

**Australian Council of Trade
Unions (ACTU) and Joint State
Union Peak Councils Submission
to the
House Standing Committee on
Employment and Workplace
Relations**

Inquiry into

**Pay Equity and Female Workforce
Participation**

27 October 2008

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1 INTRODUCTION

1.1 This Submission is made on behalf of the:-

- Australian Council of Trade Unions;
- Queensland Council of Unions;
- UnionsSA;
- UnionsNSW;
- Unions Tasmania;
- UnionsWA; and the
- Victorian Trades Hall Council.

1.2 The peak union councils represent 47 unions and almost 2 million working Australians. We welcome this opportunity to make a combined submission to this inquiry into pay equity and female workforce participation.

1.3 Almost 40 years have passed since the Industrial Relations Commission in Australia awarded equal pay for work of equal value. In the years immediately following the removal of discriminatory pay scales the gender pay gap narrowed. However, pay inequality and inequity have remained a stubborn feature of our labour market. Disturbingly in recent years we have seen the gap widen. Women, particularly those with family responsibilities, remain locked out of secure and satisfying jobs.

1.4 Progress on women's rights to equality of treatment in the federally regulated labour market has been hampered by deregulation of the labour market and dismantling of institutions that can directly and effectively intervene in the labour market relations.

1.5 The equal pay provisions currently found in the *Workplace Relations Act 1996 (Cth)* (WRA) have remained relatively unchanged since their introduction. This is despite numerous reviews highlighting the inability of the WRA to effectively address pay inequity in the deregulated modern industrial landscape.

1.6 In contrast, at the state level, there has been significant legislative and institutional advances in the fight against pay inequity. The issue of pay equity has been particularly championed in NSW and Queensland and to varying degrees in other Australian states. In the last decade, state governments have instigated a number of inquiries and reports. It is the recommendations of these inquiries and reports that have fuelled (and continue to fuel) debate and reform around pay equity. These inquiries and reports include:

- New South Wales - Pay Equity Inquiry, NSWIRC, Glynn J, 1998 (NSW Inquiry);

- Queensland - Worth Valuing, QIRC, 30 March 2001 (2000/01 Qld Inquiry);
- Queensland - *Pay Equity, Time to Act*, QIRC, September 2007 (2007 Qld Inquiry);
- Western Australia – *Report on the Review of the Gender Pay Gap in Western Australia*, Todd, T and Eveline J, November 2004 (WA Review); and
- Victoria - *URCOT Pay Equity: How to address the Gender Gap*’ Dept of Industrial Relations Victoria 2005 (Vic Inquiry).

1.7 These state inquiries represent a comprehensive and detailed investigation into pay inequity in Australia. They include many constructive and practical recommendations for strategies to eliminate gender-based pay inequity and have confirmed that:

- the Australian labour market’s particularly high levels of gender segregation has resulted in women in female dominated occupations and industries earning up to 40% less than women in male dominated occupations and industries¹. This trend appears to be increasing;²
- Australia has a particularly high incidence of women employed in part time work.³ This work is concentrated in lower classifications and provides fewer opportunities for training, skill development and promotion;⁴
- Australian women continue to shoulder the majority of responsibility for unpaid work in the home and care of children and other dependent family members;⁵
- the Australian industrial system has systematically undervalued the skills and qualifications associated with work carried out by women;⁶
- women, particularly those employed as part time and casual employees, are highly dependent on award minimum wages and conditions⁷ and have low levels of unionisation;

¹ Barbara Pocock and Michael Alexander, Labour and Industry, Vol. 10, No.2 December 1999

² Since 2005 there has been a growing pay gap between male and female dominated industries, with mining and construction sectors growing 4 % faster than the all industry average and retail and hospitality growing almost 3% slower than the all industry average.

³ Forty-five percent of women work part time compared to just 14% of men; with female dominated industries having the highest levels of part-time work and 50% of employees in the retail sector, 60% of employees in accommodation and food services and 40% of employees in education and administrative support services working part time: ABS 6306.0 May 2006

⁴ EOWA Census on Women in Leadership January 2008.

