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**SUBMISSION BY THE NEW SOUTH WALES OFFICE FOR WOMEN'S
POLICY, DEPARTMENT OF PREMIER AND CABINET**

TO THE

**HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON
EMPLOYMENT AND WORKPLACE RELATIONS
INQUIRY INTO PAY EQUITY AND ASSOCIATED ISSUES RELATED
TO INCREASING FEMALE PARTICIPATION IN THE WORKFORCE**

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Executive Summary

We welcome the opportunity to make a submission to the House of Representatives Standing Committee Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce. In particular, we welcome the opportunity to comment on the legislative changes impacting on pay equity introduced by the *Fair Work Act 2009* (Fair Work Act), which was recently passed by the Commonwealth Parliament and which commenced in large part as law on 1 July 2009.

The NSW Government has been at the forefront of promoting equitable employment arrangements through legislative and industrial mechanisms and has given the issue of pay equity significant policy attention. In 1997 the NSW Government initiated an Inquiry into Pay Equity that led the way in focusing debate and reforms to address pay equity in this country.

While subsequent state-based inquiries have followed, the NSW Pay Equity Inquiry made a significant contribution to Australian understanding about the nature of undervaluation in female dominated industries, and led to the establishment of a new equal remuneration principle in the NSW jurisdiction in 2000.¹ This principle was subsequently used to achieve adjustments in wage rates, conditions and classification structures for librarians and archivists, and for child care workers in NSW.²

In spite of the considerable gains women have made in paid employment over recent decades, across Australia there has been limited progress in relation to the relative earnings of men and women. The aggregate gender earnings gap revealed in a November 2008 comparison between full time male and female rates was 17%, widening to 35% when total earnings, including those from part-time work, were taken into account.³ The failure to narrow this gap, commonly referred to as the 'gender pay gap', presents important short and long term public policy challenges in the areas of welfare dependence and provision, retirement income security for women, the economic independence of women and other social and economic areas.⁴

A key area of concern is that the gender pay gap can be a significant barrier to raising the workforce participation rate of women in Australia. 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.⁵ Research suggests that, when compared to other nations with similar fertility rates and higher participation rates, the source of this discrepancy can be found in Australia's lack of comparable policies promoting workforce attachment.⁶ Structurally lower levels of remuneration and a lack of focus on creating quality part time work, combined with a range of other policy and social issues, provide a disincentive for many women to engage in employment.⁷

The gender pay gap can be explained to a significant degree by factors which limit equal opportunity for women and diminish their relative pay. As discussed in the body of this submission, these factors include social expectations and gendered assumptions about the role of women as workers, parents and carers, and factors related to women's working patterns and

¹ See page 20-21 of this submission for information about the NSW Pay Equity Inquiry

² See page 21-25 of this submission for a discussion of pay equity cases run under the NSW ERP

³ Australian Bureau of Statistics *Average Weekly Earnings Australia*, cat. no. 6302.0, November 2008, Table 1.

⁴ Sylvia Walby and Wendy Olsen, *The Impact of Women's Position in the Labour Market on Pay and Implications for UK Productivity*, Women and Equality Unit, Department of Trade and Industry, November 2002. Also, see page 12-13 of this submission for further discussion of the public policy challenges.

⁵ Productivity Commission, *Annual Report 2006-07*, Annual Report Series, Productivity Commission, Canberra 2007, p. 7.

⁶ Peter McDonald 'Work-Family Policies are the Right Approach to the Prevention of Low Fertility', *People and Place* 9(3) 2001 pp. 17-27.

⁷ Ibid.

opportunities to develop and use their human capital. Women disproportionately participate in part time and casual employment with significantly fewer opportunities to earn a full time wage and receive associated paid leave entitlements. As a group, women have a more precarious attachment to the workforce because of their predominant role in unpaid caring work and have less access to training, upskilling and viable career paths than their male counterparts. Additionally, women are concentrated in award-reliant employment, with less opportunity to collectively bargain for higher wages, and discretionary over award payments such as bonuses, commission and service increments.⁸

Further, as the NSW Pay Equity Inquiry found, the valuation of particular work based on stereotyped notions of women's attributes, rather than the actual skills and competencies involved, is associated with the gender-based segregation of women in certain industries and occupations. This has implications for pay inequity and the historic gender-based undervaluation of work in certain female dominated areas of the labour market.

Pay equity refers to both the goal and the process of narrowing the gender pay gap and promoting equitable access to the workplace for women and men. Pay equity is addressed by collective industrial measures such as the equal remuneration mechanism which has been adopted in NSW. Initiatives that eliminate discrimination from workplaces, support women's participation in the workforce, and increase women's access to career paths and training can form important complementary components of a pay equity strategy.

Strategies to address pay inequity have evolved as different industrial and equity principles have been developed and reshaped over time. This process continues to unfold. As Justice Glynn observed in relation to the ground breaking NSW Pay Equity Inquiry:

*The Inquiry is a further step in the evolution of the establishment of equal pay for work of equal or comparable value. It is not the last step.*⁹

We acknowledge that pay equity is a long term goal, and welcome attention to this issue at a national level.

Structure of the submission

This submission responds to the following terms of reference set out by the Inquiry:

- § The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues;
- § The need for education and information among employers, employees and trade unions in relation to pay equity issues;
- § Current structural arrangements in the negotiation of wages that may impact disproportionately on women;
- § The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation;
- § The adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours; and
- § The need for further legislative reform to address pay equity in Australia.

⁸ See Part One of this Submission for discussion of these issues.

⁹ Pay Equity Inquiry Report to the Minister IRC6320 of 1997, Vol 1 p.5.

The terms of reference for this Inquiry are wide-ranging. This submission focuses primarily on the matter of pay equity. However, we support broader measures that support women's workforce participation, and consider these to be an important component of any strategy addressing pay equity and issues associated with women's incomes and wellbeing over their life course.

In addressing these matters, this submission is structured in three parts.

Part One addresses the dimensions of pay equity and inequity including attention to structural arrangements in the negotiation of wages that impact disproportionately on women.

Part Two provides information on current statutory arrangements and the NSW Equal Remuneration Principle and addresses the need for further legislative reform to address pay equity in Australia, with reference to the Fair Work Act recently passed by the Commonwealth Parliament.

Part Three considers complementary strategies that would support the equal participation of women in the Australian workforce, including measures to increase women's access to training and promotion, and the broader importance of building community awareness of issues associated with pay equity and inequity. This section also addresses the need for more comprehensive data to measure employment patterns in Australia, and to identify and monitor the causes of gender pay gaps and progress towards pay equity.

Summary of the position

- We recognise that different factors are likely to drive gender pay differentials in different parts of the labour market, and have instituted a broad range of policy responses to address these factors. In NSW, several cross-government strategies have been used to address different facets of the gender pay gap over the previous decade, including the commissioning of research papers, promoting attention to pay equity in the public sector, policy and legislative attention, and support for mechanisms to redress the undervaluation of women's skills and eliminate discrimination from industrial instruments.
- We consider that one of the most effective ways to achieve pay equity is through industrial relations laws and arrangements that apply on an industry or occupational award basis. This approach allows pay inequities arising from the historic gender based undervaluation of work in female dominated industries and occupations to be addressed in a collective way.
- An effective pay equity strategy is best undertaken in combination with other gender equality strategies and mechanisms. These include voluntary pay equity audits and individual rights based remedies available under equal opportunity and anti-discrimination legislation, as well as other equal opportunity measures.
- We consider that the Commonwealth should apply an equal remuneration mechanism in the federal jurisdiction similar to that which has been operating in the NSW jurisdiction. In contrast to equal remunerations provisions under previous Commonwealth legislation, the NSW Equal Remuneration Principle (NSW ERP) has been better able to address one of the key contributing factors to pay inequity – the undervaluation of work in industries and occupations stereotypically characterised as female. The NSW ERP does not rely upon a threshold sex discrimination test, a feature which has now also been removed from Commonwealth industrial relations law with the advent of the Fair Work Act.

- Further, the NSW ERP incorporates significant safeguards to protect employment. In making decisions the Industrial Relations Commission of NSW (IRC of NSW) considers changes in wage relativities both within the award and against external classifications. Any changes to awards may be phased in and absorbed against any overaward payments, and there is to be no reconsideration of work value adjustments already awarded by other wage fixing principles. The IRC of NSW must also consider the state of the NSW economy, the impact on employers and employment in the industry affected.¹⁰ We consider similar provisions should be contained in any Commonwealth principle.
- Accordingly, we commend to the present Inquiry certain guiding principles and mechanisms that could be considered when establishing a more effective equal remuneration mechanism at the federal level. Following the approach taken in NSW, these are as follows:
 - the broader objective of gender equality should be promoted, including the development of strategies to increase women’s participation in the workforce;
 - priority given to gender equity considerations in wage fixing;
 - the establishment of an independent industrial tribunal with broad industrial jurisdiction similar to the pre-Work Choices Australian Industrial Relations Commission;
 - such tribunal to have dispute resolution powers and the capacity to vary, on application, modern awards;
 - gender equity principles to be mainstreamed and applied as part of all the tribunal’s functions, with the aim of normalising pay equity;
 - the tribunal to take into account the public interest in accordance with its statutory mandate.
- The Fair Work Act contains provisions addressing many of our concerns about the current federal legislation. Some of these provisions include the removal of the threshold discrimination test and the reframing of the equal remuneration test to include the concept of comparable value, which is current in the NSW jurisdiction; and the inclusion of equal remuneration for work of equal or comparable value as an object in the exercise of the new Fair Work Australia’s award making and minimum wage setting powers.
- We would welcome a general approach to award modernisation that protects award provisions and pay scales that have been subject to the NSW ERP. We submit that the gains made in the NSW system through the operation of the NSW ERP should not be lost or diminished as a consequence of the federal award modernisation process. In particular, the wages and conditions adjustments made by the IRC of NSW in the Kindergartens case ¹¹ should not be undermined when the modern award for this industry is made on 4 September 2009 as part of stage 3 of the award modernisation process.
- Further, we support the provision of adequate industrial arrangements in awards for training and the establishment of viable career paths, and consider that the award modernisation process offers opportunities to achieve this. Where there are existing training provisions in Notional Agreements Preserving a State Award (NAPSAs) we submit that these should be consolidated to make their importance clear and their meaning readily understood.

¹⁰ Industrial Relations Commission of New South Wales Re Equal Remuneration Principle, op.cit., 15(f), (i), (j), (m) at para 158.

¹¹ Miscellaneous Workers Kindergartens and Child Care Centres c. (State) Award, [2006] NSWIRComm 64.

- An integrated approach to pay equity should also recognise the broader dimensions of pay inequity, and the shared responsibilities of governments and communities to address the social, industrial and economic causes and implications of gender inequities in wages and in employment conditions.
- We recognise that initiatives that address the uneven gendered distribution of unpaid work, and that support women's participation in the paid workforce, including the provision of flexible working arrangements, paid parental leave, and access to affordable and accessible childcare, can be important in increasing women's workforce participation, and the rewards women receive for their work, across their life course. In particular, we welcome the Commonwealth Government's decision to introduce a national Paid Parental Leave scheme as a measure that would have important short and long term impacts on women's workforce participation.
- We commend the Committee's further investigations into how to improve training and career paths for women and increase community awareness of pay equity issues. We consider that a workplace targeting strategy and education campaign is a strong model for the delivery of information by the Commonwealth about pay equity to workplaces.
- One of the challenges in building public awareness of pay equity issues is the fact that gender pay gaps can be measured in different ways, and that there is no consistently reported measure or common access point for research and data analysis of these matters in the Australian context.
- Accordingly, we consider there would be value in the development of a Commonwealth research program into pay equity and associated issues related to women's workforce participation. As this is a matter of national significance, the Commonwealth is encouraged to consider establishing a clearinghouse, or common government portal, for research and monitoring of issues related to women's workforce participation and pay equity, including findings from State based inquiries and research projects. This could assist in consolidating and extending the existing efforts of State and Territories Governments, pay equity researchers, and Commonwealth Agencies including the Equal Opportunity for Women in the Workplace Agency (EOWA), the Australian Bureau of Statistics (ABS), and the Department's of Education Employment and Workplace Relations (DEEWR), and Families Housing Community Services and Indigenous Affairs (FAHCSIA).
- We support the Committee's investigations into how to increase the availability of data to reliably monitor employment changes that may impact on pay equity. Attention to this will enable more effective ongoing monitoring and evaluation of pay equity issues and outcomes at a national and sub-national level.

