

International perspective

3.1 Predictably many of the aspects evident in Australia reflect the global experience. The European Commission has identified the pay gap as increasing with age, years of service and education and listed the following six categories as contributing factors:

- personal characteristics – age, education, job tenure, children, labour market experience;
- job characteristics – occupation, working time, contract type, job status, career prospects and working conditions;
- firm characteristics – sector, firm size, recruitment behaviour, work organisation;
- gender segregation by occupation sector;
- institutional characteristics – education and training systems, wage bargaining, industrial relations, parental leave arrangements and provision of childcare; and
- social norms and traditions – education, job choice, career patterns and evaluation of male and female dominated job roles.¹

3.2 Globally there has been some success in reducing the gender pay gap in industrialised countries over the last forty years and this has been attributed to factors such as 'women gaining more work experience with fewer labour market interruptions; increasingly gaining more labour market oriented education; technological change which has led to a relative devaluation of physical strength; an increased demand for white

¹ Commission of the European Communities (2007) Communication from the Commission: *Tackling the Pay Gap between Women and Men*, Brussels 18 July 2007, p. 16.

collar workers'; increased global competition; and the introduction of anti-discrimination legislation.²

- 3.3 The World Economic Forum's *Global Gender Gap Report* includes an international comparison based on the Global Gender Gap Index to benchmark global gender-based inequalities on economic, political education and health-based criteria The International Trade Union Confederation described:

The economic component of the Index covers the participation gap, which is the difference in labour force participation rates, the remuneration gap and the gap between the advancement of women and men, based on the ratio of women to men among legislators, senior officials and managers and the ratio of women to men among technical and professional workers.³

- 3.4 A major initiative in the promotion of public awareness of women's participation in the workforce and pay equity is the International Labour Organisation's 2009 *Gender Equality at the Heart of Decent Work* campaign which aims to:

- increase general awareness and understanding of gender equality issues in the world of work;
- highlight the specific linkages between gender equality and securing decent work for all women and men; and
- advocate the importance of overcoming existing barriers to gender equality as beneficial for all.⁴

- 3.5 The following chapter sets out how Australia is faring in relation to other comparable countries in dealing with issues of the gender pay gap and female participation in the workforce. It then describes some of the measures in place in these countries to deal with these issues focusing particularly on experiences in the United Kingdom, New Zealand and Canada. Finally, Australia's international obligations to report on address

2 Weichselbaumer D and R Winter-Ebmer, 2007, 'The effects of competition and equal treatment laws on gender wage differentials', *Economic Policy* 22(4): p. 238. International Trade Union Confederation, *The Global Gender Pay Gap*, September 2007, pp. 50-51. The ITUC, however, cautioned that there is a lack of internationally comparable earnings data and cautioned that international comparisons use data from countries that use different measures to calculate the gap. Differences can result from the use of hourly, weekly, monthly or annual remuneration rates; sample size or occupation classifications.

3 International Trade Union Confederation, *The Global Gender Pay Gap*, September 2007, p. 49 citing Chicha M T (2006) *A comparative analysis of promoting Pay Equity: Models and Impacts*, p. 5.

4 International Labour Organization, at <<http://www.ilo.org/gender/Events/Campaign2008-2009/lang--en/index.htm>>.

and address matters arising in the areas of pay equity and female participation in the workforce are considered.

The Australian scene

3.6 Internationally Australia is ranked 13th of the 30 OECD countries in terms of estimated earned incomes.⁵ In terms of female participation in the labour force Australia was 40th of the 130 countries globally in 2008, up from 41st in 2007 and is 50th in 2009.⁶ On wage equality for similar work, Australia ranked 60th globally in 2009, 77th in 2008, but down from 51st in 2007.⁷ In terms of women's economic participation and opportunity Australia has slipped from 12th to 22nd globally over the year from 2007 to 2008 and in 2009 was 19th.⁸

3.7 The New South Wales Office for Women's Policy commented that:

Australia fares poorly by international standards with the workforce participation rate for women of child-bearing age ranked twenty third out of thirty OECD countries. Moreover, the proportion of Australian working women aged 15-64 who work part time (51.5 %) is well above the OECD average (33 %).⁹

3.8 Up until 2002, the gender pay gap in Australia was smaller than in many other comparable countries.¹⁰ The gender pay gap was 'commensurate with the average across OECD countries, and it has followed a similar

5 World Economic Forum, 2009, *The Global Gender Gap Report*, p. 63; World Economic Forum, 2008, *The Global Gender Gap Report*, p. 43.

6 World Economic Forum, 2009, *The Global Gender Gap Report*, p. 63; World Economic Forum, 2008, *The Global Gender Gap Report*, p. 43; World Economic Forum, 2007, *The Global Gender Gap Report*, p. 38.

7 World Economic Forum, 2009, *The Global Gender Gap Report*, p. 63; World Economic Forum, 2008, *The Global Gender Gap Report*, p. 43; World Economic Forum, 2007, *The Global Gender Gap Report*, p. 38.

8 World Economic Forum, 2009, *The Global Gender Gap Report*, p. 63; World Economic Forum, 2008, *The Global Gender Gap Report*, p. 43; World Economic Forum, 2007, *The Global Gender Gap Report*, p. 38.

9 New South Wales Office for Women's Policy, *Submission No. 153*, pp. 12-13 citing Australian Bureau of Statistics, Labour Force cat. No. 6202.0.55.001, Time Series December 1986-2008; Productivity Commission Annual Report 2006-2007, Annual Report Series, Canberra 2007, p. 7; Abhayatna J, Andrews L, Nuch H and T Podbury, 2008, *Part time Employment: the Australian Experience*, Productivity Commission Staff Working Paper, pp. 79-80.

