

Industrial relations legislative reforms

Amendments to *Fair Work Act 2009*

- 5.1 On 20 March 2009, the Federal Parliament passed the *Fair Work Act 2009*, which commenced operation on 1 July 2009 and will become fully operational on 1 January 2010.
- 5.2 This chapter examines the adequacy of the new legislation as a means of closing the gap between male and female pay and conditions through the recognition of the right to equal remuneration for work of equal or comparable value in federal law. It argues that, to effectively institutionalise pay equity into the mainstream of the federal industrial relations system, the recognition of pay equity in the *Fair Work Act 2009* needs to be strengthened.
- 5.3 Pay equity under the *Fair Work Act 2009* can be advanced through:
- the extension of equal remuneration provisions to include work of comparable value;
 - the inclusion of equal remuneration as a guiding principle for Fair Work Australia in conducting its modern award and minimum wage fixing functions;
 - the capacity to take a work value claim to Fair Work Australia;
 - anti-discrimination protection;
 - specific benefits for the low-paid under the new multi-employer bargaining stream;
 - legislated right to require flexible working arrangements; and
 - a research function of Fair Work Australia to include three yearly research into the utilisation of the right to require flexible working arrangements, extension of an additional

12 months unpaid parental leave and individual flexibility agreements.¹

- 5.4 These features contribute to advancing pay equity, but, in its current form, the *Fair Work Act 2009* is considered by some as still falling short of effective mainstreaming of gender pay equity. Critiques of the new legislation highlight the following issues:
- pay equity is recognised only indirectly as an objective of the *Fair Work Act 2009*; and
 - pay equity as a factor to be taken into account to achieve the objective of award modernisation and in the context of minimum wage setting.
- 5.5 There is a need to institutionalise stronger commitment to pay equity into the industrial relations system by amending *Fair Work Act 2009* to include:
- elevating pay equity to a principle objective of the *Fair Work Act 2009* rather than incorporating it indirectly through ‘taking into account’ international labour rights;
 - requiring that the *Fair Work Act 2009* give effect to Australian international labour obligations, including pay equity as set out in relevant International Labour Organisation instruments; and
 - enabling the *Fair Work Act 2009* to take account of the interpretation of these international obligations by regional, national and international courts and tribunals.
- 5.6 The approach in the legislation does not give an unequivocal recognition to the right to equal remuneration or legislative direction that equal remuneration is to be achieved in award setting; enterprise agreements; and fixing minimum wages. The legislation provides that an award may be varied on ‘work value’ grounds but it is unclear whether this includes the admission of evidence of historic undervaluation of work value on the basis of gender. Further, there is no obligation on parties to bargain on pay equity in the bargaining framework and agreements may be certified that do not implement pay equity.²

1 See Department of Education, Employment and Workplace Relations, *Submission 58 and Supplementary Submission 58.4*.

2 See, for example, Luxembourg and France, where gender pay bargaining is obligatory and must be identified in the collective agreement; *Gender Mainstreaming of Employment Policies: A*

- 5.7 There is specific provision for Equal Remuneration Orders in Chapter 2 Part 2-7 of the Act allows Fair Work Australia to make equal remuneration orders to ensure equal remuneration for work of equal or comparable value. This provides Fair Work Australia with broad powers to make remedial orders where there is a successful application.
- 5.8 The Queensland Industrial Relations Commissioner commented that:
- Whilst it is clear that such an order may increase rates of remuneration, it is not clear exactly what the effect of the order will be. If the effect is to override minimum wages provided in a modern award and not adjust minimum wages per se, then there is possibly no concern. However, if the effect is to adjust minimum wages then the powers of Fair Work Australia in this respect need to be considered.³
- 5.9 If granted, remuneration orders have the effect of overriding any less beneficial term(s) of a modern award, enterprise agreement or other orders of Fair Work Australia. The new equal remuneration provisions also remove the need to prove 'discriminatory cause' required under the *Workplace Relations Act 1996* (Commonwealth). The ACTU referred to the potential in this power:
- It is not based, as the previous equal remuneration provisions were in the Workplace Relations Act, on the external affairs power. It is not based on giving effect to ILO conventions, so it is not grounded in the need to prove discrimination. It is based on the Commonwealth power to make laws in respect to corporations and so, potentially, the types of cases that could be run under that provision of the act would be broader than those we have been able to run in the past. So we think that that is an opening but, again, not a guarantee.⁴
- 5.10 Removing the need to prove discrimination has been welcomed but it remains the case that specific equal remuneration orders rely on an applicant(s) initiating proceedings and any equal remuneration order applies only to those applicants. In other words, an equal remuneration order does not amend the industrial instrument for all employees engaged under its terms.

comparative review of thirty European Countries, Director-general of Employment, Social Affairs and Equal Opportunities, European Commission 2008 pp. 50-55.

3 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 3.

4 Ms Catherine Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, *Transcript of Evidence*, 3 April 2009, p. 2.

- 5.11 Finally, some commentators have pointed out that the legislation is unclear on how the equal remuneration will be applied in each type of employment contract: collective agreements, award and over award payments and in minimum wage fixing. For example, it remains unclear whether 'comparable worth' may still require the identification of a male comparator group to demonstrate the existence of pay inequality or whether the equal remuneration requirements will enable work valuation and take account of historical gender bias:

... the comparator method in direct discrimination works well only in discrimination cases where men and women are performing the same or similar work in the same workplace. There have been many commentaries about whether this process can work in addressing systemic discrimination, and her Honour Judge Glynn, in the New South Wales pay equity inquiry, noted, 'Anti-discrimination legislation, by and large, does not sufficiently address systemic discrimination or undervaluation deriving from the operation of a broad range of factors including occupational segregation.' It is also problematic because the act itself does have provisions for representative complaints or groups of complaints, but it is quite difficult to bring a representative complaint.⁵

- 5.12 Dr Sara Charlesworth commented in relation to the then Fair Work Bill that:

... we have got a new pay equity provision, but it is in fact quarantined from the rest of the legislation. It is stuck in a protection part of the act, along with antidiscrimination provisions. There is no sense that the way in which work is organised or structured and skills classification are also absolutely critical to pay inequity.⁶

- 5.13 Other aspects of the *Fair Work Act 2009* that may adversely and disproportionately impact on women employees have also attracted comment.

Unfair dismissal

- 5.14 Negotiations on unfair dismissal provisions during passage of the Bill resulted in the application of those provisions to employers with 15 full time equivalent employees. The concentration of women in low paid

5 Commissioner Susan Booth, Anti-Discrimination Commission Queensland, *Transcript of Evidence*, 31 March 2009, p. 73.

6 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 24.

part time and casual employment in small business operations in, for example, the retail, catering and restaurants sectors, means a large number of women do not enjoy equal protection from unfair dismissal.

Pattern bargaining

- 5.15 The Independent Education Union of Australia raised the issue of pattern bargaining:

... one of the major issues with the new legislation will be the prohibition on what is called pattern bargaining. We believe this is going to cause problems that will flow on negatively and it is going to reduce the leverage of employees without strong bargaining power, and they are often women. That is a concern. In a general sense, the Fair Work Bill puts the emphasis onto collective bargaining. It is providing a safety net, but it is putting the emphasis onto collective bargaining. Sectors of the workforce that do not have strong bargaining power are going to suffer under this new system, and that is something that we are concerned about.⁷

- 5.16 In relation to pattern bargaining the Queensland Nurse's Union commented that:

... a number of areas where women work are reliant on a whole series of measures that are set by external players – essentially, they are funding bodies of government – in terms of not just the funds that are provided but also the outcomes they are expected to produce, how the work is done and areas such as that. In the pattern bargaining debate around the new legislation, the concept of productivity was often raised, but rarely was the idea of gender equity raised. In our submission, one of the best ways of addressing inequity for women workers, particularly for nurses, is to create mechanisms for them to be able to move and improve their wages and conditions collectively on a sector basis.⁸

- 5.17 The following sections address specific aspects of the current legislation that have been criticised for not providing adequate prominence to pay equity and suggested recommendations.

7 Miss Sophie Ismail, Industrial Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Transcript of Evidence*, 31 March 2009, p. 26.

8 Mr Steven Ross, Queensland Nurses Union, *Transcript of Evidence*, 31 March 2009, p. 51.

Reform to *Fair Work Act 2009*

- 5.18 Key amendments to the *Fair Work Act 2009* necessary to give explicit and effective recognition to the right to equal remuneration include:
- a) state pay equity as an explicit and key objective of the law (providing it with the same status as right to freedom of association and rule of non-discrimination)
 - b) upgrade pay equity from principle to be taken into account to explicit obligation in award making;
 - c) expand variation of awards on the ground of ‘work value’ to include historical under-valuation of work value on the basis of gender;
 - d) impose an obligation on social partners to negotiate on equal remuneration in collective bargaining (single or multi-employer agreements)
 - e) require that enterprise (single or multiple) agreements implement equal remuneration and not provide certification unless Fair Work Australia is satisfied the agreement implements pay equity;
 - f) upgrade equal remuneration from principle to be taken into account in minimum wage fixing in annual wage review and national wage orders to explicit obligation;
 - g) extend the statutory research functions of Fair Work Australia to include three yearly reviews of pay equity in relation to industry and occupation based analyses for use in Fair Work Australia proceedings;
 - h) in addition to the legislative amendments and for clarity by promulgation by President stating an equal remuneration principle and setting out how is to be applied (e.g. work evaluation, comparisons across industries including similar and dissimilar work) in all contexts – awards, enterprise agreements, minimum wage fixing.
- 5.19 The rationale behind amending the legislation in this way is that the majority of women work in low paid, part time or casual work in sectors with low levels of unionisation and are reliant on minimum wage and award safety nets. Consequently, institutionalising pay equity effectively into federal industrial instruments is essential to achieving pay equity.

Coverage limited to ‘National System Employees’

- 5.20 While the *Fair Work Act 2009* maintains the expanded federal system established by WorkChoices⁹ it is not a complete national system and

9 In the 1990s greater reliance on the corporations power extended the reach of federal industrial relations laws and in 2006 the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1 upheld the Howard Government’s *Workplace Relations Act 1996* (the Work Choices

industrial relations law remains a mix of federal and state regimes. Territories are subordinate to the Commonwealth Constitution and federal law may be applied.¹⁰ The *Fair Work Act 2009* covers 85 per cent of employees but not all.¹¹

- 5.21 Although the right to equal remuneration is enshrined in international labour and fundamental human rights treaties specific equal remuneration orders available under the *Fair Work Act 2009* are only available to ‘national system employees’. The law expressly excludes state and territory courts and tribunals with powers to make an equal remuneration order, from doing so for employees covered by the *Fair Work Act 2009* (para. 26(2) (d)).¹² The recognition and implementation of the right to equal remuneration therefore remains unequal across the country, itself raising an inequality before the law and equal protection of the law issue under Australia’s international human rights and labour law obligations.
- 5.22 Under the corporations power an ‘employer can only be covered by the federal system if it is a “constitutional corporation” i.e. a trading, financial or foreign corporation’. While ‘there can be no doubt about a proprietary limited company that trades for profit, there is considerable doubt about the status of not-for-profit incorporated organisations and of municipal, charitable and educational corporations’.¹³ This is significant from a pay equity point of view as not-for profit, municipal, charitable and education sector organisations employ large numbers of women often on low and part-time wages and for whom pay equity protection varies depending on state regime.

The position at state level?

- 5.23 At the state level pay equity principles tend to be implemented via the mainstream industrial instruments such as awards and wage fixing. Queensland is the only state with specific equal remuneration orders. However, the development of Equal Remuneration Principles (ERP),

Case). O’Neil S, Goodwin M, Neilsen, M, *Fair Work Bill 2008*, Bills Digest, 30 January 2009, No.81 (2008-2009).

10 s.122 Australian Constitution.

11 O’Neil S, Goodwin M, Neilsen, M, *Fair Work Bill 2008*, Bills Digest, 30 January 09, No.81 (2008-2009), p. 19.

12 This continues the position under *Workplaces Relations Act 1996* (s.16 (1) (c)).

13 See, e.g., Federal Court in *AWU (Qld) V Etheridge Shire Council* [2008] FCA 1268 found that a Queensland council is not and cannot be a constitutional corporation; the NSW Industrial Court in *Hardeman v Children’s Medical Research Institute* [2007] NSWIRComm 189 (24 September 2007) ruled that that a non-profit organisation, the Children’s Medical Research Institute, is not a trading or financial corporation. O’Neil S, Goodwin M, Neilsen, M, *Fair Work Bill 2008*, Bills Digest, 30 January 09, No.81, pp. 16-18.

which requires neither proof of gender discrimination nor comparisons within and between occupations and industries, is said to have enabled Industrial Relations Commissions in NSW and Queensland to assess the undervaluation of work on a gender basis and provides valuable experience for federal policy makers.¹⁴ In particular, the Queensland *Industrial Relations Act 1999* is regarded as providing a stronger integration of pay equity principles into the mainstream of industrial relations law, and, where relevant, reference to the Queensland Act is included in the following discussion.

The key elements of the Queensland principle are that the evidence test is one relating to undervaluation, with no compulsory or threshold requirement that this evidence be based on establishing discrimination or that it rely on the use of a comparator. In this way, it overcomes the problem of addressing possible cases of systemic undervaluation in a segregated labour market.¹⁵

- 5.24 The move to a more 'unified' national system is considered by some commentators to be a retrograde step because most advances in pay equity in Australia have been achieved through state tribunal based wage determinations systems. In Queensland, New South Wales and Tasmania the state tribunals have adopted equal remuneration wage fixing principles applied across industries rather than relying on the anti-discrimination jurisdiction with remedies limited to the particular applicants. The states have conducted pay equity inquiries which has resulted in more modern principles being applied in those jurisdictions.
- 5.25 As noted above, Queensland also has specific provision for Equal Remuneration Orders under the Queensland *Industrial Relations Act 1999*. Consequently, the expansion of the federal industrial system has resulted in many low paid women workers being removed from state based pay equity protections and lost some of the improvements awarded to them.¹⁶ Dental assistants and child care workers are examples where conditions were lost.
- 5.26 Further, the NSW Office for Women commented that:

14 Whitehouse G and T Rooney, 2007, 'The Queensland Dental Assistants' Equal Remuneration Case: Advancing Gender Pay Equity at State Level?', *Labour and Industry* 18 (2): 85-104.

15 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 11.

16 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 3.

... 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.¹⁷

- 5.27 The following paragraphs compare definitions of 'remuneration' and the development of equal remuneration principles across Australian jurisdictions.

The concept of equal remuneration

- 5.28 Under the *Fair Work Act* equal remuneration for work of equal or comparable value 'means equal remuneration for men and women workers for work of equal or comparable value'.¹⁸ The extension of the concept of equal remuneration to cover work of 'comparable value' allows both for work that is the same, and work that is dissimilar but comparable, to be evaluated for pay equity purposes.

- 5.29 The Explanatory Memoranda confirms that:

The principle of equal treatment for men and women workers for work of equal or comparable value requires there to be (at minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of Part 2-7. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.¹⁹

- 5.30 Department of Education, Employment and Workplace Relations further explained the intent of expanding the concept of equal remuneration to encompass 'comparable value':

The concept of comparable value was originally developed to address equal pay concerns in occupations and industries that are dominated by one gender. The amendment will *in part* [emphasis added] address the issue of undervaluation of the work traditionally performed by women.