PART ONE: THE DIMENSIONS OF PAY EQUITY AND INEQUITY

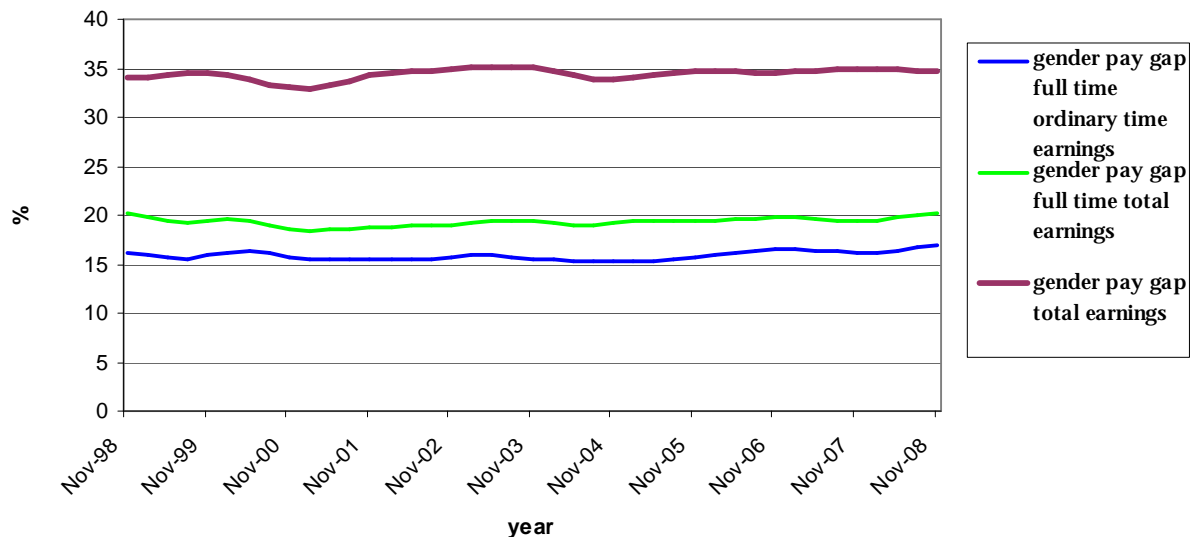
1.1 Pay equity and gender pay gaps

Pay equity refers to both the goal and the process of reducing the overall gender pay gap and promoting equitable access to the workplace for women and men. Pay equity addresses structural and historical disadvantages in remuneration levels between women and men, and is concerned with wages and conditions of work, removing direct and indirect discrimination, and ensuring equitable access to leave, flexible working practices, and training and promotion opportunities.

The term ‘gender pay gap’, also referred to as the ‘gender wage gap’ or ‘gender earnings gap’, is generally used to refer to the difference between average male and female earnings. As an aggregate measure, the gender pay gap highlights overall inequities in pay between men and women and can be calculated in a number of different ways. As other submissions to this inquiry have noted, in Australia, and in all OECD countries, there is a demonstrated earnings gap between men and women. At November 2008, Australian women who worked full time earned an average of 17% less than men who worked full time.¹² The gender pay gap widened to 35% when total earnings, including those from part time work, were taken into account.

In spite of significant improvements in women’s levels of education, workforce participation and duration spent in paid work, this gap has remained largely unchanged over recent decades. As Figure 1 illustrates, over the period November 1998 to 2008 the overall gender pay gap in Australia has varied within a range of approximately 2 percentage points.

Figure 1: The gender pay gap, average weekly earnings, Australia, 1998 to 2008



Source: ABS Average Weekly Earnings, Australia (\$) Trend, November 2008 Cat No. 6302.0

Table 1 reinforces that over this same time period there was no sustained improvement in the average weekly earnings of women as a proportion of men’s average weekly earnings. For example, where in 1998 women working full time earned, on average, 84% of men’s average weekly full time ordinary time earnings, in 2008 this had fallen slightly to 83%.

¹² Australian Bureau of Statistics *Average Weekly Earnings Australia*, cat. no. 6302.0, November 2008, Table 1.

Table 1: Aggregate female earnings a percentage of male earnings

	Full time adult ordinary time earnings: Males (\$)	Full time adult ordinary time earnings: Females (\$)	%	Full time adult total earnings: Males (\$)	Full time adult total earnings: Females (\$)	%	All employees total earnings: Males (\$)	All employees total earnings: Females (\$)	%
Nov-98	786.00	658.80	84	842.80	672.90	80	722.40	475.90	66
Nov-08	1,243.00	1,032.20	83	1,313.60	1,049.30	80	1,101.70	720.10	65

Source: ABS Average Weekly Earnings, Australia (\$) Trend, November 2008 Cat No. 6302.0 and Time Series Data (from Table 1)

Estimates of the pay gap will vary depending on which type of workers, and which factors are included in earnings calculations. As the NSW Pay Equity Inquiry and other submissions to the present Inquiry have shown, ratios of male to female earnings favour men when a per annum, per week, or per hour basis is used, although the earnings gap is narrower as the time unit becomes shorter. This is in part because women, on average, work less weeks per year and less hours per week than men, although the factors influencing gender pay gaps are complex. The gap also falls when managerial employees are excluded.

Within Australia, aggregate gender pay gaps vary across different state and territory jurisdictions. For example, in May 2008 the pay gap for full time ordinary time earnings was widest in Western Australia and narrowest in Tasmania.¹³ As demonstrated in Table 2, gender pay gaps also vary across different industries. In November 2008, the aggregate gender pay gap was highest in Finance and Insurance, at 32%, and lowest in Government Administration and Defence, at 7.3%.

Table 2: Gender pay gap by industry, full time adult ordinary time weekly earnings, Australia, November 2008

	Full time adult ordinary time earnings: Females (\$)	Full time adult ordinary time earnings: Males (\$)	Percentage pay gap
Mining	1547.90	2030.30	23.8
Manufacturing	983.30	1133.40	13.2
Electricity, Gas and Water Supply	1225.10	1438.10	14.8
Construction	1060.80	1205.30	12.0
Wholesale Trade	969.50	1144.30	15.3
Retail Trade	826.80	916.80	9.8
Accommodation, Cafes and Restaurants	775.10	876.80	11.6
Transport and Storage	942.30	1176.20	19.9
Communication Services	1093.90	1244.20	12.1
Finance and Insurance	1169.30	1716.10	31.9
Property and Business Services	1076.40	1415.50	24.0
Government Administration and Defence	1176.50	1269.20	7.3
Education	1163.30	1304.30	10.8
Health and Community Services	973.90	1377.40	29.3
Cultural and Recreational Services	1027.30	1236.10	16.9
Personal and Other Services	972.20	1213.00	19.9
All Industries	1032.00	1244.10	17.0

Source: ABS, Average Weekly Earnings, Australia, November 2008 cat no. 6302.0

¹³ Australian Bureau of Statistics Average Weekly Earnings Australia, cat. no. 6302.0, May 2008.

Men's and women's relative wages also differ across the income spectrum. In a recent analysis of data from the Household, Income and Labour Dynamics in Australia (HILDA) survey, Baron and Cobb-Clark found that while the difference between men's and women's wages was statistically significant at all points along the wage distribution, 'the gender wage gap is much larger among high wage workers, particularly in the private sector'.¹⁴ While for low paid workers, wage-related characteristics appeared to be significant in explaining these inequities, the largely unexplained basis for the earnings gap among high wage earners suggested the persistent prevalence of glass ceilings. These types of variances led the authors to assert:

The public policies we adopt to deal with this phenomenon – need to be flexible enough to account for the full range of women's experiences both at the top and the bottom of the wage distribution.¹⁵

We recognise that different factors are likely to drive gender pay differentials in different parts of the labour market, and that a range of policy responses may be required to address these. This has been reflected in the implementation of broad ranging cross-government strategies to address different facets of the gender pay gap over the previous decade, including the commissioning of research papers, promoting attention to pay equity in the public sector, legislative and policy attention including the adoption of comparable worth as a guiding principle in the NSW *Industrial Relations Act 1996* and the NSW Pay Equity Inquiry initiated by the NSW Government in 1997, and support for mechanisms to redress the undervaluation of women's skills and eliminate discrimination from industrial instruments.¹⁶

It is also important to note that care needs to be taken when attempting to understand pay equity and inequities through the measurement and analysis of gender pay gaps. Measures that might redress inequities for some workers may have limited impact on aggregate pay gaps.¹⁷ Moreover, gender pay gaps can be comprised of a range of components, including differences in human capital acquisition, work experience, occupational segregation, direct discrimination and the labor market motivations of women as compared to men.¹⁸ Additionally, both direct and systemic discrimination have been argued to affect all components of the pay gap.¹⁹

In considering contested evidence regarding the modeling of gender pay gaps in NSW, the NSW Pay Equity Inquiry warned that caution should be taken when estimating the *size* or the *causes* of any pay gap. ²⁰ Critically, however, this Inquiry found that the available evidence demonstrated the existence of a pay equity gap, and that a portion of this, in *particular* occupations, was attributable to gender related causes, specifically the undervaluation of work in occupations where women workers are disproportionately represented. Sections 2.1 and 2.2 of this submission deal with the subsequent approach taken in NSW to address systemic undervaluation in greater detail.

¹⁴ Juan D. Baron and Deborah A. Cobb-Clark, *Occupational Segregation and the Gender Wage Gap in Private- and Public-Sector Employment: A Distributional Analysis*, Institute for the Study of Labour, Discussion Paper number 3562, June 2008.

¹⁵ Ibid. p.2.

¹⁶ See <http://www.workandfamily.nsw.gov.au/payequity/index.html>

¹⁷ Pay Equity Inquiry Report to the Minister IRC6320 of 1997, Vol 1.

¹⁸ Wendy Olsen and Sylvia Walby, *Modelling Gender Pay Gaps*, Equal Opportunities Commission, Working Paper Series no. 17, Winter 2004; Submission by the Department of Education, Employment and Workplace Relations to the House of Representative Standing Committee on Employment and Workplace Relations Inquiry into Pay Equity and Associated Issues Related to increasing Female Participation in the Workforce. September 2008.

¹⁹ Olsen and Walby, 2004 op.cit. p. v-vi.

²⁰ Industrial Relations Commission of NSW, Pay Equity Inquiry, Report to the Minister (Matter No IRC6320 of 1997) 14 December 1998.

The New South Wales Public Sector

The NSW Government employs 15% of all women working in NSW²¹ and is the largest single employer in Australia.²² In 2007, 60% of all employees in the NSW public sector were women, compared to 44% in NSW.²³

Available data shows that aggregate gender pay gaps in the NSW public sector are slightly narrower than for NSW generally. In 2006, the sector-level gender pay gap in full time total earnings was 18.3%, compared to 18.5% in NSW generally.²⁴ Of all adult employees in the sector, women earned 71.7% of men's average earnings, compared to 69.3% in NSW generally.²⁵

We support the development of policies that address pay equity within the public sector and the NSW Government is continuing to implement strategies to reduce gender pay gaps.²⁶ Legislation requires the development and implementation of equal employment opportunity strategies and reporting²⁷ and merit appointment,²⁸ and industrial arrangements and policies provide for flexible work, the use of sick leave for caring purposes, paid maternity and parental leave, and a right to request to return to work on a part time basis.²⁹

The NSW Equal Remuneration Principle (NSW ERP), discussed in Part Two of this submission, has been used to achieve wage adjustments for some public sector workers in female dominated classifications on the basis of gender-related undervaluation. Following the successful Crown Librarians Case, in 2002 NSW Government employees working as librarians, library officers and archivists received wage increases of 16% on average across classifications.

A sector-wide employment and development strategy was released in 2008 to improve women's recruitment, development and retention over the next five years. ***Making the Public Sector Work Better for Women*** includes targets to increase the representation of women in senior positions and non-traditional occupations, and provides programs and initiatives to improve training and career development.³⁰

1.2 Why address pay equity?

While the task of redressing the gender wage gap appears formidable, doing so can impact key public policy areas. The effective implementation of pay equity measures is of importance in redressing gender inequality in workplace arrangements, for the advancement of wider equal

²¹ Unpublished data from the NSW Public Sector Workforce Profile; Australian Bureau of Statistics, cat. no. 6202.0, ***Labour Force***, June 2006, Table 4, NSW trend data.

²² Overview Report for the NSW Public Sector Workforce Profile, 2006, p.2.