10 OECD Employment Outlook Paris 2002, p. 95. Belgium has a six per cent wage gap and Australia is second.

trajectory over time'.¹¹ On average in OECD countries there was a 17 per cent gender pay gap and this had contracted between the 1960s and 1990s¹² largely due to educational attainment and labour market experience. However, there was little evidence of further narrowing of the gender pay gap between 1994 and 2001. Internationally, the OECD identified the following key factors as relating to the gender pay gap:

- (i) discrimination in the labour market;
- (ii) educational attainment and labour market experience explain only a small portion of the gender pay gap;
- (iii) labour market segmentation by occupation, type of contract, industry, firms and establishments explain a larger share of the gender pay gap but, more than 50 per cent of the pay gap remains unexplained;
- (iv) even when using the broadest range of potential explanatory characteristics possible (such as education, experience, occupation, motivation, expectations, and field of study) one-fourth of the gender pay gap remains unexplained;
- (v) the unexplained share of the gender pay gap appears to have increased over time.¹³

Table 3.1 Gender Gap Index (Australia)

	2006	2007	2008
Gender Gap Index rank	15 (out of 115 countries)	17 (out of 128 countries)	21 (out of 130 countries)

Source World Economic Forum, *Global Gender Gap Reports 2006;2007; and 2008*.

11 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 4. The OECD defines discrimination in the labour market as a situation in which persons who provide labour market services and who are equally productive are treated unequally because of their gender.

12 Unweighted average based on the latest data for OECD countries over the period 1997-2006.

13 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 4.

Table 3.2 Gender Gap Subindexes – Economic Participation and Opportunity (Australia)

	2006			2007			2008		
	Rank	Female	Male	Rank	Female	Male	Rank	Female	Male
Labour Force Participation	12	56%	71%	41	67%	81%	40	68%	81%
Legislators, senior officials and managers	14	36%	64%	13	37%	63%	23	38%	62%
Professional and technical workers	1	55%	45%	1	55%	45%	1	56%	44%
Wage equality	-	-	-	51	-	-	77	-	-
Earned income	-	-	-	13	24958	35832	13	26311	37414
Economic participation and opportunity	-	-	-	12	-	-	22	-	-

Table 3.3 Gender Gap Subindexes – Political Empowerment (Australia)

	2006			2007			2008		
	Rank	Female	Male	Rank	Female	Male	Rank	Female	Male
Women in Parliament	22	25%	75%	28	25%	75%	27	27%	73%
Women in ministerial positions	30	20%	80%	30	20%	80%	30	24%	76%

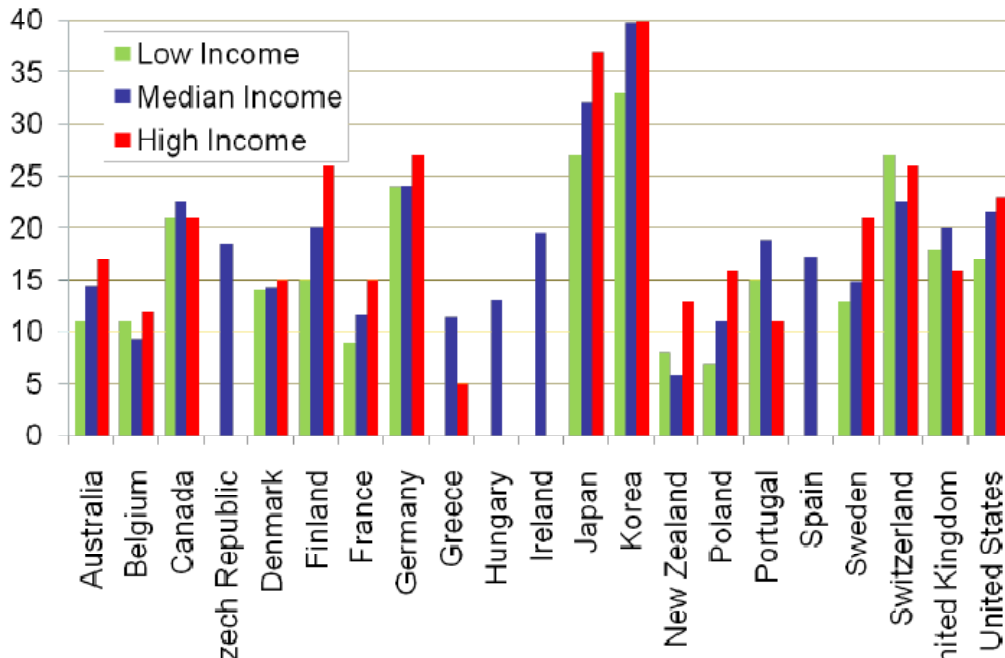
Table 3.4 Gender Gap Subindexes – Educational Attainment (Australia)

	2006			2007			2008		
	Rank	Female	Male	Rank	Female	Male	Rank	Female	Male
Literacy rate	1	99%	99%	1	99%	99%	1	99%	99%
Enrolment in primary education	1	96%	96%	1	96%	96%	1	97%	96%
Enrolment in secondary education	1	86%	85%	1	86%	85%	1	88%	87%
Enrolment in tertiary education	1	80%	65%	1	80%	65%	1	82%	64%

Source World Economic Forum, *Global Gender Gap Reports 2006;2007; and 2008*.

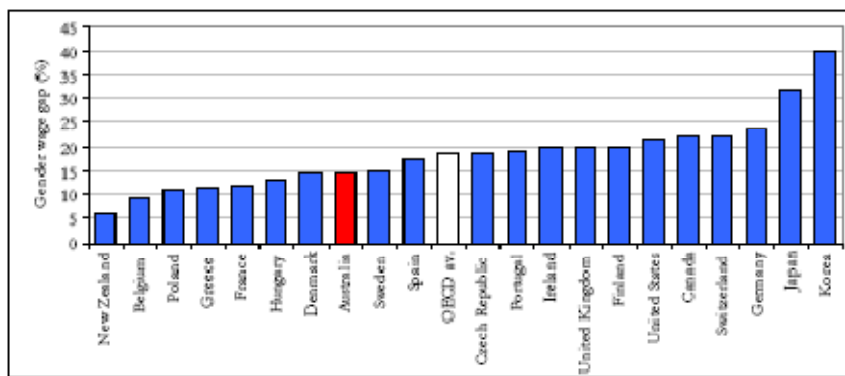
3.9 Figure 3.1 shows Australia's differences in the gender wage gap for low, medium and high income earners and the relative position compared to other OECD countries in 2003-2004.