17 New South Wales Office for Women's Policy, *Submission No. 153*, p. 6.

18 S.12 and ss302(2) of the *Fair Work Act 2009*.

19 Explanatory Memorandum, *Fair Work Act 2009*, p. 189, paragraph 1191.

In a claim for equal remuneration, comparable worth is a method for comparing females' jobs with dissimilar (and generally male) jobs using job and skill evaluation techniques. For example, in the successful NSW Librarians case in 2000, comparable value was established by comparing the skills, educational requirements and level of responsibility in various positions in several professions including librarians and geo-scientists or geologists that demonstrated the existence of gender based valuations.²⁰

The inclusion of comparable value also supports the concept of a national system through consistency with state equal remuneration principles in legislation and state industrial tribunal wage fixing principles.²¹

- 5.31 The definition of equal remuneration in the *Fair Work Act 2009* appears to be consistent with the definition of equal remuneration in the Equal Remuneration Convention (ILO 100):²²

Remuneration means the ordinary basic or minimum wage or salary and any additional emoluments whatever payable directly or indirectly, whether in cash or kind, by the employer to the worker and arising out of the worker's employment ... the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.²³

- 5.32 The use of comparator groups previously has been controversial and a question remains as to how the principle of equal remuneration will be applied in the federal jurisdiction.
- 5.33 In the New South Wales Pay Equity Inquiry there was significant debate on this point.²⁴ The key finding of the Inquiry was that the reference to comparable in the legislation did not imply a requirement for comparators. Indeed proceedings in the tribunals in New South Wales and Queensland have demonstrated that the requirement for

20 Decision [2002] NSWIR Comm 55-28 March 2002, Application under Equal Remuneration Principle.

21 Department of Education, Employment and Workplace Relations, *Supplementary Submission* 58.2, p. 13.

22 Articles 1,2, and 3 ILO 100.

23 International Labour Organisation Equal Remuneration Convention, 1951, Article 1.

24 Industrial Relations Commission of New South Wales (1998a) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(l)(d) of the Industrial Relations Act 1996, Report to the Minister, Volume I; Industrial Relations Commission of New South Wales (1998b) Pay Equity Inquiry Reference by the Minister for Industrial Relations pursuant to section 146(l)(d) of the *Industrial Relations Act 1996*, Report to the Minister, Volume II.

comparators can have a deleterious impact on applications. A broad range of comparators may be useful reference points for tribunals but they should not form a litmus test.

Recommendation 1

That for the removal of any doubt, the definition of equal remuneration for work of equal or comparable value in the *Fair Work Act 2009* be supplemented with a signpost note confirming that the concept of equal remuneration includes the valuation of dissimilar work of equal or comparable value.

Application of the equal remuneration principle

5.34 The wider concept of equal remuneration in the *Fair Work Act* opens the way for work valuation in the federal arena but, in its current form, the legislation is unclear on whether the historical undervaluation of work on gender grounds will be integral to the valuation process.²⁵ The legislation is silent on how the equal remuneration is to be applied in the various contexts of awards, over award payments, enterprise agreements, and minimum wage setting. The Explanatory Memorandum states that:

Clause 306 deals with the relationship between an equal remuneration order and modern awards, enterprise agreements and other orders of FWA. Under the provision, a term of one of these instruments has no effect to the extent that it is inconsistent with a term of an equal remuneration order.²⁶

5.35 The National Pay Equity Coalition advocated that new industrial relations law should provide both the concepts and the means for valuing work and that the provisions and principles established in Queensland and NSW should be used as models.²⁷

... the recent Decision of the Queensland Industrial Relations Commission relating to the Queensland Community Services and Crisis Assistance State Award finding that a range of factors

25 Note also that the Explanatory Memorandum states that this definition applies 'for the purpose Part 2-7' (ie the Equal Remuneration Orders jurisdiction) but the same phrasing is used throughout the legislation.

26 *Explanatory Memorandum, Fair Work Act 2009*, p. 190.

27 National Pay Equity Coalition, *Submission 118*, p. 4.

contributed to the undervaluation of work in the sector and a pattern emerges that gender is at the core of present work value of the community sector and the 'work has been undervalued on a gender basis'. The workers are to receive increases that range from 18% to 37%.

This Decision is a timely and contemporary example of how the formal industrial relations system can provide an immediate, expansive and progressive means of addressing problems of pay equity.²⁸

- 5.36 The value of work may be assessed by a number of methods. Historically industrial tribunals have relied on various means including but certainly not limited to job evaluation. Moreover job evaluation can imply binary forms of job comparison, a methodology that is at odds with the construct of undervaluation that should ideally inform the approach to remedying gender pay inequity. In addition research suggests that unless specific measures have been undertaken, job evaluation can obscure effective valuation of the work given that the benchmark criteria are constructed around masculinist standards.
- 5.37 The requirements of the Queensland equal remuneration principle are simply that the Commission is to assess the value of work, and is therefore 'required to examine the nature of work, skill and responsibility required and the conditions under work is performed as well as other relevant work features'. The assessment is to be 'transparent, objective, non-discriminatory and free of assumptions based on gender'.²⁹
- 5.38 The National Pay Equity Coalition and the Women's Electoral Lobby stated that the shift in these states from discrimination and 'comparable worth' to the historical under-valuation of women's work had been a major breakthrough:
- The test of undervaluation did not revert to a male standard in order that applications be successfully prosecuted. Applicants could use a range of comparisons, including other areas of feminised work.³⁰

28 The National Pay Equity Coalition and the Women's Electoral Lobby Australia Inc, *Supplementary Submission No. 118.1*, p. 3.

29 *The Queensland Council of Unions and Queensland Chamber of Commerce Industry Limited, Industrial Organisation of Employers and Others* (Queensland Industrial Relations Commission, Linnane VP, Swan C, Brown C, 29 April 2002, Statement of Policy B450 of 2002) (paras 2, 3).

30 National Pay Equity Coalition, *Submission 118*, p. 13.

New South Wales ERP and Principle 14

- 5.39 Following the NSW Pay Equity Inquiry the NSW Industrial Relations Commission declared the NSW Equal Remuneration Principle (C2000-52) and its application to awards under s.23 of the *Industrial Relations Act 1996* (NSW).³¹ The NSW ERP makes it clear that claims may be made for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis. The assessment of the work, skill and responsibility is to be approached on a gender neutral basis and have regard to the history of the award concerned.³²
- 5.40 A Practice Direction establishes the basic procedure to be followed by applicants.³³ NSW Office of Women's Policy stated:
- 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.³⁴
- 5.41 Undervaluation as a construct has proven capable of addressing the consequences of sex-based stereotyping, an important capability given that stereotyping is a major reason for the undervaluation of jobs and tasks performed primarily by women or those perceived as intrinsically 'feminine' in nature. The methods adopted should not undervalue skills normally required for jobs that are in practice performed by women, such as care-giving, manual dexterity and human relations skills, and nor should they overvalue those skills typically associated with jobs traditionally performed by men, such as physical strength and use of machines, plant and equipment:

31 S.19,21,23 of the *Industrial Relations Act 1996* (NSW).

32 New South Wales Equal Remuneration Principle (C2000 -52) (a)(b)(e); Re Equal Remuneration Principle [2000] NSWIR Comm 113; National Pay Equity Coalition *Submission 118*, Appendix 1, p. 43.

33 IRC NSW Practice Direction No.6: Applications for Consent Awards having regard to s.23 of the *Industrial Relations Act 1996* (NSW).

34 New South Wales Office of Women's Policy; *Submission No. 153*, p. 5.

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. We consider similar provisions should be contained in any Commonwealth principle.³⁵

- 5.42 The equal remuneration principle has been used to achieve 'adjustments in wage rates, conditions and classification structures for librarians and archivists, and for child care workers in NSW'.³⁶ Equal remuneration is established as a wage fixing principle by the 2008 State Wages Case.³⁷

Queensland Equal Remuneration Principle

- 5.43 In 2001, the Queensland Industrial Relations Commission (QIRC) conducted the Inquiry into Pay Equity in Queensland and recommended legislative reform and a new equal remuneration principle.³⁸ The Queensland *Industrial Relations Act 1999* was amended requiring the QIRC to ensure that all awards and agreements provide for equal remuneration.
- 5.44 In April 2002 the QIRC declared the Equal Remuneration Principle in a Statement of Policy under s.288 of the *Industrial Relations Act 1999* (Qld).³⁹ In 2007, the QIRC conducted a further review assessing the impact of WorkChoices and the effectiveness of pay equity measures

35 New South Wales Office of Women's Policy; *Submission No. 153*, p. 6 citing Industrial Relations Commission of New South Wales Re Equal Remuneration Principle 15(f), (i), (j), (m) at para 158.

36 New South Wales Office of Women's Policy; *Submission No. 153*, p. 3.

37 See Principles 14 and 6, Annex A Wage Fixing Principles, *State Wage Case 2008* [2008] NSWIRComm 122 87.

38 *Worth Valuing – Report of the Pay Equity Inquiry*, Queensland Industrial Relations Commission, March 2001, < <http://www.deir.qld.gov.au/pdf/ir/worthvaluinga.pdf>>.

39 The Statement of Policy was issued under s.288 Industrial Relations Act 1999 on application during proceedings *The Queensland Council of Unions and Others and Queensland Chamber of Commerce and Industry Ltd, Industrial Organisation of Employers and Others* (No.B450 of 2002).

introduced by earlier reforms. The Inquiry found that the ERP had been particularly effective.⁴⁰

5.45 The Queensland ERP applies when the Commission:

- makes, amends or reviews awards;
- makes orders under Part 5 of the *Industrial Relations Act 1999*;
- arbitrates industrial disputes about equal remuneration; and
- values or assesses the work of employees in 'female' industries, occupations or callings.

5.46 The Equal Remuneration Principle sets out the approach to be taken by the Commission when assessing the value of work:

The second category of recommendation dealt with the formulation of a pay equity principle, the purpose of which was to guide industrial parties when presenting cases for equal remuneration in the commission. The focus of the principle is to address undervaluation of work in predominantly female occupations. It allows the work of such occupations to be unpacked, that is to allow work to be evaluated in a gender-neutral way, and for all aspects of the work performed to be examined and evaluated. It does not require male comparators or discrimination to be found in order to find undervaluation of work.⁴¹

5.47 Assessment includes a requirement to examine the nature of work, skills and responsibility required and the conditions under which work is performed. 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.⁴²

5.48 Under the principle, predominantly female occupations can be reconsidered in terms of 'work which has been previously overlooked

40 Queensland Industrial Relations Commission, September 2007, *Pay Equity Time to Act*, pp. 39-43.

41 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, pp. 1-2.

42 New South Wales Office of Women's Policy; *Submission No. 153*, p. 4.

or devalued because they have been classed as inherently female aptitudes'.⁴³

The principle specifically allows the concept of what we refer to as soft skills, that is the types of skills usually exercised in predominantly female occupations, to be considered and appropriately valued. The examination of work is conducted by focusing on typically work value considerations, that is the nature of the work, skill, responsibility and the conditions under which work is performed. Importantly, it allows another element, that is other relevant work features, to be considered.⁴⁴

- 5.49 The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender. The purpose is to ascertain the current value of work and prior work assessments or the application of wage principles cannot be assumed to be free of assumptions based on gender. Gender discrimination is not required to be shown to establish undervaluation of work. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis but may be used for guidance to ascertain appropriate remuneration. The proper basis for comparison is not restricted to similar work.
- 5.50 In assessing the value of the work, the Commission is to have regard to the history of the award including whether any assessment and remuneration has been affected by gender of the workers. Some of the factors to be considered include:
- whether there has been some characterisation or labelling of the work as 'female';
 - whether there has been some underrating or under-valuation of the skills of female employees;
 - the degree of occupational segregation, disproportionate representation of women in part-time and casual work, low rates of unionisation, incidence of consent awards and other considerations of that type; and
 - whether sufficient and adequate weight has been placed on the typical work performance and the skills and responsibilities exercised by

43 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 2.

44 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 2.

women as well as the conditions under which the work is performed and other relevant work features.

5.51 The Commission is constrained in that it is has:

... public interest requirements of the Industrial Relations Act. These provisions require the commission to balance the interests of providing comparable pay and condition to women workers based on their skills, duties and responsibilities, with the public interest of not making their services unaffordable. The classic example, again, is child care. If wages are substantially increased then fees are correspondingly increased and working families cannot afford them. This then leads to children being taken out of care, with the result that women have to withdraw from the workforce.⁴⁵

5.52 The Commission may not achieve pay equity by reducing wages and decide to phase in the decision in light of the particular circumstances.⁴⁶

There have been to date three cases conducted under this principle. In the two that have been determined so far, the dental assistants case and the child care workers case, the additional element of other relevant work features has allowed consideration of such work features as unpaid overtime or the requirement to undertake training or to attend meetings in the employee's time at their expense to be considered as part of the overall conditions under which employees work and for the value of the work to take those matters into account.⁴⁷

Fair Work Act 2009

5.53 There are a number of questions that arise in relation to possible amendments to the *Fair Work Act*.

- How should the principle of equal remuneration be applied in the various contexts of modern awards, enterprise agreements and minimum wage fixing?
- Should the *Fair Work Act* set out in the legislation the way that the equal remuneration principle is to be applied?

45 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 2.

46 QIRC State of Policy under s.288 of the IR Act 1999, Equal Remuneration Principle, 29 April 2002.

47 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 2.

- Alternatively, should the *Fair Work Act* require that the President issue a direction on how the equal remuneration principle is to be applied within a set time from commencement of the legislation?

The meaning of 'Remuneration'

Article 1 ILO 100

5.54 Article 1 of ILO 100 Equal Remuneration Convention provides that:

(a) The term 'remuneration' includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.⁴⁸

5.55 The ordinary meaning of emolument is a 'profit arising from office or employment; compensation for services; salary or fees'.⁴⁹

Article 11 CEDAW

5.56 Article 11.1 of CEDAW states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work. The *Equality at Work: Tackling the Challenges* report notes that:

... 'equal pay for work of equal value is one of the least understood concepts in the field of action against discrimination. It is often given narrow interpretation in laws and regulations'. If this concept is one of the least understood, then at the very minimum, legislation must be in place to underpin the empowerment of agencies to deliver.⁵⁰

48 ILO Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value [1975] ATS 45.

49 Macquarie Dictionary Online Word Genius.

50 Ms Jo Justo, National Industrial Officer, Australian Services Union, *Transcript of Evidence*, 31 March 2009, p. 65.

Fair Work Act 2009

- 5.57 The meaning of remuneration under the *Fair Work Act* is limited to monetary entitlements. The Explanatory Memoranda states that:

The term remuneration encompasses entitlements in addition to wages (ie, it encompasses wages and other monetary entitlements).⁵¹

- 5.58 Ms Richards, Queensland Council of Unions, stated that expressing the pay equity principle as 'equal remuneration for work of equal or comparable value', rather than 'pay' was important:

As was noted in the 2001 Queensland pay equity inquiry, this definition is important because the inclusion of remuneration, rather than pay, clearly demonstrates that the law is not solely concerned with the wage or salary, but other payments made under contract of employment. ... This means the inclusion of wage or salary payable to an employee and any amount payable or benefit made available to an employee under a contract of service.⁵²

- 5.59 National Pay Equity Coalition (NPEC) recommended that remuneration should be defined to include all elements of work related rewards including allowances, superannuation, work-related benefits and bonuses, and performance payments.⁵³ NPEC argued that:

Case law on equal remuneration demonstrates strongly that the greater the clarity about the meaning of relevant terms, the more effective the legislation.⁵⁴

- 5.60 The definition of 'remuneration' under the *Fair Work Act* covers monetary entitlements and may not be sufficiently broad to encompass the intended scope of ILO 100 Article 1 and Article 11.1(d) of the CEDAW. Accordingly the Committee recommends:

51 Explanatory Memoranda, *Fair Work Bill*, House of Representatives, p. 189.

52 Ms Amanda Richards, Assistant General Secretary, Queensland Council of Unions, *Transcript of Evidence*, 31 March 2009, p. 13.

53 National Pay Equity Coalition, *Submission 118*, p. 5.

54 National Pay Equity Coalition, *Submission 118*, p. 29.

Recommendation 2

That the *Fair Work Act 2009* be amended to broaden the definition of remuneration to include direct or indirect payments, whether in cash or in kind.

