of trimmers' work both in terms of changes in their work per se over time and by comparison to that of butchers, at least under current arrangements, is a classic example of the contentions of theorists, later discussed, that a dichotomy exists in the valuing of work between the assessment and weighting of male skills eg. heavy work and female skills eg. dexterity, repetitive, high speed work and 'softer' handling skills, (V1. p.683).

35. And:

The work of trimmers as a female dominated occupation has been undervalued compared to the lesser skilled, male dominated general hands (V1, p.684).

(c) Existing industrial relations principles and processes have not resulted in equal remuneration for men and women workers for work of equal or comparable value

(d) Assessments of the value of the work of women workers have been affected by the sex of the workers and that has been reproduced by subsequent industrial consideration of both valuing of work and assessment of remuneration.

36. In the case study evidence presented to the Inquiry, a gendered assessment of work was often related to the inadequacy of industrial relations principles and processes to deliver equal remuneration. To prevent duplication, we have considered both factors together in the following section.

37. In regard to the child care workers, Her Honour concluded:

The child care worker has been undervalued because of the gender basis for the assessment of the original classification, the failure to clearly and succinctly remove this element of assessment from the classification structure, the failure to properly value the qualifications of the child care worker, the inadequacy of the Minimum Rates Adjustment process and subsequent consent award adjustments re-evaluating the classification. (V1, p.274).

38. In regard to the hairdressers and beauty therapists, Her Honour pointed to the following inadequacies of existing industrial relations principles and processes, particularly the difficulties in addressing gender based undervaluation in Minimum Rates Awards:

I have discussed the award history for hairdressers and I have noted that there was a gender basis for the assessment of rates of pay, at least in an early stage of the making of that award. Furthermore, I have noted the significant defect in the structure of that award which recognises only a single classification, omits any reference to a career path and does not adequately recognise greater acquisition of skills

through training and qualifications. I have noted that the equal pay principles have not been fully applied to this award, (V1, p.387).

More significantly, I consider that the setting of rates of pay in this female dominated area does exhibit many of the characteristics of a female dominated industry which create undervaluation, (V1, p.387).

Notwithstanding the numerous amendments which have been made to the Award one issue of outstanding concern is the relativity between the wage rates of hairdressers and beauty therapists, (V1, p.338).

39. The persistence of gender bias in pay setting for hairdressers was noted in the Report:

I have discussed the award history for hairdressers and I have noted that there was a gender basis for the assessment of rates of pay, at least in an early stage of the making of that award. Furthermore, I have noted the significant defect in the structure of that award which recognises only a single classification, omits any reference to a career path and does not adequately recognise greater acquisition of skills through training and qualifications. I have noted that the equal pay principles have not been fully applied to this award, (V1, p.387).

It should be noted that the definition of beautician in the award was varied for the first time to remove the word "female" in 1981. Despite the fact that beauty therapy has now become recognised as an apprenticeship trade by virtue of an award variation effective on and from 2 June 1989 (see in particular cl.2A) (257 IG 153) the relativity of beauty therapists has remained fixed at 92 percent of that of hairdressers, (V1, p.339).

40. In regard to the adequacy of existing industrial relations principles and processes in addressing undervaluation for librarians, Glynn found:

This is not a result of the failure of the work value principle per se (although that principle is inadequate in its present form rectify this undervaluation as a result of the principle setting a datum point for such evaluations) but as a result of:

- (a) a failure to undertake a work value review;
- (b) the failure to fully assess librarian rates in consent arrangements and agreements;
- (c) historical factors of undervaluation including impediments to the recognition of female qualifications;
- (d) a failure to (at least) make comparisons with other professional occupations such as other public sector professionals or perhaps

other professional female dominated occupations such as teachers. These comparisons are plainly available - not the least upon the bases of the historical salary nexus between the groups and comparability of the positions. These comparisons cannot be made directly under the work value principle, and accordingly it could not be used to rectify the problem (and to this extent is inadequate), (V1, pp.490-91).

(e) There is a need for a new Equal Remuneration Principle.

41. The Women's Organisations believe that in view of Australia's signature on the ILO Equal Remuneration Convention, and the NSW Government's commitment to pay equity in the objects of the Industrial Relations Act, 1996, and in view of the findings of the Minister's Pay Equity Inquiry, that undervaluation of work in female dominated occupations and industries still exists, and exists systemically (as noted by Justice Glynn, V2, p.162).
42. The industrial relations system is the appropriate legal avenue to remedy underpayment, there is a need for a new Equal Remuneration Principle, which will assist the parties to bring gender-related undervaluation in any industrial instruments and arrangements before the Commission. As Justice Glynn points out, equal remuneration issues will be confronted by all members of the Commission in the exercise of their functions, and will therefore be "alive" in the general exercise of the Commission's jurisdiction V2, p.162).
43. In the Inquiry Report, Justice Glynn concludes that:

Despite the introduction of this (equal pay for work of equal value) principle over 20 years ago there remains wage discrimination in Australia. Furthermore, each of the selected areas and occupations raised significant issues as to the undervaluation for the predominantly female workforce examined, (V2 p.2-3).

I agree with the views expressed by a number of the experts called in the proceedings and the submissions of a number of the parties (and for that matter the approach contemplated within the NSW legislative scheme) that for a substantial part pay equity or equal remuneration will best be achieved through mechanisms within industrial systems which are able to cater for collective applications which concern prospective issues.

I will propose in this Report a new principle of wage fixation.

I anticipate that this principle will operate substantially in relation to occupations and industries which have a high concentration of female workers and which have historically been characterised as female.

However, the ultimate access to the operation of the principle should be determined on a case by case basis by the Commission having regard to the undervaluation contended, (V1, pp.42-3).

2 Australia is a signatory to several international Conventions that equal remuneration for men and women workers for work of equal value. In Australia's federal system of government, New South Wales is bound by those Conventions. The ILO Convention was specifically adopted by the Commission in the 1973 Equal Pay Case. While legislation and wage fixing principles have in the past resulted in significant progress toward equal remuneration for men and women workers for work of equal value, the objective of the Conventions has not yet been achieved and further action is required.

44. Justice Glynn stated in the Report:

‘Both the Federal and NSW equal pay cases are made against the background of the 1951 Convention Concerning Remuneration for Men and Women Workers for Work of Equal Value (Convention 100) (Equal Remuneration Convention). The NSW jurisdiction appears in fact to have largely adopted the Convention (V2, p.13).

45. And:

Whatever the true effect of the equal pay principles, the Federal and NSW legislatures have recently made laws with respect to equal remuneration and pay equity. In NSW, and in a similar fashion to the pay equity principles arising from industrial jurisprudence, the legislature has established mechanisms for the achievement of equal remuneration and pay equity within the context of the Government's ordinary award making and agreement making functions, (V2.p.6).

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 the components of remuneration identified by the Australian Bureau of Statistics as overaward payments and payment by measured result. These overaward payments may be in the form of formalised enterprise agreements or informal collective workplace agreement.

46. Pay equity apparently is greater in minimum award rates of pay, a component of remuneration that has been assessed by tribunals and primarily reflects Commission decisions on the value of work especially in relation to skill, qualifications, responsibility and working conditions. Pay equity is less (and the gender gap greater) in the parts of remuneration negotiated in individual and collective bargaining, in enterprise agreements and overaward payments, components which reflect labour market factors, institutional factors, product market factors, productivity, industry economics and related factors.
47. It has been very difficult for women to improve their position where the mechanism is bargaining. The Inquiry Report states that:
- Women generally have not accessed enterprise agreements at the same rate as men. Male dominated industries and occupations have tended to have a much greater emphasis to enterprise bargaining, (V2, p.99).
48. The Inquiry Report further notes that of the occupations traditionally covered by awards and agreements, clerks and sales and personal service workers were the least likely to have access to enterprise bargaining, (V2, p.99).
49. Evidence from Professor Wooden commented on in the Report suggests that part time workers also do worse in relation to enterprise agreements, not because they deliver low wage outcomes but because bargaining is less likely to occur in these circumstances. This in turn widens the gender earnings differential across all workers (V2, p.53).
50. Justice Glynn, in referring to the case studies under examination, finds that the concentration of enterprise bargaining in male dominated areas is borne out by this evidence:

It was clear from the example of hairdressers and motor mechanics that enterprise bargains of a formal kind were concentrated in the male dominated motor mechanics area whereas in the hairdressing area there were no formal enterprise agreements and overaward

payments were restricted to incentive schemes or payments... Similarly the workers at AWA Plessey were in receipt of an enterprise agreement where the workers in the childcare sector were not, (V2, p.100).

51. It has also been very difficult for women to improve their position where the subject of bargaining is productivity and/or negotiating additional remuneration for skill, experience and training.
52. Many female dominated occupations are in areas where productivity is hard to measure, or where productivity measurement is a flawed, clumsy or unrefined tool. The service industry occupations are examples of occupations where the skills associated with the work are undervalued.
53. The report refers to Laura Bennett's evidence that there is a need "to 'unpack' women's work, then to specifically evaluate the skills often associated with service delivery as opposed to production", (V2, p.254).
54. These difficulties are also evident because of the industrially weaker position of women due to low union membership, a weak union presence, a greater concentration of women employed in small workplaces, and a greater concentration in part time and casual work.
55. Justice Glynn included these factors as indicators for the identification of gender related undervaluation (V1, pp.46-47).
56. The implications of this concentration of bargaining in male dominated occupations was addressed by Professor Bob Gregory in the Inquiry, and referred to by Justice Glynn in the Report:

...decentralisation of the wage fixing system and the growth of enterprise bargaining is likely to increase the wage differential over time, (V2, p.99).

57. Importantly and relevantly, Her Honour states:

I do not accept the contention that decentralised systems better redress the gender wage gap. This is simply not sustained on the evidence before the Commission and I agree with the conclusions made by Professor Gregory ...that having regard to international comparisons centralised wage fixing has tended to produce higher pay ratios for women relative to men and a narrower pay gap between women's in segregated occupations relative to women's pay on average (V1, p.154).

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.