⁵ Ironically, women’s lower wages are a major factor in families’ initial decisions that women should undertake the unpaid caring role: HREOC Submission to the AFPC p.40

⁶ The recent pay equity cases for child care workers, librarians and dental assistants demonstrated the systematic undervaluation of skills and qualifications in females dominated occupations and industries: Children’s Services Award, Librarians and Queensland Dental Assistants Case, 2005

⁷ In 2006, 44% of casuals and 33% of part time employees’ wages and conditions were determined solely by awards. Unsurprisingly, employees in these sectors are also the lowest paid: ABS 6306.0 May 2006

- women generally have not made the same gains as men under the bargaining system and enjoy less over-award entitlements than men;⁸
 - the gap between low paid workers on minimum award wages and employees able to negotiate over award wages and conditions continues to be a key source of pay inequity for women; and
 - the WorkChoices regime particularly undermined the capacity for women to maintain pay equity by stripping the safety net,⁹ restricting the capacity of unions to represent employees,¹⁰ promoting individual contracts and restricting women's access to equal remuneration remedies.¹¹ The long-term effects of the WorkChoices policy are most clearly seen in Western Australia. Here the pay gap has grown to 28%¹² since the 1993 deregulation of WA labour laws.¹³
- 1.8 It is the contention of this submission that state governments have led the way in advancing pay equity reform in Australia. Since 2000 state governments have introduced a range of far-reaching and effective reforms in respect of pay equity.
- 1.9 These reforms have utilised existing institutions to ensure regulation of employment relationships to address discrimination and inequity. Importantly, these reforms have provided collective and inexpensive remedies for eliminating pay inequity. These have had a significant effect on female dominated occupational groups and industries.
- 1.10 This submission is of the view that the experience of the states and the resultant legislative and institutional reforms are an invaluable and practical guide to enduring and workable models for reform at a federal level.
- 1.11 We commend to this Inquiry for due consideration, the recommendations of the state inquiries and the subsequent legislative and institutional reforms.
- 1.12 Not least, it is integral to any federal reform agenda that any changes do not remove the rights to pay and employment equity which women have achieved through state industrial reforms. It would be a perverse result if

⁸ Women have less access to over-award allowances and bonus payments, overtime and penalty rates. For example, women earn 35% less paid overtime than men: ABS 6306.0 May 2006

⁹ OEA Data supplied to the Senate Estimates Committee in May 2006 confirmed that 100% of AWAs removed at least one protected award condition, the majority cut overtime, penalty rates, annual leave loading, public holidays payments and shift loadings and that the pay gap was worst for women on AWAs: One Year On: The Impact of the New IR Laws on Australian Working Families, ACTU publication, March 200. In 2006-7, women on AWAs earned on average \$87 less per week than their counterparts on collective agreements with part-time women earning \$140 less: ABS 2007

¹⁰ *Under WorkChoices, the capacity of unions to enter workplaces and to inspect the work time and wages records of workers were restricted, including those in response to complaints of pay discrimination.*

¹¹ In addition, WorkChoices specifically removed access to remedies which would be inconsistent with the minimum wages set by the AFPC and removed access to State Tribunals with superior equal remuneration principles.

¹² *ABS Average Weekly Earnings 6302 February 2008*

¹³ *A Study of Low Paid Work and Low Paid Workers in Western Australia; Women in Social & Economic Research Curtin University of Technology August 2007; Women and WorkChoices: Impacts on the Minimum Wage Sector. Centre for Work + Life, University of South Australia. (2007)*

the efforts of various state governments to rectify pay and employment equity were significantly undermined by federal government reform to that same end.

The need for federal legislative and institutional reform to ensure pay equity in Australia

1.13 The case for the federal government to take active steps to ensure pay equity for women is underpinned by three broad principles:-

- international human rights obligations;
- democratic rights and Australian traditions of inclusiveness and equality; and
- Australia's productivity and future prosperity.