Pay equity and the objects of the *Fair Work Act*

- 5.61 Section 3 sets out the broad policy objectives of the *Fair Work Act 2009*, which is to provide a fair and cooperative system of workplace relations based on ‘good faith’ collective bargaining (enterprise level) and underpinned by a safety net of National Employment Standards, modern awards and national minimum wage orders. The legislation recognises the right to representation and free association and to be free from discrimination in the workplace.
- 5.62 Pre-ambular paragraphs and sections set out legislative objectives as they act as a guide to the interpretation of the substantive provisions of the law. They promote a ‘purposive’ methodology, explaining Parliament’s intention and help to guard against strict legalism, which may introduce unintended interpretations that undermine the laws ability to achieve the intended policy outcome.
- 5.63 The elements of the s. 3 objects that pertain particularly to pay equity include:
- the promotion of social inclusion;
 - a requirement to take into account Australia’s international obligations;
 - a requirement that employees be assisted in achieving balance between their work and family responsibilities by providing for flexible working arrangements; and
 - protection against discrimination.
- 5.64 The principle of pay equity is recognised indirectly as an objective of the Act through the expressed intention to take international labour obligations into account in order to achieve the overall goals of the Act. The individual and collective right to equal remuneration for work of equal or comparable value and the positive obligation to eliminate systemic inequality in the workplace are enshrined in various ILO and UN treaties to which Australia is a party.
- 5.65 The right to be free from discrimination also encompasses the right to be free from direct or indirect discrimination on the grounds of certain attributes (including sex/gender). However, based on past experience,

as a rule, non-discrimination has not been effective in eliminating systemic gender bias within the industrial relations system.

- 5.66 An omission in the current legislation is the need for more specific guidance as to the types of assessments available to Fair Work Australia, and the intersection of contemporary assessments with past assessments of work value. In the state industrial jurisdictions this guidance is articulated by way of equal remuneration principles founded on the construct of undervaluation.
- 5.67 Fair Work Australia could develop its own principle with possible reference to the terms of the principles in New South Wales and Queensland which have enabled consideration of a wide range of evidence concerning the valuation of feminised work. The understandings concerning gender pay equity developed in state jurisdictions, and articulated by way of equal remuneration wage-fixation principles founded on the construct of undervaluation, have proven capable of addressing gender pay equity in a diversity of cases. The recent decision by the Queensland Industrial Relations Commission in the community services sector noted the heterogeneity of the equal remuneration applications made to the QIRC including the different parts of the equal remuneration principle that they invoked.⁵⁵

Objectives of Queensland Industrial Relations Act

- 5.68 In contrast to the *Fair Work Act*, pay equity is given explicit recognition as a principal object of the Queensland *Industrial Relations Act 1999*, which provides in s.3 (d) that:

The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by:

- (c) preventing and eliminating discrimination in employment; and
- (d) **ensuring equal remuneration for men and women employees for work of equal or comparable value;** and
- (e) helping balance work and family life ...

- 5.69 The Queensland legislation signals that social justice and economic prosperity are mutually reinforcing rather than in inherent conflict and achieving pay equity is given explicit recognition as an integral element

55 Re Queensland Community Services and Crisis Assistance Award (Queensland Industrial Relations Commission, Commissioner Glenys Fisher C 6 May 2009).

of that overall goal. The object gives unequivocal legislative direction that the industrial relations system is intended to guarantee pay equity.

5.70 The application of an ERP is most useful in dealing with discreet occupational groups 'where award histories can be readily analysed for gender bias and where common duties, skills, responsibilities and other relevant work features can be readily identified and assessed in a gender neutral manner'.⁵⁶

5.71 The Queensland Government stated that the application and effectiveness of the Queensland ERP provisions is limited by their partial coverage of an occupation group:

Clearly the State law survives in its entirety for employees remaining in the Queensland jurisdiction. The difficulty, however, is that any union which seeks to pursue an equal remuneration case under the IRA and ERP for a particular occupational group is likely to find that the industrial regulation for that group is either spread across both the federal and state systems or wholly in the federal jurisdiction. The impact of having the occupational group spread across jurisdictions raises questions about the efficacy of the pursuit of such cases in the future and the effectiveness of any outcomes. It is also possible that an employer faced with an equal remuneration case may seek to incorporate their business in order to avoid the case and/or its outcomes.⁵⁷

5.72 Compatibility between the federal and state jurisdictions will assist in overcoming this concern and facilitate the effective and efficient consideration of future equal remuneration cases.

Recommendation 3

That the section 3 of the *Fair Work Act 2009* be amended to state that equal remuneration for men and women employees for work of equal or comparable value is an explicit object of the Act.

5.73 Notwithstanding the legislative amendments will achieve the necessary goal of an equal remuneration principle, for clarity, there should be by promulgation by the President of an equal remuneration principle and

⁵⁶ Queensland Government, *Submission No. 135*, p. 17.

⁵⁷ Queensland Government, *Submission No. 135*, p. 16.

setting out how is to be applied (e.g. work evaluation, comparisons across industries including similar and dissimilar work) in all contexts – awards, enterprise agreements, minimum wage fixing. (This could be based on the Queensland Equal Remuneration Principle model.) Clarification of this matter will be of assistance to employers and employees who are aware of the New South Wales and Queensland Equal Remuneration Principle and are seeking the comparable information in the federal jurisdiction.

Recommendation 4

That the President of Fair Work Australia, by promulgation, enunciate an equal remuneration principle and set out how this principle is to be applied (e.g. work evaluation, comparisons across industries including similar and dissimilar work) in all contexts.

Equal remuneration provisions

- 5.74 Specific provision for Equal Remuneration Orders was first introduced into the *Industrial Relations Act 1988* (Commonwealth), substantially reproduced in the *Workplace Relations Act 1996* (Commonwealth) and subsequently amended by the *Work Choices Act 2005*. Several witnesses argued that key aspects of the *Workplace Relations Act 1996* reduced the capacity of the federal industrial relations system deliver pay equity. Some of the key concerns with the previous legislation were:
- the removal of minimum wages from awards and move away from collective bargaining toward workplace and individual agreements;
 - the requirement of applicants to meet the threshold test of demonstrating that disparities in earnings had a discriminatory cause; and
 - the requirement to identify a ‘comparator group’.⁵⁸
- 5.75 The requirement that the applicant demonstrate a ‘discriminatory cause’ was said to overlook the fact that pay inequality often results from historic biases and the undervaluation of female dominated work rather than sex based discrimination.⁵⁹ The requirement to identify a ‘comparator group’ also suggested that gender pay inequity can only be proved by comparing a female dominated job with a male dominated

58 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129.

59 Australian Human Rights Commission, *Submission 108*, pp. 18-19.

job – an approach that fails to appreciate the historic undervaluation of work performed in female dominated occupations and industries.⁶⁰

These features were criticised as being out of step with the evolution in thinking about equal remuneration principles based on construction of undervaluation rather than direct sex discrimination.⁶¹

5.76 DEEWR stated that:

... there have been no applications for equal remuneration orders considered by the commission since the introduction of the Work Choices Act, and only 16 previously. There were no orders made but two significant cases were widely reported. They are the *Age* case and the HPM case....⁶²

5.77 The Australian Human Rights Commission reiterated that the AIRC has not issued a single equal remuneration order and only one claim has proceeded (unsuccessfully) to arbitration.⁶³ The Sex Discrimination Commissioner intervened in the HPM Case but has never made an application under the *Workplace Relations Act* (or the previous *Industrial Relations Act 1988*).⁶⁴

5.78 The provision for Equal Remuneration Orders has been retained in the *Fair Work Act* with some notable changes. DEEWR summarised the federal reforms:

- powers for Fair Work Australia to make equal remuneration orders;
- broadening of the equal remuneration concept to include work of equal or comparable value;
- removal of current obstacles and restrictions relating to equal remuneration applications;
- limit on application of equal remuneration orders to national system employees;
- simpler and more effective compliance measures; and
- inclusion of equal remuneration as a guiding principle for Fair Work Australia in conducting its modern award and minimum wage fixing functions.⁶⁵

60 Australian Human Rights Commission, *Submission 108*, p. 19.

61 Australian Human Rights Commission, *Submission 108*, p. 19.

62 Ms Sandra parker, Group Manager, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations, *Transcript of Evidence*, 18 September 2008, p. 2.

63 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129

64 Australian Human Rights Commission, *Submission 108*, p. 19.

65 Department of Education, Employment and Workplace Relations, *Supplementary Submission 58.2*, pp. 11-12.

- 5.79 In addition to extending the concept of equal remuneration the *Fair Work Act 2009* also removes the requirement to prove a 'discriminatory cause'. The Explanatory Memorandum (EM) states that '...an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value'.⁶⁶ The EM indicates that the extension of the concept of equal remuneration is intended to ensure that job and skill evaluation techniques are applied, rather than the more limited approach of sex discrimination, opening the federal jurisdiction to gender neutral job evaluation principles. The changes are intended to make Equal Remuneration Orders more accessible and effective.
- 5.80 Part 2-7 applies to 'national system employees' and relies on the corporations power,⁶⁷ it does not purport to give effect to Australia's international pay equity obligations under ILO or other UN treaties. However, these international labour obligations must be taken into account when Fair Work Australia performs a function or exercises its powers under the *Fair Work Act*.
- 5.81 Fair Work Australia is established as an independent statutory agency. Accordingly, the President is not subject to direction by or on behalf of the Commonwealth.⁶⁸ Under s. 582(1) the President may issue a written direction as to the manner in which Fair Work Australia performs its functions. This could provide a mechanism to provide additional direction on these matters.

66 Explanatory Memoranda, *Fair Work Bill*, House of Representatives, p. 189.

67 The definitions of national system employee and national system employer in these clauses operate together to provide the constitutional support for most parts of the Bill. These parts rely on the Parliament's power to legislate with respect to foreign corporations and trading or financial corporations (paragraph 51(xx) of the Constitution), the territories (section 122 of the Constitution), interstate and overseas trade and commerce (paragraph 51(i) of the Constitution) and the Commonwealth's power to regulate its own employment relationships (incidentally to other legislative powers). The links to these heads of power are established by defining national system employer as the following, in their capacities as employers of individuals: a constitutional corporation; the Commonwealth or a Commonwealth authority; a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce; a body corporate incorporated in a Territory; or a person who carries on an activity in a Territory and employs a person in connection with the activity. The definition of national system employer includes a constitutional corporation that usually employs an individual and national system employee includes an individual usually employed by a national system employer.

68 S. 583 of the *Fair Work Act 2009*.

Interaction of Fair Work Equal Remuneration Jurisdiction & State and Commonwealth Anti-Discrimination Law

- 5.82 The Fair Work Authority has no jurisdiction to deal with an application for an Equal Remuneration Order under s.302, where an alternative adequate remedy is available to the employee that would ensure equal remuneration for work of equal or comparable value (s. 721). The meaning of 'adequate remedy' is open to interpretation. However, the Act and the Explanatory Memorandum clarify that (at minimum) the existence under anti-discrimination law of a remedy that consists solely of compensation for past actions is not an adequate remedy for this purpose (ss 721(2)). Section 721 works in conjunction with s 27, which preserves the operation of State and Territory anti-discrimination laws, potentially giving priority to anti discrimination jurisdictions to deal with equal remuneration cases (provided comparable remedy is available).
- 5.83 Similarly, Commonwealth anti-discrimination law potentially has priority, provided it is capable to providing an adequate remedy to the employees. An applicant will have to consider the scope of available remedies under anti-discrimination law (or other laws promoting equal opportunity) before making an application for a Commonwealth Equal Remuneration Order.⁶⁹ If alternative Commonwealth, State or Territory law provides for wider remedies the Fair Work Authority will have to assess as an *a priori* jurisdictional question whether the available alternative remedies are adequate within the meaning of the *Fair Work Act 2009*.

Application for remuneration orders

- 5.84 Resourcing to pursue remuneration orders may be substantial. Historically, the case has been that a lack of resource has significantly impeded the progress. Accordingly, a fund should be set aside under the jurisdiction of the Attorney General and bodies such as the Australian Human Rights Commission could make application for funding to enable the pursuit of cases in relation to remuneration orders. This would not be a form of recurrent funding but a one off allocation on application considered on a case by case basis with regard to particular circumstances.
- 5.85 Access to the available funds should be at the discretion of the Attorney General who could consider advice from an advisory panel comprising

⁶⁹ An applicant, having invoked an alternative jurisdiction, may subsequently apply for such an Order if the alternative application failed for want of jurisdiction (lacks power to meet the object of the claim) (ss 724(4)).

unions, employers and the Pay Equity Unit proposed to be incorporated in Fair Work Australia (See Chapter 7).

Recommendation 5

That the Government establish a discretionary fund to be administered by the Attorney General for the provision of funding on application for the pursuit of cases in relation to remuneration orders.

Classification and remuneration benchmarks

- 5.86 The Queensland Industrial Relations Commission recommended an investigation of the 'feasibility of advisory classification and remuneration benchmarks to provide advice to employees and employers'.⁷⁰ The Brisbane City Council supported the recommendation and pointed out that 'this would be particularly helpful to overcome equity and parity issues for occupations with low wages and poor job security'.⁷¹

Recommendation 6

That Fair Work Australia investigates the feasibility of advisory classification and remuneration benchmarks to provide advice to employees and employers.

Pay equity and modern awards

- 5.87 The Women's Electoral Lobby referred to the organisations that in the past have been able to improve pay equity by using the industrial relations system:⁷²

If we look at the Australian outcomes compared to systems which are less centralised, decentralised, or to some extent collective bargaining systems, the Australian system has proved to be quite effectual. In more centralised systems, outcomes have been better, and the level at which bargaining takes place has been an

70 Queensland Industrial Relations Commission, *Pay Equity Time to Act*, September 2007, p. 10.

71 Brisbane City Council, *Submission No. 23*, p. 4.

72 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women's Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 2.

important determinant in pay equity outcomes. So in the past we have used the industrial system to provide a better outcome ... Again, that is why we emphasise the use of the formal industrial system and the importance of the award system.⁷³

Variation of Awards for work value reasons

5.88 Fair Work Australia must review modern awards every four years and, during a review, may make new awards, or vary or revoke existing awards (s. 156). During these reviews, Fair Work Australia may vary minimum wages in awards only if this is justified for work value reasons (s. 156 (3)). Under s. 156 (4) ... 'work value reasons' are defined as:

...reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
and
- (c) the conditions under which the work is done.

5.89 Historically, an assessment of 'work value' has not included valuation of comparable worth.⁷⁴

5.90 The fact that there has been no successful application to have federal equal remuneration provisions remedy gender based undervaluation of work shows the need for specific measures, including measures explicitly directed at equal remuneration. The obligation to achieve equal remuneration for work of equal or comparable value should result in approaches at least equivalent to the states.

5.91 It has been argued that such an amendment would ensure consistency of conditions for a modern award variation with the equal remuneration principles of the modern awards objective and the minimum wages objective.⁷⁵ The Queensland principle notes that relevant matters should include:

73 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women's Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 2.

74 National Pay Equity Coalition, *Submission 118*, p. 12.

75 National Pay Equity Coalition <https://senate.aph.gov.au/submissions/committees/> -

Whether there has been some characterisation or labelling of the work as female;

Whether there has been some underrating or undervaluation of the skills of female employees;

Whether remuneration in an industry or occupation has been undervalued as a result of occupational; segregation or segmentation;

Whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part-time and casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements and other considerations of type; or

Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work performed and other relevant work features.

- 5.92 The Queensland Nurses Union also stated that gender pay equity goes beyond 'work value' and *Fair Work Act* may need re-examination.⁷⁶ As suggested during the consideration of the Bill, s. 156(4) should be amended to include:

(d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.

Recommendation 7

That s. 156(4) be amended to include:

(d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.

- 5.93 It would be counterproductive if this inclusion were to enable Fair Work Australia to not hear an application under clause 302 because an adequate

⁷⁶ Mr Stephen Ross, Industrial Officer, Queensland Nurses Union, *Transcript*, 31 March 2009, p. 53.

alternative remedy was available (s. 71). An assessment needs to be made as to whether proceedings arising from the application to vary a minimum rates award would be able to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers.