58. The ILO Convention defines remuneration as: "the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever paid directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment". (V.3, Appendix, p.148).
59. Justice Glynn formally adopted the ILO Convention 100 definition of remuneration for the purposes of the Inquiry. She also stated that this definition should apply to any principle established to deal with equal remuneration. She considered the definition applicable to s.23 of the IRA 96 (V1, p.33).
60. The Her Honour stated that:

In order to come to an accurate conclusion as to the existence of an inequitable pay gap based on gender, or, indeed, on any basis, the Tribunal needs to know not only the amount of the money received by the employee but also, amongst other factors, what is received in substitution for moneys that would otherwise have to be paid out by that employer, (V1, p.32).

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. There has been an absence of consideration of equal remuneration issues since 1980 although evidence presented to the Inquiry clearly showed that equal remuneration has not been achieved.

61. Justice Glynn concluded that:

[T]here were limitations in the application of the principles to dissimilar work performed by male and female employees (V2, p.147). This was already contemplated by the principle itself, which treated this type of comparison as exceptional. (V2, p.147).

62. She also states that the existence of a presumption in NSW cases that marginal rates already were set according to the value of work:

acted as a deterrent to the review of margins and in some cases was effective in defeating the cases brought under the equal pay principle, (V2, p.147).

63. Her Honour concludes that in relation to the limitations to the application of the Equal Pay principles:

It [the limitation] is also a result of the limited number of cases that were actually brought (V2, p.147).

64. The application of the 1969 Equal Pay Decision was constrained by the extreme occupational segregation of the workforce. In the Federal Meat Industry Interim Award, for example, only 120 adult females of 2000 employed under the award were granted equal pay (Print B4823). The 1958 legislation in NSW also applied to a limited proportion of women for the same reason.

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

65. The International Labour Office Committee of Experts on ILO Convention 100 has noted the distinction between job rate and actual rate and comments:

Because job evaluation provides a basis for determining the rate for the job and not the amount actually earned by the worker, it may be that the proclaimed equity concerns only part of the wage in many cases. In so far as any additional payments making up the individual worker's actual earnings are dependent on some appraisal of his performance or other factors unrelated to the evaluation of the job, the criteria used in these regards should also be chosen or re-examined in the light of the Convention so as to eliminate any discrimination based on sex.

(International Labour Office General Survey of the Reports on the Equal Remuneration Convention (No.100) and Recommendation (No.90), 1951: Report of the Committee of Experts on the Application of Conventions and Recommendations para 145.)

66. The Commission has in the past taken account of total remuneration when it sets award rates, including amounts included in overaward payments. In

the 1996 decision in *Renison Limited – AWU Agreement* (Print N5980), Commissioner Raffaelli said:

In the context of national wage increases (however styled from time to time) the Commission has ventured into the overaward area by recommending and at times issuing orders that overawards not be absorbed against wage adjustments. A decision by the Full Bench of the Commission related to the Vehicle industry – Repair Services and Retail Award 1983 and reported in Print J9407 contains a useful summary of the range of such decisions. Additionally the decisions suggest that the Commission has the power to make an order regulating the overaward – provided of course that such order is made in full or part settlement of an existing dispute. Further, it upheld the Commissioner's decision to exercise his discretion to make an order precluding absorption.

The existence of the Commission's power to make orders in respect of overawards was reinforced in the decision of a Full Bench in respect of awards in the textile, clothing and footwear sector and reported in print K4148, by Full Benches in the entertainment and broadcasting industry and reported in Print K2103 and K2101 and a Full Bench dealing with the metal industry and reported at 56 IR 229.

67. The Report of the Pay Equity Inquiry noted the Commission's past consideration of overaward payments, citing examples of cases where the Commission had:
- - taken account of the need to attract workers to an occupations (V2, p.196; V2, p.203);
 - taken account of overaward payments in the private sector in setting public sector rates (V2, p.196-7);
 - taken account of overawards in considering "true value" of work (V2, p.203);
 - taken account of overawards in consideration of effects of work value related increases (V2, p.204);
 - taken account of overawards in providing supplementary payments in lieu of overawards (V2, p.141);
 - considered overawards in relation to absorbing National Wage Case increases (V2, p.204);
 - taken account of overawards in the equal remuneration context and elsewhere (including in relation to bonus payments) (V1, p.26)
68. In the Inquiry, Her Honour took account of evidence on the prevalence and bases and level of overawards in the case studies as part of assessing the

overall level of remuneration and the factors reflected in remuneration. In the case studies, the Commission does take account of overaward payments based on market factors (eg the general lack of overawards in hairdressing and their pervasive availability for motor mechanics; the skills and other bases of overawards for mechanics; the lack of overawards in childcare; the finding that market factors had been taken into account historically in setting rates for geologists but not for librarians (despite shortages of librarians in the 1940s. (V1, p.485). The Commission specifically points to the inclusion of clerks in productivity based overawards at Maintrain as a "good practice" example, as it recognises that all the employees contribute to the organisation's performance.

69. The Commission says direct discrimination in market setting is unacceptable (V2, p.310). On that basis, market factors identified as the bases for overaward payments would be required to be free of direct discrimination. It would therefore be necessary, as Her Honour points out, to consider the bases on which the overawards are paid. Setting first awards is of course entirely based on an assessment of current rates and conditions that may incorporate discriminatory elements or be otherwise affected by the sex of the workers, so it is particularly important that first awards be scrutinised in relation to equal remuneration, as the Inquiry recommended and as we propose.
70. The submissions by the CEO Group and Employers' Federation that historically the Commission has not taken account of overaward payments are at odds with the case information we have outlined above. Their submissions that award rates have been based entirely on assessments of skill, responsibilities and conditions are also unsustainable. It is simply inaccurate to say that the Commission has not taken account of factors such as economic capacity, productivity, labour market attraction and retention in setting award rates of pay.

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.

71. The progress that can be made is primarily in relation to undervalued awards where consideration of the value of women's work was or was considered to be constrained by the requirements under the work value

change principle to show change in work value from a particular datum point, or was or was considered to be constrained by other work value principles. Thus, awards where equal pay had not been implemented fully could be considered under the proposed principle. In the Inquiry, examples of undervaluation included childcare, librarians and seafood processing.

72. The Labor Council's proposed principle under the current legislation cannot directly and specifically address the undervaluation of women's work where it arises in relation to enterprise agreements or overawards. A case for an award level remedy cannot be made out since the scope of the undervaluation, while pervasive, is not as wide as the scope of the award.
73. It does seem that under the current legislation the Commission cannot amend the terms of enterprise agreements except where discrimination can be established. The Commission cannot make orders in respect of overaward payments although it can take account of any existing payments (whatever their bases) made under enterprise agreements and made as overawards when the Commission is setting award rates and classifications. Clearly, the Commission cannot in setting principles enhance or limit the express statutory provisions dealing with pay equity. It can, of course, provide guidance to the application of the statutory provisions to particular industrial circumstances, and that is what we are proposing.
74. These limitations can be illustrated by reference to the only two cases so far taken in the federal jurisdiction. In the HPM case, part of the pay inequity claimed to exist between men and women was in the areas of overaward payments. The payments were claimed by the company to relate to experience, skill, knowledge, conditions and work effort, among other factors - that have often been taken into account in work value assessments by industrial tribunals. The pay inequities subject of the application were at the HPM company rather than across the scope of the award. The remedy sought (and ultimately negotiated) therefore was at company level and within the scope of the enterprise agreement.
75. In the NSW jurisdiction, changes to the terms of the enterprise agreement could not be the subject of an equal remuneration application since the Commission does not have the power to alter the terms of enterprise agreements to give effect to pay equity nor to make orders in relation to the basis or levels of overaward payments. Making a separate award for the process workers to provide pay equity would separate them from the industrial coverage applying to the other workers at the company and separate them from the industrial protection afforded by an industry award. The problems that had led to the undervaluation of their work would be likely to re-emerge persistently.

76. In The Age Case, the pay inequity claimed in relation to the telephone sales operators was in the enterprise agreement. In the enterprise bargaining process, the clerical workers had not been able to secure inclusion on equitable terms in the enterprise agreement with the result that they were not included in the enterprise agreement and were receiving lower amounts than printing workers, and those amounts were paid as overawards.
77. In the NSW jurisdiction, it would not be possible to provide pay equity through amendment of the terms of the enterprise agreement to include the clerical workers on an equitable basis. Making a new award for those workers to put them in an equitable relationship with the printing trades workers would continue to place them in an isolated position and the relative lack of bargaining power that led to the undervaluation would be likely to mean that the undervaluation - even if remedied by equitable rates in a new separate clerical award - would re-emerge.
78. We recognise that these two cases were not decided by the Commission and that the version of the circumstances in the cases we have set out above is contested. However, the real point of referring to these cases is to demonstrate that in cases where the circumstances were found to be as we have outlined above, the NSW jurisdiction could not provide a complete and lasting pay equity remedy under the existing legislation and the Principles proposed by the Labor Council. While the Pay Equity Inquiry Report did recommend legislative change and we consider the recommended changes would have advanced pay equity, the NSW Government has not yet made the recommended changes.

8 The Inquiry contributed significantly to understanding how industrial relations processes and principles have created and reproduced gender-related undervaluation of women's work.

Some aspects have been:

- (a) The prevalence of consent arrangements with minimal supervision by the Commission regarding the adequacy of arrangements in relation to their effects on equal remuneration.**
79. This was found by the Inquiry to be one of the elements that indicate the probability of undervaluation (V 1, p.46).
80. The Inquiry points to the sometimes unintended or unanticipated result of what appears to be a conventional industrial process such as consent awards and agreements, resulting in pay inequities (V1, p. 55).

81. In its specific findings on the undervaluation of childcare workers, the Inquiry documents the role of consent arrangements in the history of the Child Care workers award (V1, pp.215, 218, 222) and concludes that:

...the child care worker has been undervalued because of the gender basis for the assessment of the original classification, the failure to clearly and succinctly remove this element of assessment from the classification structure, the failure to properly value the qualifications of the child care worker, the inadequacy of the Minimum Rates Adjustment process and subsequent consent award adjustments re-evaluating the classification (V1, p.244, *our emphasis*).

82. Her Honour also notes that the process of making consent awards needs to be carefully scrutinised so as to avoid the undervaluation of female dominated work (V1, p.276).