1.14 Since 1919 successive international human rights instruments have demonstrated that paying men and women equally is considered by the international community to be a crucial component of women's equality. One of the principal objects of the WRA Equal Remuneration Provision is to give effect to the ILO Equal Remuneration Convention (C100), the Discrimination (Employment and Occupation) Convention (C111) and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

1.15 Pay equity promotes greater labour force participation of women, enhancing the quality of the Australian labour market and assisting in sustaining the tax base of an ageing population. Treasury modelling shows that a modest 2.5% increase in labour participation rates would produce an additional 9% increase in economic output by 2022.¹⁴

1.16 In Australia employee compensation accounts for 47.66% of GDP. Women constitute 45.3% of the workforce¹⁵ and overall earn 65.6% of men's earnings.¹⁶ Improving the participation rates of Australian women and their position in the labour market (including most notably their earnings) would have a significant effect in lifting Australia's overall economic performance. For example, UK studies have shown that gendered workplace inequality damaged UK productivity¹⁷ and that significant gains would be made from improving women's remuneration.¹⁸

1.17 Pay equity also has the capacity to flow on to other aspects of the labour market, lessening the requirement of male workers to work increased

¹⁴ Gruen, D & Garbutt, M., "The Output Implications of Tighter Labour Force Participation", Treasury Working paper, 2003-02, October 2003.

¹⁵ ABS Labor Force Australia June 2008

¹⁶ ABS Average Weekly Earnings May 2008, 6302

¹⁷ Walby, Sylvia and Olsen, Wendy (Nov 2002) 'The impact of women's position in the labour market on pay equity and the implications for UK productivity' (UK Department of Trade and industry, Women and Equality Unit)

¹⁸ Equal Opportunity Commission (UK) 'Britain's competitive edge: Women: unlocking the potential' 2004

hours, increasing the opportunities available for males to parent and decreasing the requirement for direct government transfers to support families.

- 1.18 However, the fact remains that despite the increase in women's levels of education and participation in the labour force, the gender pay gap has widened from women earning 87 cents for each dollar earned by men in 2004 to 84 cents in 2007.¹⁹ Average weekly earnings for women have not kept pace with inflation and in May 2007 women's total earnings actually fell in real terms.²⁰
- 1.19 A recent study by the OECD found that relying on 'market forces', the 'effluxion of time' or improvements in women's 'human capital' are not enough to remedy discrimination in employment terms and conditions.²¹ Action is required from government.
- 1.20 In order to effectively address pay inequity, the government must take a proactive role and amend the legislative and institutional framework.

Legislative reform must be relevant and effective in dealing with recent developments in the setting of wages and conditions

- 1.21 The award system is integral to addressing gender pay inequity. This is because of the role of awards in establishing and maintaining decent minimum wages and conditions for award reliant women and as a decent foundation for enterprise bargaining.
- 1.22 Wage fixation is far more complex in 2008 than it was at the time of the equal pay reforms forty years ago. Addressing the gender pay gap requires intervention at every stage that decisions about wages and conditions of employment are made. For that reason this submission recommends that amendments to the WRA, the *Equal Opportunity for Women in the Workplace Act 1999* (EOWWA) and the *Sex Discrimination Act 1984* (SDA) be made to establish a robust legislative pay equity framework which forms a proactive public educative and regulatory regime.
- 1.23 The award system has traditionally been a means by which the pay gap was narrowed in Australia. Enterprise level collective bargaining and individual wage fixation have now become significant factors in the setting of wages in Australia. Accordingly these forms of wage setting must be taken into account when designing a relevant and effective means of addressing pay inequity.
- 1.24 Thus while awards remain of primary importance, any equal pay legislation must also address the legal framework within which bargaining occurs.