Award variation on work value grounds to achieve Modern Awards Objective [s. 157]

- 5.94 The Full Bench of Fair Work Australia may create, vary or revoke modern awards outside the four year review period on work value grounds if it considers this is necessary to achieve the modern awards objective (s. 157) or if the award is referred to it under the *Human Rights and Equal Opportunity Commission Act 1986* (s.161) (see below).
- 5.95 Subsection 157(2) provides that Fair Work Australia may make a determination varying modern award minimum wages if Fair Work Australia is satisfied that:
- (a) the variation of modern award minimum wages is justified by work value reasons; and
 - (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.⁷⁷
- 5.96 As noted above, the modern awards objective includes taking into account equal remuneration for work of equal or comparable value. However, Commissioner Fisher, Queensland Industrial Relations Commission, argued that it is unclear whether pay equity cases would automatically trigger the work value provisions. She said that, while pay equity is a subset of 'work value', to avoid future argument it should be made abundantly clear in the legislation that gender pay equity is a reason for justifying award variation of minimum wages outside the four yearly review.⁷⁸

77 Note: As Fair Work Australia is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

78 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 4.

Recommendation 8

That s. 157 be amended to ensure consistency with s. 156 and include a definition of ‘work value reasons’ defined as:

... reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;**
- (b) the level of skill or responsibility involved in doing the work;**
- (c) the conditions under which the work is done [S 156(4)].**
- (d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued.**

Awards modernisation process

- 5.97 The award modernisation process is aimed at achieving awards that are simple and easy to understand; provide a minimum safety net for terms and conditions of employment; are economically sustainable; and promote collective bargaining. The review of existing awards provides an opportunity incorporate the necessary changes to address pay equity issues. The achievement of pay equity through the award process should be enhanced by the following changes:

Recommendation 9

That the Government:

- elevate pay equity to be a clear objective of modern awards;**
- expand scope of variation and amendment of awards on work value grounds to explicitly include pay equity, applying a gender neutral work valuation’ require Fair Work Australia to be satisfied that the award satisfies pay equity criteria.**

- 5.98 The awards modernisation process began in April 2008 on request by the Minister for Education, Employment and Workplace Relations (28 March 2008) to the Australian Industrial Relations Commission (AIRC). The AIRC is required to complete the process by 31 December 2009. The purpose of the awards modernisation process is to review and rationalise awards operating in the federal industrial relations system. Award modernisation is being undertaken in four stages – each of which involves pre-drafting consultations, the release of exposure draft awards, further consultation on the drafts and the publication of modern awards.
- 5.99 The first 17 ‘priority’ awards to be finalised under award modernisation were published by the AIRC on 19 December 2008 but are not due to come into effect until January 2010 (or thereafter). The 17 modern awards will replace some 500 awards that currently cover those industries and occupations.⁷⁹
- 5.100 Award modernisation provides an opportunity to consider and implement pay equity principles. The AIRC must have regard to a number of factors when performing awards modernisation, including:
- the need to help eliminate discrimination;
 - to promote the principle of equal remuneration for work of equal value;
 - to assist employees balance their work and family responsibilities effectively; and
 - improve retention and participation of employees in the workforce.⁸⁰
- 5.101 Fair Work Australia is required to ensure that modern awards, together with the National Employment Standards, provide a ‘fair and relevant minimum safety net of terms and conditions’ taking into account’ the following factors:
- relative living standards and the needs of the low paid;

79 The Stage 1 draft awards are: Black Coal Mining Industry Award 2010 ; Clerks – Private Sector Award 2010; Fast Food Industry Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry Award 2010; Higher Education Industry – Academic Staff – Award 2010; Higher Education Industry – General Staff – Award 2010; Horse and Greyhound Training Award 2010; Hospitality Industry (General) Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Rail Industry Award 2010; Security Services Industry Award 2010; Textile, Clothing, Footwear and Associated Industries Award 2010.

80 S576B *Workplace Relations Act 1996*; Request under Section 576(1) – Award Modernisation Consolidated Version Issue Julia Gillard, Minister for Employment and Workplace Relations, 18 December 2008, paragraph 3 (e)(f)p. 2.

- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation;
- the need to promote flexible modern work practices and the efficient and productive performance of work; and the
- principle of equal remuneration for work of equal or comparable value (s.134)

5.102 Together these points constitute the modern award objective.

5.103 The *Fair Work Act* guarantees that modern awards will be 'fair' and provide relevant minimum terms and conditions, and, in achieving this goal 'the principle of equal remuneration for work of equal or comparable value is to be 'taken into account.' While equal remuneration is explicitly referred to as part of the modern awards objective it is unclear what weight will be given to the principle or what methodology will be used to apply when establishing modern awards.

5.104 The Queensland Council of Unions emphasised the need for a 'robust and comprehensive award system with the achievement of pay equity as an underlying objective of modern awards'.⁸¹ The Queensland *Industrial Relations Act 1999* requires the Queensland Industrial Relations Commission to 'ensure an award provides for equal remuneration for work of equal and comparative value' in paragraph 126 (e).

5.105 Qld *Industrial Relations Act 1999* s.126 relevantly provides that:

The commission must ensure an award –

(a) does not contain discriminatory provisions; ...

(e) provides for equal remuneration for men and women employees for work of equal or comparable value; ...

(j) takes into account employees' family responsibilities.

5.106 This is a clearer statutory duty to guarantee pay equity in the award process than its equivalent under federal law.

81 Ms Amanda Richards, Assistant General Secretary, Queensland Council of Unions, *Transcript of Evidence*, 31 March 2009, p. 12.

Recommendation 10

That s. 134 of the *Fair Work Act 2009* be amended so as to require that an award must provide for equal remuneration for men and women employees for work of equal or comparable value.

- 5.107 Many women are award-dependent and therefore it is essential that the award modernisation process ensures that the skill, responsibility, the nature and conditions of the work, are taken into account in determining classification structures in modern awards.⁸²
- 5.108 Associate Professor Taksa and Dr Anne Junor suggested that many women are award-dependent and therefore it is essential that the awards modernisation process ensures that the skill, responsibility, nature and conditions of the work, are taken into account in determining classification structures in modern awards:

If the Award Modernisation process is not carried out under such a principle of equal or comparable value, the rationalisation process, based on industry awards, will simply repeat the history of the 1969 and 1972-74 equal pay and equal value exercises, whose limitations have only partially been addressed forty years later. Requirements under this legislation were often met by slotting female classifications in underneath male, without consideration being made to genuine work value assessments. In many industries, such work value assessments have never been finalised. At best the Minimum Rates Adjustment process of the late 1980s provided some needs-based compression at the low-wage end.⁸³

- 5.109 Thus:

... it is essential that each Modern Award contain a clause allowing consideration of work value in the context of the award's history, without relying on arguments based on discrimination or comparisons, and that if comparisons are undertaken they may be with relevant work in any occupation, industry or workplace. If such comparisons reveal inequity, then an application for award variation may be made outside the four-yearly review cycle.⁸⁴

82 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 5.

83 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 5.

84 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 9.

5.110 A number of additional risks have been identified:

In respect to that minimum wage-fixing, the Fair Work Act does pick up the notion that, in setting minimum wages and in adjusting the new modern awards, Fair Work Australia will have to have regard to the principle of achieving equal or comparable equal pay for work of equal or comparable value. Having put that objective into the legislation, that enables but does not guarantee that minimum wages can be set and adjusted having regard to the need to look at gender differentials in pay. Fair Work Australia has the power to review those minimum wages. It has to do so every year. It can also do so on application by the Sex Discrimination Commissioner. It can also review the other safety net matters such as leave and hours of work and penalties and those sorts of things – which are an enormous component of the actual differential in men’s and women’s wages – at any time on application if the application is based on a work value ground.⁸⁵

5.111 The Queensland Nurses Union, expressed concern that the award modernisation process may lead to the loss of occupational identity and this will disadvantage nurses’ ability to achieve pay equity.⁸⁶ The maintenance of nursing occupational awards in award modernisation process is important as scoping it in the health and welfare services awards will ‘have an adverse effect on nursing’s capacity to achieve gender equity’.⁸⁷

5.112 The Pharmacy Guild of Australia also sought the inclusion of all community pharmacy employees under a national pharmacy award rather than the retail award because of the health care focus arguing that the latter would create ‘a significant cost imposition on the community pharmacy industry for no reason and likely to have a negative effect on the employment opportunities and pharmacy workforce participation for women’.⁸⁸

5.113 The Women’s Electoral Lobby (WEL) emphasised that because women are reliant on minimum wages and safety nets more than men that there should be a levelling up rather than a levelling down from the

85 Ms Catherine Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, *Transcript of Evidence*, 3 April 2009, pp. 1-2.

86 Mr Steven Ross, Industrial Officer, Queensland Nurses Union, *Transcript of Evidence*, 31 March 2009, p. 50.

87 Mr Steven Ross, Industrial Officer, Queensland Nurses Union, *Transcript of Evidence*, 31 March 2009, p. 50.

88 Pharmacy Guild of Australia, *Submission No. 127*, p. 7.

award minimisation process.⁸⁹ WEL believes that that the new modern awards should be compared to relative enterprise agreements rather than the lowest awards.⁹⁰

5.114 WEL also raised concerns in relation to the 'speed and efficiency with which the award modernisation process is happening, there is little attention paid to equal remuneration provisions set down in the modernisation process'.⁹¹

5.115 Thus:

It cannot be assumed that prior work value assessments, were bias-free. The history of the award is to be considered, with consideration of whether remuneration has been affected by gender. Indicators include:

- some characterization or labelling of work as 'female';
- some under-rating of the skills of female employees;
- whether the work is an industry or occupations undervalued because of segregation or segmentation;
- industry features that may have affected work value such as degree of segregation, concentration of women in part time or casual work, low unionization, low workplace union representation in workplaces characterized by formal or informal work arrangements, incidence of consent awards and agreements, and other considerations of that type; and
- whether sufficient weight has been given to typical work performed and the skills and responsibilities exercised by women, conditions under which the work is performed and other relevant work features.⁹²

5.116 The Australian Services Union argued that unless the award rates are equitable, then the reliance of collective bargaining on award rates 'will be flawed in the sense that the lowest minimum rate will be the starting point for negotiations, which in the vast majority of cases, will not include any kind of gender or pay equity comparison'.⁹³ UnionsWA stated:

89 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women's Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 2.

90 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women's Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 2.

91 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women's Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 2.

92 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 11.

93 Ms Julie Bignell, Branch Secretary, Australian Services Union, *Transcript of Evidence*, 31 March 2009, p. 66.

... that injecting gender equity considerations explicitly into the current award modernisation process is something that should be considered, at the same time ensuring that awards retain relevance and coverage. Despite a trend over the last two decades to decentralisation and away from award coverage, there is still the need for clear minimum standards ... but also classifications that can be then examined and referred to for the establishment of women's pay rates.⁹⁴

Recommendation 11

That the Australian Industrial Relations Commission report to the Committee prior to the finalisation of the awards in the awards modernisation process in relation to how pay equity principles have been achieved.

5.117 The Australian Services Union provided an example of a private sector award for clerks stating that 'it has not been benchmarked against any comparative occupations, it is simply an amalgam of classifications and rates of pay' ... There has been no examination of this award in a pay equity sense. Indeed the award will result in a decrease of take-home pay for many Australian women and men once it comes into operation' and 75 per cent of employees under this award are female.⁹⁵

5.118 Commissioner Fisher stated:

Fair Work Australia has power under the act to vary modern award wages outside the system of four yearly reviews if satisfied the variation is justified on work value grounds and such variation is necessary to achieve the modern award's objective. The modern award's objective includes taking into account equal remuneration for work of equal or comparable value. The issue is this. Given that work value is the first consideration that needs to be considered under this provision, it is not sufficiently clear in my view that pay equity cases would automatically be taken to satisfy this criteria. Although it could be argued that pay equity is a

94 Ms Simone McGurk, Assistant Secretary, UnionsWA, *Transcript of Evidence*, 5 November 2008, pp. 31-32.

95 Ms Julie Bignell, Branch Secretary, Australian Services Union, *Transcript of Evidence*, 31 March 2009, p. 66.

subset of work value, I would recommend, perhaps out of an abundance of caution and in an endeavour to avoid future argument, that the legislation make clear in the modern awards section that pay equity is a reason for justifying award variation of minimum wages outside the four yearly reviews.⁹⁶

Recommendation 12

That Fair Work Australia report to the Parliament within the annual reporting process on any changes to the awards after 1 January 2010 that may have the potential to impact on pay equity.

5.119 The Australian Services Union commented that Australia:

... is highly gender segmented in terms of the workforce, the only chance has been the award system where you have been able to actually designate pay rates and proper classification structures based on what people actually do, not what they are called, but what they actually do, what their skills and knowledge are, and what their qualifications are. This is a seriously retrograde step that the award modernisation process has taken with respect to women's pay in Australia ... the modern award system must recognise skills and knowledge; it must be consistent for occupations, such as the clerical award, and it must not depend upon designating pay and conditions based on job titles rather than qualifications, skills and abilities, which is the case at the moment.⁹⁷

Individual flexibility agreements

5.120 S. 65 of the *Fair Work Act* allows for arrangements that suit the particular needs of employers and employees in enterprise agreements provided they make employees better off overall compared to their award. These flexibility arrangements are designed to assist employees balance the family commitments with work:

96 Commissioner Glenys Fisher, , Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, pp. 3-4.

97 Ms Julie Bignell, Branch Secretary, Australian Services Union, *Transcript of Evidence*, 31 March 2009, p. 67.

Any individual flexibility arrangement made under an agreement must be genuinely agreed to by the employer and employee and must make the employee better off than they were under the enterprise agreement. This means that an employee or employer cannot be coerced to make an individual flexibility arrangement and they cannot be used to undermine an employee's terms and conditions of employment.⁹⁸

5.121 The Australian Industrial Relations Commission introduced individual flexibility agreements into modern awards which allow employees and employers to reach agreement about modifying the terms of the award. These agreements must be in writing and a copy provided to the employee but do not have to be lodged with Fair Work Australia.

5.122 While this arrangement has benefits, there is limited capacity to monitor any pay equity implications of these agreements as there is currently no requirement to lodge them. ACTU and Joint State Union Peak Councils raised concerns that use of individual flexibility arrangements may undermine terms and conditions reached through collective bargaining or set in the safety net. The unions called for appropriate protections against the use of individual flexibility clauses that may adversely affect women through the implementation of lower terms and conditions.⁹⁹

5.123 The New South Wales Office for Women's Policy commented in relation to the variation of award clauses that

Any such variations [monetary entitlements such as overtime, penalty rates and allowances] 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

98 Department of Education, Employment and Workplace Relations, *Supplementary Submission No. 58.2*, p. 25.

99 Australian Council of Trade Unions and Joint State Union Peak Councils, *Submission No. 125*, p. 24.

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.¹⁰⁰

5.124 Therefore:

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.¹⁰¹

5.125 Under s.124 of the *Fair Work Act* 2009, the Fair Work Ombudsman must prepare and publish a Fair Work Information Statement which must include information on individual flexibility arrangements. An employee's request and employer's response to that request must be in writing but do not have to be lodged with Fair Work Australia. While these agreements should be submitted to Fair Work Australia for research purposes to enable the Ombudsman to fulfil this obligation, an approval process should not be introduced.

5.126 Requiring lodgement individual flexibility arrangements would heighten awareness of the need to take care and ensure that the 'not worse off' consideration is taken into account. This information would also be available to determine the aggregate pay equity implications to be assessed.

5.127 One aspect of the research to be conducted could be in relation to whether there is a disproportionate impact on women in low paid employment. Accordingly the Committee recommends that:

Recommendation 13

That s. 65 of the Fair Work Act be amended to require that individual flexibility arrangements are lodged with Fair Work Australia.