83. In its examination of the undervaluation of the work of child care workers, the Inquiry found that:

The consent award which was made in 1988 included a new classification structure. The highest classification in that award was the Child Care Worker Grade 1. This classification undervalued the work of child care workers in three important ways:

1. The definitions of child care worker did not distinguish between qualifications held at a CCCS level or an associate diploma level and no independent evaluation was undertaken as to the particular requirements or standards in the associate diploma course at that time;
 2. There was no assessment of the work value of child care workers in order to undertake the award restructuring. This is significant because the award had hitherto been predicated upon assumptions about the performance of the work of child care workers, based on notions of domesticity and child minding, as opposed to qualified work; and
 3. That the undervaluation of work derived directly from the characterisation of the industry as a female industry, or one in which the work was associated with purported female traits such as domestic and child minding.
84. Justice Glynn notes that this last point is important, for two reasons. First, that no review of the award was undertaken until 1990. Second, in that review, the Australian Industrial Relations Commission did not undertake any analysis of the causes of the disadvantage suffered by the child care workers. Rather the Commission undertook an evaluation based upon changes in training and qualifications within the industry and some comparisons drawn with engineering tradespersons pursuant to the Minimum Rates Adjustment principle (V1,p.244).

85. The role that consent arrangements played in the undervaluation of librarians was also examined by the Inquiry. Justice Glynn summarises the effect of the 1992 consent application:

The 1982 application finally resulted in a new consent award by order of Bauer J on 18 December 1985 (243 IG 823) (Ex 139). The effect of the award was to compress from 10 years to 7 years the non-graduate increment levels and to amalgamate the non-graduate and graduate pay rates. The "hard barrier" progression to Senior Librarian positions continued. However, there was an agreement reached to regrade the positions of librarians as part of this award process. This regarding process was seen as an alternative to a wage increase.

86. This more recent history of the wages and conditions for librarians commencing with the 1973 Award indicates that in the last quarter of a century no case has been arbitrated by the Commission which involves full consideration of work value of librarians. The circumstances of the 1985 Award, while clearly a consent award, provide no basis for inferring, nor does it make obvious, any true work value assessments of the work performed by librarians (V 1 p. 469).

87. The Inquiry found that that the work of librarians is undervalued, not because of the failure of the work value principle (though the Inquiry notes that the principle is inadequate in its present form) but as a result of:

- (a) a failure to undertake a work value review;
- (b) the failure to fully assess librarian rates in consent arrangements and agreements;
- (c) historical factors of undervaluation including impediments to the recognition of female qualifications;
- (d) a failure to make comparisons with other professional occupations such as other public sector professionals or other professional female dominated occupations such as teachers. However, the report notes that such comparisons cannot be made directly under the work value principle, and is inadequate for that reason) (V1, pp.491-92).

88. In a similar observation re seafood trimmers and butchers, the Inquiry found that there is:

a clear present day undervaluation of trimmers under the award". (V1, p.686), part of which emerged from the equal pay processes, and one source of which was consent arrangements between the parties in which there may have been inadequate recognition of the work of trimmers (V1, p. 686).

89. In its examination of the 1987 Nurses case, the Inquiry notes that the Australian Industrial Relations Commission indicated the proper basis on which the assessment of rates should be made. In particular, the Commission said:

We appreciate the fact that movements in New South Wales nurses' rates may have been an important element in assessing the wage settlements for Commonwealth nurses in the 1970s, and that pronouncements of the New South Wales Commission suggest that equal pay was fully implemented in that State. All of the indications however point to a situation of no positive application of the 1972 decision in any of the consent settlements in the Commonwealth area. An examination of wage rates within the ACT, for example, indicates no advance since 1972 by nurses as compared with male tradesmen (V1,p.66).

90. The Commission concluded:

In our opinion all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains (V1, p.66).

91. The Inquiry also documents major commentaries on the application. One commentator, Ms L Bennett, summarised the effect of the 1972 Equal Pay Principle as a commitment to non-discriminatory wage outcomes. However, the wage fixing practices used to implement this policy incorporated elements that reflected the gendered nature of women's workforce participation, the most important being work value and consent awards (V2 p.80).
92. Glynn J agreed with the Labor Council's suggestion that common characteristics of female dominated work include a high incidence of consent award wage movements amongst other matters. (V1,p.46).

(b) the work value of female dominated work has been affected by the sex of the worker

93. It is notable that work value tests have been formulated, modified and expanded over many years, but have strong roots in work value examinations of the metal and manufacturing industries. It is also notable that such industries are male dominated.
94. The Inquiry had before it clear examples of female dominated industries where either work value cases had not been conducted and/or consent

arrangements have not properly valued the work. Examples of the failure to conduct work value including the librarian and beauty therapist areas.

95. Moreover, the Inquiry received evidence that shows that work value assessments in the child care area have clearly undervalued the work of the child care workers (although these assessments were made in conjunction with the operation of first award principles, the minimum rate adjustment principles, and consent arrangements)(V 2, p.252).

96. Her Honour Glynn J found that in examining existing tests and mechanisms for ascertaining work value:

one must keep in mind not only their adequacy or otherwise in the past, but whether they will be adequate in assessing work in new and emerging industries and occupations. That will require, in my view, at the very least, a re-honing of the first award principle that, *prima facie*, the rates achieved by the employees themselves are indicators of appropriate rates. The principle has always been rebuttable, but, in the future, will need to be overtly sensitive to gender influences on the achievement of those rates (V1, p. 49).

97. Further, she states that:

In dealing with new areas of work, which are either totally new or within existing industries, all concerned in the application of work value tests, including the tribunal, will need to become more sensitive to the possibility of gender bias or gender based differentials in wages and conditions, a bias which is more than likely to be difficult to recognise and identify, let alone remedy. It would also assist to minimise the presence of bias, if the processes of arriving at outcomes as to value were to be as transparent to examination as could be developed (V1, p. 50).

98. Her Honour states that:

the means of obtaining a gender neutral outcome, and one which properly and fully values the work of persons engaged in female dominated industries, is not to apply the current wage fixing principles in relation to work value. Furthermore, the appropriate test is not a consideration of discrimination *per se* in attempting to evaluate whether there is undervaluation of work. (V1,p.204)

99. The specific example of childcare demonstrates how qualifications were dealt with, and how the female nature of the work affected its assessment. These factors acted against a proper gender bias free assessment of the value of work notwithstanding fact that in 1990, the Australian Industrial Relations Commission recognised that:

members of this industry's workforce, from whom the community expects so much, have been disadvantaged (V1, pp.267-268).

100. The evidence of Ms Shean, Industrial Officer, Nurses Association of New South Wales, was revealing on the approach her relatively successful union took to work value cases.
101. She said that nursing has been a reasonably easy area to work within the work value principle, because of changing education and technology needs in that profession. However, Ms Shean notes that the Association has emphasised in its evidence and explanations the more generally accepted male skills, such as technology, able to be easily inspected in areas such as neo-natal intensive care and intensive care units (V1,p.58).
102. By focussing on technological changes, the Nurses Association was able to focus on how these changes have impacted on the work performed by nurses. The attention paid in nursing work value cases to the technological and highly visible aspects of the nursing profession, such as the work performed by nurses in neo-natal intensive care and intensive care units is because of the "difficulties" (as described by Ms Shean) of demonstrating the subtle skills associated these areas (V1, p.513).
103. This example, more than any, demonstrates that there is something seriously lacking in the way work is valued. Notwithstanding the "non technical" nature of the work performed by nurses in the psychiatric and aged care nursing, and the lack of evidence presented from these sectors in work value cases, the evidence before the Inquiry pointed to the fact that nurses in these fields exercise highly specialised nursing skills (V1, p.513).
104. What we see in nursing and not in childcare is a recognition that work evaluation has not properly valued all aspects of the work, but unlike child care, the Nurses Association was able to draw upon accepted "male" skills to run work value arguments.
105. As Glynn J states:

the evidence plainly demonstrates how work value mechanisms may have the potential to undervalue women's work, where so called 'softer' or 'non-technical', but nonetheless significant and important skills and responsibilities, are prevalent. This evidence points to the need for principles which focus attention upon the potential for undervaluation of work in female dominated industries exhibiting those characteristics (V1, p.514).
106. The Labor Council submission that was accepted by Her Honour was that the undervaluation of women's work may stem from gendered assumptions in work value assessments, as well as different returns on the basis of sex for

equivalent or comparable levels of skills, and awards and agreements which fail through inadequate classification structures to adequately nominate, differentiate and reward skill. Part of this effect derives from the very circumstances which often apply to the female dominated industries. Rates are set lower because of the existence of occupational segregation or segmentation.

107. The Labor Council described a combination of factors which are frequently found in female dominated industries and which combine to generate lower returns for workers in those industries than in other industries. Justice Glynn considered that:

- The Commission processes should recognise that this combination of factors will of itself contribute to the undervaluation of female work
- The attention of the Commission needs to be focussed upon female dominated industries to examine whether as a consequence of those factors, or their combination with other factors, there has been insufficient valuation of women's work, both historically and under current wage fixing processes. (V2,p.158).

108. In her conclusions on the value of work, Her Honour proposes:

The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle. (V2,p.175).

109. Importantly, Her Honour found that in female dominated industries and occupations, it should no longer be presumed:

that the rates of remuneration have been properly assessed having regard to either the equal pay principles or proper work value assessments. In this regard it should not be assumed that all work has been valued correctly up to and including the structural efficiency processes and thereafter or that changes in work value have been taken into account (V2, p.178).

110. Her Honour further said:

it should not be assumed that assessments made by the Commission of the work value of these classes of employees has fully and

adequately taken into account all relevant matters. Nor should it be assumed that the Minimum Rates Adjustment process, if undertaken, has been fully undertaken. (P. 178, V2

(c) The interrelationships of the Equal Pay Principle and other wage-fixing principles have been complex and not always properly understood by industrial parties, as was raised in relation to the discussion of the Nurses' Cases ([1986] 13 IR 108 and [1987] 20 IR 420) and the Water Resources Case (1979 AR 321) in the Report of the Inquiry.

111. One of the ways that gender related undervaluation has been reproduced is through misunderstanding of the interrelationships of Equal Pay principle and other wage fixing principles.
112. Evidence from Ms Good to the Inquiry shows at least a perception that it was impossible to overcome gender-based inequities within existing wage fixing principles.