²³ Australian Bureau of Statistics, ***Labour Force*** cat. no. 6202.0, June 2007, Table 4.; EEO Statistical Spreadsheet, Total Public Sector, 2007.

²⁴ NSW Public Sector Workforce Profile, 2006; Australian Bureau of Statistics ***Average Weekly Earnings Australia***, cat. no. 6302.0, May 2006, Table 11A, NSW trend data. Full time adult total earnings (rather than ordinary time earnings) is the ABS equivalent to the measure of earnings used in the NSW Public Sector Workforce Profile Collection.

²⁵ Ibid.

²⁶ NSW Department of Premier and Cabinet, ***Making the Public Sector Work Better for Women*** Circular 2008-32.

²⁷ Part 9A of the ***Anti-Discrimination Act 1977*** (NSW).

²⁸ Section 19 of the ***Public Sector Employment and Management Act 2002*** (NSW).

²⁹ For example, the Crown Employees (Public Service Conditions Of Employment) Reviewed Award 2006 and Circular 2004-45 Public Sector Salaries Award Settlement of Claim with the Public Service Association covers the Public Service. These conditions are mirrored in industrial arrangements and policies applying to the Government Service which includes teaching, health, police, fire fighters, and judicial staff.

³⁰ NSW Department of Premier and Cabinet, ***Making the Public Sector Work Better for Women: A New Approach to Making the NSW Public Sector a Preferred Employer for Women 2008-2012***, September 2008.

opportunity strategies, for securing greater economic independence for women, and for the economic and social wellbeing of families.³¹ Moreover, pay equity can have implications for workforce development and the development of skilled and viable labour markets.³²

Pay equity can assist in providing greater retirement income security for women by helping redress the negative cumulative impact of women receiving gender-based lower levels of relative pay over a working life.³³ Research has shown that pay inequity reduces retirement income for women and causes greater welfare dependence, despite the operation of a Commonwealth legislated guarantee of employer contributions to superannuation.³⁴

Furthermore, pay equity can improve efficiencies within the labour market. The NSW Pay Equity Inquiry found that, when implemented incrementally to spread any wage adjustments over time, and given a reasonable rate of economic growth, pay equity measures could have positive impacts on the economy. The Inquiry found that, to the extent that gender discrimination represents a sub-optimal allocation of resources, changes in the composition of employment because of pay equity can represent improvement in economic efficiency and resource allocation.³⁵

Pay equity inquiries in other states have also found that at a workplace level there are benefits for employers in adopting pay equity strategies, including improved workforce morale, enhanced organisational effectiveness, reduced staff turnover, an enhanced skill base and productivity improvements.³⁶ Employers complying with pay equity strategies can become employers of choice for women who see their qualifications and skills appropriately remunerated.³⁷ Possible strategies to improve pay equity outcomes at a workplace level include voluntary pay equity audits and ongoing consultation with unions and other stakeholders to achieve pay equity through a review of salary arrangements, as well as programs to reduce occupational segregation and enhance access to flexible work arrangements at all levels.

Pay equity and women's workforce participation

The public policy case for addressing pay equity is also influenced by evidence that gender pay gaps can be a significant barrier to raising the Australian workforce participation rate of women, which lags 14% behind that of men.³⁸ Australia fares poorly by international standards with the workforce participation rate for women of child-bearing age ranked twenty third out of thirty

³¹ Trish Todd and Joan Eveline, *Report on the Review of the Gender Pay Gap in Western Australia*, November 2004, p.21. http://www.docep.wa.gov.au/LabourRelations/Content/Work%20Life%20Balance/Pay%20Equity/2004_Review_of_the_Gender_Pay_.html

³² Ibid. p.22.

³³ Ibid.; Olsen and Walby 2004, op.cit.; Jenny Chalmers and Trish Hill, 'Marginalising Women in the Labour Market: "Wage Scarring" Effects of Part-Time Work', *Australian Bulletin of Labour*, 33 (2) 2007, pp.180-201; AMP.NATSEM, *She Works Hard for the Money: Australian Women and the Gender Divide*, AMP.NATSEM Income and Wealth Report, Issue 22, April 2009.

³⁴ Diana Olsberg "Women and superannuation: still ms...ing out" *Journal of Australian Political Economy*, no.53, June 2004, pp. 161-178.

³⁵ According to the NSW Pay Equity Inquiry report, further potentially positive economic impacts of pay equity measures included: improved overall community wellbeing if discrimination can be removed through pay equity measures; improvements in opportunities and choices for women by providing economic independence; reduction in the need to rely on State support such as welfare or income support; and more transparent award structures and enhanced organisational productivity.

³⁶ Queensland Industrial Relations Commission, *Pay Equity – Time to Act*, Final Report of the Queensland Pay Equity Inquiry, September 2007, pp.21-22 http://www.qirc.qld.gov.au/inquiry/pay_equity/final/final_report.htm

³⁷ Ibid.

³⁸ Australian Bureau of Statistics, *Labour Force*, cat. no. 6202.0.55.001, Time Series December 1986-2008.

OECD countries.³⁹ Moreover, the proportion of Australian working women aged 15-64 who work part time (51.5 %) is well above the OECD average (33 %).⁴⁰

A key issue is that, together with disincentives in the taxation and welfare systems, lower earnings can provide a disincentive for women to undertake or remain in employment,⁴¹ and can reinforce women's role as a secondary income earner within families. When combined with gender inequities in caring and parental responsibilities,⁴² one of the long-term dimensions of systemic pay inequity is that women are more likely to withdraw from paid employment to care for children or other family members and rely on the higher earnings of the male partner.⁴³ In the event of relationship breakdown this reliance may be necessarily transferred to the state in the form of income support. More fundamentally, while there is some debate about the extent to which women choose their position in the labour market and the home,⁴⁴ the difference between men's and women's wages has the potential to narrow the choices that women and families can make about how they balance their paid work and family life.

Where gender pay differentials affect decisions regarding how to share work and care in this way, it is also arguable that the investment made in women's human capital in Australia is failing to be fully captured. While Australia performs well in educating young women, keeping those skills within the labour market is more difficult. According to the World Economic Forum's 2008 Gender Gap index, out of 130 countries Australia ranked number 1 on women's educational attainment, but number 40 on women's labour force participation.⁴⁵ This represents a significant leakage of resources from the formal Australian economy.

Gender pay inequities not only affect the *utilisation* of human capital and women's skills in the Australian labour market. Women's working patterns, gender segregation and systemic discrimination also affect women's *potential* in the labour market, and can see women disadvantaged in the acquisition of human capital. Accordingly, pay equity strategies that reduce gendered skill and human capital gaps, and improve the effective and competitive functioning of labour markets, can contribute to increasing the productive capacity of the economy.⁴⁶

³⁹ Productivity Commission, *Annual Report 2006-07*, Annual Report Series, Productivity Commission, Canberra 2007, p.7. Research comparing Australia to OECD nations with similar fertility rates, such as France and Norway, suggests that this is related to a difference in policies promoting workforce attachment, such as paid parental leave, and free, high-quality early childhood education. See Peter McDonald, op.cit.

⁴⁰ Joanna Abhayaratna, Les Andrews, Hudan Nuch, and Troy Podbury, *Part-Time Employment: the Australian Experience* Productivity Commission Staff Working Paper, Productivity Commission, June 2008, p. 21.

⁴¹ Peter McDonald, op.cit.

⁴² For example, ABS publications show that while men are doing slightly more household work than in the past, in 2006 women still did 1.8 times as much household work as men. See Australian Bureau of Statistics, *Australian Social Trends*, cat. no. 4102.0, March 2009; Australian Bureau of Statistics *How Australians Use Their Time*, cat. no. 4153.0, 2006. These publications examine gendered differences in paid and unpaid work.

⁴³ See Human Rights and Equal Opportunity Commission, *It's About Time: Women, Work and Family in Australia*, Final Paper 2007 pp. 79-80.

⁴⁴ See Olsen and Walby 2004, op.cit. pp.32-34, for a review of three main approaches to interpreting women's working time preferences.

⁴⁵ World Economic Forum (WEF), *Global Gender Gap Report 2008*, Country Profiles: Australia, WEF 2008.

⁴⁶ Olsen and Walby 2002, op. cit.; Olsen and Walby 2004, op.cit.

1.3 Structural arrangements in the negotiation of wages that impact disproportionately on women

The Commonwealth Government's *Fair Work Act 2009* (Fair Work Act) contains several legislative innovations which may have positive impacts on pay equity considerations for national level employees. These include the broadening of equal remuneration provisions, and mechanisms to facilitate low paid bargaining which have the potential to have a positive effect in feminised areas.

Pay equity provisions should be aimed at redressing a variety of structural features in the Australian labour market that disproportionately impact on and entrench disadvantage for women negotiating wages. These are intrinsically linked to women's working patterns, including their location in the labour market by occupation, industry and type of employment. Mechanisms to redress the gender wage gap should be capable of reducing the effects of these structural features, which include:

- the impact of gender segregation of the labour market and the associated historic undervaluation of work carried out in some feminised industries;
- the disproportionate participation of women in part time employment;
- the concentration of women in award reliant industries such as hospitality and retail where there is little opportunity for real bargaining or access to over award payments;
- poorer wage outcomes for women in all bargaining streams and the lower rates of unionisation in feminised industries;
- the tendency for women to trade off wages and wage related benefits as a consequence of needing to find ways to balance their working lives with their caring responsibilities;
- the historically lower priority assigned to caring responsibilities when developing bargaining agendas and associated wage claims.

Some of these factors are discussed in more detail below. The existence of such factors and their effects on women's pay and working conditions was reported on in detail in the Pay Equity Inquiry established by the NSW Government in 1997.⁴⁷ That Inquiry and its findings are further discussed in Part 2 of this submission.

Gender segregation in the workforce

One of the most significant factors responsible for persistent pay inequity is the high level of gender segregation in the Australian workforce, and associated undervaluation of work performed by women. Gender segregation in the workforce refers to the uneven distribution of women and men, and the concentration of women in certain industries and occupations whose common features include:

- high levels of part time/casual work and award-reliance for minimum employment conditions; and
- relatively low levels of hourly earnings.

Recent occupational and industry data demonstrates the uneven distribution of men and women across the Australian workforce. Women are far more likely than men to work in clerical and administrative positions or as community and personal service workers, and are far less likely than

⁴⁷ Industrial Relations Commission of NSW, Pay Equity Inquiry, Report to the Minister (Matter No IRC6320 of 1997) 14 December 1998. See in particular Volume 2, p.267 and following: 'The Wider Dimensions of Undervaluation'.

men to work in managerial positions or as technicians and trades workers. Current data shows that women make up 76% of clerical and administrative workers and 70% of community and personal service workers. Conversely, women comprise 34% of managers and 14% of technicians and trades workers.⁴⁸

Table 3 shows that the majority of full time female employees are located in the industry sectors of health care and social assistance, education and training, retail trade, public administration and safety, and professional, scientific and technical services (a total of approximately 56% of all female full time employees). There are also a disproportionate number of part time female employees in the health care and social assistance, retail trade, accommodation and food services and education and training sectors, amounting to approximately 61% of all female part time employees.

These industries have been identified as ones that predominantly require the use of skills stereotypically labelled as “female”.⁴⁹ Such skills include those relating to caring, communications and personal interaction (such as required for customer service) and aptitude for domestic labour associated with the accommodation/hospitality sector.

These skills have been systematically undervalued when compared to skill sets associated with work performed in male dominated industries such as transport and manufacturing. In some female dominated industries, this has meant that the work has been undervalued on a gender basis.⁵⁰

Table 3: Female employment density by industry, Australia, February 2009

Industry	Industry composition: percentage female	Percentage of total full time female labour force	Percentage of total part time female labour force
Health care and social assistance	79.9	18.23	19.75
Education and training	69.7	11.35	10.26
Retail trade	57.1	10.15	19.09
Accommodation and food services	56.2	5.11	11.68
Financial and insurance services	54	6.13	2.18
Administrative and support services	53.8	3.49	4.39
Rental, hiring and real estate services	50.5	2.09	1.46
Public administration and safety	46.8	8.71	3.41
Arts and recreational services	46	1.57	2.51
Other services	44.1	3.96	4.11
Professional, scientific and technical services	43.9	8	5.48
Information media and telecommunications	43.5	2.68	1.13
Agriculture, forestry and fishing	31.6	2.03	2.77
Wholesale trade	31.2	2.9	2.02
Manufacturing	26.8	7.12	3.56
Transport, postal and warehousing	24.6	3.16	2.75
Electricity, gas and water supply	20.3	0.91	*0.26
Mining	12.7	0.65	*0.16
Construction	11.5	1.75	3.03

Source: Australian Bureau of Statistics, Australian Labour Market Statistics, February 2009, cat no 6105.0, Table 2.4, p50 (adapted)

⁴⁸ Australian Bureau of Statistics, *Labour Force*, Australia, Detailed, Quarterly, cat. no. 6291.0.55.003, February 2009.