Figure 3.1 Gender wage gap (Around 2003-04)



Source Department of Families, Housing, Community Services and Indigenous Affairs, 2008, *Gender Earnings differentials in Australia: A statistical overview of women's earnings, unpublished presentation, September 2008.*

Figure 3.2 International comparison of gender wage gaps¹⁴



Source Department of Families, Housing, Community Services and Indigenous Affairs, 2008, *Gender Earnings differentials in Australia: A statistical overview of women's earnings, unpublished presentation, September 2008.*

14 Department of Families, Housing, Community Services and Indigenous Affairs, 2008, *Gender Earning differentials in Australia: A statistical overview of women's earnings*, Presentation to the Australian Bureau of Statistics Pay Equity Forum, September 2008, unpublished, p. 10. Gender gap in median earnings of full time employees, 2004 or latest year available. Sources OECD Women and men in OECD countries 2007, Employment and Labour Market Statistics, Table 38181941.xls.

- 3.10 Figure 3.2 places Australia just below the OECD average in terms of the gender wage gap.¹⁵ At the time, Australia was ranked 8th in the OECD based on the gender gap in median earnings for full time employees. More recent figures released show Australia slipping from 17th to 21st on the global gender index and in 2009 was 20.¹⁶

International approaches to address pay inequity

- 3.11 Ms Meg Smith stated that:

Internationally there has not been the strong joining of equal pay applications with wage fixing processes and in many other jurisdictions ... it is founded in human rights law. Then you have the problem of claimants having to claim the right to equal pay. In those jurisdictions where they have sought to introduce provisions that might be thought of as either proactive provisions or gender pay equity audit provisions, for example, the United Kingdom is going down the path of gender pay equity audits, Canada has gone some way down that path and New Zealand has gone down that path in the public sector. There has always been a significantly high resolution of those issues in a favourable sense in the public sector rather than the private sector.¹⁷

Scotland and the United Kingdom

- 3.12 The Close the Gap project has been operating in Scotland since 2001 and the first phase of the project, which ran until December 2005, was funded under the [European EQUAL initiative](#).¹⁸ The Close the Gap initiative was established in recognition of the 'fact that the gender pay gap is an issue for women's equality ... but also for Scotland's productivity':

The work that we do very much ties in with the current Scottish government's economic strategy and the specific sectors that it has identified as being important to Scotland. Some of these are:

15 Gender gap in median earnings of fulltime employees, 2004 or latest data available. Source OECD Women and men in OECD countries 2007, Employment and Labour Market Statistics, Table 38181941.xls

16 World Economic Forum, 2009, *The Global Gender Gap Report*, p. 63; World Economic Forum, 2008, *The Global Gender Gap Report*, p. 43; World Economic Forum, 2007, *The Global Gender Gap Report*, p. 38.

17 Ms Meg Smith, *Transcript of Evidence*, 26 September 2008, p. 51.

18 Close the Gap The Project, <http://www.closesthegap.org.uk/project.asp?h=History> accessed 8 October 2009.

science and technology; energy, with a specific focus on renewables ... including the finance sector.¹⁹

- 3.13 Close the Gap builds the capacity of individual organisations and provides guidance and assistance to the sectors to meet their statutory obligations. Close the Gap is a partnership project that includes the Scottish Government, Scottish Enterprise, Scottish Trades Union Congress, Highlands and Islands Enterprise, and the Equality and Human Rights Commission.
- 3.14 The United Kingdom's approach also emphasises productivity. Figures released by the Women and Work Commission in 2005 estimated that should the causes of the pay gap be resolved, the benefits would be two per cent of GDP (£23 billion) to the United Kingdom's economy.²⁰

Pay equity in Scotland

- 3.15 Scotland's Parliament was established under the devolution process implemented by the *Scotland Act 1998*. Under this arrangement 'equality per se is reserved to the UK government'.
- 3.16 In the United Kingdom the *Equal Pay Act 1979* and the *Sex Discrimination Act 1975* underpin equal remuneration.²¹ An objective of the Equal Pay Act is to 'eliminate discrimination between men and women in the same employment in pay and other terms and conditions of employment such as piecework, bonus payment, redundancy payment and employer's superannuation contributions':

The Equal Pay Act offers avenues of recourse for claimants who believe they have been discriminated against on the basis of sex, with the burden of proof resting with the employer to prove to the employment tribunal that any differences in pay are not inequitable but are genuinely due to a factor other than the difference in sex between the employees concerned.²²

- 3.17 The Scottish Government is responsible for all issues that are not explicitly reserved to the United Kingdom Parliament. The *Scotland Act* identifies an equalities remit of the Scottish Parliament and the Equal Opportunities Committee is one of eight mandatory standing committees of the Parliament:

19 Ms Emma Ritch, Manager, Close the Gap, *Transcript of Evidence*, 11 August 2009, p. 1.

20 Ms Emma Ritch, Manager, Close the Gap, *Transcript of Evidence*, 11 August 2009, p. 3.

21 A further relevant law is the *Equality Act 2006*, Para. 3.23.

22 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 28.

Employment legislation is reserved to the UK Government at Westminster ... The Equal Pay Act (as amended) provides for legal remedy where men and women are doing like work, work rated as equivalent by an analytical job evaluation scheme, or work of equal value, and their difference in pay cannot be explained by reasons that are not attributable to, or tainted by, their difference in sex.²³

- 3.18 The United Kingdom's Sex Discrimination Act can influence the gender pay gap through prevention of discrimination in education, training and employment.²⁴ A voluntary Code of Practice on Equal Pay was introduced in 1997.²⁵ DEEWR stated that:

The 2006 ILO Working Paper on pay equity models was ... critical of the United Kingdom model finding that despite a genuine willingness (on the part of the Government) to promote pay equity in workplaces the model "focuses more on the establishment of non-discriminatory pay practices than on the elimination of the pay gaps themselves; more on achieving equal opportunities rather than equal results".²⁶

- 3.19 Close the Gap clarified:

The law requires individual women or men to take cases. There is no clear provision for mass litigation, although in some tribunals case management is, in practice, processing cases in bulk. There are currently approximately 50,000 outstanding equal pay cases in the Scottish tribunal system. The vast majority of these are equal value cases that have arisen from public sector pay modernisation programmes.²⁷

Gender Equality Duty

- 3.20 The *Equality Act 2006* requires public sector bodies in the UK to take steps to actively promote equality between men and women through their work and eliminate unlawful discrimination:

23 Ms Emma Ritch, *Submission No. 149*, pp. 1-2.

24 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 28.