[T]he Association accepted the 1985 Award made by consent. This was not an easy decision for the PSA, but was made on the basis of several years of attempts, without success, to negotiate a new grading structure and improved rates for librarians. We were continually frustrated by the changing wage fixing principles, including the wages pause, the wage freeze, and we had to change our arguments because of the Principles from a 'work value' case to an 'anomalies and inequities'. This prevented the PSA from running a case using the work value comparisons with other public sector professional groups which I have referred to earlier. The Association accepted a compromise solution which resulted in the resolution of some of the more glaring anomalies through the use of regradings. (V1, p.458-9)

However, Her Honour found that:

the wage fixing principles do not extinguish or otherwise reduce the operation of the equal pay principles.

113. The Water Resources Case (1979 AR 321) showed that in fact the Equal Pay Principle continued to be available irrespective of the operation of other wage fixing principles.

(d) The Inquiry showed that various methods of assessing work value (including job evaluation, competency standards, qualification standards, productivity assessments and work value assessments) are all susceptible to gender-related undervaluation of women's work. Those considerations provide a basis for addressing the ways in which rates can be and have been affected by the sex of the workers. There is a continuing effect of weak and under-developed and under-recognised and under-documented skill taxonomies for service occupations. Some of the difficulties of assessing skills used in clerical work were considered by Justice Glynn in her decision in the Clerks' Case (Decision 25 October 1996, Matters Nos. IRC2335 of 1992, 384 of 1993, 1651 of 1994, 1871 of 1994 and 2367 of 1994).

114. The Inquiry found that undervaluation of women's work was related to inadequate recognition of:

- Additional levels of experience, skill and training acquired after entering an occupation (hairdressing, librarianship);
- The levels of qualifications women hold and that the work requires (childcare, librarianship);
- Appropriate relationship between women's qualifications and men's qualifications (beauticians, childcare);
- Women's training outside formal qualifications or accreditation arrangements (in hairdressing);
- Skill differentials within women's occupations (hairdressing, outworkers);
- Under-classification of women's work into award levels (childcare, seafood processing, outworkers);
- The depressing effect on market rates of non-compliance with legislative and award requirements in women's occupations (outworkers, hairdressing);
- Women's dependence on their earnings and their comparable needs with men (childcare).

115. Many approaches to valuing work have been developed, all with their various problems. Techniques used (and contested) in equal pay jurisdictions in other countries include comprehensive payroll based regression analyses matching pay and job and employee characteristics, independent job evaluation experts, and assessors appointed by courts.

Experience in those jurisdictions demonstrates that whatever the method, ensuring assessments of work value are free of gender bias is difficult.

116. The approach recommended by the Commission in the Pay Equity Inquiry – requiring assessment of work value to be objective, transparent and unaffected by the sex of the workers - recognises the complexity of the decisions involved in valuing work and accepts there is no one perfect method. It accepts that identifying and eliminating sex bias in valuing work may be a long term, iterative learning process in which industrial parties and tribunals have a role to play. Dr Clare Burton said in her evidence:

[T]he priority must be, in my view, enabling the Industrial Relations Commission through the provision of expert advice, to set up processes whereby pay equity both in the pay setting policies and procedures and in associated administrative processes, can be scrutinised and reviewed and through that process – which should be informed by a set of standards – learning should occur about the range of issues and the range of ways in which the pay equity issue can be more effectively dealt with (V2, p.248).

117. Justice Glynn fundamentally agreed with Dr Burton.

118. Under-classification of women's work was evidenced in the study of outworkers in the Inquiry, where Justice Glynn found:

Although no work value case has been undertaken in the Commission in relation to the work performed by outworkers, it is clear on the evidence before this Inquiry, that the classification structures and descriptors contained in the award do not address some important aspects of the work performed by outworkers, nor do they address the employment structure which sees outworkers forming a significant and substantial part of the ladies' fashion industry, a fact which impacts strongly on the nature of their work. The nature of their work is such that it is neither adequately, nor properly described, by classifications in the current Awards, which are derived from factory, based employment (V1,p.636).

119. And at V1, p.50:

In dealing with new areas of work, which are either totally new or within existing industries, all concerned in the application of work value tests, including the tribunal, will need to become more sensitive to the possibility of gender bias or gender based differentials in wages and conditions, a bias which is more than likely to be difficult to recognise and identify, let alone remedy. It would also assist to minimise the presence of bias, if the processes of arriving at outcomes as to value were to be as transparent to examination as could be developed. (our emphasis)

(e) Many of the occupations and industries in which women are correlated are poorly situated to make effective use of industrial relations processes principles to secure equal remuneration

120. In regard to the hairdressers and beauticians, for example, Justice Glynn found:

More significantly, I consider that the setting of rates of pay in this female dominated area does exhibit many of the characteristics of a female dominated industry that create undervaluation.

As I have noted from the evidence, the industry consists mainly of small employers employing a young workforce with a high labour turnover. There is a shortage of qualified staff. Union membership is low and there is a low level of industrial activity. There is a lack of regulation in the industry, particularly in relation to beauty therapists, and as I have already noted there is a lack of overaward payments and recognition for post trade qualifications and skills, and, in the case of beauty therapists, recognition of trade qualifications and skills. As Ms Smith noted, there is a tendency to treat post trade training as maintaining the trade rather than deepening the trade, a tendency to the contrary of that exhibited in the area of motor mechanics. (V1, p.382-4).

121. We have also commented in Submission 3 above, in relation to difficulties in bargaining in disadvantaged female-dominated occupations.

(f) Appropriate and effective equal remuneration tests and principles and processes for applying them have not to date been available in the industrial relations system.

122. We have also commented in Submission 8b above on gender bias and work value assessment and in Submission 8d on methods of assessing work value.

123. That concludes our opening out of our general submissions as lodged by us on November 5 last year. Now we turn to our draft Equal Remuneration Principle where we will provide some further argument. On occasion we will simply refer to arguments we have already made in our general submissions rather than make them again.

Attachment 1

PROPOSED EQUAL REMUNERATION PRINCIPLE

1 The Equal Remuneration 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 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 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.

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

(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

(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

5. The assessment of the value of work is required to be 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

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.

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.

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.

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

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.

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.

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.

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
- (h) Changes to work practices to ensure equal employment opportunities

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

Comments have been made on this under Submission 8 above.

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.

PROPOSED EQUAL REMUNERATION PRINCIPLE

1 The Equal Remuneration Principle applies to all aspects of the Commission's jurisdiction as provided in the Industrial Relations Act including in consent matters.

124. This accords with Justice Glynn's proposed equal remuneration principle (V 2, p. 174):

(ii) The principles would serve to ensure that:

- (a) all instruments made by the Commission in the exercise of its jurisdiction would provide for equal remuneration and other conditions of employment for men and women doing work of equal and comparable value; and
- (b) in female dominated industries and occupations that the work of employees is properly valued and in consequence is properly remunerated.

125. In our proposed Principle, specific inclusion of the application of the Principle to consent awards is based on the high proportion of matters in the NSW jurisdiction that are settled by consent and on the findings of the Inquiry that equal pay implementation has been obstructed by the limited supervision by the Commission of consent arrangements.

126. We consider that in consent matters the Commission could exercise its responsibility to ensure equal remuneration requirements are met by a procedure like that the federal Commission has adopted in *The Age* case. In that case, the Commission has set a hearing date in February 2000 for parties to address the Commission on how any proposed settlement of the matter meets the requirements of the legislation. This process need not result in unnecessary delay in settlements but would heighten parties' awareness of meeting the legislative requirements and provide a degree of transparency that has not always characterised consent arrangements.

127. We note the comments of the Full Bench in *Re Principles for Approval of Enterprise Agreements* (Fisher P, Cahill VP, Bauer and Schmidt J&J, Neal C; IRC96/5032; 19/12/96) in relation to the requirement of Rule 41 regarding the filing of a 'comparison and compliance statement':

It seems to us that something more than a mere assertion that the provisions of the Anti-Discrimination Act have been complied with is required, and that relevant aspects of the negotiations and the agreement itself should be referred to.

128. Justice Glynn considered that such a statement should apply equally in the context of undervaluation/pay equity. (V1,pp.63-4)
129. We note the proposal of the CEO Group that the Commission may require parties presenting consent awards to demonstrate how the award does provide equal remuneration. We consider, however, that it is essential that the Commission actually require the demonstration rather than simply hold the power to require it.
130. This process would ensure that more attention was paid to equal remuneration issues and that there was greater transparency about its application, which would in turn promote better implementation of the requirements.

2 Access to the Equal Remuneration 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.

131. In the Inquiry Report, Justice Glynn states:

I will propose in this Report a new principle of wage fixation.

I anticipate that this principle will operate substantially in relation to occupations and industries which have a high concentration of female workers and which have historically been characterised as female. However, the ultimate access to the operation of the principle should be determined on a case by case basis by the Commission having regard to the undervaluation contended, (V1, p.44).

132. The Report gave extensive consideration to characteristics of female dominated occupations and industries. The Report summarised investigation of a number of characteristics associated with undervaluation in female dominated work, occupations and industries, in V1, pp.46-7.
133. The Commission specifically did not set a particular proportion of women in the occupation as the test of whether or not an occupation or industry is female-dominated. The Commission did state that the proportion of women in an occupation or industry can be a strong indication that the wages for the work have been affected adversely by the fact that the work is done by women (V1, p.39;V1, p.42).

134. There is no reference in the Act or in the ILO Convention 100 or its associated Recommendation 90 to the concept of “female-dominated” work and there is no basis for introducing such a limitation, contrary to the submissions of the CEO Group.

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.

135. The Inquiry investigated the interrelationship between ILO Convention 111, on discrimination in occupation and employment and ILO Convention 100, equal remuneration, and compared the operation of the various Australian anti-discrimination laws and mechanisms for taking equal remuneration with those available in the Australian and the NSW Industrial Relations systems.
136. It is important to recognise that ILO Convention 100 requires a prospective remedy of equal remuneration and does not provide a remedy for past discrimination. The NSW Industrial Relations Act provisions similarly require provision of equal remuneration without providing a remedy for past discrimination. The previous equal pay decisions did not involve any requirements for proof of past discrimination.
137. The 1972 federal decision specifically required that work value be considered. Some awards had already implemented equal pay as required under the 1969 Equal Pay Principles, and in some awards, industrial parties did consider there already was equal pay. There was, though, no requirement to demonstrate that (and which) discrimination accounted for the lack of pay equity and provided a basis for application of the Equal Pay Principle.
138. In the Report, Glynn J gave reasons for leaving a discrimination test out of any test for establishing equal remuneration for men and women: (V2, p.66).