⁴⁹ *Ibid.* p.270.

⁵⁰ *Ibid.* Volume 2, p.267 and following.

In addition, the industries where women are significantly concentrated are also those industries that are most reliant on minimum wage regulation through award dependence, with little opportunity to collectively bargain for better wage outcomes. This is revealed by Table 4 which reinforces that a high percentage of employees who are totally award reliant are located in industries where women are represented in substantial numbers as shown in Table 3.

Table 4: Award reliant industries, Australia 2006

Industry	Percentage of employees totally award-reliant
Hospitality	60.1
Retail	31.3
Health and Community Services	26.6
Personal Services	23.5
Property and Business Services	19.7
All Industries	20.0

Source: John Buchanan, 'Low paid employment – a brief statistical profile', Overheads prepared for press conference on LHMU – University of SA – ARC Project on low paid service sector employment, WRC, University of Sydney 2006

However, while award reliance is unlikely to provide opportunities for workers in these areas to achieve significant improvements in wages (which are more readily available in bargaining scenarios), the award system has played an important redistributive role in ensuring that, where appropriate, improved working conditions are available by way of award variation. Test cases in the state and federal industrial tribunals have been the main mechanism for achieving these kinds of improvements – for example, in making carers leave available generally,⁵¹ extending parental leave entitlements⁵² or ensuring security of employment.⁵³ National and state wage cases, as well as more recent mechanisms for adjusting minimum wage rates, play a part in ensuring that women in award reliant industries share in the wage improvements that are achieved through these processes.

Given that low paid, award-reliant industries are predominantly feminised, the introduction of the low paid bargaining stream by the *Fair Work Act 2009* may have some positive impact on low paid women's ability to engage in enterprise bargaining. However, it should be noted that when bargaining does occur, historically women are more likely than men to trade off wages, and wage-related monetary entitlements, for employment conditions and flexible work arrangements which help them meet their disproportionate caring, family and household responsibilities. This effect is strongest in individual bargaining scenarios.⁵⁴

Women's participation in part time and casual work

The concentration of women in part time and casual employment has clear implications for the gender earnings gap.

⁵¹See *Family Leave Test Case* FB of IR (L6900) 29/11/94 and *Family Leave Test Case (NSW)* FB of IRC (IRC 220 of 1995) 12/5/95.

⁵² See *Family Provisions Case* FB of AIRC (PR082005) 8/8/05.

⁵³ See *Secure Employment Test Case* [2006] NSWIRComm 38.

⁵⁴ Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory, the Northern Territory, 9 November 2005, p.56.; See also the discussion of the relative impact on the gender wage gap of centralised versus decentralised wage systems in the NSW Pay Equity Inquiry Report op cit, Volume 1 p123 and following, and in particular the conclusions at p.130 and p.154.

Part time work remains a female dominated form of employment. Only 35% of full time employees are female. On the other hand, females represent 71% of all part time employees. Table 5 shows this in terms of the aggregate numbers of workers in full time and part time employment by gender breakdown.

Table 5: Australian labour force by gender breakdown, April 2009

Full time	Males	4.9 million
	Females	2.7 million
Part time	Males	0.94 million
	Females	2.2 million

Source: Australian Bureau of Statistics - Labour Force Survey, cat no 6202.0, April 2009 – seasonally adjusted

The disproportionate representation of women in casual and part time employment is strongly linked to their primary responsibility for unpaid work in the home, caring responsibilities and associated breaks from paid employment. Quality, secure part time work has a strong role in promoting workforce attachment and providing the flexibility needed for many women with family responsibilities to maintain a work-life balance, particularly following childbirth and in periods of primary care-giving. However, the prevalence of women in insecure part time work in low paid jobs and industries is a cause for concern.⁵⁵

Poor quality part time work can be associated with more restricted career paths, poorer quality work opportunities, less secure employment, and more limited access to leave and other work-related conditions.⁵⁶ Women are less likely to have paid leave entitlements, with data suggesting that women constitute 66% of all casual employees working part time hours.⁵⁷ In addition, significant periods of time spent in part time and casual work can have a wage and superannuation penalty for women.⁵⁸

Evidence from Australia has shown that part time work experience can ‘scar’ women’s future earnings and has significant impact on total earnings over the life course. Chalmers and Hill’s analysis of data from the Negotiating the Life Course (NLC) survey found that part time women workers lose 6% per year in earnings growth compared to their full time counterparts and that this loss accumulates to 49% after ten years. They comment:

By working part-time women give up the earnings growth they would have achieved through working full-time. Yet they are not remunerated for the work experience they gain on a part-time basis. Indeed part-time work appears to have a scarring affect on their full-time career.⁵⁹

Research from Britain has similarly shown that part time work experience can have a cumulative negative effect on women’s wages, and that this can be reinforced by ‘rigidities’ between the part time and full time labour markets.⁶⁰ Pre-existing gender segregation and the different nature of the work available can make it difficult for women to move between full time and reduced hours

⁵⁵ Table 3 on p.15 of this submission shows that the highest proportion of female part-time workers are engaged in the retail trades and the health and community services sectors. Table 4 on p.15 shows that these industries are highly award-dependent.

⁵⁶ Pocock, B., Skinner, N. and Williams, P., *Work, Life and Time: The Australian Work and Life Index 2007*, Centre for Work + Life, University of South Australia, Adelaide, 2007.

⁵⁷ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0 August 2008

⁵⁸ Chalmers and Hill, op.cit.

⁵⁹ Ibid.

⁶⁰ Olsen and Walby 2004, op.cit.; Chalmers and Hill, op.cit.

work, and women may find themselves competing for a different range of jobs than equivalently qualified men.

Many women express a preference for part time work, with this work providing an important 'bridge' enabling women to manage the competing demands of work and care in contemporary life. However, it is important to note the constraints that exist on their range of employment choices and options.⁶¹ If women are choosing part time work because the available full time work doesn't incorporate flexibilities that enable them to meet caring and family commitments, then these are constrained choices. Likewise, if the work available on a part time basis does not reflect a woman's skills and provide career development opportunities, these constrained choices can lead to sub-optimal labour market outcomes. Given the potential ramifications on women's earnings and the gender earnings gap the *quality* of part time work opportunities available in the community needs ongoing attention.

These matters were examined recently at a Round Table on Quality Part Time Work in NSW, which was hosted by the NSW Minister for Women. Issues raised by the Round Table are currently being used to inform the development of future initiatives to address quality part time work in the NSW jurisdiction.

Individual and collective bargaining

Different forms of wage setting produce different wage outcomes. Women receive lower average weekly rates of pay than men in both the registered collective and individual bargaining streams. Across Australia, award-reliant female workers earn substantially less than women covered by collective bargaining arrangements. This is confirmed by the data in Table 6 which also shows that the average weekly earnings of men are greater than that of female workers for all methods of pay setting.

Table 6: Methods of setting pay, average weekly total cash earnings, Australia, May 2006

	Average weekly earnings non-managerial employees		% gap	Amount \$
	Males	Females		
Award only	\$550.30	\$448.50	18.5	\$101.80
Registered collective agreements	\$1038.00	\$729.80	32.6	\$353.20
Unregistered collective agreements	\$873.00	\$580.20	33.5	\$292.80
Registered individual agreements	\$1119.30	\$689.10	38.4	\$430.20
Unregistered individual arrangements	\$1021.40	\$719.10	29.6	\$302.30
All methods of setting pay	\$946.00	\$652.00	31.1	\$294.0

Source: Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2006 (reissue 20 April 2007); cat no. 6306.0 Table 20 adapted*

The data from Table 6 reinforces the conclusion that the concentration of women in industries with relatively high award coverage, and with fewer opportunities to enter into collective bargaining arrangements, inhibits the capacity of women to improve their relatively poor earnings position.⁶² It should be noted, however, that historically enterprise bargaining has not provided the same

⁶¹ Robyn Dale, Meg Smith, Fiona Macdonald and Simone Bingham, *Pay Equity: How to Address the Gender Pay Gap*, Research Report by URCOT for Industrial Relations Victoria, 2005, pp. 9-10.

⁶² See Gillian Whitehouse and Betty Frino, 'Women, Wages and Industrial Agreements', *Australian Journal of Labour Economics*, 6 (4) 2003, pp. 579-596.

improvements in remuneration for women as for men for a variety of reasons and has not been as effective at addressing issues of concern to women workers as might have been hoped.^{63 64}

It is also relevant to note that the largest gender earnings gap appears where registered individual agreements prevail. This essentially represents the Australian Workplace Agreements (AWAs) encouraged under Work Choices and shows the negative impact that forced individual arrangements can have on workers with little bargaining power, in this case, women in low-skill or unskilled jobs.⁶⁵ This is particularly the case in feminised service industries, where outputs are less easily measured for the sake of trading increased productivity for increased remuneration.⁶⁶

We acknowledge and welcome the abolition of AWAs under the Commonwealth Government's reforms and believes that this action will help prevent the further widening of the gender pay gap. Further, we note that the Fair Work Act makes provision for low paid multi-employer bargaining, which may present a possible avenue to improve enterprise-based outcomes in low paid, feminised areas. However this development should be treated with some caution as while, where it is prevalent, collective bargaining has proven outcomes in raising wages and conditions, historically enterprise bargaining has achieved limited outcomes for gender pay equity overall.

PART TWO: THE ADEQUACY OF LEGISLATIVE PROVISIONS TO ADDRESS PAY EQUITY

2.1 Equal remuneration provisions in Australia

Historical background

For more than 40 years after the 1907 Harvester case,⁶⁷ the notion of the spending requirements of a male family bread winner working full time with dependants, and the need to protect male jobs, largely dominated arbitral considerations in relation to the fixing of the basic wage. This contributed to the institutionalisation of pay inequity.

NSW acted early to address the issue of equal pay through legislative action. The *Industrial Arbitration (Amendment) Act 1926* inserted into the *Industrial Arbitration Act 1912* an amended definition of industrial matters to include 'any claim that the same wage shall be paid to persons of either sex performing the same work or producing the same return of profit or value to their employer'.

Further equal pay legislative initiatives followed. In 1958 the *Female Rates (Amendment) Act 1958* was inserted into the *Industrial Arbitration Act 1940*. Its terms were consistent with International Labour Organisation Convention No.100 (Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value) adopted at the 1951 session of the International Labour

⁶³ See Justine Evesson, John Buchanan, Larissa Bamberry, Betty Frino and Damien Oliver, *Lowering the standards: From Awards to Work Choices in Retail and Hospitality Collective Agreements*, Prepared for the Queensland, NSW and Victorian Governments, September 2007 – less than one in six of the collective agreements studied in these industries with high female employment addressed child care and work and family balance issues p viii.

⁶⁴ And note NSW Pay Equity Inquiry Report op.cit., Volume 1 p.154 where the contention that decentralised wages systems better redress the gender wage gap is rejected.

⁶⁵ See Marian Baird, Rae Cooper and Damien Oliver, *Down and Out with Work Choices: The Impact of Work Choices on Women in Low Paid Employment*, Report to the NSW Office of Industrial Relations, June 2007

⁶⁶ Whitehouse and Frino, op.cit; Kristin Van Barneveld 'What's in Australian Workplace Agreements in the Hospitality Industry? A Content Analysis', *Journal of Hospitality and Tourism Management*, 13(2), August 2006, pp.199-215.

⁶⁷ Decision of Higgins J. in Ex Parte HV Mackay (Harvester Case) (1907) 2 CAR 1.

Conference. The amendments required the then Industrial Commission of NSW and conciliation committees to, in prescribed circumstances, insert equal pay provisions in awards and agreements.

The particular notion of equal pay for equal work that was adopted had limited value as a mechanism for assessing gender undervaluation of work. It only applied where work performed by men and women was of the same or a like nature and of equal value with the male and female employees working under the terms of the same award. However, in the relevant historical context, this was a major advance.

The 1972 National Wage Case decision made by the Commonwealth Conciliation and Arbitration Commission established a new concept – the principle of equal pay for work of equal value.⁶⁸ It required only that there be equal value between the work performed, irrespective of the sex of the worker. This principle was better suited to the task of work valuation in female dominated industries.