25 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 28; Equal Opportunities Commission 2003, *Code of Practice on Equal Pay*, London.

26 Department of Education, Employment and Workplace Relations, *Submission No. 58*, pp. 28-29; Chicha, M-T 2006, *A comparative analysis of promoting pay equity: models and impacts*, International Labour Office, Geneva.

27 Ms Emma Ritch, *Submission No. 149*, p. 2.

Listed public bodies with more than 150 full time equivalent staff, in Scotland,... were ... required to publish an equal pay statement, by September 2007, which was expected to provide a detailed description of how the equal pay aspirations of the public body would be delivered. The statement was recommended to include activity to address each of the causes of the gender pay gap, including occupational segregation, inflexibility of working arrangements and discrimination within pay system.²⁸

New Zealand

3.21 Between 2004 and 2009 a five year Pay and Employment Equity Plan of Action was implemented in New Zealand. A Tripartite Pay and Employment Equity Taskforce had found that:

... the gender pay gap in the public sector arises from the way that women's jobs are valued, the jobs that women are in and the relationship between the structure of paid work and women's job choices and progression. The task force found that the gender pay gap is persistent and troubling, that it is not good for the economy and that it is not in the interests of the majority of employers or employees.²⁹

3.22 The New Zealand Government decided to lead by example and conducted pay and employment reviews across the public sector where the gender pay gap was higher than in the general workforce:

... because of the higher concentration of women in the public sector and their greater concentration in female dominated, lower paid occupations.

The evidence based and cooperative nature of the reviews produced extensive qualitative and quantitative information and analysis about gender equity and employment and developed workable solutions that were agreed by employers, unions and chief executives.³⁰

3.23 The New Zealand Pay and Employment Equity Plan of Action focused on the pay and employment reviews in 67 public sector workplaces which covered 13.5 per cent of New Zealand employees:

28 Ms Emma Ritch, *Submission No. 149*, p. 2.

29 Ms Philippa Hall, Director, Pay and Employment Equity Unit, Department of Labour, New Zealand, *Transcript of Evidence*, 13 August 2009, p. 1.

30 Ms Philippa Hall, Director, Pay and Employment Equity Unit, Department of Labour, New Zealand, *Transcript of Evidence*, 13 August 2009, p. 2.

The review process has been a significant education and awareness raising exercise for employers, unions, human resources practitioners and others, and hundreds of people have been directly involved in review committees and many thousands involved in reviews in various ways...

The mechanisms established to implement the Plan of Action were:

- a dedicated seven person Pay and Employment Equity Unit (PEEU) in the Department of Labour (the overall leader of the Plan) to develop tools and provide advice and support for the programme ;
- a one million dollar annual Contestable Fund to resource pay and employment equity projects (in the event, primarily used to resource organisations conducting pay and employment equity reviews); and
- a tripartite Steering Group comprising employers and unions for the Public Service, public health and public education, the EEO Commissioner, the Director of the PEEU and an independent Chair, to lead and monitor the programme.³¹

3.24 The New Zealand approach instigated:

... ways of making gender equity ordinary so that they are just built in to everyday practice and so that you do not have to go through that redress mechanism with all the toll that it takes, and the very contested nature of such applications and the almost inevitable compromise nature of the solutions.³²

3.25 The New Zealand Government stated:

The main information used in the reviews has been payroll and other human resources information and staff surveys and other consultations with staff.³³

3.26 The gains of the New Zealand Pay and Employment Equity Unit, included:

- promotion of greater openness and transparency of wage and promotion systems;
- greater clarity of job specifications;
- employee participation in equity issues;
- constructive interaction with unions; and

31 New Zealand Department of Labour, *Submission No. 148*, p. 1

32 Dr Anne Juror, *Transcript of Evidence*, 26 September 2008, p. 58.

33 New Zealand Department of Labour, *Submission No. 148*, p. 2.

- improved organisational communication.³⁴

3.27 The Finance Sector Union of Australia commended the New Zealand approach, particularly the gender neutral job evaluation tool.³⁵

Findings of the pay and employment equity review process

3.28 The New Zealand Government described:

The pay and employment equity review tool ... [as] structured around three indicators of gender equity in employment – equity between women and men in rewards, in participation in all areas and levels of the organisation, and in experiences of being treated with respect and fairness.³⁶

3.29 The undervaluation of women's work has been estimated as accounting for 20 per cent or 25 per cent of the gender pay gap in New Zealand³⁷ and:

All Public Service reviews except one found gender pay gaps in median equivalent full-time earnings. These varied in size from 3% to 35%. Common findings included:

- Women and men received unequal starting salaries for the same job;
- Female-dominated jobs were lower paid than male-dominated jobs;
- Gender inequalities were found in pay progression and performance pay;
- Women predominated in the lowest paid staff and were a minority of those in the best paid jobs; and
- Women had a smaller share of additional rewards, such as employer-funded superannuation, premiums and bonuses.³⁸

3.30 The review process also discovered 'significant gender differences in opportunities to participate in all roles and at all levels', including:

- women were often under-represented at senior management levels and were less likely to apply for more senior roles;

34 Australian Education Union, *Submission No. 76*, p. 18 citing Fisher G, 2007, *Pay Equity – Time to Act Report into Pay Equity and the Impact of WorkChoices*, Queensland Industrial Relations Commission, p. 91.

35 Ms Susan Kenna, National Industrial Officer, Finance Sector Union of Australia, *Transcript of Evidence*, 3 April 2009, p. 28.