I would recommend to the Minister that any importation of equal remuneration processes of the kind contained within the *Workplace Relations Act* would make clear that discrimination simpliciter was not the test for establishing equal remuneration for men and women performing work of equal value.

In broad terms I have that view for two reasons:

1. Anti discrimination legislation is by its nature and operation unsuited to resolving pay equity issues, and does not adequately address these issues in an industrial context, where there will often be a requirement to establish or create new rights and obligations by awards and/or agreements and in the resolution of disputes (and thereby establish standards at a collective level);
 2. Anti discrimination legislation by and large does not sufficiently address systemic discrimination, or undervaluation, deriving from the operation of a broad range of factors including occupational segregation.
139. A discrimination test would provide an onerous barrier to taking an equal remuneration case. Under a discrimination test requiring that it be established that there was different treatment in the same or similar circumstances, lack of equal remuneration in most of the case studies in the Inquiry could not have been found. Comparisons of dissimilar occupations would generally founder on such a test.
140. In many cases, particularly in view of the high proportion of matters settled by consent, there is very little documentation of the bases of decisions made about rates. In many organisations, records about who made decisions and why are very poor. In the HPM case, the company acknowledged that its records of who was paid what and why were very poor. It may be impossible for an applicant to document exactly how specific acts of discrimination occurred especially where few or poor records are kept. It may be that the problem has been that actions that could have provided equal remuneration were not taken. It is very difficult to establish discrimination through omission (although omissions do fall within the scope of the definition of discrimination in ILO Convention 111).
141. Inability to document the specific discriminatory acts would not necessarily mean that the applicant could not make out a case to attract the remedy of provision of equal remuneration for work of equal value. Rather than requirements to prove a particular act of discrimination has occurred, all that is really relevant is establishing that there is not equal remuneration and therefore a remedy should be provided.
142. The requirement to establish that a difference in male and female earnings is caused by discrimination has been quite problematic in the only two equal pay cases taken so far in the federal jurisdiction.
143. *AMWU v The Age* (Print R3273)
 In the first decision in this case, Ross VP noted the Workplace Relations Act (WRA) requirement to identify the employees covered by the equal remuneration application, and noted that there is no power to cure a defect for a class of employees such as female clerical employees. The

AMWU/ACTU had said that the claim could not cover all clerical employees as no gender discrimination could be shown between male clerical and male production employees, and the basis of the claim was discrimination against female clerks by comparison with trade-level male production workers.

144. Ross VP said that, first, the Commission must be satisfied that there is not equal remuneration for work of equal value. The first step in doing that is to ascertain whether rates have been established without discrimination based on sex. Therefore the AMWU would need to show that the rates of pay of clerical employees had been established having regard to the gender of employees (or of a large proportion of them). Ross VP noted that this approach had been adopted by Commissioner Simmonds in the HPM Case and he adopted it in The Age case in the absence of any argument to the contrary.
145. Ross VP said that there was no impediment to the application covering all clerical employees as the central issue is not the gender of the particular current employees but whether remuneration for the work they do had been established without discrimination based on sex. He dismissed the application.
146. The case was lodged again and Whelan C rejected the company's challenge to the Commission's jurisdiction (C No.32261 of 1999). Whelan C says:

The words of the Convention do not suggest that the only comparisons acceptable are those which compare the work being performed by males with those being performed by females. Indeed it is clear that the issue is not who performs the work but the basis on which the rates have been established.

147. Whelan C also says:

As noted by both Simmonds C (*AMWU v HPM Industries (No.1)* [Print P9210]) and Munro J (*AMWU v HPM Industries (No.2)* [Print QQ1002]), the Commission's principles and practice related to work value comparison and changes are a primary source of guidance about what factors and considerations are of accepted relevance to evaluating whether the relevant work is of equivalent value.

148. The company's appeal against Whelan's decision to the Federal Court failed and the case was heard later in 1999. Negotiations regarding a settlement of the claim are continuing.
149. *AMWU and HPM Industries (No.1)* [Print P9210] and No.2 [Print Q1002])
In the HPM case, the Australian Industrial Relations Commission's Third

Safety Net Adjustment and Section 150A Decision (Print M5600) definition of discrimination (which includes both direct and indirect discrimination and has the Sex Discrimination Act (SDA) formulation of indirect discrimination as it was prior to the 1995 SDA amendments) was adopted. Commissioner Simmonds notes that any argument in favour of the SDA definition (as submitted by the AMWU/ACTU) needs to be advanced and determined in a forum where if adopted it would be generally be applied by the Commission.

150. Simmonds C said that the first step was ascertaining whether rates had been established without discrimination based on sex. He said the necessary **precursor** was to establish that the work was of equal value. He said this was essential as direct discrimination only arises where treatment is different and circumstances the same, and that required establishing equivalence of the work being compared.
151. Simmonds C found that there was different remuneration of the male and female comparators but the circumstances were not sufficiently similar to amount to direct discrimination. He did not consider that s.93 of the WRA imported the SDA's reversal of the onus of proof but nonetheless saw good reason for the person or institution imposing indirectly discriminatory requirements to establish their reasonableness. With regard to indirect discrimination he found that no requirement or condition had been established so it was not necessary to consider "reasonableness" of the requirement or condition. He noted that gender segmentation of workforce does not amount to a requirement or condition.
152. Simmonds C said that the award classification process does not provide a presumption of equal value, especially if the relativities in question were established a long time ago. He said that factors in overaward payments must not be discriminatory (as required by ILO Convention 100) and that agreement about the bases of them would be highly persuasive.
153. The case was settled late in 1998 through negotiation of a new enterprise agreement after three years of Commission proceedings. It resulted in the women receiving, in the course of a two and a half year agreement, the same rate of pay as applied to their male colleagues employed as General Hands and Storemen. The agreement also abolished the sources of discriminatory wages at HPM which were a three level performance based wage system which applied to the male jobs only and discretionary overaward payments to individual employees (paid almost exclusively to men).

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

154. The Report found this to be a factor in undervaluation of beauty therapists, child care workers, hairdressers, and librarians.

(b) whether there is some under-rating or undervaluation of the skills of women employees per se

155. The Report found this to be the case for the childcare and librarian's occupations, that the actual knowledge and skills required to perform the work were under-estimated, and that this was carried through in the alignment of their qualifications and skills with award classifications, and of classifications with rates of pay. In the hairdressing industry, post trade qualifications were not recognised in the classifications scale; and the trade level qualifications of the beauty therapist attracted only 92% of trade rate of pay.

(c) whether occupational segregation or segmentation has adversely affected remuneration

156. Extensive investigation of the interrelationship of occupational segregation in Australia, and the selection of the female dominated occupations for the Inquiry attests to the importance of this criterion. Case studies presented important evidence on the effect of occupational segregation on equal remuneration. The economic analysis linking female dominated industries and occupations with undervaluation was thoughtfully presented, and was supported by all economic experts at the Inquiry.
157. At the case study level, evidence was presented of occupational segregation being used to keep women seafood trimmers in the lower paid classifications, through under-recognition of skills, company and union practices giving preference to men for training for promotion, and overt sexual harassment by male workmates and supervisors discouraging women from challenging their lack of access to training and overtime.

(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

158. Justice Glynn's recommended Principle states:

(vi) In female dominated industries and occupations, it shall no longer be the presumption that the rates of remuneration have been properly assessed having regard to either the equal pay principles or proper work value assessments. In this regard it should not be assumed that all work has been valued correctly up to and including the structural efficiency processes and thereafter or that changes in work value have been taken into account. Moreover, it should not be assumed that assessments made by the Commission of the work value of these classes of employees has fully and adequately taken into account all relevant matters. Nor should it be assumed that the Minimum Rates Adjustment process, if undertaken, has been fully undertaken.

(vii) It is essential that the Commission have regard to the history of the award and whether there have been any assessments made of the female dominated work in the past, in considering cases where this principle will apply. Furthermore, it will be important to consider whether the rates have been assessed on the basis of the sex of the worker. By this I do not import a discrimination test. The issue to be considered is a broad one having regard to a range of considerations includes the following:

- (a) whether there some 'female characterisation' or labelling of the work;
- (b) whether there some underrating or undervaluation of the skills of the female employees *per se*.
- (c) Whether the industry or occupation has undervalued remuneration as a result of occupational segregation or segmentation.
- (d) Whether there are features of the industry or occupation which may have the potential to reduce the likelihood of a proper evaluation of the work such as the high degree of occupational segregation, the disproportionate representation of females in part-time or casual work, low rates of unionisation and low representation in workplaces covered by formal and informal work agreements and other considerations of that type.
- (e) In considerations of this kind the Commission would be careful to undertake gender neutral assessments of the work and to

place sufficient and adequate weight upon traditional work of women such as dexterity, nurturing, interpersonal skills and service delivery. These skills should be reassessed not only in the light of previous work value assessments (if any) but in the light of an objective appraisal of those features of work. Clearly, if no previous work value assessment has been undertaken then such an assessment should be undertaken as part of the award review processes.

(V 2, p.178)

159. Justice Glynn's principle (ix) specifies the need for each case to proceed on its own merits:

(ix) A number of alternative approaches should be available to the Commission to remedy undervaluation. Each case should proceed on its own merits. Some possible approaches include reclassification of work, the establishment of new career paths, changes to incremental scales, reassessment of the broadbanding of classifications or skills, reassessments of definitions and the avoidance of generic descriptions of work which do not properly describe the value of the work.

160. The identification of factors associated with undervaluation and factors relevant to comparability as we propose does not change the meaning of the Labor Council's proposed Principle but does assist in understanding and applying the Principle. This is particularly important in relation to establishing that an occupation is undervalued and that an equal remuneration remedy is appropriate. It is particularly important that the ILO Convention, the existing equal remuneration legislation and the Labor Council's proposed Principle do not require proof that absence of equal remuneration for men and women workers is caused by sex discrimination (however defined). Rather, the requirement is that a basis for a prospective equal remuneration remedy exists.