In 1993 the Commonwealth *Industrial Relations Act 1988* was amended in the face of persistent stagnation on the pay equity front. Pay inequity had been to that time more effectively addressed through work value cases where what needed to be demonstrated was a change to the nature of the relevant work, skills or responsibility required.

The amendments inserted new equal remuneration provisions that were based on International Labour Convention 100 and other international labour standards dealing with discrimination in employment, using the constitutional external affairs power. These provisions have essentially been re-enacted in successor legislation and are part of the current federal legislative framework.

The Fair Work Act, commencing on 1 July 2009, substantially alters these equal remuneration provisions, recasting them under the constitutional corporations power rather than the external affairs power. In addition, it introduces, for the first time in the federal jurisdiction, the concept of ‘equal remuneration for work of equal or comparable value’, a substantially broader test.

New South Wales developments

The need to ensure pay equity is embodied in the NSW *Industrial Relations Act 1996* (NSW IR Act), with the commitment to address pay equity contained in both its objects and provisions.

The object of the NSW IR Act relevant to pay equity considerations is section 3(f):

... to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value.

The Industrial Relations Commission of NSW (IRC of NSW) also has a general award making power which allows the conduct of broad ranging reviews. Awards are reviewed under section 19 of the NSW IR Act. This section stipulates the Commission must take account of a number of matters in the review of awards including, under section 19(3) (e):

... any issue of discrimination under the awards, including pay equity.

Under section 21 the Commission must, on application, make an award setting a number of conditions of employment, which include:

⁶⁸ Commonwealth Conciliation and Arbitration Commission, National Wage and Equal Pay Cases 147 CAR 172.

... equal remuneration and other conditions for men and women doing work of equal or comparable value.

Most significantly, section 23 requires that:

Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

The NSW IR Act updated the previous definition of equal pay to include work of comparable value. This more inclusive definition reflected an advance on previous formulations of the test of equal pay.

The NSW Pay Equity Taskforce (the Taskforce) was established in 1996 by the then Minister for Industrial Relations (the Minister) as part of the NSW Government's Pay Equity Strategy, to consider the undervaluation of women's skills and ways of dealing with pay equity in NSW. In March 1997 the Taskforce submitted to the Minister its final report dealing with its investigations of the undervaluation of women's skills and strategies for addressing pay inequity in NSW workplaces.

The Taskforce recommended an inquiry into work value be undertaken in the IRC of NSW by Ministerial Reference and the convening of a pay equity case before the IRC of NSW to establish principles for pay equity in industrial instruments.

On 10 November 1997 the Minister referred the terms of reference of an Inquiry into pay equity to the IRC of NSW. Justice Glynn of the IRC of NSW conducted the Pay Equity Inquiry in 1998 (the Inquiry).

Six case studies were selected to allow the comparison of female dominated industries and occupations with male dominated industries and occupations (a seventh occupation, that of clothing outworker, was added during the course of the Inquiry). These occupations and industries were selected to provide a cross section of professional and para professional, skilled, unskilled, trades and non-trades positions in both the public and private sectors. All of the areas and occupations examined in the Inquiry raised significant issues about the undervaluation of female occupations and industries.

One of the key findings of the Report of the Inquiry (the Report) concerned the concept of undervaluation. The Report found that undervaluation of women's work may arise for a number of reasons, including:

- § gendered assumptions in work value assessments;
- § occupational segregation (which may cause female dominated industries to be undervalued because they are female dominated); and
- § a number of other factors to do with the poor bargaining position of female dominated occupations and industries.

The Report noted that the combination of these factors contributed to the undervaluation of women's work, both historically and under then current wage fixing processes. Consequently, it was concluded that comparisons between female dominated occupations and industries and male dominated occupations and industries are not and should not be pre-requisites for equal remuneration claims. Evaluating whether work in female dominated industries or occupations is

undervalued may be assisted by comparing them with male dominated areas, but should not be a requirement.

The Inquiry concluded that:

- the concept of gender-related undervaluation of work is central to any equal remuneration mechanism;
- proof of sex discrimination should not be required; and
- the IRC of NSW should have a central role in guarding against pay inequity and in ‘...developing forward thinking strategies to pre-empt the development of pay inequities’.⁶⁹

The NSW Pay Equity Inquiry represented an advance, resulting in the IRC of NSW identifying the barriers in its own traditional procedures to the full airing of equal remuneration claims, and making recommendations for change. In particular, the Inquiry recommended that new equal remuneration and work value principles were required. Its findings informed the development of equal remuneration principles in NSW and other jurisdictions.

2.2 The NSW Equal Remuneration Principle (NSW ERP)

On 23 April 1999 the Labour Council of New South Wales (now Unions NSW) made an application to the IRC of NSW for the establishment of a new equal remuneration principle based, in part, on the findings of the Inquiry. On 30 June 2000 the Full Bench of the IRC of NSW gave judgement in this matter. It rescinded the equal pay principle set down in the State Equal Pay Case 1973 and established a new equal remuneration and other conditions principle.⁷⁰

One of the key findings of the Full Bench was that, in a macroeconomic sense, there was some disparity between the wages earned by men and women and that the disparity occurs in relation to the fixing of wages for women employed in female dominated industries and callings.⁷¹

The NSW ERP provides the IRC of NSW with the capacity to flexibly redress gender based undervaluation through the establishment of new employment conditions, classification structures and award career paths/incremental scales as well as allowing for appropriate adjustments of pay rates.⁷² This is achieved on a case by case basis, after hearing submissions and evidence from the parties in relation to particular areas where work undervaluation is alleged.⁷³

Fresh work value assessments are permitted where particular award pay rates have been undervalued on a gender basis, and comparisons can be made across dissimilar work, industries and occupations, and with rates fixed by industrial agreements.

There is no requirement that there be a male or any other wage comparator group, that any particular job evaluation methodology be applied, or that a threshold finding establish the undervaluation was due to gender based discrimination.

⁶⁹ NSW Pay Equity Inquiry Report to the Minister Vol. 1IRC6320 of 1997n p.64.

⁷⁰ Industrial Relations Commission of New South Wales, Re Equal Remuneration Principle [2000] NSWIRComm 113.

⁷¹ Ibid. para 69.

⁷² Ibid. 15(h) at para 158. See also Crown Librarians, Library Officers and Archivists Award Proceedings-Applications under the Equal Remuneration Principle [2002] NSWIRComm 55.

⁷³ Ibid. para 150, 151.

The NSW ERP also provides a mechanism for examining the history of industrial regulation as it applies to a particular industry or occupation to determine gender undervaluation; including whether there have been any arbitrated decisions that took account of work value considerations.⁷⁴

Significant safeguards to protect employment are incorporated in the NSW ERP. The IRC of NSW will consider changes in wage relativities both within the award and against external classifications. Any changes to awards may be phased in and absorbed against any over-award payments, and there is to be no reconsideration of work value adjustments already awarded by other wage fixing principles. The IRC of NSW must also consider the state of the NSW economy, the impact on employers and employment in the industry affected.⁷⁵

The IRC of NSW recognised that pay equity may be addressed through a range of remedies, including increasing rates, changes to conditions of employment, new career paths or changes in incremental scales. Remedies can also be limited to groups of employees, by creating new classifications rather than increasing rates for whole classifications.⁷⁶

Crown Librarians Case

The first application under the NSW ERP was made in the Crown Librarians case and concerned the gender-related undervaluation of the work of state government workers employed as librarians, library officers and archivists. These types of workers had been the subject of one of the case studies considered in the NSW Pay Equity Inquiry.

The Full Bench of the IRC of NSW handed down its judgement in this matter on 28 March 2002.⁷⁷ It found that the work of librarians had been undervalued on a gender basis although this issue was not contested by the parties.

The Full Bench identified certain indicia establishing undervaluation on a gender basis in the Crown Librarians case. These include the consensus of the parties, female domination of the occupation of librarian, evidence that librarians have been historically underpaid when compared with other public sector groups exhibiting similar characteristics and the relevant Pay Equity Inquiry findings of Justice Glynn.⁷⁸

Significantly, the findings of Justice Glynn in relation to the work of librarians established that there had been no work value assessments since 1982 and certain historical factors of undervaluation were present including impediments to the recognition of female qualifications.⁷⁹

The principal task of the IRC of NSW when applying the NSW ERP was described by submissions made in the Crown Librarians case in the following terms:

Ultimately, the task in this case in applying the Equal Remuneration and other Conditions Principle is to conduct a traditional work value assessment, but in a gender neutral way and in the absence of assumptions based on gender.⁸⁰

This view was endorsed by the Full Bench in its decision in that case.⁸¹

⁷⁴ See Miscellaneous Workers Kindergartens and Child Care Centres c. (State) Award, [2006] NSWIRComm 64, paras 133-148.

⁷⁵ Re Equal Remuneration Principle, op.cit. 15(f), (i), (j), (m) at para 158.

⁷⁶ Ibid. 15(h), (k) at para 158.

⁷⁷ Crown Librarians, op.cit.

⁷⁸ Ibid. para 9.

⁷⁹ See Re Equal Remuneration Principle op.cit. para 9.

⁸⁰ Crown Librarians, op.cit. para 140.

As described above, the parties did not contest that there had been undervaluation of the work in question or that wage increases were justified. Rather, the main matter in contention was the size of the adjustment required and how it was to be applied.⁸² The Commission noted the range of remedies available to it and stated that:

*The more broad-based solutions proposed by the parties to overcome the undervaluation problem which travel beyond simple wage increases are, therefore, readily available and, where a case is made out on merit, appropriate.*⁸³

A new award was made with new classification structures and provisions for the transfer from the old structure were included. Wage increases were awarded as part of the making of the new award: on average 16% across classifications, and up to 37% for some classifications.⁸⁴ This outcome indicates the type of substantial wage adjustment that can flow from the application of the ERP where a gender based undervaluation of relevant work has been established on the available evidence.

NSW Child Care Case

The Crown Librarians case was followed by an application by the NSW branch of the Liquor, Hospitality and Miscellaneous Union (LHMU) to the IRC of NSW to vary the *Miscellaneous Workers Kindergartens and Child Care Centres, & C. (State) Award* (the Award) in 2004.⁸⁵ The application was made under both the Work Value Principle and ERP established by the IRC of NSW. Employers First (acting for the employer parties) filed a counter application which also sought variations to the award, to its classification structure and wages. That application sought reductions in wages for some classifications.

This was the first time the IRC of NSW was called upon to consider a fully contested equal remuneration matter. However, it is significant to note that during the progress of the case, conciliation by the IRC of NSW and discussions between the parties led to agreements about various aspects of the claims made by each, and to adjustment of the competing claims ultimately arbitrated by the IRC of NSW. This process limited the extent of the differences between the claims.⁸⁶

On 7 March 2006, the Full Bench of the IRC of NSW handed down its decision. The key finding was that the work of a long day care worker was undervalued on a gender basis. The applicant union was not required to make a comparison with, or demonstrate wage relativities with, a male dominated industry such as metal trades which was the industrial benchmark for wage relativity assessments. In fact, the Full Bench concluded that the uniqueness of the work of child care workers limits the usefulness of such an exercise, and that a more useful comparison was the teaching profession.⁸⁷

⁸¹ Ibid.

⁸² Ibid. para 9.

⁸³ Ibid. para 55.

⁸⁴ Michael Lyons and Meg Smith, 'Gender Pay Equity, Wage Fixation and Industrial Relations Reform in Australia: One step forward and two steps backward?' *Employee Relations*, 30 (1) 2008, pp. 4-19.

⁸⁵ *Miscellaneous Workers Kindergartens and Child Care Centres (State) Award*, op.cit.

⁸⁶ Ibid. para 11, 12.

⁸⁷ Ibid. para 243.

The IRC of NSW in effect endorsed the capacity to argue an abstract notion of undervaluation, one which would not be available under traditional wage fixing principles.⁸⁸ As the researcher Meg Smith has noted in relation to the operation of the ERP in this case:

*...the application of the principle acknowledged the influence of sex segregation in the labour market when considering the appropriate wage rate for highly gender skewed industries and occupations.*⁸⁹

The Full Bench selected certain prescribed rates for teachers as an appropriate work value comparator. Substantial wage increases of between 20 and 50 per cent were granted depending on the classification involved. Classification structures were adjusted, and changes to other working conditions were also awarded.⁹⁰

The Full Bench noted the concerns expressed by employer parties about the impact of significant wage increases on their costs and viability and concluded as follows:

[344] We have determined that rates of pay must be significantly increased for child care workers and the various promotion positions, having regard to the proper value of the work in question. There is a resulting necessity however, that we not only address the work value changes and undervaluation which has been identified, but that we also seek to ensure that the increases awarded are introduced in such a way, that they do not put employer viability at risk and do not lead to unemployment amongst the predominantly female child care worker workforce employed in this industry.