100 New South Wales Office for Women's Policy, *Submission No. 153*, p. 30.

101 New South Wales Office for Women's Policy, *Submission No. 153*, p. 30.

National Employment Standards

- 5.128 The National Employment Standards (NES) were developed to set out minimum standards that apply to employees in relation to:
- Minimum weekly hours;
 - Requests for flexible working arrangements
 - Parental leave and related entitlements;
 - Annual leave;
 - Personal/carer's leave and compassionate leave;
 - Community service leave;
 - Long service leave;
 - Public holidays;
 - Notice of termination and redundancy pay; and
 - Fair Work Information Statement.
- 5.129 Division 3 (13) provides that employees who have responsibility for the care of a child under school age may request flexible arrangements and provides as examples of changes in working arrangements: change in hours of work, changes in patterns of work and changes in location of work.
- 5.130 The Australian Human Rights Commission was critical of the NES in that the right to request flexible work arrangements is confined to children under school age; employees have had at least 12 months continuous service and does not apply to casual workers.¹⁰² Women are less likely to have job tenure and therefore are less likely than men to have been in a particular workplace for more than 12 months.
- 5.131 It is necessary to recognise demographic changes and to accommodate caring responsibilities across the life cycle.¹⁰³ New Zealand and the United Kingdom have a right to request for anyone with caring responsibilities.¹⁰⁴ The Sex Discrimination Commissioner commented on the importance of the NES to men, 'under the jurisprudence and case law that exist, women actually have a right to request, it is men who do

102 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 6.

103 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 6.

104 See Ms Juliet Bourke, Chair, Equal Employment Opportunity Network of Australasia, *Transcript of Evidence*, 26 September 2008, p. 87.

not.¹⁰⁵ The NES extends the right to request to any employee who is a parent.

- 5.132 The Equal Opportunity Network of Australasia suggested that the limited right to request had ramifications for productivity and it 'is not where the market is at':

the research that we had out of the task force on care costs showed that 67 per cent had refused a promotion and something like 44 per cent had taken a job below skill level if it would give them flexibility.¹⁰⁶

- 5.133 The Brisbane City Council suggested that allowable requests from employees for more flexible work arrangements be broadened in two main respects:

- To apply to all employees irrespective of reason or at least those with a broader range of responsibilities such as children of all ages and dependent adults, including ageing parents and other relatives; and
- Expand the range of changes in working arrangements.¹⁰⁷

- 5.134 Dr Sara Charlesworth commented on the exclusion of casual workers from some of the provisions of the National Employment Standards:

Given that women make up 60 per cent of casual workers, what seems to be just IR, and not to do with discrimination or pay equity issues, in fact really has quite a profound impact on pay equity.¹⁰⁸

- 5.135 The right to request should apply to all workers including casuals. This is a right to request only and the employer has the right to decline if there are reasonable grounds for doing so. Accordingly, the Committee recommends:

105 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 6; see also Association of Professional Engineers, Scientist and Managers, *Submission No. 121*, p. 9.

106 Ms Juliet Bourke, Chair, Equal Employment Opportunity Network of Australasia, *Transcript of Evidence*, 26 September 2008, p. 88.

107 Brisbane City Council, *Submission No. 23*, pp. 2-3.

108 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 24.

Recommendation 14

That the National Employment Standards Division 3 (13) in relation to requests for flexible working arrangements be amended to include all employees.

- 5.136 Further, the Government should also consider the expansion of the list of examples cited to include a reduction in work hours such as part time and job share, that changes to patterns of work should include flexibility to vary standard start and finish times, flex time, working more hours over less days and changing days of work, changes to the span of ordinary hours outside of which shift and overtime penalties apply and changes to location of work including working from home or another location.¹⁰⁹
- 5.137 Annual leave entitlements and parental/carers leave were also highlighted by the Brisbane City Council as needing improvement in the National Employment Standards. While the additional rights in these categories would be of assistance to some employees, this has the potential to add substantial costs for the employer depending on the nature of the tasks involved. The National Employment Standards set minimum standards only and other matters can be dealt with in awards and enterprise agreements where appropriate.
- 5.138 There were also calls for clarification as to what constitutes 'reasonable operational reasons' for an employer to grant or refuse flexible work arrangements.¹¹⁰
- 5.139 There also needs to be some educational support relating to flexible arrangements as there still persists a perception that those seeking these arrangements are less committed to work while they are trying to juggle responsibilities.¹¹¹ Further a survey conducted by Aequus Partners and CCH Australia found that 80 per cent of respondents, mostly Human Resources practitioners rated employees and managers knowledge of the right to request as 'either non-existent or low.'¹¹² The Department of

109 See discussion in Brisbane City Council, *Submission No. 23*, pp. 2-3.

110 City of Perth, *Submission No. 31*, p. 1.

111 Ms Juliet Bourke, Chair, Equal Employment Opportunity Network of Australasia, *Transcript of Evidence*, 26 September 2008, p. 88.

112 Aequus Partners and CCH Australia, 2009, *Wake up call: Few employers are ready for the R2R and time is running out*, Executive Summary, pp. 1-2; media Release "Right to request flexibility"

Consumer and Employment Protection in Western Australia called for Fair Work Australia to 'educate employers and employees about the right to request in the federal National Employment Standards'.¹¹³

Minimum wages case

5.140 Women are more likely than men to be reliant on the minimum wage.

A strong minimum wage is an important factor in improving women's wage outcomes and dealing with the gender wage gap as many women are reliant on minimum wages.¹¹⁴

5.141 The minimum wages objective requires the Fair Work Australia to 'establish and maintain a safety net of fair minimum wages', taking into account the following factors:

- the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth;
- promoting social inclusion through increased workforce participation;
- relative living standards and the needs of the low paid; and
- principle of equal remuneration for work of equal or comparable value (s. 284).

5.142 In relation to a recent decision by the Australian Fair Pay Commission not to increase the minimum wage, the National Pay Equity Coalition and the Women's Electoral Lobby Australia Inc expressed concern that women are more likely to be affected and low paid workers are falling further behind other members of the community who received pay increases, thus compounding the gender wage gap.¹¹⁵ The Working Womens' Centres stressed the importance of keeping awards increases in line with inflation:¹¹⁶

National Employment Standard survey results, 3 September 2009, p. 1 at <http://www.workplaceflexibility.com.au/press_release_3_september_2009.html>.

113 Department of Consumer and Employment Protection, Government of Western Australia, *Submission No. 134*, p. 4.

114 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, p. 14.

115 The National Pay Equity Coalition and the Women's Electoral Lobby Australia Inc, *Supplementary Submission No. 118.3*, pp. 1-2.

116 Working Women's Centres, *Submission No. 119*, p. 4.

The disproportionate representation of women on award and comparatively low wages has meant that minimum wage increases have provided significant benefits for this group of women and provided an effective protective mechanism for gender pay equity. As 60.3 percent of award-dependent workers are women, changes to minimum wage setting and awards will disproportionately affect them.¹¹⁷

5.143 Women are more likely than men to be reliant on the minimum wage and the Australian Catholic Bishop's Conference (ACBC) referred to the decline in the Federal Minimum Wage relative to the Henderson Poverty Line and the importance of this to women.¹¹⁸

5.144 An important a features highlighted by the ACBC is that in the determination of the minimum wage by the Australian Fair Pay Commission uses as a basis a single person without dependents. This has the effect of making it difficult for single mothers to return to work as the cost of child care is not taken into account.¹¹⁹ The ACBC argues that:

In doing so, it has failed to take proper account of the needs of workers with dependants and has failed to have proper regard for the *Family Responsibilities Convention* and anti-discrimination laws that protect workers with family responsibilities.¹²⁰

5.145 The South Australian Government noted that:

Where minimum wages are adjusted to reflect pay equity considerations, these may create some pressures on employment levels due to declining marginal productivity. Where these adjustments have been made in the past, however, they have usually been accompanied by long notice periods and the impact will also be less in those areas where market driven rates are already higher than the minimum wages that will be adjusted, as is the case in some of the areas that would likely be reviewed.¹²¹

5.146 Further, the New South Wales Office for Women's Policy 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

117 Working Women's Centres, *Submission No. 119*, pp. 7-8.

118 Australian Catholic Bishops Conference, *Submission No. 64*, p. 5.

119 Australian Catholic Bishops Conference, *Submission No. 64*, p. 3.

120 Australian Catholic Bishops Conference, *Submission No. 64*, p. 3.

121 South Australian Government, *Submission No. 124*, p. 13.

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.¹²²

- 5.147 In relation to the additional cost to the employers, in referring to the recent decision not to grant an increase to the minimum wage the National Pay Equity Coalition and the Women's Electoral Lobby commented that:

The reasoning for the Decision is flawed in arguing that an increase would worsen unemployment. Not only does the Decision harm women and low paid by not granting them an increase when other workers have received annual increases of 4.6% but it also is a retrograde step in addressing the gender wage gap ... The AFPC also chose to ignore international research from other Organisations such as the OECD which found that 'there is no significant direct impact of the minimum wage on the unemployment rate.'¹²³

Enterprise agreements

- 5.148 The Fair Work Bills' regulatory impact analysis states that while employers can tailor agreements to their business there is a strong safety net for employees. An enterprise agreement must not contravene the National Employment Standards but may include terms that are ancillary or supplementary to the NES. An enterprise agreement must be lodged with Fair Work Australia for approval and must pass a number of tests including the Better Off Overall Test. Parties are required to bargain in 'good faith' (Division 8 Subdivision A). The Independent Education Union of Australia (Qld and NT) observed that Western Australia was the first state to introduce 'good faith bargaining' and is also the state with the

122 New South Wales Office for Women's Policy, *Submission No. 153*, p. 28.

123 National Pay Equity Coalition and Women's Electoral Lobby, *Supplementary Submission No. 118.3*, p. 1.

largest pay equity gap.¹²⁴ The IEUA cautioned that any possible relation between the two should be monitored.¹²⁵

- 5.149 Under s. 195, a term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement on the basis of the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- 5.150 Although equal remuneration for work of equal or comparable value is a permitted matter for the purposes of collective bargaining, there is no explicit legal requirement that the parties must do so. Nor is there any legal requirement that Fair Work Australia not approve an enterprise agreement unless the agreement is necessary to achieve pay equity or implements pay equity. Traditionally, collective bargaining and collective agreements have not been used as often as they could to promote equal pay for work of equal value, both in Australia and in other jurisdictions.
- 5.151 The *Fair Work Act 2009* provides for collective enterprise agreements that may be single or multi-enterprise agreements and the right to be represented during the bargaining process. The capacity to bargain across more than one employer would encourage bargaining in small enterprises where the employer does not have a human resources function, and where the employer is effectively constrained from workplace bargaining due to the nature of the product or service market within which they operate. Examples of sectors of low paid, female dominated sectors that should have the opportunity to effectively bargain and participate in multi employer bargaining include:
- the health and community services sector where the employer is often dependent upon government funding and has little flexibility to increase the price they charge for services. Accordingly they cannot meet new labour costs on a workplace by workplace basis;
 - the contract cleaning and contract catering industries where labour costs account for a significant proportion of the cost of the business. In these industries employers are unable to raise prices due to the competitive nature and short duration of supply contracts; and

124 Miss Sophie Ismail, Industrial Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Transcript of Evidence*, 31 March 2009, p. 27.

125 Miss Sophie Ismail, Industrial Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Transcript of Evidence*, 31 March 2009, p. 27.

- franchised stores and restaurants where the employer has no real capacity to bargain on a workplace by workplace level.¹²⁶

5.152 There is no distinction made between agreements negotiated with or without union representation. In industry sectors such as aged care:

That is where the facilitative bargaining for the low paid can help because it is available on a multi-employer basis. In the funded sector, you have a lot of small employers often with no HR function. I am thinking about community services, disability services and those sorts of places. The typical workforce is a part-time female workforce of, I think the ASU estimates, about eight people, so they are not a big collective themselves; voluntary committee of management.¹²⁷

Those employers' hands are tied in improving their workers' wages, because they only have what they are funded to do, and they are also in that classic situation where any increase in wages is at the cost of service to the client group to whom they are all incredibly committed.¹²⁸

5.153 While unions strongly supported the introduction of multi-enterprise agreements, the New South Wales Office for Women's Policy cautioned 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.¹²⁹

Pay equity, agreements and Queensland *Industrial Relations Act*

5.154 In contrast to the Fair Work Act, the *Queensland Industrial Relations Act 1999* (s. 156 (1) (i)-(iii) s.156 (m)) ensures that an agreement is not certified unless it meets pay equity standards. Section 156 provides that:

126 Australian Council of Trade Unions (ACTU) and Joint State Union Peak Councils, *Submission No. 125*, p. 23.

127 Ms Catherine Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, *Transcript of Evidence*, 3 April 2009, p. 7.

128 Ms Catherine Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, *Transcript of Evidence*, 3 April 2009, p. 7.

129 New South Wales Office for Women's Policy, *Submission No. 153*, p. 19.

- (1) The commission must certify the agreement if, and must not certify the agreement unless, it is satisfied –
- (l) for an agreement other than a multi-employer agreement or project agreement, the employer –
- (i) remunerates all men and women employees of the employer equally for work of equal or comparable value; or
- (ii) will, because of the agreement if it is certified, remunerate all men and women employees of the employer equally for work of equal or comparable value; or
- (iii) is implementing equal remuneration for work of equal or comparable value for all men and women employees of the employer;
- (m) for a multi-employer agreement or project agreement – the agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value.

Recommendation 15

That the *Fair Work Act 2009* be amended:

- to impose a legal obligation on the parties in a negotiation of a single or multi enterprise agreement that the negotiation and the agreement must include bargaining to achieve pay equity as defined by the Act; and
- to require that Fair Work Australia must not approve an enterprise agreement unless the agreement is necessary to achieve pay equity or implements pay equity.

Employees of non-English speaking background

5.155 FECCA called for a provision in relation to the need to explain adequately to people of non-English speaking background relevant to industrial instruments. FECCA cited the example of the Australian Industrial Relation Commission not certifying an agreement that had not adequately been explained to people in their first language

The ability to negotiate with employers is often unrealistic for women in the CALD community, many of whom lack the confidence and necessary linguistic skills to negotiate fair wage

contracts. The provision of equity support would ensure CALD women employees were assisted in the negotiation of wages and flexible conditions, such as paid maternity leave, that would allow for fairer workforce participation.¹³⁰

- 5.156 FECCA informed that up to five per cent of Australians have low English proficiency, which may lead to issues such as understanding an employee workplace agreement or arrangement.¹³¹

...when there is no requirement that those [employment] agreements are communicated to people in their own language, they are really just signing things they may not understand. Of course people want employment, of course people want to provide for themselves, and they are in an absolutely weak bargaining position.¹³²

- 5.157 Equity issues can be exacerbated by' multiple disadvantages of ethnic background, language, culture and faith, on top of existing gender bias discrimination.¹³³

Culturally and linguistically diverse women placed outside the award and collective bargaining stream under WorkChoices were at a particular disadvantage in individual negotiation. Even for those covered by collective agreements, there is no longer a requirement that the provisions be explained in the community languages of the workplace as a condition for approval. It therefore is welcome news that Fair Work Australia will be given the power to facilitate multi-employer collective awards. Culturally and linguistically diverse women are concentrated in some of the areas to be covered by these awards, such as aged care and cleaning. We submit, however, that Fair Work Australia will need to be given powers to mandate good-faith bargaining and to exercise last-resort dispute settling powers.¹³⁴

130 Federation of Ethnic Communities' Councils of Australia, *Submission No. 50*, pp. 4-5. citing *Re Epona* (PR931064.6.5.03).

131 Mr Peter van Vliet, Director, Federation of Ethnic Communities Councils Australia, *Transcript of Evidence*, 24 October 2008, p. 18.

132 Mr Peter van Vliet, Director, Federation of Ethnic Communities Councils Australia, *Transcript of Evidence*, 24 October 2008, p. 18.

133 Ms Voula Messimeri, Chair, Federation of Ethnic Communities Councils of Australia, *Transcript of Evidence*, 24 October 2008, p. 16.

134 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 12.

5.158 To address this issue, FECCA suggested¹³⁵ reinstating a provision that existed under the former *Workplace Relations and Other Legislation Amendment Act 1996* in that stated, in regard to certifying agreements, the explanation of the terms of the agreement must have been undertaken,

...in ways that were appropriate, having regard to the person's particular circumstances and needs. An example of such a case would be where persons included:

- (a) women;
- (b) persons from a non-English speaking background; or
- (c) young persons.¹³⁶

5.159 FECCA further stated that the former Australian Industrial Relations Commission had "...in the past refused to certify agreements which had not been adequately explained to people in their first language".¹³⁷

Recommendation 16

That Fair Work Australia ensure that where a significant proportion of an organisation's employees are from a non-English speaking background, that the explanation of the terms of an employment agreement have been explained in the employee's own language.