36 New Zealand Department of Labour, *Submission No. 148*, p. 2.

37 Ms Philippa Hall, Director, Pay and Employment Equity Unit, Department of Labour, New Zealand, *Transcript of Evidence*, 13 August 2009, p. 3.

38 New Zealand Department of Labour, *Submission No. 148*, p. 6.

- high levels of occupational segregation by gender;
- female staff had less access to training and development opportunities;
- female-dominated roles had fewer career steps;
- women were less likely to believe that they would be supported by their manager to apply for a more senior role; and
- most part-timers were women and women were more likely to be employed on temporary contracts.³⁹

Canada

3.31 At a federal level, the Canadian legislative approach to gender pay equity has been implemented through the *Canadian Labour Code 1985* and the *Canadian Human Rights Act 1985*. In 2004, an independent Pay Equity Taskforce reported on *Pay Equity: A New Approach to a Fundamental Right* which recommended new federal stand alone pay equity legislation.⁴⁰

3.32 The *Employment Equity Act 1995* applies to federally regulated private sector employers of more than 100 employees and most public sector employers:

The Act places an obligation on employers to eliminate employment inequity by:

1. Identifying and eliminating employment barriers that result from the employer's policies and practices (where they are not authorised by law);
2. Instituting positive policies and practices to ensure that people in designated groups (Indigenous people, people with disabilities, women and people in visible minorities) are represented within each group in the employer's workforce in numbers that reflect their representation in the Canadian workforce;
3. Developing an employment equity plan including timelines for achieving the desired representation of designated groups; and
4. Filing annual public employment equity records, reporting on how they are progressing towards employment equity.

The Canadian Human Rights Commission is responsible for ensuring compliance with the Act, but the staff in the Commission

39 New Zealand Department of Labour, *Submission No. 148*, p. 6.

40 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 29.

generally see their role as assisting employers to comply with their obligations, rather than taking proceedings against them.⁴¹

3.33 These national Acts are supported by various pieces of legislation at the provincial level.⁴²

3.34 The Department of Education, Employment and Workplace Relations commented that a:

... multi-tiered arrangement sparked prolonged concern from stakeholders and members of the public, with key concerns identified as being:

(i) lack of clarity with respect to definitions of key concepts, standards and methodologies, including the meaning of 'establishment', occupational group, gender-neutral job evaluation, and wage adjustment methods;

(ii) frequent challenges to the methodologies selected for job evaluation and wage adjustment;

(iii) timeliness and effectiveness of the current system which has been characterized by protracted and costly litigation and concomitant delays in correcting wage inequities; and

(iv) inaccessibility of the system to individual and non-unionized employees.⁴³

3.35 The ACTCOSS added that:

We note that there has been considerable controversy in relation to a number of areas of the Act (particularly the term 'visible minorities') and that its application is very limited, with the 2006 review of the Act finding that only about 6% of the Canadian population come under the Act. However, it is a positive example of affirmative action in the area of workplace inequity that has operated over a long time period and can be looked to for guidance.⁴⁴

41 ACT Council of Social Services, *Submission No. 54*, p. 6.

42 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 29.

43 Department of Education, Employment and Workplace Relations, *Submission No. 58*, p. 29; Department of Justice Canada 2004, *Pay Equity Review Backgrounder*, Ontario. Accessed at <http://www.justice.gc.ca/eng/payeq-eqsal/6026.html>

Quebec

- 3.36 In 1996, Quebec adopted its own proactive pay equity legislation which came into effect for employers as of November 1997. The *Quebec Pay Equity Act 1995* covers all aspects of pay equity implementation and applies to employers with 10 or more employees.⁴⁵ As stated by the Queensland Industrial Relations Commission, Quebec's Pay Equity Act is widely regarded as most the progressive approach to pay equity to date.⁴⁶
- 3.37 The statute contemplates different requirements for enterprises employing more than 100 employees, enterprises employing between 50 and 99 employees and enterprises with between 10 and 49 employees. For the purposes of the Act, 'enterprise' is defined as configuration of activities which can be described as self-contained and functional.⁴⁷
- 3.38 Pay equity legislation in Quebec requires employers to be proactive in addressing pay equity.⁴⁸
- 3.39 The Pay Equity Commission is the administrative arm of the Pay Equity Act and was established one year prior to the legislation coming into effect for employers with a view to providing information and resources to assist in giving effect to the Act. Other features of the Quebec legislation include:
- flexibility with respect to methodological criteria in order to adapt implementation to different workplaces;
 - that several employers may work together to develop aspects of their pay equity plans;
 - provision for sectoral joint committees (subject to approval by the Pay Equity Commission);
 - the important role of joint employer-employee pay equity committees in large organisations; and
 - an obligation to maintain pay equity.⁴⁹

45 Canada Pay Equity Task Force, *Exhibit No. 81*, p.70.

46 Queensland Industrial Relations Commission, *Pay Equity – A Time to Act*, 2007, Queensland, p.82. For example see Australian Education Union, *Submission No. 76*, p. 17.

47 Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right*, 2004, Ottawa, p.70.

48 Dr Cassandra Goldie, Director, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 17.

49 Queensland Industrial Relations Commission, *Pay Equity – A Time to Act*, 2007, Queensland, p.94.

- 3.40 Evidence to the inquiry supported initiatives undertaken in Quebec in relation to appropriate reporting requirements for business:

The public information that was available showed that it [the Quebec Pay Equity Act] was delivering positive outcomes for women and it was narrowing the pay gap.⁵⁰

- 3.41 The Anti Discrimination Commission Queensland supported the Quebec Pay Equity Act because there are a number of good elements including the requirement for organisations to report on their compliance and bolstering of monetary sanctions for non-compliance. ADCQ suggested this could be an effective means of systematically advancing pay equity in Australia.⁵¹

Pay Equity Plan

- 3.42 For employers who employ 50 or more staff the Act prescribes the development of a four stage pay equity plan designed to determine the cause of gender pay discrimination. In summary, the four stages are:

- identification of predominantly male jobs and those which are predominantly performed by women;
- development of job evaluation methodology;
- job evaluation, calculation of pay disparities and implementation of pay adjustments; and
- determination of the timeframe for making pay adjustments (a four year timeframe is prescribed from the development of the pay equity plan to the implementation of pay adjustments).⁵²

Pay Equity Committee

- 3.43 Employers with more than 100 employees are required to establish a pay equity committee responsible for developing stages 1 to 3 of the process. The committee must comprise at least two-thirds employee representatives, of which at least half must be women. Furthermore, employers must provide training and information to the committee representatives to allow them to carry out their responsibilities.⁵³

50 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 9.