...

[346] ... we are satisfied that the evidence led in the employer case, provided a sound foundation for the conclusion that there is good reason for phasing in the increases awarded, in order to ensure that centres, parents and governments can make adjustments necessary to ensure that they can be paid, without jeopardising the financial viability of particular centres, or the employment of any employee.⁹¹

The orders made by the Full Bench therefore took full account of the undervaluation identified and the need to redress it in a range of ways, and the needs of employers.

Resourcing pay equity cases

The NSW ERP (and those in other states) has provided clear guidance on establishing historic gender undervaluation of work. However, it should be appreciated that significant time and research can be required to establish these issues.

For example, in 1998, as a contribution to the Crown Librarians Case, the then NSW Office of the Director of Equal Opportunity in Public Employment undertook a case study comparing the work of public service librarians with public sector geoscientists, to test 1991 research that showed that female dominated public service occupations were underpaid compared to public service male dominated occupations.

The evidence from this case study was then used by the Public Service Association (PSA) to bring the pay equity case for librarians under the new ERP, as outlined above. While this case was won,

⁸⁸ Meg Smith, 'Crying Wolf? Employers Awards and Pay Equity in the New South Wales Children's Services Industry', *Employment Relations Record*, January 2006, p.9.

⁸⁹ Ibid.

⁹⁰ *Miscellaneous Workers Kindergartens and Child Care Centres (State) Award*, op.cit. para 234 et seq.

⁹¹ Ibid. para 346.

with significant wage increases for librarians, library technicians and archivists, the PSA noted that running the case was 'protracted and expensive' requiring considerable investment in legal fees and staff expenses.⁹² The possible barriers to unions running pay equity cases, especially in an environment of declining union membership and related resource constraints, need to be acknowledged in assessing the success of industrial provisions to promote equal remuneration.

The legislative framework supporting the NSW ERP

The ERP as it applies in the NSW industrial relations jurisdiction must be seen against the background of the NSW industrial relations legislative scheme which provides an appropriate regulatory setting for the implementation of the NSW ERP in and through awards. As the Full Bench of the IRC of NSW has observed in relation to the legislative context provided by the NSW IR Act:

In the Act, the legislature has emphasised also the importance of awards providing for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value. This appears from the objects of the Act, as well as from the provision made therefore in ss19, 21 and 23.⁹³

Accordingly, the IRC of NSW must explicitly take into account discrimination issues in awards, including pay equity, when reviewing awards for the purposes of modernising or consolidating them (s19 (3)(e) NSW IR Act). The IRC of NSW has a statutory mandate to make awards that set fair and reasonable conditions of employment (s10).

The IRC of NSW is required, on application, to make an award that provides, among other stated employment conditions, equal remuneration and other conditions for men and women doing work of equal or comparable value (s21(1)(b)). Under s 23 the IRC of NSW also has an explicit statutory mandate to ensure that awards it has determined provide equal remuneration and other conditions of employment for men and women doing work of equal or comparable value. The IRC made clear in its decision establishing the ERP that section 23 does not require the IRC of NSW to conduct an inquiry into equal remuneration issues every time an award comes before it. The IRC of NSW has no power at large to conduct inquiries and this section does not provide such power. Both under section 23 and in section 19 reviews, the normal processes of litigation before the IRC of NSW will be observed, with the parties having to satisfy the IRC of NSW of the matters required by those sections.⁹⁴

The concept of equal remuneration is therefore entrenched in the NSW industrial relations legislative framework as a basic entitlement and is a key regulatory principle in relation to the making, review or maintenance of NSW common rule awards.

It is significant, also, that the NSW ERP operates within an industrial relations system that:

- provides for an independent industrial relations tribunal (the IRC of NSW) with comprehensive dispute resolution powers, broad jurisdiction over industrial matters and powers to vary awards on application where the case to do so is established;
- allows the tribunal to set wage fixing principles that provide guidance for parties as to what mechanisms and wage determination principles can be utilised when seeking relevant award variations;

⁹² Labor Net, 'First Pay Equity Decision Tomorrow' 27 March, 2002.

⁹³ Re Equal Remuneration Principle op.cit. para 48.

⁹⁴ Re Equal Remuneration Principle op.cit. para 101 et seq and in particular para 108 and 110.

- provides for the collective representation of workers by registered industrial organisations appearing in the IRC of NSW.

We submit that any Commonwealth initiative in the area of equal remuneration should be considered in the context of this type of industrial relations framework. The Fair Work Act contains some innovations in line with existing NSW legislative provisions, particularly the removal of the threshold discrimination test and the introduction of the concept of comparable value to equal remuneration provisions. This removes some obstacles to the establishing of principles for dealing with pay equity cases.

2.3 Equal remuneration provisions in the Commonwealth jurisdiction

Until recently, the Commonwealth statutory regime was the *Workplace Relations Act 1996* (WR Act), however the *Fair Work Act 2009* has received Royal Assent and substantial elements of the Fair Work Act commenced on 1 July 2009.

Under the WR Act, the equal remuneration mechanism has had significant limitations. The legislation creates the concept of equal remuneration for work of equal value with reference to the Equal Remuneration Convention (s 623 WR Act) which makes specific reference to rates of remuneration established without discrimination based on sex. In addition, equal remuneration orders under the WR Act may only be made to ensure that, for employees covered by the order, there will be “equal remuneration for work of equal value” (s 624 (1)). This differs significantly from the NSW jurisdiction where, as discussed, equal remuneration cases encompass work of “equal or comparable value”, a significantly broader test.

Using the definition endowed under the Equal Remuneration Convention, the discrimination test applying in the federal jurisdiction under the WR Act severely curtailed the capacity of an industrial tribunal to investigate work value across an award and assess the extent of historic gender based undervaluation of work through an examination of the history of the relevant award and industrial regulation in female dominated industries.⁹⁵ The difficulty of satisfying this test within the terms of an equal pay for work of equal value framework is demonstrated by the way it was applied in a leading case involving an application for an equal remuneration order – the HPM Industries case.⁹⁶

The WR Act contains no mechanism for conducting gender undervaluation cases or inquiries in a public, transparent way, or to make evidence based findings similar to those mandated in the NSW or Queensland jurisdictions. The WR Act also removed minimum rates from awards, which significantly weakened the ability of the minimum wage determination process to deliver industry wide wage outcomes based on work value or equal remuneration considerations.

Award based remedies have historically been an effective way of flowing on minimum wage increases which reflected work value outcomes.⁹⁷ Historically, centralised wage determination and flow on mechanisms to employees in state jurisdictions helped temper wage disparities, and

⁹⁵ Dale et.al op.cit. p.146.

⁹⁶ See the AIRC case of *Automotive, Food, Metals, Engineering, Printing Industries Union and HPM Industries (1998) 94IR 129 at 162*. Test also effectively applied in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme and Co Ltd (1999) 97 IR 374 at 380*.

⁹⁷ Lyons and Smith, op.cit. pp. 4-19.

provided benefit to women employees.⁹⁸ While the wages system in Australia has become far less centralised, with a greater focus on the achievement of wage increases through bargaining, any processes available for adjusting minimum wages in awards are still of strong importance to many women. ABS data shows that feminised service industries and occupations are most likely to be award-reliant, with around a quarter of all female workers engaged in award-reliant work, compared to 14.7% of male workers.⁹⁹

The Commonwealth Government's Forward with Fairness reforms go some way to remedy two of the main statutory barriers to equal remuneration cases. The Fair Work Act, as the main vehicle of the changes, is discussed in more detail below.

The Fair Work Act 2009

Unlike the current NSW legislation, equal remuneration is not explicitly named as an object of the Fair Work Act. However, there are several initiatives that could impact positively on pay equity for national system employees.

Historically, wage fixing based on the adjustment of minimum pay rates in awards helped maintain appropriate wage relativities and detailed wage classification structures providing skills based career paths. This system of wage adjustment reflected notions of comparative wage justice and established benchmarks in terms of traditional work value assessments.¹⁰⁰

While Work Choices removed minimum wages and classification structures from awards, the Fair Work Act will restore minimum wages as allowable matters in federal awards. One advantage is that this allows wages to be determined in the context of a consideration of adjustments to other award employment conditions, including monetary entitlements, and the proper relationship to be maintained between these award components.

However, it is noted that while wages are to be restored to their former status as award provisions, the Fair Work Act provides that minimum wage reviews will be conducted in quite separate proceedings from other award variations, with differing statutory objectives (unlike the NSW system where, despite the practice of conducting regular and separate minimum wage proceedings, wages are clearly conceptualised as part of the award system, with the same statutory objectives applied to all award variation matters). The risk is that there may still be a disjunction in the relationship between minimum wage considerations and other award provisions. It is to be hoped that the four-yearly review of all modern awards, as well as any other variation proceedings, will provide relevant opportunities to bring together the consideration of these matters. This is further discussed below.

Another area of change is the recasting of equal remuneration provisions under the constitutional corporations power, rather than continuing its current incarnation under the external affairs power. In doing so, the Fair Work Act removes the discrimination test, which has been discussed at 2.2 above. As well, the Fair Work Act broadens the concept of equal remuneration to include work 'of equal or comparable value'. These new developments eliminate the requirement for a specific male-based comparator in assessing individual remuneration conditions, allowing Fair Work Australia (FWA) to consider a whole range of equity comparisons and effectively addressing some key concerns with current federal pay equity arrangements.

⁹⁸ Women in Social & Economic Research (WiSER) Curtin University of Technology, Submission to the Australian Fair Pay Commission, March 2007, p.7.

⁹⁹ ABS *Employee Earnings and Hours* cat. 6306.0, April 2007.

¹⁰⁰ WiSER 2007, op. cit. p.7.

Consistent with legislation currently operating in NSW, the Fair Work Act sets wider terms for equal remuneration interventions that can be made by FWA, than those under the WR Act. From commencement of the new Act, FWA will be able to make orders it considers appropriate to ensure that for employees to whom the order will apply there will be equal remuneration for work of equal or comparable value. There is also scope for FWA to vary a modern award outside of the system of four yearly reviews to achieve a modern awards objective. Equal remuneration for work of equal or comparable value is explicitly a part of the modern awards objective and minimum wages objective, which indicates some capacity for FWA to have regard to equal remuneration matters in the exercise of its powers.

It may be useful for FWA to develop and establish a set of principles over time for dealing with these matters. We submit that the NSW ERP should be considered as an appropriate model in this area. The NSW ERP is specifically tailored to the task of rectifying the wage disparities evident in awards covering female dominated industries where there has been an historic gender undervaluation of relevant work.

As noted above, the Fair Work Act also empowers FWA to grant permission to a bargaining agent to undertake multi-employer bargaining in relation to two or more enterprises employing low paid employees. Significantly, in deciding whether to make the authorisation the FWA must take into account both current and historical matters relating to collective bargaining. These provisions are potentially applicable to low paid feminised industries without a strong history of enterprise bargaining and where the employees are at a disadvantage in bargaining due to factors such as prevalence of casualisation. As such, they may have an impact on pay equity outcomes – although historically the awards system has provided better outcomes for employees in service industries where productivity trade-offs are not always available or appropriate. The explanatory memorandum to the Fair Work Bill noted that the low paid bargaining stream would assist workers in industries such as child care, aged care, community services, security and cleaning to enter enterprise bargaining.

A tribunal such as FWA should have an obligation to take account of overarching public policy concerns as part of its decision making functions. It should also have the capacity to reach a balanced assessment of sometimes competing public interest considerations.

Pay equity and federal award modernisation

Pay equity and equal remuneration should also be a matter for active consideration in the award modernisation process in accordance with paragraph 3(e) of the Ministerial Request made pursuant to new s 576 C(1) of the WR Act.¹⁰¹

Para 3(e) requires the Australian Industrial Relations Commission (AIRC) to have regard, among other matters, to the need to promote the principle of equal remuneration for work of equal value in undertaking award modernisation. Significantly paragraph 2(c) provides that employees are not to be disadvantaged by the award modernisation process.

The AIRC could also deal with pay equity as part of its obligation discharged through the President to publish a quarterly progress report to the Minister pursuant to paragraph 23 of the Ministerial Request for award modernisation. This report could outline any developments in relation to the monitoring of the equal remuneration matter contained in paragraph 3 (e).