Low paid stream

5.160 The segregation of the Australian labour market means there are a number of industries where women workers are in the majority and frequently these industries have the lower pay rates such as aged care, childcare, translators, interpreters and some health workers.

5.161 The four low paid industries are not commensurate types of industries in that retail and hospitality have an over representation of lower skilled

135 Federation of Ethnic Communities Councils of Australia, *Submission No. 50*, p. 5.

136 See *Workplace Relations and Other Legislation Amendment Act 1996*, Schedule 8, Division 4 - *Certifying Agreements*, 170LT (7) (Cwlth).

137 Federation of Ethnic Communities Councils of Australia, *Submission No. 50*, p. 5, citing *Re Epona* (PR931064. 6. 5.03) the AIRC refused to certify an agreement involving a clothing manufacturer because information provided to the largely NESB workforce was inadequate.

casual positions while property and health have a range of skills.¹³⁸ It could be argued that health and community services and property industries be considered for possible undervaluation of skill in some occupations.

- 5.162 There has been a systemic undervaluation of the skills and qualifications in relation to the work performed by women within the Australian industrial system.¹³⁹ The undervaluation of women's work is a major contributor to the current wage gap:

Some employers enjoy a degree of monopsonistic power in the labour market and find advantage in keeping wages and employment below the level that might be found in a freely operating labour market. This may particularly affect some public sector jobs where the state is the primary, or even the sole, employer of that type of labour and more often women tend to be found in these lower wage paying markets.¹⁴⁰

- 5.163 Of some concern to undervaluation of women's work are the provisions of clause 262(5) of the *Fair Work Act* which references the public interest test. The public interest has consistently been relied on by employers to deny-low paid workers improvements in their conditions of employment and/or rates of pay. The concept of public interest should not be confused with the concept of an individual employer's capacity to pay. To do otherwise would undermine the concept of 'fair' for this is the foundation of the scheme of the federal legislation. CPSU stated:

Most women are familiar with arguments that improvements in women's workforce entitlements such as equal pay, maternity leave and other benefits will result in women losing their jobs. This myth has been argued whenever any positive attempt to improve wages and conditions has been made. However the true picture is that when one examines participation rates both nationally and internationally, the narrowing of the gender wage gap has seen an increase in women's workforce participation. The problem facing Australian policymakers is that while the closing

138 Mr Joshua Healy, Research Assistant, National Institute of Labour Studies, Flinders University, *Transcript of Evidence*, 6 November 2008, p. 9; Mr John Hart, Chief Executive Officer, Restaurant and Catering Australia, *Transcript of Evidence*, 1 April 2009, p. 50.

139 Australian Council of Trade Unions (ACTU) and Joint State Union Peak Councils, *Submission No. 125*, p. 5.

140 Department of Consumer and Employment Protection, Government of Western Australia, *Submission No. 134*, p. 8.

of the wages gender gap has slowed so has the rate of improvement in women's workforce participation.¹⁴¹

Work value

5.164 Work job evaluations are required to address the historical undervaluation of occupations which depend on women's contributions.¹⁴² CPSU-SPSFG explained:

Wages in occupations and industries where women work haven't increased despite labour shortages and while women have increased education levels this still hasn't provided equality in earnings and career progression.¹⁴³

5.165 The Western Australian Department of Consumer Affairs stated:

Often the skills and work associated with female labour have been seen as natural and innate and, hence, have not been highly valued in the labour market. Women's work is undervalued because of:

- the absence of appropriate classification structures;
- poor recognition of qualifications;
- the absence of previous and detailed assessments of their work; and
- gendered characterisations of the work undertaken by women, and
- inadequate application of previous equal pay measures.¹⁴⁴

5.166 The Victorian Women's Trust commented that:

Defining and valuing skill is a complex and contentious process. Given that women tend to be concentrated in occupations with lower formally recognised skill levels, the starting point is to define and recognise skills below trade level. After more than a decade of reform of the national vocational education and training system Australia now has an extensive system of competency standards that describe what are traditionally regarded as

141 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, pp. 5-6 citing OECD Employment Outlook 2008.

142 South Australian Government, *Submission No. 124*, p. 5.

143 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, p. 2.

144 Department of Consumer and Employment Protection, Government of Western Australia, *Submission No. 134*, p. 9.

‘unskilled and semi skilled’ work yet this has had no impact on the pay outcomes for women.¹⁴⁵

5.167 Associate Professor Taksa and Dr Anne Junor emphasised the ... need for a capacity to support a re-evaluation of the skill requirements of jobs with an award (or award-free) history that places them outside the masculinist traditions of skill assessment. These award traditions derive from a model of technical education and trade qualifications that has its origins in the male apprenticeship system. Gradually, in a service economy, these traditions were modified, with the introduction of traineeships, the extension of competency standards into service occupations such as call centre work, and the development of qualifications within the Australian Qualifications Framework, ranging from Certificate III to degree level in areas such as child care and aged care. For example, close to 80 per cent of Personal Care Assistants in Australia have Certificate III qualifications, a credential level that also covers electricians, motor mechanics; sound technicians and wood machinists.¹⁴⁶

5.168 National Pay Equity Coalition and the Women’s Electoral Lobby Australia Inc commented that:

Showing undervaluation requires demonstrating that significant elements of work value have not been taken into account or given enough weight in evaluating the work. A case cannot proceed without sufficient basis that the existing rates are not appropriate for the value of the work. Establishing that the undervaluation is gender-related requires connecting important aspects of the work and how it has been valued with the sex of the workers. The NSW Pay Equity Inquiry provided some indicators of likely gender-related undervaluation (including female dominated occupation, low union membership, high part-time and casual workforce, and little industrial regulation) ... It has to be shown that these (or other) characteristics of the workforce and its industrial history have been related to the undervaluation.¹⁴⁷

5.169 The inclusion of the components around work value should also assist in taking away presumptions about the job and focus on what skills,

145 Victorian Women’s Trust, *Submission No. 123*, p. 2.

146 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 13.

147 The National Pay Equity Coalition and the Women’s Electoral Lobby Australia Inc, *Submission No. 118*, p. 17.

knowledge and experience a person needs to do the job and how jobs with equivalent skills, knowledge and experience are categorised and paid. Soft skills such as communication, decision making and pastoral care are undervalued and not recognised as a work skill.¹⁴⁸

5.170 Soft skills and personal attributes used by employers such as:

... 'maturity', 'resilience', 'empathy' and 'sense of humour' as proxies for the skills they are seeking, and even deny their status as skills by explicitly describing them as 'natural'. Such natural attributes are assumed to be 'free gifts', not value-creating skills. Even if the skills are recognised as having been learned, they tend not to be unpacked, but called 'interpersonal', or 'communication' or 'time management' skills, which is a bit like saying a woodmachinist has 'woodworking skills'. Clearly, these skills need to be 'unpacked'. Whilst some of the skills may be somewhat transferable from life experience, jobholders need to learn to apply them in specific work contexts, incorporating them into ongoing work processes, and this capacity is a skill. An examination of competency standards indicates that discrete elements of competence, for example of call centre work or of team leadership may be defined, but what is less likely to be defined in qualifications and in occupational classifications is the way these skills are put together.

A process for auditing intangible skills, at a range of experience levels, particularly in jobs with flat career structures in sectors, occupations, industries where labour shortages are emerging and where women are concentrated.¹⁴⁹

5.171 In the United Kingdom women are also clustered in the child care, cleaning, catering, clerical and cashiering sectors.¹⁵⁰ Of the 50 000 equal pay cases in the Scottish tribunal system, most are from women with equal pay claims and the majority are from the caring and catering sectors.¹⁵¹ The institutional and systematic undervaluation of skills that are considered innate such as caring:

...when we look at women who do caring for children or caring for older people type work, or women who clean or women who

148 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, p. 2.

149 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 14 and *Supplementary Submission No. 109.1*, p. 5.

150 Ms Emma Ritch, Manager, *Close the Gap*, *Transcript of Evidence*, 11 August 2009, p. 7.

151 Ms Emma Ritch, Manager, *Close the Gap*, *Transcript of Evidence*, 11 August 2009, p. 7.

make the meals for the older people, and compare their jobs in a kind of systematic, analytical way with the jobs of some of the craft workers then we see that they are comparable in terms of worth. So there are cases there to answer.¹⁵²

5.172 The New Zealand experience was that:

Addressing the proportion of the gender pay gap that relates to gender-related undervaluation is also complex. Not all female-dominated occupations are affected by gender-related undervaluation. Collective bargaining and labour market mechanisms have addressed some instances of historic or recent gender-related undervaluation. In some sectors (notably teaching and nursing) there are high levels of collective bargaining, while in others, there is limited bargaining about pay. For reasons outlined elsewhere in this paper it has proven difficult to establish the case for and to negotiate the cross-organisation pay investigations that would be needed to assess and address the undervaluation of an entire occupation. Within-organisation assessments of the relative pay and size of jobs cannot address the overall evaluation of the occupation.¹⁵³

Funding structure

5.173 The Australian Chamber of Commerce and Industry commented that there is limited capacity organisations to bargain freely where funding is limited or constrained:

These organisations are often also subject to additional regulatory obligations which limit their ability to introduce productivity measures or modify staffing arrangements. As a result, relative to other sectors, wage increases in the funded sector may be dampened.¹⁵⁴

5.174 Dr Patricia Todd commented that:

In terms of comparing those industries [such as mining], with the aged-care sector you are talking about the service sector, and labour costs are always a high component, whereas in the mining industry labour costs are a much smaller component and therefore it might be easier for them to respond by increasing the pay. I have

152 Ms Emma Ritch, Manager, Close the Gap, *Transcript of Evidence*, 11 August 2009, p. 12; See also Annecto the people network, *Submission No. 59*, p. 1.

153 New Zealand Department of Labour, *Submission No. 148*, p. 12.

154 Australian Chamber of Commerce and Industry, *Submission No. 84*, p. 9.

some sympathy, looking at the aged-care sector, with how it is that they then find the extra money to increase the pay to address that problem.¹⁵⁵

- 5.175 ACCI suggested that in such sectors, additional funding to providers is the only way to alter relative pay outcomes:

In a funded environment, there is simply no additional scope for wage adjustments beyond funding levels. This therefore is a question for those levels of government with responsibility for funding these organisations.¹⁵⁶

- 5.176 Therefore, the extent to which funding decisions contribute to the perpetuation of a gender pay gap, is a matter for governments who have the capacity to address this through their funding decisions:

Potentially, the most significant impact on overall pay disparity could be achieved by Commonwealth, State and Territory governments properly reviewing and uprating their support for the funded and community sectors employing many Australian women.¹⁵⁷

- 5.177 The LHMU commented that workers in aged care do not have their qualifications or shift work financially recognised.¹⁵⁸ If qualifications and experience are incorporated within an agreement, then there is a legally binding element to it.¹⁵⁹ In relation to the pay equity case for child care workers, the LHMU commented that it:

... did provide employees, the industry and the community with recognition of the vital work of the child care sector. The results of the case reaffirmed child care as a valid and sustained career path which underpins the economic progress of the nation.¹⁶⁰

- 5.178 In relation to child care workers, the City of Yarra case study referred to the ASU's argument that:

155 Dr Patricia Todd, Senior Lecturer, Industrial Relations and Human Resources and Co-Director, Consortium for Diversity at Work, Business School, University of Western Australia, *Transcript of Evidence*, 5 November 2008, p. 63.

156 Australian Chamber of Commerce and Industry, *Submission No. 84*, p. 9.

157 Australian Chamber of Commerce and Industry, *Submission No. 84*, p. 9.

158 Ms April Anderson, Delegate, Queensland Branch, LHMU, *Transcript of Evidence*, 31 March 2009, p. 18.

159 Miss Sophie Ismail, Industrial Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Transcript of Evidence*, 31 March 2009, p. 33.

160 Ms Nikki Boyd, Organiser, Queensland Branch, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 31 March 2009, p. 17.

... wage rates and allowances needed to be increased to acknowledge the far greater demands on childcare workers that had developed as a result of accreditation; more stringent legal requirements and increased professional development. The union also argued that childcare workers were undertaking regular unpaid overtime to complete their increased duties and were taking far greater responsibility for the health and wellbeing of children than previously.¹⁶¹

- 5.179 Another example is interpreters (61 per cent female) and translators (71 per cent female). AUSIT stated that the decline in wages in real terms meant that they are now being paid below the minimum federal wage level.¹⁶² Much of this work is for the community sector and they work through agencies which tender for contracts.¹⁶³ Qualified and experienced women will find the employment untenable and 'a waste of educational resources' with little difference in pay levels for accreditation.¹⁶⁴
- 5.180 The Victorian Trades Hall Council saw government intervention as essential to address the situation because of the failure of the market to deliver pay equity.¹⁶⁵ The Victorian Trades Hall Council commented that the community values cases such as teachers a lot more than professions that are paid more highly and the 'challenge is to set up structures that represent the community rather than power structures'.¹⁶⁶ Further, a commissioner in Fair Work Australia would be a suitable arbiter.¹⁶⁷
- 5.181 Fair Work Australia should as a matter of urgency conduct job evaluations of these occupations as discussed.

161 Ms Jo Justo, National Industrial Officer, Australian Services Union, *Transcript of Evidence*, 31 March 2009, p. 64.

162 The Australian Institute of Interpreters and Translators Inc, *Submission No. 61*, p. 4.

163 The Australian Institute of Interpreters and Translators Inc, *Submission No. 61*, p. 10.

164 The Australian Institute of Interpreters and Translators Inc, *Submission No. 61*, pp. 9-10; See also discussion in Ms Sarina Phan, President, Australian Institute of Interpreters and Translators Inc, *Transcript of Evidence*, 24 October 2008, pp. 45-54.

165 Ms Jennifer O'Donnell-Pirisi, Women's Office, Victorian Trades Hall Council, *Transcript of Evidence*, 2 April 2009, p. 72.

166 Ms Ann Taylor, President, Victorian Trades Hall Council, *Transcript of Evidence*, 2 April 2009, p. 76.

167 Ms Barbara Jennings, Women's Office, Victorian Trades Hall Council, *Transcript of Evidence*, 2 April 2009, p. 76.

- 5.182 Pay increases in these cases have always been phased in and have not resulted in a large number of women losing their jobs.¹⁶⁸ The Governments at the time gave undertakings that they would fund the services to the duly arbitrated award.¹⁶⁹
- 5.183 The Independent Education Union of Australia ascribed the failure to investigate the value and nature of women's work as the 'single greatest factor impeding achievement of equal pay in Australia':
- The undervaluation of women's skills reflects a range of social, historical and industrial factors. Prejudices regarding women as employees and the nature of their skills have interfered with the objective assessment of women's work ... In addition, the work value criteria used by industrial tribunals in some cases have tended to value features which are characteristic of work performed predominantly by men.¹⁷⁰

Aged and community services sector

- 5.184 Mr Anderson from the LHMU would like to see greater pay equity in the aged care sector in relation to recognition of the 'historical undervaluation and increased skill requirements and work value changes', qualifications and experience and an introduction of a skills based classification structure and security of employment.¹⁷¹
- 5.185 While collective agreements are better instruments than individual contracts to reduce the pay gap, the Australian Education Union made the point that:
- ... enterprise bargaining has not delivered pay to adequately value women's experience and skills. Many tasks and so called soft skills such as communication, decision-making and pastoral care go unrecognised as a work skill. A way forward to redress this problem of the gender gap is to have the work that women do properly valued and remunerated. The problem of undervaluation

168 Ms Fran Hayes, Spokesperson, National Pay Equity Coalition, *Transcript of Evidence*, 14 May 2009, p. 8; Ms Suzanne Hammond, Industrial Relations Spokesperson, *Transcript of Evidence*, 14 May 2009, p. 9.