5. The assessment of the value of work is required to be 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**

161. Justice Glynn's proposed principle states:

(iv) In implementing the statutory requirement to ensure equal remuneration and other conditions of employment for men and women doing work of equal and comparable value the following should apply:

(b) The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle (V 2, p.175).

162. We note that in the 1972 Equal Pay Decision, the Commission specifically said that the requirement that assessment of work be objective meant assessment in keeping with work evaluation for wage and salary fixation and not in terms of the worth to the employer. The word "objective" does not and cannot mean "worth to the employer is irrelevant and not to be considered". "Objective" means that the assessment must be made in terms of specifiable factors and not purely in terms of the employer's (or anyone else's) subjective, personal opinion of the value of the work. Specification of the factors and criteria and relating evidence to them promotes consistent interpretation of principles across industrial parties and tribunal members.
163. The Commission has considered labour market attraction as a factor in setting rates in awards on many occasions (for example, the Professional Officers' Case, 12 CAR p.114; Teachers – Department of Education) Award (1970 AR 345); Metal Trades Work Value Case (1967) 121 CAR 587 at 676; 1986 Nurses' Case (Print G7200)).
164. In fact, prevailing market rates have frequently been the most important determinant of wages. In the period 1930-1967, work value was not considered at all in the Metal Trades Award, the key consideration being market rates. Industry profitability was a key consideration in the Oil Industry Case in 1970 (Print B5642).
165. Capacity to pay has been very significant in assessment of rates by industrial tribunals (for example, in the Marine Cooks Case (2 CAR p.55) although most often at the level of overall national wage case consideration of national productivity. Productivity considerations were central to the operation of the Restructuring and Efficiency Principle (National Wage Case [1987] 17 IR 65). The Commission said:

The work value principle recognises that the level of an employee's skill and responsibility may change significantly due to changes in the

nature of work, justifying a wage increase. The new principle is intended to encourage significant and appreciable improvements in efficiency at the enterprise or plant level which may or may not involve changes in skill and responsibility sufficient to meet the tests of the work value principle (V1, pp.79-80).

166. Thus, productivity and efficiency and work value considerations were integrally interrelated in decisions about wage fixation under this principle.
167. Public interest, comparative wage justice, and the need to resolve disputes have also been important wage setting criteria (as outlined by Hutson, J in *Six Wage Concepts*, AEU, 1971, pp.131-241, provided as an Exhibit during the Inquiry). Hutson refers to the Combined Research Centre Survey of 55 decisions on awards and classifications made between August 1957 and June 1957, which identified more than 30 factors taken into account in assessing work value (p.163). Hutson provides a discussion of the complexities of work value cases and assessment methods pp.211-240.
168. The Commission has also recognised that traditional work value factors as well as labour market attraction and other factors have also been reflected in overaward payments, in (for example) the 1997 Safety Net Review Decision:

Employers may elect to maintain overaward payments. Such payments may reflect a policy of attracting superior labour or differentiating between employees by reference to skill, experience or other factors. An employer may wish to persevere with such a policy and thus maintain the level of overaward payments (p.25)

Employers may maintain the level of overaward payments for various reasons, including attraction and retention, the desire to recruit superior labour, rewarding long service or high-level performance, employee pressure and the objective of maintaining workplace morale (p.131).

169. Thus, it is clear that the history of industrial tribunals' consideration of the value of work in the context of wage-fixing has included a wide range of factors, and that both award and overaward payments are based on a wide range of factors. It is artificial to draw a tight distinction between consideration of the value of work and the economic worth and context of the work within which the value of work is assessed, and in practice the Commission has not done so.
170. Transparency – making clear the basis of something, and/or the steps undertaken in a process – can be a very effective way of identifying whether or not discrimination is affecting processes and outcomes. It can involve additional effort and cost and may facilitate challenge to bases and processes

of decisions. At the same time, it also provides a basis for defending what has been done.

171. A measure of transparency is achieved when the bases of overaward – or any other – payments is specified. In the key Danfoss Case, (*Handels-OG Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening* [1989] 18 IRLR 532), the European Court of Justice held that in a situation where the basis of the pay system was far from transparent, and on aggregate men and women of the same grade received different levels of pay, the onus should pass to the employer to establish the bases for remuneration. When payments were said to be based on zeal, adaptability and a sense of enthusiasm, the Court said it was inconceivable that men and women would have different levels of zeal and enthusiasm. The Court also noted that assessing adaptability in terms of preparedness to work at various places and times could have a discriminatory effect if that were not necessary for the performance of the work.
172. The operation of work value assessment is often affected by other considerations (including capacity to pay, concern about flow-ons, effects on disputes and their resolution etc.) and it is desirable to have the considerations in decisionmaking identified.

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.

173. In regard to the components of a new principle, Justice Glynn stated that the requirement is “directed to the ascertainment of the appropriate value of work and to ensure that there is equal remuneration where there is equal or comparable value” (V2, p.176).
174. This requirement is at the core of ILO 100, and the NSW Industrial Relations Act 1996 equal remuneration provisions.

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.

175. Justice Glynn's proposed Principle (iv)(b) is:

(b) The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle (V2, p.175).

176. The Commission has on various occasions and bases departed from previous Commission decisions and is not bound by strict precedent. Hutson quotes the decision of the Arbitration Commission on an appeal against a Ship Painters and Dockers Award decision:

It is within the province of a Commissioner, for example, to conclude that a predecessor had honestly and sincerely taken too humble or exalted a view upon facts and circumstances exactly the same as those before him, and he might, without transgressing any principle of industrial jurisprudence, in equity and good conscience prescribe departures from the work of any number of predecessors (94 CAR p.612).

177. A departure from a past decision may well be necessary to meet the requirements of the 1996 Act, where the award had previously been dealt with under a legislative scheme framed in terms of "equal pay for work of equal value and similar nature" or where only award rates had been taken into account, rather than "remuneration" as presently specified.

178. The Commission points out in the Report that the market rates in childcare and the making of the first award were affected by the fact that women were doing the work. The Commission considered in making the first award that the women providing childcare were not fully dependent on their

earnings and that increasing their rates would significantly disadvantage the women who depended on childcare in order to pursue their own employment and earnings. The undervaluation of childcare was continued by consent agreements that failed adequately to examine the value of the work. The ongoing failure to examine the work done and the level of the qualification required persisted in the minimum rates adjustments process. At the time the first award was made, equal pay was not a relevant consideration since the work was usually done by women and the equal pay requirements did not extend to work usually done by women.

179. The Commission traces ongoing undervaluation of librarians' work to the Commission having based the first award on the work of (usually) unqualified male librarians rather than on the work of the qualified women librarians. (V1, pp.488-9).

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.**

180. This is consistent with Justice Glynn's findings (V2, pp.176-177). The Report also states that in relation to a new principle:

The principle would provide an alternative basis for the assessment of work in female dominated industries which does not depend for its operation upon the existence of, or the making of, comparisons between female and male rates of pay. This principle will provide for the assessment of undervaluation simpliciter". (V2, pp.177-178)

181. The Universities' Equal Pay Case (1980 AR 616) clearly established that comparators are not required as is pointed out in the Report.
182. In one sense, there is always an implicit comparison being suggested when it is claimed that a rate is not appropriate – by reference to what is paid in other awards, or what has been paid in the past or in some other sense. Consideration of the value of work and of appropriate rates is not carried out in a vacuum. In the childcare case study, the pay inequity was demonstrated by the comparison by the metals award and also by reference to the higher rates the childcare work might attract if it were paid at its value rather than at a discount based on the assumed needs of those workers. In the hairdressing case study, the pay inequity was established by showing the differences in treatment of post-trade training in the metals and hairdressing awards. In the librarians study, the disadvantaging industrial treatment of librarians was shown in relation to different treatment of professional qualifications for librarians and others and by showing the different treatment of the qualifications of male and female librarians. In this sense, there were comparators.
183. However, the case study pay inequity findings were not based on finding equivalences of hairdressing and mechanics occupations, or of librarians and geologists, of childcare workers and a specified metalworker classification, but on examination of the treatment of the occupation itself. The findings did not depend on the comparators or their rates and the comparisons were not prerequisite to the findings.
184. Comparisons, even where accepted, can be made out up to a certain point and then they run out as Justice Glynn noted (V1, pp.36-37). The male comparators did not always assist in assessing the true value of the female work.
185. The meaning of the ILO Convention 100 is clear – ratifying countries are required to take action to ensure that remuneration is not affected by sex. Achieving that would produce equal remuneration as between men and women workers for work of equal value. Wherever there is undervaluation related to the sex of the workers, eliminating it is required under the Convention. Establishing and remedying undervaluation simpliciter is consistent with the pay equity requirements of the Convention and the Act, not inconsistent as is claimed by the CEO Group on p.5 of their Submission.
186. Requiring comparators in a labour market characterised by such extreme occupational segregation as Australia's places an insurmountable obstacle in the way of pay equity. It is clear that the more differences there are between occupations, the more difficult it is to establish comparability. So many

women are in female-dominated occupations where it is extremely difficult to establish satisfactory comparators.

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

187. This is consistent with Justice Glynn's recommendation that:

Comparison for the value of work may be undertaken across and within industries and occupations, between different awards and with more than one comparison if required (V2, p.176).

188. Justice Glynn goes on to state that the use of comparators is a foundation for wage fixing and "is used only to the extent that it furnishes a guide of some reliability of proper rates" (V2, p.176).

189. Comparison of dissimilar work is a very familiar and traditional exercise for industrial tribunals. The Minimum Rates Adjustment process relied on such comparisons. Historically, the fitter has provided a comparator of central importance as fitters were employed in a wide range of industries and fitters could be used as a yardstick to set other trades rates (on the basis of similar period of apprenticeship training and high degree of manual skill). The trades rates could then provide a reference point for setting rates for other occupations.

190. The use of comparisons has been commonplace in Australia's industrial systems. Comparisons establishing equivalence of value as a basis for setting rates have been important in wage fixing. That does not amount to a "comparable worth" doctrine.