¹⁰¹ Request under s 576C (1)-Award Modernisation Consolidated Version Workplace Relations Act 1996.

The Award Modernisation request also requires the AIRC to ‘...prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and employee’ (para 10).

The AIRC Full Bench in its decision handed down on 28 June 2008 relating to award modernisation determined that it was unnecessary and perhaps inappropriate to include terms about minimum wages in the model award flexibility clause applying to individual arrangements between an employer and employee.

As the AIRC observed:

It is difficult to see how the trading-off of minimum wages against other benefits could meet a genuine need for individual flexibility without at the same time weakening the function of the award as a safety net in an unacceptable way.¹⁰²

The model clause as settled by the AIRC does, however, permit award clauses dealing with a range of monetary entitlements such as overtime, penalty rates and allowances to be varied in their application to individual employees.¹⁰³ Any such variations are achieved through unregulated individual flexibility agreements between the employer and an individual employee, and so are to be distinguished from clauses that are common in existing awards and agreements permitting flexibilities departing from some award requirements to be negotiated at the workplace level. The concern is that this may have the potential to further reduce the total earnings of award-reliant women who would otherwise be entitled to such payments under the standard terms of their award, thus neutralising other efforts to reduce the gender earnings gap. In particular, it will potentially increase male/female earnings disparities within awards if women are effectively forced to trade-off these benefits for more family friendly hours and working arrangements. The lack of the collective dimension adds to the risk that individual women may feel pressured to accept loss of wages and other conditions in return for much needed flexibilities.

It is submitted that this should be carefully monitored in a way consistent with the protection against disadvantage for individual employees contained in clause 2(c) of the award modernisation request. This issue may be dealt with as part of the AIRC specific reporting obligations under paragraph 23 of the award modernisation request. One aspect of FWA’s jurisdiction could be the monitoring of the impact of the operation of the model individual flexibility clause upon gender based earnings differentials in awards.

We would welcome a general approach to award modernisation that protects award provisions and pay scales that have been subject to the NSW ERP.

We submit that the gains made in the NSW system through the operation of the NSW ERP should not be lost or diminished as a consequence of the federal award modernisation process. In particular, the wages and conditions adjustments made by the IRC of NSW in the Kindergartens case ¹⁰⁴ should not be undermined when the modern award for this industry is made on 4 September 2009 as part of stage three of the award modernisation process.

¹⁰² AIRC PR062008 para 168.

¹⁰³ Ibid. para 187.

¹⁰⁴ Miscellaneous Workers Kindergartens and Child Care Centres (State) Award, op.cit.

PART THREE: COMPLEMENTARY STRATEGIES AND FURTHER ISSUES

3.1 The adequacy of arrangements to ensure fair access to training and promotion for women

The terms of reference for this Inquiry ask about the adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours. As previous sections have noted, these features of women's workforce participation can present impediments to women's career progression and life time earnings that have ramifications for pay equity outcomes.

As noted in section 1.3 of this submission, female employees tend to be concentrated in industries and occupations with high levels of casual and part time work. Evidence shows that workers in such employment have significantly limited access to skill enhancement and training. Employers are less likely to allocate resources to training where they believe they will not receive the full benefit of the expense because of the perceived precarious attachment of women employees to the workforce. Women employees are more likely to bear the cost of training, face an uncertain capacity to recoup the investment in training, have limited time available, and face unpredictability of work commitments and a lack of access to information and advice.¹⁰⁵

Researchers have asserted that the rising levels of non-standard work have weakened skills formation at the workplace and case study research has revealed that caring for children can also affect access to training opportunities.¹⁰⁶ While a proportion of women not working full time hours may value their employment arrangement, as it enables them to meet work and family responsibilities, for many women their choices are highly constrained.¹⁰⁷ More generally, women in part time work commonly find access to training difficult with subsequent adverse consequences for career progression.¹⁰⁸

The probability of females undertaking structured training where there is the presence of a child aged 0-2 in the family is largely reduced. Research reveals that males are not affected by this characteristic.¹⁰⁹

The former federal government's Work Choices regime created further disincentives for employees and employers to invest in training and skills development by:

- shifting from industry-wide training regimes to individual arrangements;
- removing award classifications thus weakening the link between skills acquisition and reward;
- removing award provisions that facilitate and support training;
- encouraging employers to compete on the basis of cost-minimisation rather than strategies for quality and innovation; and
- facilitating more precarious employment arrangements.

¹⁰⁵ Hall, R., Bretherton, T. & Buchanan, J., *It's Not My Problem: The Growth of Non-Standard Work and its Impact on VET in Australia*, Kensington Park, NCVER, 2000.

¹⁰⁶ Watson I., Buchanan J., Campbell I. & Briggs, C., *Fragmented Futures: New Challenges in Working Life*, The Federation Press, ACCIRT University of Sydney, 2003.

¹⁰⁷ See page 16-17 of this submission.

¹⁰⁸ Whittard, J. 'Training and Career Experiences of Women Part-Time Workers in a Finance Sector Organisation: Persistent Remnant of the 'Reserve Army'?' *Australian Journal of Labour Economics*, 6(4) 2003.

¹⁰⁹ Miller, P., 'Gender Discrimination in Training: An Australian Perspective', *British Journal of Industrial Relations*, 32 (4) 1994.

Recent research has revealed the effect of Work Choices on training in industrial agreements. The University of Sydney's *Lowering the Standards* report examined collective agreements in the female dominated retail and hospitality industries lodged since the commencement of Work Choices and compared them to the awards and agreements that had previously covered these employees. The research revealed:

- training is only mentioned in 37 per cent of agreements;
- competencies and promotion is only mentioned in 34 per cent; and
- child care and family friendliness is only mentioned in 14 per cent.¹¹⁰

The award modernisation process being conducted by the AIRC is an opportunity to use the award system to promote training and skills development. This was advocated by us in our submissions to the AIRC.

A number of NSW awards have general training provisions that facilitate skills development and training opportunities both on and off-the-job. We have submitted that existing training provisions in awards and Notional Agreements Preserving a State Award (NAPSAs) should not be dispersed or fragmented undermining their importance. Rather they should be consolidated to make their importance clear and their meaning readily understood.

The priority modern awards from the first stage of the award modernisation process were made on 19 December 2008 and an analysis reveals that in making the awards the AIRC has included training-related provisions currently afforded to employees in the NSW industrial relations system. It should also be noted the AIRC has released exposure drafts of schedules dealing with national training wages and school based apprenticeships as part of stage 2 of the process. The AIRC has indicated that the schedules will be included in each modern award and will be of general application.

In its decision of 3 April 2009 the AIRC issued draft schedules for the National Training Wage and skills based apprenticeships. The skills based apprenticeships schedule will be included in every modern award where an apprenticeship is possible. The National Training Wage schedule will be given further consideration by the parties when stage four of the award modernisation process commences on 10 July 2009.

It is clear from the available research that there is a particular need to address current industrial arrangements to ensure fair access to training and promotion, including the specific circumstances where women are accessing flexible work arrangements or returning from parental leave.

Strategies to improve access to training and promotion

A number of strategies could make a difference in improving women's access to training and promotion.

As noted above, we support the provision of adequate industrial arrangements in awards for training and the establishment of viable career paths, and considers the federal award modernisation process offers opportunities to achieve this. Industry-based awards should contain a comprehensive range of provisions dealing with hours, wages, reimbursements, training allowances and on-the-job training, as well as the employment of apprentices and trainees.

¹¹⁰ Evesson, J. *Lowering the standards: From Awards to Work Choices in Retail and Hospitality Collective Agreement*, University of Sydney, 2007.

Fair access to training and promotion for women may also be addressed by appropriate human resource management strategies at the enterprise level. Recent research shows that a quarter of women do not believe their employer provides them with a career path and 16% believe they are not afforded sufficient learning and development opportunities.¹¹¹

This research has suggested remedial strategies that could be adopted by employers, including developing an annual development and training plan, mentoring by senior managers, providing access to different training options such as on-the job, rotation and distance education and monitoring inequities in access to training and development opportunities.¹¹²

Part time work can be of positive benefit to women in enabling them to maintain their connection to the workforce while undertaking caring responsibilities. However, as noted in section 1.3, a lack of access to *quality* part time work can at the same time be a barrier to women's career development. Initiatives that increase women's access to quality part time work, that is, work that is seen as part of the regular workforce in a workplace or industry, would increase women's access to training and career development opportunities through the workplace setting. In 2007 the then Human Rights and Equal Opportunity Commission (HREOC)¹¹³ recommended that the Commonwealth Government promote the development of quality part time work, in particular through working in consultation with relevant employer and employee organisations to develop industry specific resources.

At the Commonwealth level, the recently established *Fresh Ideas for Work and Family Program*, targeting smaller businesses, provides an opportunity for the Federal Government to support the resource needs of small employers and employees to implement quality part time work arrangements.

The NSW public sector provides employees with a range of entitlements through awards, enterprise agreements and policies, which promote attachment to the workforce and improve employees' access to training and their prospects for promotion, including flexible work arrangements and paid leave to care for immediate and extended family. Across the range of centrally-funded public sector TAFE and university-level training opportunities there is gender parity: 50.5% of training places were allocated to women in 2008. Such parity suggests that in the public sector, merit selection and study leave entitlements facilitate women's participation in, and completion of, training. In 2008-09, some NSW public sector women's training scholarships also provide for a child care subsidy, if required.

NSW public sector employees also have the right to request to return from maternity, adoption or other parent leave on a part time basis until the child reaches school age, including the option of returning to work on a part time leave without pay basis.¹¹⁴ Returning to work on a part time leave without pay basis enables women to return to their full time position but work part time hours, with the right to resume work at full time hours when ready. Such rights are critical to maximising women's choices in timing their return to work and ensuring the transition to work is as successful as possible.

A recent informal survey of 12 public sector agencies revealed a preference by women to reduce their hours upon return to work from paid or unpaid maternity leave, with agencies reporting that

¹¹¹ Equal Opportunity for Women in the Workplace Agency (EOWA), *Generation F: Attract, Engage, Retain*, Australian Government, 2008, p.20.

¹¹² *Ibid.* p.22.

¹¹³ HREOC is now known as the Australian Human Rights Commission.

¹¹⁴ [M2005-15 Family Provisions Test Case Flow On](#); [Family Provisions Case 2005 \[2005\] NSWIRComm 478](#).

of women who had returned from a period of paid or unpaid maternity leave in the 12 months to May 2008, 65% had returned to work on a part time basis.¹¹⁵

This reinforces that for women who have spent time away from work around the birth of their child, or who are returning from maternity leave on a less than full time hours basis, access to training is contingent on that training being provided in flexible ways, and on the days of the week that the woman works or can arrange alternative care.

The recently launched NSW public sector women's employment and development strategy *Making the Public Sector Work Better for Women* recommends public sector agencies offer corporate training within core hours, and develop flexible delivery options including online and self-paced training, to facilitate women's participation and skill development.

To enhance women's access to training across the workforce, registered training organisations could be more broadly encouraged to offer flexible delivery training options. This could be specifically enhanced through funding incentives or contractual equity requirements.

Arrangements in the competitive NSW training market, for example, require public and private tenders who are successful in being placed on an Approved Providers List to enter a contract which includes a requirement that they provide equitable access to training opportunities funded under the Apprenticeship and Traineeship Training Program and the Strategic Skills Program. The contract specifies that they must ensure the absence of unlawful discrimination in all aspects of their operations, have inclusive teaching and learning practices and make provisions that enable participation in quality training and successful outcomes for those who may not achieve such outcomes without additional support. Women in non-traditional occupations are specifically highlighted as a target group. Participation by women in new entrant traineeships has risen in recent years – in 2007 just over 52% of the total enrolments under the Apprenticeship and Traineeship Training Program and the Strategic Skills Program were women.

We consider that fair access to training and promotion for women can be achieved through a number of strategies including human resource strategies at the enterprise level, initiatives that improve women's access to quality part time work, and provision of flexible working arrangements paired with flexible training options. However, as previously outlined, these strategies should be supported by adequate industrial arrangements in awards for training and the establishment of viable career paths.

Young women's opportunities – employment, career and subject choices

While women's opportunities to access training and promotion once in the workforce are critical, as important are the factors that shape young women's early engagement with work, and feed into their later education, training, and career outcomes.