169 Ms Fran Hayes, Spokesperson, National Pay Equity Coalition, *Transcript of Evidence*, 14 May 2009, p. 10.

170 Independent Education Union of Australia, *Submission No. 100*, pp. 5-6.

171 Ms April Anderson, Delegate, Queensland Branch, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 31 March 2009, pp. 18-19; see also Dr Patricia Todd, Senior Lecturer, Industrial Relations and Human Resources and Co-Director, Consortium for Diversity at Work, Business School, University of Western Australia, *Transcript of Evidence*, 5 November 2008, p. 61.

of women's work can be redressed through tackling gendered notions of skill and reward that exist in pay and classifications structures in awards and agreements.¹⁷²

5.186 The Chamber of Commerce and Industry of Western Australia commented in relation to the negotiation of wages that:

... some of the industries that have the strongest union representation with the longest history of collective agreement making are in the female dominated health industry.¹⁷³

5.187 Aged and Community Services Tasmania argue that aged care is one of a number of care sectors that are predominantly female and is 'undervalued and underpaid relative to other industries.'¹⁷⁴ Australian Catholic Bishops Conference (ACBC) added:

Pay rates do not reflect the increased work value in this sector ... equity issues disproportionately affect the most vulnerable ... women in professional or managerial roles probably enjoy the most equity post maternity leave and workforce participation arrangements and yet still they face conditions less favourable than their male counterparts. How much more difficult, then, are the challenges faced by women in unskilled, labouring and caring roles frequently in work that is casualised or part time? These workers consequently miss out on other entitlements, such as sick leave, holiday pay and bereavement leave. In addition, the unpredictable hours in casual employment make it difficult to access adequate childcare arrangements. Women in these roles also have lower access to training and more limited opportunities for promotion and career development.¹⁷⁵

5.188 The pay and conditions in the aged care sector are determined by government contracts and service agreements. Wages and salaries constitute between 70 and 80 per cent of agency budgets.¹⁷⁶ The Australian Catholic Bishops Conference stated that cutbacks in the aged care sector will result in a reduction in wages, salaries, training and professional

172 Australian Education Union, *Submission No. 76*, p. 8.

173 Chamber of Commerce and Industry of Western Australia, *Submission No. 72*, p. 19.

174 Aged & Community Services Tasmania, *Submission No. 47*, p. 1.

175 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 1.

176 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 4.

development.¹⁷⁷ The competitive tendering process will put pressure on wages so that the organisation will win the tender.¹⁷⁸

- 5.189 The aged care sector is currently facing financial stress and therefore has limited ability to offer competitive wages which means that the female dominated workforce do not receive the level of remuneration that Aged and Community Services Tasmania believe their work deserves.¹⁷⁹

It would not be uncommon in our services for us to wait until the middle of June for the government to make its decision about whether those services will be ongoing. So when services are funded often on an annual basis, sometimes on a biannual basis, it is almost impossible for women in those workforces to make sensible plans about taking some reasonable time off or for parents – fathers as well – to make reasonable plans about taking substantial time off because you just may not know whether the program is going to exist when you come back from that leave.¹⁸⁰

- 5.190 UnionsWA considered that the care industries that have a common funding source could benefit from multi-employer bargaining as ‘many female dominated industries have found it almost impossible to bargain, partly, they are restricted in taking industrial action and partly because of their work organisation.¹⁸¹ Further, female workplaces in the services sector ‘have had less to trade off in collective bargaining in terms of inefficiencies and so-called working time flexibility.¹⁸²
- 5.191 The Australian Catholic Bishops Conference commented that 80 000 Australians are eligible for services but did not receive them due to inadequate funding.¹⁸³ The aged care industry is unable to pass on additional costs to their clients and therefore Government policy in effect caps wage rates and ‘wage inequity across sectors is institutionalised.¹⁸⁴

177 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 9.

178 Ms Susan O’Connor, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 9. See also Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 28.

179 Aged & Community Services Tasmania, *Submission No. 47*, p. 1.

180 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 9.

181 Ms Simone McGurk, Assistant Secretary, UnionsWA, *Transcript of Evidence*, 5 November 2008, p. 32.

182 Ms Simone McGurk, Assistant Secretary, UnionsWA, *Transcript of Evidence*, 5 November 2008, p. 32.

183 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 7.

184 Aged & Community Services Tasmania, *Submission No. 47*, p. 2.

There are fewer agencies stepping up to the plate as they cannot agree to provide services at this inadequate funding level.¹⁸⁵

5.192 Research has shown that many women in Tasmania who have had caring responsibilities and are marginally attached to the labour market are attracted to the aged care sector.¹⁸⁶ Funding is needed to provide employment opportunities for women to enter this sector, for career progression and appropriate wages.¹⁸⁷

5.193 Aged and Community Services Tasmania has organisations in both metropolitan and rural communities and made the point that:

Our organisations have the ability to offer employment and increase female participation in the workforce in these communities however funding to the sector needs to provide us with the ability to attract and retain these workers.¹⁸⁸

5.194 In the not-for-profit sector, the reliance on government funding, government funding formulas have not kept pace with the increased costs in this sector and therefore the workers are disadvantaged.¹⁸⁹ Nationally, 40 per cent of aged care facilities are operating at a loss as funding has not kept up with the costs of care.¹⁹⁰

5.195 The skills shortages and the demand for labour in the care sector have not resulted in the negotiation of higher wages.¹⁹¹ In the community services sector which is predominantly a female workforce:

Award pay rates in these sectors have not maintained parity with changes in the community – particularly community’s demands for a better skilled workforce to meet the needs of the professional and/or practical, hands-on care level. Changes in such award rates of pay based on either pay equity or work value have been slow to accommodate this changing industrial reality.¹⁹²

185 Mr Frank Quinlan, Australian Catholic Bishops Conference, *Transcript of Evidence*, 12 March 2009, p. 15.

186 Aged & Community Services Tasmania, *Submission No. 47*, p. 2

187 Aged & Community Services Tasmania, *Submission No. 47*, p. 2

188 Aged & Community Services Tasmania, *Submission No. 47*, p. 2.

189 Centacare and the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, *Submission No. 6*, p. 2.

190 Mr Darren Matthewson, Chief Executive Officer, Aged and Community Services Tasmania, *Transcript of Evidence*, 25 June 2009, p. 3.

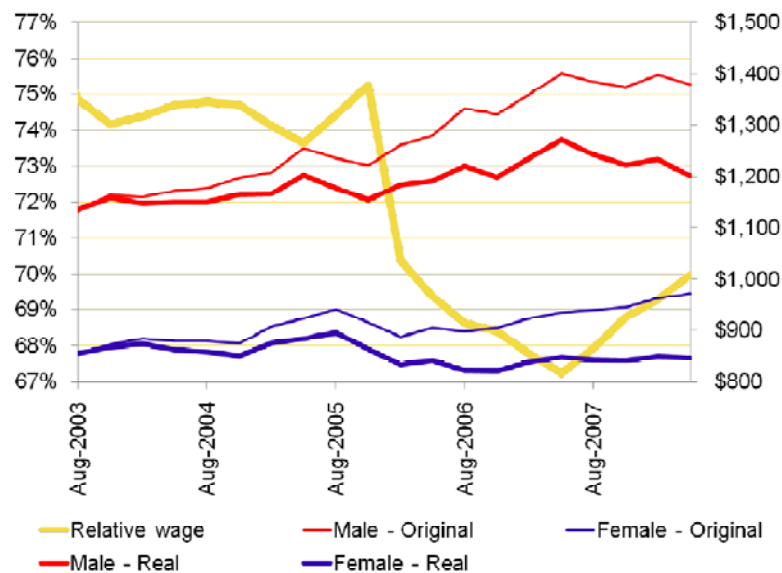
191 Ms Simone McGurk, Assistant Secretary, UnionsWA, *Transcript of Evidence*, 5 November 2008, p. 37.

192 Centacare and the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, *Submission No. 6*, p. 1.

5.196 Dr Sara Charlesworth gave the example of:

... the community services sector, because of tight funding arrangements or funding arrangements, which the Australian Productivity Commission found with regard to the aged-care industry have absolutely no relation to the cost of providing aged care, there is some evidence that agencies are cutting back the hours of workers but then expecting them to work their previous set of hours. That is not seen as a pay equity issue, but it has pay equity ramifications.¹⁹³

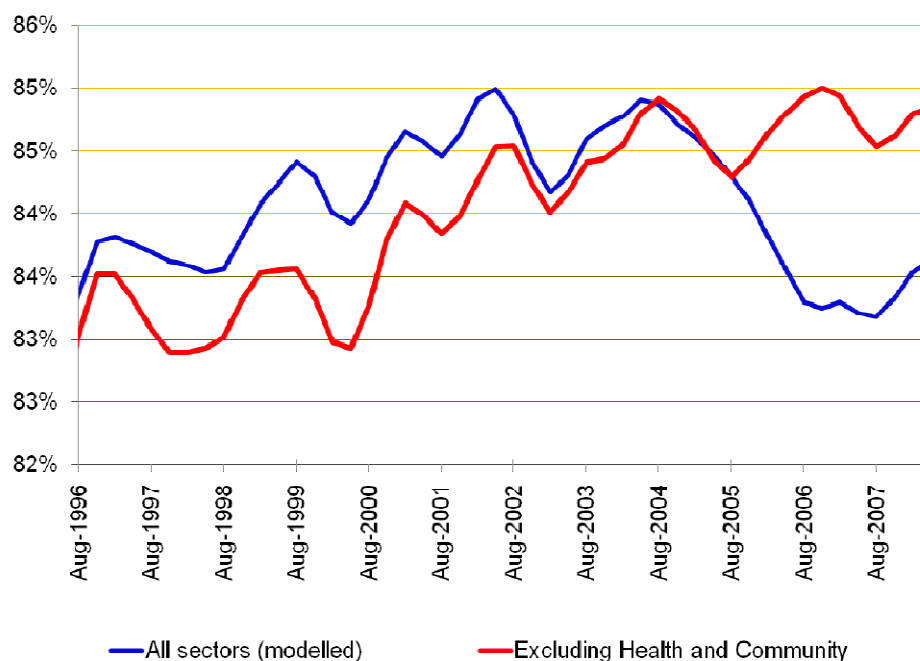
Figure 5.1 Health and community services , relative, original and real wages from 2003 to 2007



Source Department of Families, Housing, Community Services and Indigenous Affairs, unpublished

193 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 25.

Figure 5.2 Trend in wage relativities (Average Weekly Earnings Full time Adult Employees)



Source Department of Families, Housing, Community Services and Indigenous Affairs, unpublished.

5.197 Liquor, Hospitality and Miscellaneous Union noted that incapacity of the aged care industry to meet any substantial increase in wages without an increase in Commonwealth funding.¹⁹⁴

It is not consistent with equity and good conscience for a society, or for that matter a government, to impose on those who staff such institutions an undue degree of responsibility for the dilemmas of funding and services that appear to be chronic. Nor is it consistent with good conscience to fail to address patient incapacity to deliver a relatively equivalent level of remuneration for work of equal value. Substantial differences which appear to exist in the effective remuneration available to professional aged care service providers in such institutions and comparable staff in other health and human services institutions in the public or private sectors.

That circumstance should either be justified or redressed; it should not be simply ignored.¹⁹⁵

5.198 Dr Charlesworth described the paying of staff at the bottom level to address funding shortfalls rather the skills of staff, private providers are

194 Liquor, Hospitality and Miscellaneous Union, *Supplementary Submission No. 138.1*, pp. 2-3.

195 Australian Industrial Relations Commission cited in Australian Nursing Federation, *Submission No 97*, p. 11.

not paying penalty rates or travel time between clients as measures to ensure that the services can be provided as an example, notwithstanding the very low legal wages.¹⁹⁶ These practices are 'technically illegal but which have never been chased up because your services would not function.'¹⁹⁷

While there is an assumption that a lot of community services workers are secondary earners in their family, the reality is a lot of them are sole breadwinners and their hours of work are totally critical.¹⁹⁸

5.199 Dr Charlesworth believes that the government needs to 'draw a line in the sand and say 'that from this point on, we are going to incrementally try and improve the situation'.¹⁹⁹ This is an underpaid and undervalued sectors and it is important that governments demonstrated the importance of these services to the community.

5.200 Occupations such as child care, nursing and teaching are more attractive to women wishing to move in and out of an occupation.²⁰⁰

... if women had chosen the fields which men were in, the better paid fields, they would have been worse off than where they started. The reason for that is that the payoff to men and women seems to differ from occupation to occupation. There may be an element of discrimination in some of the professions in this, but the other way of looking at this is the penalty to going in and out of the workforce, or the penalty for wanting to work part time rather than full time, or not the overtime or whatever ... So I think that is part of the explanation of why women choose some areas, that those areas are actually friendlier to them during their lives than other areas.²⁰¹

5.201 The City of Whitehorse commented on the constraints imposed by funding by federal and state governments on the wages paid to the

196 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 25.

197 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 25.

198 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 26.

199 Dr Sara Charlesworth, Research Fellow, Centre for Applied Social Research, *Transcript of Evidence*, 2 April 2002, p. 28.

200 Dr Thomas Karmel, Managing Director, National Centre for Vocational Education Research, *Transcript of Evidence*, 6 November 2009, p. 25.

201 Dr Thomas Karmel, Managing Director, National Centre for Vocational Education Research, *Transcript of Evidence*, 6 November 2009, p. 25.

semiskilled indoor workforce such as child care and aged care not that semiskilled outdoor workers have pay rates and allowances 'that give them a reasonable wage'.²⁰² The Council noted that 'this grants system severely impacts on Council's ability to address pay equity issues in its workforce.'²⁰³

For example a "relative worth" case for child care workers, or aged care workers which are the primary domain of women workers would be desirable from Council's perspective as long as any outcome of such a case was adequately reflected in the grants and subsidies offered to council by state or federal government for the provision of these services.²⁰⁴

5.202 The Australian Nursing Federation also commented that:

Nursing work remains under-valued despite various wage cases, industrial campaigns, the widespread shortage of nurses and the numerous reports, inquiries and reviews into nursing and workforce issues identifying improvements in wages and conditions as key issues in recruitment and retention of nurses and attracting students to nursing education. In nursing, the under-valuing of women's work is one part (albeit a significant one) of the gender pay gap that must be addressed.²⁰⁵

5.203 The National Institute of Labour Studies survey in residential aged care facilities found that personal Care Assistants

... more than nurses, were highly dissatisfied with their pay, feeling that the value and skills of their work were undervalued. Over 60 per cent were dissatisfied or very dissatisfied with their pay levels, particularly with the flat incremental structures that failed to recognise accumulation of skills over time. As a result the turnover rate was and is very high in this industry ... Not only does high turnover reduce the quality of services to vulnerable people, it is a budgetary drain, adding to running costs more significantly than a pay structure genuinely based on work value.²⁰⁶

202 City of Whitehorse, *Submission No. 89*, p. 2.

203 City of Whitehorse, *Submission No. 89*, p. 2.

204 City of Whitehorse, *Submission No. 89*, p. 4.

205 Australian Nursing Federation, *Submission No 97*, p. 2.

206 Associate Professor Taksa and Dr Anne Junor, *Supplementary Submission No. 109.1*, pp. 4-5 citing Richardson S and Martin B, 2004, *The Care of Older Australians: A Picture of the Residential Aged Care Workforce*, National Institute of Labour Studies, Flinders University, Adelaide; Moskos M and Martin B, 2005, *What's Best, What's Worst? Direct Carers' Work in their Own Words*, The National Institute of Labour Studies, Flinders University, Adelaide; Healy J and

- 5.204 The Liquor, Hospitality and Miscellaneous Union noted, however, that the undervaluation of the childcare sector in Australia is entrenched and made the point that:

The introduction of the low paid bargaining stream with the Fair Work Act in July 2009 is unlikely to remedy the low wages in the childcare sector. Parts of the sector have a history of bargaining which despite not delivering real wage increases will exclude access to the low paid stream. Childcare bargaining has largely been undertaken to protect award conditions. Bargaining will not deliver the increase needed to gain parity with the metal trades industry.²⁰⁷

- 5.205 The Australian Council of Social Service made the point that:

A significant proportion of the organisations in the sector are trading corporations and therefore subject to the federal system. As a consequence, workers working in organisations covered by the federal system will be paid rates of pay which do not recognise the inherent inequity that has existed in rates of pay for workers in the community sector for many years. The QIRC decision recognised that this inequity was a result of the historical undervaluation of the work performed because of the high proportion of women working in the sector.²⁰⁸

- 5.206 This situation also has an adverse impact on employers as the former Department of Education, Science and Training found that:

... low morale and poor image ... appears most profound in the aged care sector. Recruitment therefore becomes problematic as women in general, and nurses in particular, seek employment opportunities that are more rewarding emotionally and financially ... And that the disparity between rates of pay for aged care nurses and acute care nurses clearly acts as a major obstacle to recruitment.²⁰⁹

- 5.207 Furthermore:

Moskos M, 2005, *How Do Aged Care Workers Compare With Other Australian Workers?* Adelaide: National Institute of Labour Studies, Flinders University.