¹⁹ ABS cat no. 6320.0 AWOTE May 2008

²⁰ ABS 2007

²¹ OECD Employment Outlook 2008, Chapter 3, 'The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity' OECD Employment Outlook 2008

- 1.25 The government's policy commitments set out in *Forward with Fairness* will see the safety net provided by awards simplified. Wages and conditions above the safety net will largely be achieved by bargaining. Collective bargaining will be the dominant means for wage bargaining above the safety net for many employees in the foreseeable future.
- 1.26 The legal framework within which wage bargaining occurs has the potential to support or inhibit women's participation in bargaining. This submission proposes a range of measures that will facilitate women's ability to benefit from collective bargaining.
- 1.27 While statutory individual contracts will be phased out, individual wage fixation above the award safety net continues to be available through common law contracts. These issues are addressed in this submission.
- 1.28 Remuneration practices that contribute to pay inequity are no longer confined to over award rates of pay, or access to overtime. A fresh examination of the gender pay gap must consider allowances, penalties, shift loadings and access to benefits. Important too are the complex and opaque performance based pay schemes that are commonplace today.
- 1.29 This submission recommends new ways to ensure both formal and informal over-award wage fixation is conducted in a transparent and accountable manner.

Outline of Recommendations

- 1.30 This submission argues that government must reform the federal equal remuneration regime. The new regime must be a proactive framework which addresses pay inequity through legislation, enforceable regulations and education together with practical support from public institutions.
- 1.31 Reforms proposed in this submission include:
- maintaining a decent safety net of minimum wages and conditions;
 - improving the capacity for women to bargain for over award wages and conditions;
 - providing remedies to address the pay gap between those employees who do and those who do not have access to collective bargaining;
 - improving access to flexible work arrangements and provisions for carers;
 - introducing mandatory annual reporting of basic remuneration data for all employers;

- instigating regulatory measures to prevent pay inequity;
- broadening the capacity of Fair Work Australia (FWA) to address pay equity;
- providing FWA with broad discretion and powers to make any orders it sees fit to remedy pay inequity;
- establishing a specialist Pay Equity Division which is proactive in addressing the gender gap and which integrates the monitoring, compliance and remedial aspects of the pay equity scheme; and
- establishing a Pay Equity Commissioner within FWA.

2 THE REGULATORY FRAMEWORK

- 2.1 A range of approaches can be deployed to enhance women’s labour force experience, and address the gender pay gap. Effective marginal tax rates, provision of affordable and quality child and elder care, and enforceable rights to equal employment opportunity can encourage higher female workforce participation rates. Equity measures in the education and training sector can influence girl’s career choices, and return to work opportunities for women who have broken work patterns due to caring roles can also enhance women’s experience of paid employment.
- 2.2 Despite deregulation of the wages system, the primary regulatory tool available to government is the industrial relations legislation. The government should ensure that its new one stop shop, Fair Work Australia (FWA), has pay equity as a central objective in the performance of all of its functions.

Recommendation 1:

Amend the industrial relations legislation to include equal remuneration for work of equal or comparable value as a stand alone object.

Equal remuneration for work of equal or comparable value should also be a specific object in relation to the setting of minimum wages and workplace bargaining.

3 MINIMUM WAGE FIXATION AND THE AWARD SYSTEM

- 3.1 While the proportion of the labour force that is award-reliant may continue to reduce, the award system remains the primary means for dealing with gender pay inequity. It is both a robust minimum safety net and a decent foundation upon which workers are able to bargain.

- 3.2 The importance of labour market institutions to the achievement of pay equity was highlighted in submissions to the 2007 Qld Inquiry.²² It was observed that between 1970 and 1980 Australia's pay equity performance improved markedly, jumping from 60% in 1970 to over 80% in 1980. It was concluded that the origin of this relatively good international performance was Australia's centralised wage setting institutions. More specifically the implementation of a series of equal pay principles through a coordinated system of awards. This delivered gains largely achieved without a sophisticated understanding of embedded gender-bias in the valuation of work. In addition, during this period Australia enjoyed a relatively higher relationship between the legislated minimum wage and the median wage than in the UK and the US.
- 3.3 The approach of NSW and Queensland governments to pay equity has utilised this wage setting model. Significant reforms to the approach of wage setting bodies to the question of gender equity in pay and employment has seen improvements in the pay of many women under state awards.

Minimum wage setting

Recommendation 2:

In setting and adjusting minimum wages FWA should ensure that minimum award wages provide for equal pay for work of equal or comparable value.