Research by the NSW Commission for Children and Young People (CCYC) reveals that gender pay gaps, and the gender segregation of 'female' and 'male' work, are clearly evident in children's

¹¹⁵ Agencies in the sample included the departments of Premier and Cabinet, Community Services, Environment and Climate Change, State and Regional Development, Planning, Attorney General's, Ageing, Disability and Home Care, Commerce, NSW Treasury, Office of State Revenue, Ministry of Transport, NSW Health (including the area health services, Ambulance Service, New Children's Hospital and Justice Health). Calculation based on the number of women employed on the census date in each agency in 2006 - Unpublished data from the NSW Public Sector Workforce Profile. The agencies responding to the survey employed approximately 130,000 employees or 35% of the sector, and around 93,000 women or 41% of all women in the sector, in June 2006.

work.¹¹⁶ Young males on average are paid at a higher rate than young females, within almost all job categories. Further, while young 'males dominate in work associated with physical activity...females dominate in work associated with care for, and service to, others'.¹¹⁷ The CCYC research suggests:

*This division reflects the gender segregation in the adult labour market and, more broadly, different expectations of males and females.*¹¹⁸

Labour market regulation around wage rates and other factors can go some way to addressing these issues. However, a considerable portion of children's work is undertaken on an informal basis. Attention also needs to be given to the broader social bases of these inequalities, including how job preferences and gendered ideas about what is appropriate work for males and females are formed in young people and prospective employers, and transmitted through, for example, recruitment practices.¹¹⁹ Also critical are strategies that challenge gender stereotypes and ensure gender equity in education and training opportunities early in life.

The NSW Department of Education and Training's Priority Schools and Equity Coordination Unit undertakes a number of activities to address a range of issues relating to women's participation in the workforce. The *Boys' and Girls' Education Strategy* provides schools with a framework and related support to explore gender as an educational issue. The strategy provides particular support to schools in relation to exploring a range of career pathways for boys and girls. Exploring and challenging gender stereotypes, non-traditional subject choices and career pathways is an area of specific support in the strategy and related documents.

Professional learning activities supporting the implementation of the *Boys' and Girls' Education Strategy* highlight the importance of considering post-school outcomes for girls and boys, including the link between career choices and potential financial security.

The Director-General's Advisory Group for Gender Equity in Education regularly explores issues relating to subject and career choice. The work of this group informs the work undertaken by the Coordinators of Boys' and Girls' Education. The *Girls' Choices* working party, a subset of the Director-General's Advisory Group for Gender Equity in Education, is a cross-directorate working party that explores a range of issues in relation to girls and their subject and career choices. A particular area of focus for this group has been exploring opportunities to promote girls' access to a broad range of career options, particularly in areas currently under-represented by women, including engineering and information and communication technologies.

In addition, in 2008 the NSW Department of Education and Training's Equity Programs and Distance Education Directorate coordinated an acknowledgement of International Women's Day, providing schools with a range of suggestions about how they could engage with the day and promote messages of equality for women. A specific project supporting International Women's Day was a series of *Women in Science* forums. This pilot project involved collaboration between the Department's Science Unit, Curriculum K-12 Directorate and the Priority Schools and Equity Coordination Unit, supporting schools across three regions. The forums provided an opportunity for over 500 Year 10 and Year 11 girls to learn more about career opportunities in science from some of the highly successful female scientists recognised by the Australian Institute of Policy and Science's *Tall Poppies* campaign.

¹¹⁶ NSW Commission for Children and Young People (CCYP), *Children at Work*, researched and written by Toby Fattore, NSW CCYP, Sydney, 2005. This study involved 11 000 children between years 7 to 10 across 22 NSW High Schools.

¹¹⁷ Ibid pp. 33-34 and pp. 55-56.

¹¹⁸ Ibid. p.33.

¹¹⁹ Ibid. p.6.

We consider that an effective pay equity strategy requires attention to the causes of inequities that are seeded long before women enter the workforce, and continues to support women's participation throughout their working lives.

3.2 The need for education and information in relation to pay equity

The gender pay gap cannot be effectively addressed through an industrial relations legislative framework or public policy alone. There is a need for industrial arrangements to be accompanied by effective communication strategies that increase community awareness about the benefits of pay equity. This not only includes raising greater awareness among employers, but also promoting a broader understanding of the way that social expectations around the roles of men and women in work and care influence decisions that have income ramifications over the life course.

Broader community awareness and targeted information is required to address the range of factors that affect pay equity. We note the 2008 Equal Opportunity for Women in the Workplace Agency (EOWA) Equal Pay Day campaign and supports strategies that promote public awareness of this issue. Such efforts need to be backed up by targeted information and education strategies that support change at the workplace and industry level. Broader national campaigns, including industry specific campaigns, would serve to raise awareness in the community.

The NSW Office of Industrial Relations (OIR) currently provides industrial relations information and assistance to employers, employees and other members of the public. The OIR website is a valuable resource, providing reliable and practical industrial relations information, and attracting over 2.7 million visitors a year.

As well as undertaking education and information campaigns in workplaces as part of its ongoing compliance strategy, the OIR also conducts employer-focussed workshops and information sessions to vulnerable workers, including women. OIR provides an award information telephone advisory service and undertakes state-wide compliance campaigns in award-reliant industries where female employees are concentrated.

Targeting information to particular workplaces

The OIR's targeted industrial compliance program and workplace information strategies are examples of how a coordinated information and education campaign for employers and employees can be specifically tailored to achieve results. Employers receive advice and assistance to address non-compliance early as part of a preventative strategy designed to ensure ongoing compliance into the future.

The OIR has developed intelligence and information gathering strategies to identify where non-compliance is high and where particularly vulnerable workers are located. OIR now uses a snapshot approach to information and compliance – disseminating relevant information and conducting education campaigns targeting certain industries, occupations or geographical locations.

These activities are complemented by an extensive website, delivering practical information and assistance, and a range of employment related workshops and information sessions for employers and employees to increase awareness of industrial entitlements and obligations.

We submit that a workplace targeting strategy and education campaign would be an appropriate model for the delivery of information about pay equity to workplaces.

3.3 Adequacy of the current data

It is important that appropriate types of survey data are available to measure labour market trends that impact on pay equity, and to clarify the dimensions of the problem. This includes information on the factors that drive the gender pay gap, including gaps in graduate incomes, and gaps for different groups of workers.

A useful starting point for an examination of this issue is the September 2006 report prepared by the research group Women in Social and Economic Research (WiSER) titled *Women's Pay and Conditions in an era of Changing Workplace Regulations: Towards a Women's Employment Status Key Indicators (WESKI) Database* (the WESKI Report). It principally examines the following matters:

- the capacity of existing data collections to monitor women's wages and other employment related conditions under the new regulatory framework (then Work Choices); and
- the need to provide an inventory of available data and identify strategic areas of data collection to provide clear and comprehensive insight into the role of new workplace regulations.

The main task of the WESKI Report was described by its authors in the following terms:

It both identifies current data and indicators of women's employment status and documents inconsistencies, fragmentation and gaps in and between existing data collections that severely constrain the development of a comprehensive understanding of labour market experience. It represents a first step towards a Women's Employment Status Key Indicators (WESKI) database.¹²⁰

The WESKI Report's central finding is that as labour market regulatory systems change, the types of data that will provide adequate monitoring will also need to change to provide sufficient insight into the effects of new regulation on specific workforce sectors.

The availability of longitudinal data is also important. The Australian Workplace Industrial Relations Survey (AWIRS) was first conducted by the then Commonwealth Department of Industrial Relations in 1990 to provide a comprehensive and statistically reliable database on workplace relations in Australia. The second and final AWIRS (1995) introduced an employee survey which gauged the actual responses of employees about their workplace conditions. This data enabled researchers to compare the results of the two surveys and assess the impact - at the workplace level - of changes occurring during that time.¹²¹

¹²⁰ Preston, A., Jefferson, T., and Seymour, R, *Women's Pay and Conditions in an Era of Changing Workplace Regulations Towards a 'Women's Employment Status Key Indicators (WESKI) Database*, Report prepared by Women in Social and Economic Research (WiSER) Unit at Curtin University of Technology, September 2006. p.7.

¹²¹ Morehead, A et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Department of Workplace Relations and Small Business, Longman, Melbourne, 1997.

The absence of AWIRS as a baseline study of workplace conditions over time left an information gap that needed to be filled. In 2005, Workplace Industrial Relations Surveys were commissioned independently by the NSW, Queensland, and Victorian Governments which provided limited additional information for the eastern seaboard states.

The need for longitudinal data remains an ongoing challenge for researchers and policy makers. As the Queensland Government submission to the 2007 Inquiry of the Queensland Industrial Relations Commission into Pay Equity and the impact of Work Choice on women observed:

Clearly there is a need for the collection of detailed indicators of employment status that are comparable over time. This can be substantially addressed through an annual WIRS... Priority should be given to the reporting of indicators by gender, age and cultural background.¹²²

Time series data identifying employment arrangements are also better adapted to the task of monitoring labour market trends as changes to regulatory settings occur. This is particularly relevant in the present federal industrial relations context where significant regulatory changes have been set in motion.

More detailed longitudinal survey data would enable researchers to assess the effects on individuals over time as employee move between employers, industrial arrangements and respond to family needs. There is a need for further data survey tools and analytical instruments such as an enhancement of AWIRS to identify trends that impact on the position of women in the Australian labour market.

More broadly, one of the challenges in building public awareness of pay equity issues is the fact that gender pay gaps can be measured in different ways, and that there is no consistently reported measure or common access point for research and data analysis of these matters in the Australian context.

Accordingly, we consider there would be value in the development of a Commonwealth research program into pay equity and associated issues related to women's workforce participation. As this is a matter of national significance, the Commonwealth could consider establishing a clearinghouse, or common government portal, for research and monitoring of issues related to women's workforce participation and pay equity, including findings from state based inquiries and research projects. This could assist in consolidating and extending the existing efforts of State and Territories Governments, pay equity researchers, and Commonwealth Agencies including the Equal Opportunity for Women in the Workplace Agency (EOWA), the Australian Bureau of Statistics (ABS), and the Departments of Education Employment and Workplace Relations (DEEWR), and Families Housing Community Services and Indigenous Affairs (FAHCSIA).

Conclusion

A persistent gender pay gap exists in Australia, operating in concert with other institutional and labour market barriers to inhibit the full and equitable participation of women in the workforce. The gender pay gap needs to be effectively addressed as it poses significant national public policy challenges in important areas of economic and social development.

¹²² Queensland Government Submission to Progressing Pay Equity, An Inquiry conducted by the Queensland Industrial Relations Commission 2007 p.66.

Reform initiated in the industrial relations area has had some effectiveness in addressing, by means of collective industry award measures, pay inequities arising largely from the historic undervaluation of women's work in female dominated industries and occupations.

We submit that the way forward is to establish appropriate federal industrial arrangements and regulatory measures to redress pay inequity that would deliver collective benefits for workers. These industrial arrangements would sit alongside and complement the individual remedies available under anti-discrimination and equal opportunity legislation and would be consistent with the guiding principles that have been articulated in this submission. In establishing these arrangements consideration should be given to the effective way the NSW ERP operates to redress the historic gender based undervaluation of work.

The Fair Work Act will go some way towards removing current legislative obstacles for national level employees. While equal remuneration for work of equal or comparable value is not an explicit object of the Fair Work Act, unlike the NSW legislation, it is an object of both the modern awards objective and the minimum wages objective. In addition, the recasting of the equal remuneration provisions under the corporations power, including the removal of the threshold discrimination test and the inclusion of the concept of comparable value, removes significant barriers. We would welcome the further development of principles for dealing with pay equity claims, in line with the NSW ERP.

Alone, industrial and legislative measures cannot effectively redress pay inequity and must be accompanied by other pay equity initiatives and strategies designed to achieve gender equality in the workplace.

Redressing gender pay inequities requires a widespread commitment to understanding the causes of gender pay inequities at industrial, social and economic levels. Close consideration needs to be given to increasing awareness and understanding of the nature of gender pay inequities and address the attitudinal barriers to greater gender equality in workplaces and across society.

Further strategies that are likely to have a complementary impact on the gender pay gap include measures that tackle the uneven gendered distribution of unpaid work, and measures that support women's participation in the paid workforce, including the provision of flexible working arrangements, paid parental leave, access to affordable and accessible childcare, and measures that improve women's access to training and promotion opportunities. These can be important in increasing women's workforce participation, and the rewards women receive for their work, across their life course. Such outcomes are critical for gender equality and for achieving social and economic benefits at a national level.