51 Commissioner Susan Booth, Anti-Discrimination Commission of Queensland, *Transcript of Evidence*, 31 March 2009, p. 74.

52 Queensland Industrial Relations Commission, *Pay Equity – Time to Act*, 2007, Queensland, p. 93.

53 Queensland Industrial Relations Commission, *Pay Equity – Time to Act*, 2007, Queensland, p. 93.

Table 3.5 Provisions of the Quebec Pay Equity Act

Size of Organisation	Pay Equity Committee	Pay Equity Plan
Organisation with 100 employees or more	Mandatory	Mandatory
Organisation with 50 to 99 employees	Optional Only obligation: joint process	Mandatory
Organisations with fewer than 50 employees	Optional	Optional Only obligation: determination of salary adjustments

Source *Pay Equity Taskforce Final Report 2004, Pay Equity: A new approach to a fundamental right, Table 4.5 Organisation by size, p. 130.*

International obligations

- 3.44 As a party to a number of international treaties, Australia is required to implement and report on obligations in relation to pay equity. The global pay equity law and policy contained in labour conventions emphasises gender neutral assessment of 'work value' as the international standard but does not prescribe the method to be applied to work value assessment. This differs from the obligations established under international human rights law, which emphasise the obligation to eliminate discrimination based on gender.
- 3.45 The objects of the *Fair Work Act 2009* are set out in section 3, and require Fair Work Australia to take into account Australia's international labour obligations.⁵⁴

54 S.3(a) *Fair Work Act 2009* The Explanatory Memorandum states that these obligations, include, those under the following instruments: International Covenant on Economic, Social and Cultural Rights (16 December 1966) [1976] ATS 5; Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) [1983] ATS 9; ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (29 June 1951) [1975] ATS 45; ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (25 June 1958) [1974] ATS 12; ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (23 June 1981) [1991] ATS 7; ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (22 June 1982) [1994] ATS 4; and ILO Recommendation (No. 166) concerning Termination of Employment at the Initiative of the Employer (22 June 1982).

- 3.46 The general duty to take Australia's international obligations 'into account' is a traditional administrative law approach that gives an indirect effect to international obligations in domestic law. From a modern human rights law perspective, this approach falls short of providing a guarantee that the rights recognised in international law will be implemented. In the United Kingdom and the ACT (for example) a person exercising a power or making a decision (including a court or tribunal) must do so consistently with the relevant right, so far as it is possible to do so.⁵⁵
- 3.47 In its current form, equality rights and pay equity obligations undertaken by Australia and enshrined in ILO, CEDAW and ICESCR are incorporated as relevant matters to take into account but may be discounted or given lesser weight provided Fair Work Australia has turned its mind to relevant obligation. Consequently, it is arguable that the current approach is not a sufficiently strong mechanism to guarantee the implementation of pay equity obligations in a systemic way, because pay equity has been accorded no greater status than other relevant factors. It is one factor by which the overall objectives of a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion (s. 3).
- 3.48 The equal remuneration provisions do, however, give explicit recognition in domestic law of the right to pay equity and provide a cause of action and access to an enforceable remedy. The question now is whether, in light of the developments in international pay equity law and policy, this measure is sufficient to meet the totality of Australia's obligations.

United Nations Convention for the Elimination of All Forms of Discrimination Against Women Article 11.1

- 3.49 This Convention requires Australia to 'take all appropriate measures to eliminate discrimination against women in ... employment' and to 'encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities'.
- 3.50 States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

55 For example, s.3 *Human Rights Act 1998* (UK); s.30 *Human Rights Act 2004* (ACT), which gives effect in domestic law to the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights respectively. Unless there is a clear intention or necessary implication that the law is to be applied notwithstanding inconsistency, then it should be interpreted and applied in a way that give effect to the right.

- The right to work as an inalienable right of all human beings;
- The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

3.51 The UN CEDAW Committee has adopted Equal Remuneration Recommendation (13), in which the UN Committee advocated that to overcome the gender- segregation in the labour market and implement pay equity obligations under CEDAW and ILO 100, States Party adopt gender neutral job evaluation systems that compare the ‘value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate.’ The results should be reported to the Committee as part of the periodic country reporting process.⁵⁶

3.52 UN CEDAW Committee also recommends that implementation machinery be established to ensure pay equity principles are applied in practice, and that parties be encouraged to adopt pay equity principles as part of their collective agreements.⁵⁷

3.53 UN CEDAW: Australia expressed concern that

... there are inadequate structures and mechanisms to ensure effective coordination and consistent application of the Convention in all states and territories.⁵⁸

3.54 The UN CEDAW Committee commented that:

The Committee regrets that the report neither provides sufficient statistical data, disaggregated by sex and ethnicity on the practical realization of equality between women and men in all areas covered by the Convention nor information on the impact and

56 ILO Resolution *Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection*, para 3, (92nd Session, June 2004).

57 CEDAW, *General Recommendation No. 13* (eighth session, 1989), para 2 and 3.

58 Committee on the Elimination of Discrimination against Women, 2006, *Concluding comments of the Committee on the Elimination of Discrimination against Women*, United Nations Convention on the Elimination of All Forms of Discrimination, p. 2.

results achieved of legal and policy measures taken. It also regrets the absence of sufficient information and data on women with disabilities.⁵⁹