191. We reject the Employers' Federation claim (pp.23-24 of their Submission) that a comparable worth approach referable to US approaches is what was developed in the Inquiry and reject that a comparable worth approach in that sense is being contended for by us in this case. We do also point out that there are no cases of a direct translation of a comparable worth exercise (based on job evaluation points) into equal rates in the US or elsewhere. Such exercises taken alone have always been found by courts to be insufficient to determine rates of pay. It is surprising that a position that is not being contended for at all has received so much attention in the Inquiry and in statements in evidence for this case.

192. Rather, what we propose is consistent with approaches in Australian industrial tribunals to evaluating work, including the use of comparisons

with other occupations, enterprises and industries in setting rates. Such comparisons are frequently and understandably used on the basis that a fair system will provide some consistency of treatment of elements of value in work and produce outcomes where rates are proportional to value and not influenced instead by sex or other irrelevant considerations.

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.

193. The Labor Council proposed Principle does apply to award reviews and first awards. We have specifically referred to those award-making and award-varying circumstances in view of the importance of the initial establishment of the value of work in a first award and the opportunity the award review process offers for addressing equal remuneration problems within the ordinary industrial processes. The Commission is required by way of application under s.21(1)(b) when making an award to ensure that the award provides for equal remuneration for men and women workers for work of equal or comparable value.
194. Justice Glynn found that it was particularly important that equal remuneration be addressed in first awards. The market rates basis of first awards leaves them especially vulnerable to reflecting market-based discrimination. As the Inquiry showed, the rate set in the first awards for childcare and librarians had a substantial and ongoing effect on the industrial treatment of those occupations.

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.

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.

195. Justice Glynn states in Principle (iii):

(iii) The principle would be an essential feature of the exercise of the Commission's powers in award review processes pursuant to s.19 of the Act (V 2, pp.174-175).

196. The Commission's active involvement in identifying areas in which there apparently may not be equal remuneration would play an important part in redressing the extreme disadvantage some of the worst-off female dominated groups face in utilising the ordinary industrial mechanisms to improve their situation. Poorly unionised groups in small geographically dispersed workplaces, workers who are subject to considerable pressure, poor treatment and likely victimisation, workers who are casual or part time, workers with limited education and/or English language skills, simply are not well situated to bring an equal remuneration case before the Commission. It is clearly within the Commission's powers (for example under s.19) to identify areas for consideration, to bring to light the information necessary to consider whether equal remuneration applies and to implement or phase-in remedies.

197. It is clear that where the Commission has been involved in setting rates there has been greater gender pay equity. The greater transparency of the Commission's supervision will facilitate recognition and remedying of equal remuneration problems.

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**
- (h) Changes to work practices to ensure equal employment opportunities**

198. We have specifically identified the possibility of the Commission making equal opportunity orders in awards in order to achieve equal remuneration. It is within the Commission's power to make such award provisions - for example, arrangements about access to overtime, or recruitment processes. In some circumstances, orders like these will achieve as much or more as exercises in valuing work to result in real equal remuneration. It is also open to the Commission to keep equal opportunity provisions under ongoing review. During award restructuring, the Commission on occasion did provide particular classifications and career paths and processes for implementing them, and required further reports on implementation of the provisions that provided the bases for pay increases, sometimes over several years.

Equal remuneration adjustments

199. At 13(g), we have proposed that remedies include changes to rates of remuneration including through orders to ensure equal remuneration. Those orders would, of course, be confined to orders it is within the Commission's jurisdiction to make. The Act's Dictionary defines an award as "any order of the Commission under this Act that sets conditions of employment". Within the Labor Council's proposed Principle, 13(g) is "Changes to rates of remuneration" and the equal remuneration adjustment we propose could be accommodated under that proposed remedy, and falls under the Commission's power to set award terms.

200. Under 13(g) of our proposed Principle, it would be open to the Commission to include in awards an equal remuneration adjustment clause. We proposed in our final submissions to the Pay Equity Inquiry (at para 303) that an equal remuneration adjustment be included in awards where the Commission found on reviewing an award that equal remuneration had not been achieved in that award. We proposed that the Commission

should determine the extent of the pay disparity based on sex and recommend an appropriate level of payment to the relevant employees, in the form of an equal remuneration adjustment. In assessing the amount of the adjustment, the Commission would need to take account of the likely impact of any other proposed equal remuneration remedies, including changes in classifications.

201. The Labor Council also proposed an equal remuneration adjustment in its submissions to the Pay Equity Inquiry. The reasoning for proposing an equal remuneration adjustment clause for awards is that in some of the most disadvantaged and low paid areas of women's work, there is very little capacity for resolving pay inequities through enterprise-based bargaining strategies (including enterprise agreements and overaward payments) and the pay equity problem is outside the reach of award restructuring remedies (such as reclassification of work, establishing new career paths, changes to incremental scales, assessment or reassessment of broadbanding of classifications, or amending definitions and descriptions of work - as set out in our proposed Principle 13).
202. The equal remuneration adjustment would be inserted on application where the Commission was satisfied that there is not equal remuneration and that equal remuneration is unlikely to be achieved by other means (such as review of classifications, and the other remedies proposed in our Principle 13). The adjustment would usually apply in awards covering workplaces with the characteristics identified by Justice Glynn as likely indicators of gender-related undervaluation (V.1, pp.46-7). The level of under-remuneration and of the required equal remuneration adjustment would be identified by comparing aggregate remuneration across the industry or occupation covered by the award in relation to the Commission's assessment of the value of the work by a method of assessment that is unaffected by the sex of the workers.
203. Establishing what is actually being paid has often presented industrial tribunals with practical problems (at least as far back as in 1913 in the Builders' Labourers Case 7 CAR p.210) and industrial parties and tribunals have developed a wide range of approaches. In assessing appropriate rates for the work evaluated, the Commission could have regard to rates for other comparable work in one or more other occupations or industries. In assessing the total remuneration paid in other comparator occupations the Commission could use a range of methods including:
 - ABS data on earnings
 - employer surveys of earnings
 - employer/union joint surveys

- union surveys
- surveys by Government including workplace industrial relations surveys
- witness evidence
- case study evidence.

204. These methods have all been used at various times by the Commission in ascertaining the prevailing levels and distribution of remuneration in industries and occupations and in the economy generally. In applying the supplementary payments principle, for example, establishing the appropriate level of supplementary payment for inclusion in awards depended on establishing the level of remuneration in the area of the award's coverage. That was often done by carrying out surveys. The surveys were often difficult to carry out and employers and unions often disagreed on methods and results. However, the Federal Commission did state in various supplementary payments cases that surveys were a satisfactory method of ascertaining levels of remuneration and their bases.

205. The Commonwealth Government's submissions in the 1988 National Wage Case summed up the progress in relation to supplementary payments cases as follows:

In a number of supplementary payment cases, employers objected to the conduct of a survey of overaward payments. Some argued against the aims of the Principle; the inappropriateness of supplementary payments to their particular industry; and/or their preference for second tier increases to be processed under the Restructuring and Efficiency principle. Commission members have ruled that material emanating from surveys would enable an informed judgement to be made on the appropriateness of supplementary payments...In a number of early supplementary payment cases, difficulties and delays were experienced, particularly with the survey process, leading to some frustration on the part of the unions involved. However, with the finalisation of a number of the earlier claims many of the issues associated with the design, scope and processing of surveys and related matters were resolved, particularly at the federal level. Standard procedures have been established as a result.

(Department of Industrial Relations, Australian Government Publishing Service, 1988).

206. The Commonwealth Government also provided Exhibit 10, Federal Decisions Under the Supplementary Payments Principle in the Case, setting out award parties, number of employees covered, decision, average cost flowing from insertion of supplementary payments. The supplementary payments principle had the specific objective of addressing the position of lower paid workers.

207. At the time of the 1988 Case, supplementary payments had proceeded in Victorian local government, timber, transport, manufacturing grocers, furnishing trades, gelatine and glue manufacture, actors, clothing, finance company clerks, textiles and pest control workers in South Australia. Claims were also being pursued in a further 22 cases, in clerical (wool and transport), hotels/motels, plastics, vehicle industry (repair, service and retail), commercial radio, and eleven transport awards. In 13 of those cases, surveys had been completed and a further three were in progress, including the Transport Workers (Mixed Industries) Award, the largest survey undertaken to that time in the federal award area
208. Surveys have also been used to establish levels of overaward payments in the process of updating awards to reflect more closely existing levels of remuneration in particular occupation and industry labour markets. Such surveys have included joint union/employer surveys of rates being paid in the metals industry.
209. The CEO Group contentions and submissions point out that rates of pay in industries vary considerably for comparable work within and across industries and enterprises. The CEO submission argues that the differences reflect other than “objective” factors, apparently equating “objective” with those factors most often considered as work value criteria (skill, qualifications, responsibility and conditions).
210. The Commission has considered a very wide range of factors including but not restricted to those factors in assessing the value of work, as outlined above in our comments on our proposed Principle 5. Indeed, with the exception of the factors related to a specific employee (individual contribution to profit, individual performance, individual experience), the factors in the CEO Group list (para 35) have been considered by the Commission in cases.
211. Even the factors specified in the CEO Group list as relating to individuals have been considered by the Commission in relation to groups of employees including small groups. To consider factors and rates that are found in some but not all enterprises or occupations in an industry as part of considering rates and bases of remuneration for that industry does not amount to an individually-based approach to wage fixation, contrary to the CEO Group submission para 37. Rather, the Commission considers the patterns of earnings as presented in the evidence and makes judgements about the representativeness and diversity of that evidence.
212. In the PSAC case (*Public Service Alliance of Canada (PSAC) v Canada (Treasury Board)* [1991] 14 CHRR D/341), there was extensive consideration of appropriate approaches to determining the comparator’s rate where people in the comparator occupation were paid a range of rates

for work of the same assessed value. The Human Rights Tribunal heard substantial evidence from statistics experts and ultimately reached a view that an average of the rates (weighted for the numbers of employees receiving that rate) provided an appropriate comparator rate. The Tribunal rejected the view that the minimum rate should be taken as the comparator occupation rate and the argument that anything above the minimum reflected characteristics legitimately attracting additional pay.