207 Liquor, Hospitality and Miscellaneous Union, *Supplementary Submission No. 138.1*, p. 3.

208 Australian Council of Social Service, *Submission No. 147*, p. 2.

209 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, p. 8 citing Commonwealth Department of Education, Science and Training, 2001, *Report on Australian Aged Care Nursing: A critical review of Education, training, recruitment and retention in residential and community setting*.

Turnover is very high hidden cost to the employer, for reasons well-illustrated in the EOWA turnover costs calculator. When a staff member leaves, direct and indirect costs of replacement and lost productivity run at well over the cost of a year's salary, over and above the salary paid to the person working in the position. But over and above this productivity loss to the organisation, is the national wastage resulting from under-utilised training investment ... Turnover represents a loss of these skills that is clearly not in the national interest. A similar point can be made about other areas where women's skills are undervalued. It is a commonplace that there would be no shortage of teachers and nurses if more of those who trained for these professions were actually working in them. Pay inequity is the source of 'brain drain' or under-utilisation of human capital that needs to be counted as an offset in the calculation of national productivity.²¹⁰

- 5.208 Associate Professor Taksa and Dr Anne Junor argued there is an under recognition of skills gained through experience:

Yet higher levels of these intangible skills are required of experienced workers. Work processes are sustained through the higher-level application of these skills, based on problem-solving, solution-sharing and informal system-building. The skills in question are developed through experience, on the basis of practice, teamwork and informal leadership.²¹¹

- 5.209 In citing the work of the New Zealand Department of Labour Pay and Employment Equity Unit framework which identifies social and organisational skills, Professor Taksa and Dr Anne Junor commented that:

... different combinations and levels of these skills contribute to outcomes such as service quality, customer focus, teamwork and informal leadership. These integrative skills form the basis of dynamic workplace activities ... methods of identifying these skills could be included amongst resources that for aiding an accurate evaluation of the skill demands of jobs.²¹²

- 5.210 WEL stated:

Whether we work full-time or part-time, we need to be properly paid for the work we do, not for the hours we work, with those

210 Associate Professor Taksa and Dr Anne Junor, *Supplementary Submission No. 109.1*, p. 5.

211 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 14.

212 Associate Professor Taksa and Dr Anne Junor, *Submission No. 109*, p. 14.

jobs therefore being considered to be low paid or, for some reason, lesser qualified. What we are talking about is a proper value – addressing a problem of undervaluation. Pay equity is about the undervaluation of women’s work. So we need to unpack the problem, not just consider aggregates.²¹³

- 5.211 It has been argued that in the community based jobs in the not-for-profit sector, funding is through government grants and can not afford increased wages.²¹⁴ The Committee believes, however, that the evaluation, will start a conversation and provide crucial information to the discussion.

If women ‘choose’ to work in these sectors and ‘choose’ to work part time this does not excuse or provide any justification as to why they should not be paid the appropriate value for their work. Such simplistic explanations will not resolve the pay equity problem.²¹⁵

- 5.212 Further, it is not possible to get an equitable job evaluation without the vocabulary. The Scottish experience is that there is a greater acceptance of the concept of job evaluation in the public sector than in the private sector.²¹⁶ People skills are equally important as technical skills and are held by women and men equally.²¹⁷

One of the main problems, of course is that, even though skill, responsibility, the nature of the work and the conditions of the work are the four main criteria under the best equal remuneration principle that we have, we really do have a major problem in defining women’s skills. I do not think that we can rely on a tribunal system for doing that; groundwork has to proceed at the same time.²¹⁸

- 5.213 There is a role for governments as leaders in redressing the situation in these sectors as the minimum standards in the areas of sectors such as childcare and aged care the funding comes from government. While there is a need to present responsible budgets to the electorate, the

213 Ms Suzanne Hammond, Industrial Relations Spokesperson, Women’s Electoral Lobby, *Transcript of Evidence*, 14 May 2009, p. 1.

214 For example see Australian Council of Social Service, *Submission No. 147*, p. 1.

215 Community and Public Sector Union State Public Services Federation Group, *Submission No. 107*, p. 2.

216 Ms Emma Ritch, Manager, Close the Gap, *Transcript of Evidence*, 11 August 2009, p. 7.

217 Ms Juliet Bourke, Chair, Equal Employment Opportunity Network of Australasia, *Transcript of Evidence*, 26 September 2008, p. 84.

218 Dr Anne Junor, *Transcript of Evidence*, 26 September 2008, p. 59.

Victorian Trades Hall Council argued that 'governments can sell changes and priorities that they follow on the basis of what they deliver to the community:

Pay equity is not just about the money in the pocket of the individual who might get better pay; it is about the community. We need to tell the community that it is needed to retain people in various areas and that there is going to be more money spent by their families. It is a bigger picture thing rather than just that really narrow bit ... government should be leading the way ... but it is across everything.²¹⁹

Funding for industrial organisations

- 5.214 Commissioner Fisher also raised the issue of 'the provision of funding for industrial organisations that conducted pay equity cases in the commission'.²²⁰ The Commissioner argued that the cases conducted under the principle are resource intensive and time-consuming and that funding should be available to industrial organisations because of the 'extensive work required, the reality that the nature of the occupational groups concerned in pay equity cases meant that they were non-unionised or not heavily unionised, and so it provided an incentive to run cases before the commission.²²¹
- 5.215 The Victorian Trades Hall Council stated that the provision of funds for cases was a key factor in enabling more activity in Queensland than elsewhere.²²² The Independent Education Union of Australia concurred that cost was one of the reasons that union had not brought a pay equity case.²²³ The ACTU and Joint State Union Peak Councils added that the funding was in recognition of the significant costs involved in

219 Ms Ann Taylor, President, Victorian Trades Hall Council, *Transcript of Evidence*, 2 April 2009, p. 83.

220 Commissioner Glenys Fisher, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 1; see also Dr Christine Short, *Transcript of Evidence*, 19 March 2009, p. 4.

221 Ms Glenys Fisher, Commissioner, Queensland Industrial Relations Commission, *Transcript of Evidence*, 31 March 2009, p. 3.

222 Ms Barbara Jennings, Women's Office, Victorian Trades Hall Council, *Transcript of Evidence*, 2 April 2009, p. 75.

223 Miss Sophie Ismail, Industrial Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Transcript of Evidence*, 31 March 2009, p. 26, see also Association of Professional Engineers, Scientist and Managers, *Submission No. 121*, p. 6.

participating in equal remuneration cases and requested funding for industrial organisations to assist with this process.²²⁴

- 5.216 The Liquor, Hospitality and Miscellaneous Union reported that the dental assistant's case cost the union \$220 000 in 2005 and received a government grant of \$33 000.²²⁵ The child care case in 2006 cost the LHMU \$160 000 and received a grant of \$50 000.²²⁶
- 5.217 The New South Wales Office for Women's Policy commented that:
- 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.²²⁷
- 5.218 The Committee received evidence from the New Zealand Department of Labour in relation to the contestable fund which provided funding for investigation of information that could be used by parties in bargaining processes.²²⁸ The contestable fund had criteria for applications and recommendations were made by a tripartite steering group (consisting of unions, employers and Equal Opportunity Commissioner) to the Minister.²²⁹ The Committee believes that this could provide a useful model in relation to the consideration of this aspect.

Achieving national consistency in pay equity law

- 5.219 Pay equity protection for Australian working women is a patchwork of Commonwealth, state and territory laws and policy instruments in both the industrial relations and anti-discrimination arenas. Not all states incorporate equal remuneration provisions in their legislation, but

224 Australian Council of Trade Unions (ACTU) and Joint State Union Peak Councils, *Submission No. 125*, p.22.

225 Ms Avalon Kent, Industrial Officer, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 31 March 2009, p. 15.

226 Ms Avalon Kent, Industrial Officer, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 31 March 2009, p. 15.

227 New South Wales Office for Women's Policy, *Submission No. 153*, p. 26.

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

229 Ms Philippa Hall, Director, Pay and Employment Equity Unit, Department of Labour, New Zealand, *Transcript of Evidence*, 13 August 2009, p. 4.

instead, provide capacity to make claims for equal remuneration through the wage fixing and award variation principles of their respective industrial tribunals (NSW, WA, TAS and SA). Queensland is the only state to expressly provide for the Queensland Industrial Relations Commission (QIRC) to make equal remuneration orders.²³⁰

- 5.220 The *Fair Work Act* is intended to cover the field in respect of 'national system employees', and excludes state industrial laws from applying to this class of people.²³¹ The principle of pay equity is recognised indirectly as an object of the Act, as part of the award modernisation objective, and an objective of minimum wage setting and is supplemented by equal remuneration orders (discussed above).
- 5.221 A more systematic and nationally consistent approach could be achieved through the adoption of uniform laws in each state and territory or a complementary scheme that guarantees the same level of protection for all employees. This could be achieved through bringing pay equity protections in the federal and state industrial relations systems and anti-discrimination laws into alignment and strengthening pay equity in the mainstream of the industrial relations system. It might also be achieved through separate national pay equity legislation that introduces a range of additional measures.
- 5.222 Before turning to various models for achieving a national coverage, it is important to understand the role of international law in providing constitutional authority for equal remuneration legislation.

Australian federation - National pay equity law

Uniform or complementary

- 5.223 In practice, to achieve nationally consistent pay equity protection the Commonwealth will need to negotiate through COAG a reference of power or an agreed legislative scheme. There are three common legislative frameworks:

230 The Fair Work Act expressly excludes State and Territory courts and tribunals established under State and Territory laws, with powers to make an equal remuneration order from doing so for employees covered by the *Fair Work Act 2009* (para. 26(2) (d)).

231 As a general principle of constitutional law, where the Commonwealth successfully covers the field the states and territories are precluded from legislating in respect of the same subject matter and a State or Territory become inoperable; Note also that the *Fair Work Act 2009*, applies to a 'national system employee', being an individual *usually employed* by a national system employer. The term 'usually employed' has been judicially considered to include casual or day hire employees but not a person on a vocational placement (EM p. 11).

- uniform laws;
- complementary laws; and
- state references.

Uniform laws

- 5.224 It is open to federal, state and territory governments to agree to pass identical laws to ensure uniformity (equal protection of the law) for all Australian workers. Uniform laws multi-jurisdictional schemes must, of course, be passed through multiple parliaments and assemblies and may vary to some extent.
- 5.225 The *Trade Practices Act 1974* and *Therapeutic Goods Act 1989* are Commonwealth laws directed at 'constitutional corporations' (as is the *Fair Work Act*) and state and territory laws cover natural persons and unincorporated bodies. Robert Cornall has commented that '...experience shows achieving uniformity through such arrangements is often difficult and maintaining it is even harder'.²³² A shortcoming of this approach is the difficulty in maintaining uniformity over time as the jurisdictions pass amendments. In this situation:
- a Federal Pay Equity Law passed by the Commonwealth and applied to 'national system employees' could be supplemented by identical state laws. The experience of Queensland provide some basis to negotiate an optimum model.
 - The States could also pass equal remuneration provisions identical to the Federal *Fair Work Act 2009*, to ensure uniform protection through the industrial relations systems. The *Fair Work Act* could be strengthened and then replicated.
 - Gaps and inconsistencies between jurisdictions in anti-discrimination laws could also be remedied this way (e.g. discrimination on the grounds of family responsibilities).

Complementary laws

Applied law regime

- 5.226 A complementary system involves the combination of Commonwealth, State and Territory laws to support functions of a single regulatory agency. This approach involves the application in participating jurisdictions of the law of the lead jurisdiction, or, the distribution of elements of the scheme between the Commonwealth and the States.

232 Robert Cornall, former Secretary, Attorney General's Department, *Federal Relations: The Legal and Constitutional Framework*, Public Administration Today, July – Sept 2007, p. 8.

- 5.227 The best known example is the Corporations Law Scheme, which consists of a Commonwealth Act enacted for the ACT and with each State and Territory then applying the law in force in the ACT.²³³ The Corporations' Law operates as a national law even though it is enacted separately in each jurisdiction and has the benefit of being capable of amendment by the Commonwealth in the ACT. The national law is administered by a national agency supported by laws applied in each jurisdiction and related functions were referred to the Commonwealth Director of Public Prosecutions and Australian Federal Police.
- 5.228 This composite approach is supported by a COAG Agreement that requires consultation and agreement on amendments, but, as noted above, once agreement is achieved the Commonwealth Parliament can effectively amend the entire national system because of its application via the ACT.

Recommendation 17

That the Australian Government place on the COAG agenda the consideration of the introduction of complementary legislation in relation to all equal remuneration matters dealt with by Fair Work Australia in each jurisdiction.

Other complementary schemes

- 5.229 Other complementary schemes (not involving applied laws) involve the Commonwealth assuming responsibility for decision making and States and Territories for control and enforcement (e.g. food standards, film classifications).
- 5.230 Federal regulator is given statutory powers based on the patchwork of constitutional powers with additional complementary powers, with respect to state matters, conferred by State laws (e.g. Australian Crime Commission). A national Pay Equity Act applied in the ACT and applied in each State would provide a truly national pay equity law. This would need to be underpinned by a COAG Agreement. It could support a centralised national Pay Equity Unit.

233 This approach relies on s.122 Territories Power and agreement among the States and Territories to apply the law in their own jurisdiction.

- 5.231 This raises the issues of the capacity for a national pay equity model to operate in the context of the Federal industrial relations system that is limited to national system employees. However, there has been some progress in recent weeks with some States considering the referral of powers to the Federal jurisdiction.

Referral of state powers

- 5.232 Under the Federal Constitution, Territories are subordinate to the Commonwealth Parliament with authority to pass laws for them subject to few restrictions (s.122). However, States, as independent constituent elements of the Federation, must refer legislative power if the Commonwealth lacks legislative power under s.51. Victoria and South Australia have referred legislative power on industrial relation.
- 5.233 Referral of power would enable the Commonwealth to legislate pay equity, however, it seems unlikely that any State would refer legislative power on pay equity in the absence of a referral for industrial relations more generally. Especially if this risks creating a conflict of laws in the industrial relations arena.
- 5.234 One option is a specific legislative referral, namely, a referral based exclusively on the provisions of a particular federal law, which is then given effect through State parliaments. The 2002 referral of counter terrorism offences is an example where States referred, but only to the extent of the specific provisions. This means the Commonwealth cannot amend the legislation without agreement by the States.
- 5.235 At the State level pay equity principles tend to be implemented via the mainstream industrial instruments such as awards and wage fixing although Queensland has specific equal remuneration orders. The development of Equal Remuneration Principles (ERP), which require neither proof of gender discrimination nor comparisons within and between occupations and industries, is said to have enabled the Commissions in NSW and Queensland to assess under-valuation of work on a gender basis.²³⁴
- 5.236 It is unclear how equal remuneration can be pursued in each type of employment contract (collective agreements, award and over award payments), a situation that could be rectified by amending section 582 of the *Fair Work Act 2009* so as to require the President to give detailed direction on how equal remuneration applications are to be handled.

234 Whitehouse G and T Rooney (2008) The Queensland Dental Assistants' Equal Remuneration Case: Advancing Gender Pay Equity at State Level?, *Labour and Industry* 18(2): 85-104.

Recommendation 18

That section 582 of *Fair Work Act 2009* be amended to require the President of Fair Work Australia to state explicitly the appropriate equal remuneration principle and to give detailed direction on how equal remuneration is to be handled.