- 3.55 The most recent report does contain basic statistics on employment for Indigenous women, but there is limited information about women with disabilities and those of culturally and linguistically diverse backgrounds in the most recent report.⁶⁰
- 3.56 Australia's international legal obligations apply to each constituent unit of the Federation and it is the Commonwealth that has responsibility for ensuring Australia implements its international legal obligations. The Commonwealth that has the responsibility to remedy the lack of implementation on pay equity and Australia as a nation is subject to international monitoring (principle of state responsibility). States Parties also enjoy a measure of discretion as to how they achieve the implementation of internationally binding obligations, but implementation *per se* is not optional.
- 3.57 CEDAW: Australia added that 'While noting the existence of national legislation to prohibit sex discrimination at federal, state and territory levels, the committee expresses concern about the status of the Convention at these levels and the absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men'.⁶¹

The Committee urges the State party to ensure that all states and territories are in full compliance with the obligations under the Convention and to take steps to entrench the prohibition of discrimination against women and the principle of equality of women and men in line with Article 2, subparagraph (a), of the Convention. The Committee further recommends that the State party undertake awareness and training programmes on the

59 Committee on the Elimination of Discrimination against Women, 2006, *Concluding comments of the Committee on the Elimination of Discrimination against Women*, United Nations Convention on the Elimination of All Forms of Discrimination, p. 3; See also Federation of Ethnic Communities' Councils of Australia, *Submission No. 50*, p. 3.

60 Australia's combined sixth and seventh report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, 2003-2008, paras 9.51 - 9.59.

61 Committee on the Elimination of Discrimination against Women, 2006, *Concluding comments of the Committee on the Elimination of Discrimination against Women*, United Nations Convention on the Elimination of All Forms of Discrimination, p. 2.

Convention for the judiciary, law enforcement officials, members of the legal profession and the public.⁶²

- 3.58 FECCA referred to the UN CEDAW Committee 2006 recommendation 'that Australia take proactive measures to eliminate discrimination against refugee, migrant and minority women and girls'.⁶³

In 2006 the Committee on the Elimination of Discrimination against Women expressed concerns that immigrant, refugee and minority women and girls in Australia may be subject to multiple forms of discrimination in the areas of education, health, employment and political participation.⁶⁴

Convention on Equal Remuneration for Work of Equal Value (ILO100)

- 3.59 Convention 100 requires the application of the principle that all male and females workers receive equal remuneration for work of equal value. Australia ratified the Convention in 1974 and has incorporated equal remuneration provisions in workplace relations and discrimination legislation although the success of this approach has been questioned.⁶⁵ It is important that pay equity must be across occupations as well as within occupations and highlighted the need for cross industry comparisons.⁶⁶ Cross industry comparisons are important particularly in the context of the level of segregation in the Australian workforce.

Article 1 For the purpose of this Convention--

(a) the term *remuneration* includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) the term *equal remuneration for men and women workers for work of equal value* refers to rates of remuneration established without discrimination based on sex.

62 Committee on the Elimination of Discrimination against Women, 2006, *Concluding comments if the Committee on the Elimination of Discrimination against Women*, United Nations Convention on the Elimination of All Forms of Discrimination, pp. 2-3.

63 Federation of Ethnic Communities' Councils of Australia, *Submission No. 50*, p. 2.

64 Ms Voula Messimeri, Chair, Federation of Ethnic Communities Councils of Australia, *Transcript of Evidence*, 24 October 2008, p. 17.

65 Group Training Australia Ltd, *Submission No. 45*, p. 4.

66 Group Training Australia Ltd, *Submission No. 45*, p. 4.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of
 - (a) national laws or regulations;
 - (b) legally established or recognised machinery for wage determination;
 - (c) collective agreements between employers and workers; or
 - (d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
 2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.
 3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.
- 3.60 In 2004, the International Labour Organisation Conference adopted a Resolution Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection. The Resolution includes a call on governments to, among other things:
- eliminate pay differences based on gender (1(a)(v));
 - ensure that gender is taken into consideration in labour market regulation and collective agreements (1(a)(ix));
 - analyse the impact of gender segregation on the labour market (1(b)).

- 3.61 The Resolution calls on employers and workers organisations to promote:
- negotiation and adoption of employment equity plans;
 - the introduction of gender neutral job evaluation schemes;
 - the evaluation of general equality policies, workplace practices and programmes in order to detect and eliminate gender discrimination, taking into account other forms of discrimination.

Convention Concerning Discrimination in respect of Employment and Occupation (ILO111)

- 3.62 Convention 111 prohibits discrimination in employment and occupation and advises that the 'principle of remuneration for work of equal value should be upheld and implemented'.⁶⁷ The convention recognises the importance of pay equity as a measure of more general equality.⁶⁸
- 3.63 The International Labour Organisation Committee of Experts responsible for the Convention Concerning Discrimination in Respect to Employment and Occupation noted that the difficulties in the application of equal pay for equal work stem from:
- insufficient data and research
 - lack of understanding of 'equal value'
 - ignorance of the job evaluation processes necessary for determining the relative value of jobs; and
 - inadequate financial resources for collection of data and instituting appropriate job evaluation schemes.⁶⁹

Covenant on Civil and Political Rights

- 3.64 Human rights treaties which also require Australia to protect and assist families.

International Declaration on the Rights of Disabled Persons 1975

- 3.65 International Declaration on the Rights of Disabled Persons 1975 affirms the rights and dignity of women with disabilities and provides a framework for legislation, policy programs and services for women with disabilities.⁷⁰

67 Group Training Australia Ltd, *Submission No. 45*, p. 4.

68 Group Training Australia Ltd, *Submission No. 45*, p. 4.

69 Group Training Australia Ltd, *Submission No. 45*, p. 5.

70 Women With Disabilities Australia, *Submission No. 44*, p. 16.

In 2004, Australia was party to the Resolution of Gender equality, Pay Equity and Maternity Protection, adopted by the 92nd Session of the International Labour Conference (ILC). That resolution seeks to strengthen ILO Equal Remuneration Convention (No 100) and calls on the social partners to carry out capacity building, training and advocacy programmes on all aspects of pay equity.⁷¹