213. The Human Rights Tribunal also explored at some length arguments about “ratcheting”, a process of repetitive wage adjustments whereby one (equal remuneration) wage adjustment sets up the basis for a second (claim by the males below the newly adjusted females) that affects the original and then repeats itself. The Tribunal found that there was no validity to the concerns about ratcheting, and pointed out that a claim by a male group to be brought to the male average used as a comparator rate for the purpose of setting equal remuneration for a group of women seeks to alter the pre-existing relativities among the male group, which had before the claim been set and regarded as fair. The male group would in effect be seeking to compare its rate to the higher paid males rather than to the female rate. The male rate is generally unlikely to have been set initially by reference to the female rates (paras 387-97).
214. The Human Rights Tribunal also considers how it can be determined whether regional rates have been applied consistently and equitably in setting wages and so provide “a reasonable factor that justifies the difference” between male and female earnings (paras 398-416).
215. The Employers’ Federation Submission at p.6 outlines a “ratcheting scenario. Our response to the concerns they raise is that if hairdressers did achieve (say) a \$50 equal remuneration adjustment there is no basis for the claim that motor mechanics could then achieve a \$50 pay increase to restore their relative position in relation to hairdressers. The claim clearly would not succeed as an equal remuneration claim without evidence that the rates for mechanics had been affected by the sex of the workers or that there was equal value and not equal pay as between the hairdressers and mechanics. Presumably current pay rates for mechanics (award and overaward) reflect factors of value in the work and none of that is changed by an alteration in the rates of hairdressers. There is an existing distribution of earnings for mechanics with some earning more than others, and that would be unaffected by a reappraisal of hairdressing rates.
216. The adjustment to hairdressing rates is based on considerations of the value of that work – it is not determined by a differential with mechanics or anyone else. The Commission may draw on a particular comparison or a range of comparisons and other inputs, but the real focus is assessing the value of the applicant occupation. The comparison may help by raising

issues about the consistency of treatment of particular factors of value from one occupation to another, but the decision as to value is ultimately about the value in the applicant occupation, not the comparator.

217. It is hard to see what would substantiate the claim – there is no provision under current legislation of wage fixing principles for a claim based on restoring a particular relativity (including an unlikely claim that a previously unidentified relativity between hairdressers and mechanics provides a basis for increases).
218. In an equal remuneration claim, it would be up to the applicant to present the Commission with acceptable evidence of levels and bases of remuneration in comparator occupations and industries, in keeping with the usual requirements and practice in the industrial jurisdiction.
219. Award histories could also provide useful information about the levels and bases of award adjustments in awards for which applications are being made and comparator awards.
220. The adjustment would be absorbable against overawards, which would take account of the possibility that some workplaces would already have increased rates and be free of the under-remuneration identified.
221. The equal remuneration adjustment would apply throughout the award's coverage with provision for employers to apply for exemption on the basis that equal remuneration already is provided for their employees. The equal remuneration adjustment would be part of the award rate for calculating any remuneration elements. The equal remuneration adjustment would be specifically identified in the award, thus making the basis and amount of the adjustment transparent.
222. In the NSW jurisdiction, equal pay was implemented under the 1973 Principles by including equal pay adjustments to the basic wage in awards. In the federal jurisdiction, amounts assessed as providing equal pay for work of equal value were inserted in each award. Under the 1972 federal Principle, these amounts were required to be assessed on the basis of work value assessments for each award (although there has been questioning especially by feminist scholars of the extent to which the adjustments actually were based on a careful and specific examination of work value in each award). The equal remuneration adjustment we propose is similar in many ways to the approach contained in the 1972 federal Principles. The adjustments would be based on assessments of the value of work and would provide a minimum rate consistent on average with equal remuneration for work of equal value for the workers covered by the award.

223. While it will no doubt be possible to point to hypothetical - and perhaps even actual - anomalies or problems that would or could arise through the operation of the equal remuneration adjustment as we have proposed it, there are many anomalies and problems in the current situation, including that very low paid workers are paid below the economic value of their work on the basis of their sex. Those problems and anomalies arise from the fact that many of the most low paid female dominated occupations are seriously disadvantaged in their capacity to use the other mechanisms provided by the industrial system to achieve equal remuneration.
224. The adjustment as we have proposed it contains options for the Commission to determine that equal remuneration already exists in the award's coverage, or in particular parts of it. The Commission could determine that other mechanisms are available to provide equal remuneration. There are already several mechanisms available to deal with capacity to pay issues.
225. We would expect that the Commission would insert an equal remuneration adjustment in situations where the Commission is satisfied that other remedies are not available, not appropriate, or unlikely to be effective.
226. Without the mechanism, we cannot see how equal remuneration can be achieved, especially for those workers who need it most and who are most likely to have been disadvantaged on an ongoing basis by historic undervaluation of their work.
227. Current remuneration shall not be reduced under any circumstances.

This is normal industrial practice.

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

Comments have been made on this under Submission 8 above.

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.

228. Justice Glynn said in the Inquiry:

(x) In all cases the Commission should be mindful of the economic, and in particular the employment impact of any decision to review rates of pay or conditions. Naturally, an incremental or evolutionary approach to reform will facilitate a change in a way that minimises adverse economic or employment consequences (V 2, p.180).

229. We consider that it is most important that the Commission continue to apply its usual approach to assessing the economic effects of its decisions in relation to equal remuneration. There simply is no basis for setting additional tests and barriers in relation to the Commission exercising its equal remuneration jurisdiction. The Commission's history is characterised by taking account of the effects of its decisions on employment and industry economics. For example, capacity to pay was considered in the clothing industry (Print H2282 p.9; in the actors' case (Print H1990); and in the textiles case (Print H2808); and in many others.

230. Section 18 of the Industrial Relations Act provides for the Commission to grant exemptions from whole or part of an award if it is satisfied that it is not contrary to the public interest, and is in the best interests of the employees and employers concerned or the operation of the award or part of the award would result in significant unemployment or other serious consequences for the employees and employers concerned.

231. The current wage fixing principles already include Principle 14 *Economic incapacity* regarding reducing or postponing increase in labour costs and provides that such an application is to be vigorously tested and processed according to the Special Case Principle before a Full Bench unless otherwise allocated by the President.

232. The s.18 provision and the Economic incapacity principle have rarely been used, possibly because employers are required to provide to the Commission evidence of the claimed incapacity to pay, or the public interest considerations or best interests of employers and employees.
233. Her Honour Justice Glynn has noted in the Report of the Pay Equity Inquiry (V2, pp.368-69) that:

[t]he Commission should exercise caution in weighing up the [employment] impact of wage increases flowing from pay equity adjustments, both generally and in relation to particular industries. However, I would not propose that the Commission carry out that function any differently than would occur in the ordinary exercise of its wage fixing powers.
234. The Commission traditionally has considered the employment impacts of its decisions including in determining appropriate remedies such as redefining classification structures and introducing new classification levels.
235. Since the 1959 amendments to the Industrial Arbitration Act, the Commission has been entitled to take into account the state of the economy and its capacity to meet higher wage levels. The Commission has regard to wages in the community generally (V2 p196). The Commission said in the National Wage Case ((1969) 129 CAR 617) that the arbitrator has a responsibility to consider the economic impact of work value cases (V2, p.215).
236. Under s.146 (1), the Commission has a range of functions including hearing and determining industrial matters. Under s.146 (2), the Commission is required in carrying out its functions to take account of the public interest and to take account of the State's economy. Consideration of public interest in the past has included consideration of employment effects. Under proposed legislative amendments s.146(2) would be amended to require the Commission to take account of the implications of its decisions for employment in particular occupations and industries.
237. The Commission can make equal remuneration adjustments on a phasing-in basis if it considers it necessary in the light of evidence about economic or employment effects. The Commission specifically endorses in the Report a case-by-case consideration of economic and employment impacts, weighing up equity and economic considerations consistent with the Industrial Relations Act and the long established wage fixing processes of the Commission (V2, p.180).
238. To impose additional requirements solely in relation to equal remuneration both questions the Commission's past compliance with its legislated

responsibilities and implies that equal remuneration adjustments have a unique economic effect. Evidence has not been provided for either proposition.

239. We would not claim that no wage increase has ever had an effect on employment. Neither would we claim that every employment adjustment effect of the Commission's decisions is in itself good or bad in overall economic terms. What we do claim is that the fact that an equal remuneration adjustment might affect employment or other aspects of industry economics should on its own prevent that adjustment being made.
240. Economic history is full of examples of adjustments to changing prices of capital and labour - occupational mix has changed, levels of employment have changed, work practices and technologies have changed. Many of these changes have increased economic efficiency by promoting better use of labour and other resources. It was noted in the Pay Equity Inquiry Report that labour market adjustments related to equal remuneration could in some circumstances provide both efficiency and welfare benefits (V2, pp.370-72).
241. What we propose is that the Commission should consider all these issues on a case by case basis, in light of the evidence provided. There are many, many decisions of federal and state governments as well as industrial tribunals that would fail a test of having no effect on employment. A test such as that proposed in the Crown's Principle would freeze existing pay inequities and their associated economic inefficiencies for all time. That would be economically irrational as well as unjust. The CEO Group proposed Principle requires the Commission to consider whether its decision could lead to loss of employment or employment opportunities. This involves a requirement for considerable speculation and is well beyond the Commission's customary consideration of the economic and employment effects of its decisions. There is no good reason for providing this additional hurdle in equal remuneration matters.

CONCLUSIONS

242. We believe that the evidence the Commission hears over the course of this case will lead it to the inevitable conclusion that:
243. First: There is a supportable issue related to gender undervaluation which is unable to be resolved under current State wage principles, legislation or other avenues.

244. Second: That it is timely that the matter of pay inequity be able to be remedied through appropriate mechanisms on a case by case basis by this Commission.
245. Third: The suggested additions to Labor Council's proposed principle and the reasoning of the Women's Organisations in our submissions and the evidence to be presented will provide a just, appropriate and industrially sound mechanism basis for remedying the issue of pay inequity.
246. Fourth: The evidence is so compelling that in fairness and good conscience, this Commission, having regard to the public interest, and to economic considerations as it is required to do by the legislation, will determine that anything less than a principle that will close the gender gap is unacceptable. This is particularly so given that there has been a generation of women workers waiting for this to occur.
247. Fifth: That the economic and industrially based evidence support each other, and support the approach taken by the women's organisations, and;
248. Lastly: That anything less will simply provide the avenue and necessity whereby the next generation of working women will be arguing the same issue.

If it please the Commission, these are our submissions.