A party to an award should be able to make an application to FWA seeking an adjustment to the minimum rates to ensure equal pay for work of equal or comparable value.

- 3.4 The Committee should note that the adjustment of awards to ensure equal remuneration for work of equal or comparable value by FWA would be an evolutionary, not revolutionary change. Until the WorkChoices amendments of 2005, the AIRC was able to adjust minimum wages to ensure equal pay for work of equal value under its wage fixing principles. Upon application the Commission could adjust wages if there had been change in the:

*“nature of the work, skill and responsibility required or the conditions under which work is performed...[that] constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.”*²³

- 3.5 Thus, the AIRC's wage fixing principles allowed for the adjustment of award rates of pay based upon undervaluation of work. However the criteria does not reflect the approach followed in NSW and Qld through the adoption of

²² Whitehouse, G 'Submission to the Queensland Pay Equity Inquiry' 2007 School of Political Science and international Studies, University of Queensland

²³ *August 1989 National Wage Case [Print H9100; (1989) 30 IR 81].*

an equal remuneration principle.²⁴ In particular, the AIRC was not concerned with historical undervaluation of work, but changes in the value of work that had occurred since the last work-value assessment, effectively entrenching long-standing gender based undervaluation of work.

Recommendation 3:

Amend the industrial relations legislation to oblige FWA to consider historical undervaluation as part of ensuring equal pay for work of equal or comparable value.²⁵

Recommendation 4:

Amend the industrial relations legislation to require FWA to have regard to all relevant matters when engaged in setting the minimum wage including:

- **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 or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that 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 is performed and other relevant work features.²⁶**

Award modernisation

3.6 In 2005 the AIRC was stripped of its wage setting function and repealed its wage fixing principles. As a result the AIRC is now modernising the award system without the guidance of formal wage fixing principles. While the modernisation process includes the promotion of the principle of equal remuneration for work of equal or comparable value:²⁷

²⁴ See further discussion regarding the equal remuneration principle at para 5.13-5.22

²⁵ See also Recommendations 15 and 16

²⁶ See also Recommendations 15 and 16

²⁷ *In setting the new award rates of pay the AIRC is required to have regard to a range of factors, including*

- the process is complex and inevitably all parties will want the capacity to address unintended inequities prior to the first scheduled four yearly review;
- the timetable has meant that the approach adopted by all parties has been to minimise change, rather than to take the opportunity to address longstanding inequities or inefficiencies; and
- at least some awards will be modernised prior to the conclusion of this Inquiry and the implementation of any recommendations arising.

Recommendation 5:

The FWA should have the capacity to review any awards that are modernised and unions should have standing to seek a review of remuneration rates on a case by case basis to ensure that inequities have not been perpetuated through the award modernisation process.

Regular and ad hoc review of awards

- 3.7 *Forward with Fairness* envisages regular four yearly reviews of awards to ensure that they remain relevant. This mechanism should ensure that award reliant workers are not left behind those workers engaged in formal and informal over-award wage bargaining. However to be effective FWA must be empowered to adjust award rates of pay having regard to market based movements from time to time.
- 3.8 Both the Western Australian and Queensland industrial relations systems provide scope, albeit limited, for award rates to be lifted from time to time to address the gap between award and negotiated rates within an industry or occupation.
- 3.9 The approach adopted by the Queensland Industrial Relations Commission (QIRC) in the Dental Assistant's case²⁸ is instructive of how FWA could address market based movements without disturbing the wage relativities and the relevance of the award for future bargaining.
- 3.10 In that case the QIRC accepted that to properly assess the pay inequity it needed to acknowledge that *"it is this lack of access to, or participation in, enterprise bargaining that we consider to be the single biggest contributing factor to pay inequity for [dental assistants]."*²⁹

"the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value";