United Nations Convention on the Rights of Persons with Disabilities 2006

- 3.66 The Convention was ratified by Australia on 18 July 2008.
- 3.67 Article 6 recognises ‘that women and girls are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms’. And that ‘States parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purposes of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out ...’⁷²
- 3.68 Article 27 requires Australia to ‘recognise the right of people with disabilities to work in freely chosen or accepted employment in a labour market and work environment that is open’, inclusive and accessible to persons with disabilities.⁷³

Convention (No 156) Concerning Equal Opportunities and Equal Treatment of Men and Women Workers: Workers with Family Responsibilities

- 3.69 Convention 156 provides protection for workers with family and carer responsibilities by requiring Australia to take account of the needs of workers with family responsibilities in terms and conditions of employment (article 4b) and ensure that workers are not terminated on the basis of their family responsibilities (Article 8).
- 3.70 Other relevant international obligations include International Covenant Economic, Social and Cultural Rights Article 6.1; Convention on the Rights of the Child; Universal Declaration on Human Rights 1948 and Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993 and the Convention 159 International Labour Organisation Standards, Vocational Rehabilitation and Employment (Disabled Persons).

71 Work and Family Policy Roundtable, *Submission No. 143*, p. 11.

72 Women With Disabilities Australia, *Submission No. 44, Appendix 1*, p. 22.

73 Women With Disabilities Australia, *Submission No. 44*, p. 10.

Reporting on international obligations

- 3.71 Australia is required to report on a number of international conventions which have been ratified. In many areas relevant to pay equity in Australia there are significant gaps in the available information. This report will address various aspects of data collection or the lack thereof in chapter 9.
- 3.72 Women With Disabilities Australia suggested that:
- Information on women with disabilities should be provided in relevant human rights treaties periodic reports and NGO shadow reports, as a matter of course. This would include information on the situation of women with disabilities (eg employment) under each right, including their current de-facto and de-jure situation, measures taken to enhance their status, progress made and difficulties and obstacles encountered.⁷⁴

Federal Pay Equity Law – International Law

Constitutional source of power

- 3.73 It is open to the Commonwealth to develop comprehensive federal pay equity law relying on Australia's internationally binding legal pay equity obligations under various ILO and UN Treaties, and provide pay equity protections for all Australian workers.
- 3.74 The regulation of industrial relations is a shared Commonwealth and State matter, with the Australian Constitution providing a relatively limited head of power for the Commonwealth to make laws for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters' thus leaving the bulk of industrial relations within the sphere of the States (s.51 (i)). In the absence of comprehensive referral of power by the States, industrial relations law remains a complex mix of Commonwealth and State law.⁷⁵ Victoria and South Australia referred their power to regulated industrial relations, and, the Commonwealth continues to negotiate referrals although Western Australia has declined to do so. While it is appreciated that referral may not

⁷⁴ Women With Disabilities Australia, *Submission No. 44*, p. 6.

⁷⁵ Under section 51(xxxvii) of the Constitution, the Commonwealth can make laws with respect to 'matters referred to the Parliament of the Commonwealth' by any state.

incorporate some public service sectors,⁷⁶ the capacity to address the gender pay gap in the private sector will be a significant step forward.

- 3.75 Since the 1990s consecutive Labour and Liberal-National Party Coalition Governments have relied on the corporations (s.51 (xx)) and external affairs powers (s.51 (xxix)) to extend the reach of Federal industrial relations system. DEEWR explained the background to Commonwealth equal remuneration law:

Equal remuneration provisions were first introduced into the federal workplace relations legislation in 1994 giving effect to obligations under various international conventions. Prior to this, legal principles which underpinned the federal industrial tribunal's wage fixing principles were established by two important test cases, the Equal Pay for Equal Work Case of 1969⁷⁷ and the Equal Pay for Work of Equal Value Case of 1972.⁷⁸

- 3.76 The Commonwealth may rely on Australia's international legal obligations as the source of constitutional power (via the external affairs power s. 51 (xxix) for the purpose of implementing the right to pay equity. The domestic law must be *reasonably appropriate and adapted to the purpose of implementing Australia's obligation* under international law and federal provisions that go beyond this, and, which are not supported by other heads of power, are vulnerable to invalidation by the High Court in the event of a challenge.
- 3.77 In practice, however, it would be extremely complex, difficult and probably undesirable for the Federal Government to assert a comprehensive national jurisdiction for pay equity purposes, while the rest of the industrial relations system is limited to national system employees.
- 3.78 It is notable that the equal remuneration provisions of the *Workplace Relations Act 1996* (Division 3 Part 12), were expressly intended to give effect, or further effect, to 'certain anti-discrimination conventions and

76 The New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union made the point that councils are not constitutional corporations and therefore not captured by the federal industrial relations legislation in the New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union, *Submission No. 140*, p. 2. Further on 13 November 2008 the NSW Government passed the Local Government Amendment (Legal Status) Bill decorporatising NSW Councils.

77 Equal Pay Test Case 1969 (1969) 127CAR1142.

78 National Wage and Equal Pay Case 1972 147CAR172; Department of Education, Employment and Workplace Relations, *Supplementary Submission 58.3* p. 7.

ILO recommendations' (s.620).⁷⁹ In contrast, the *Fair Work Act 2009* applies expressly to 'national system employees' and derives its constitutional authority from other heads of legislative power, and are not expressed as intending to give effect to Australian international legal obligations.⁸⁰ International law, however, does provide a constitutional basis for aspects of the *Fair Work Act* (including for example, NES) and is relevant to the interpretation of provisions of the *Fair Work Act*. The current status and reliance on international labour obligations is limited and signifies a more cautious approach.

- 3.79 Nevertheless, international law and policy provides both a source of legally binding obligations and international policy consensus on what is required in order to fulfil these obligations. Comparative analysis of other developed western nations is also useful sources of experience from which best practice model can be developed.

79 *Explanatory Memorandum, Workplace Relations Amendment Act 1996 (Work Choices) Bill 2005*, p. 303, as cited ARHC *Submission 108*, p. 16; ARHC argues that the terms 'employer' and 'employee' and 'employment' were given their ordinary means because the Division has 'universal application to employees in Australia, regardless of the identity or corporate status of their employer'.

80 S. 301 *Fair Work Act 2009*.