²⁸ (2005) 180 QGIG 187

²⁹ At 183

- 3.11 The QIRC provided a separate increase in recognition of the premium that dental assistants working in the private sector were denied by their lack of access to enterprise bargaining. The QIRC referred to enterprise agreement databases and included a one-off increase of 11% in the equal remuneration order.
- 3.12 In recognition of the need to address the gap resulting from lack of access to bargaining in an ongoing sense, the QIRC further provided for an equal remuneration component of 1.25%. This was an ongoing percentage amount to compensate for inequities that would inevitably arise as a result of future bargaining outcomes in the comparator sectors.
- 3.13 The Queensland approach does not substitute arbitration for wage bargaining. In spite of the gains made, the increases achieved in this case were modest and still left the dental assistants working in the private sector well below the actual rates achieved through bargaining of the comparator males and dental assistants working in the public sector. With further rounds of bargaining, this gap can be expected to widen further. Nevertheless, the strategy developed by the QIRC in the Dental Assistant's case demonstrates how the regular reviews of modern awards could become the vehicle to address the gap between market and award rates.

Recommendation 6:

As part of its annual review of awards, and in undertaking the reviews, or upon the application of a party to an award, FWA should be both required and empowered to ensure equal pay for work of equal or comparable value having regard to all elements of remuneration, including rates of pay in collective agreements and over-award pay arrangements.

Relativities

- 3.14 Retaining skill based classification structures in awards is particularly important in promoting pay equity, ensuring objective and transparent evaluation of work value and facilitating comparison of wage relativities within and across industries.³⁰

Recommendation 7:

Amend the industrial relations legislation to provide that the competency standards process contained in the relevant award is a significant component of the assessment of work value.

³⁰ In the equal pay test case of AMWU v HPM Industries, the Commission was prevented from applying the competency standards contained in the relevant award for the assessment of work value without the agreement of the employer: *Automotive, Food, Metal Engineering Printing and Kindred Industries Union v HPM Industries*(1998) 43 AILR

4 INDIVIDUAL PAY SETTING

- 4.1 Women who were employed on Australian Workplace Agreements (AWAs) were significantly disadvantaged compared to women employed on other wage fixing instruments. Women on AWAs earned on average \$2.90 an hour (or \$100.20 per week) less than women on registered collective agreements³¹. Between 2001 and 2006 the real wages of full time women in the private sector fell by 1.8%.³²
- 4.2 AWAs that reduced entitlements to penalty rates, overtime, casual loading and flexible work arrangements particularly disadvantaged women.³³ The growth in the gender pay gap that has emerged in recent years must be in part attributable to the widespread use of AWAs in low paid female dominated industries such as hospitality and retail.
- 4.3 A sinister feature of AWAs was the requirement that employees maintained confidentiality as to the terms of their employment contracts. This significantly undermined the capacity to address pay inequity. The ACTU supports the proposal contained in the UK Equality Bill to outlaw pay secrecy clauses. The recommendations contained in Section 7 of this submission relating to transparency and reporting of pay data will be important mechanisms to address pay equity.
- 4.4 The government's commitment to abolish AWAs, and to develop a robust regime for good faith collective bargaining, should partly ameliorate the negative effects of individual bargaining on pay equity. Nonetheless individual pay setting will remain a feature of the Australian labour market, both as an over award common law arrangement, and in award free areas (including where employees earn more than \$100,000 per annum). Reform of the legislation should include remedies where industrial agreement must comply with equal remuneration principles.

5 ESTABLISHING A PAY EQUITY JURISDICTION

- 5.1 It was noted by Commissioner Fisher in the 2000/01 Qld Inquiry:

“The concept of equal pay was initially construed to mean equal pay for equal work, that is, the same wage being paid for work which was the same in class, quality and quantity. This was later extended to comprehend equal pay for work of equal or comparable value. Pay equity has a broader meaning than equal pay. Pay equity is defined in the Industrial Relations Act 1999 as meaning equal remuneration for men and women workers for work of equal or comparable value. Remuneration

³¹ Based on a 38 hour week, ABS 6306.0 Feb 2007

³² ABS cat no.s 6410.0, 6302.0 March 2007

³³ OEA Data supplied to the Senate Estimates Committee in May 2006 confirmed that 100% of AWAs removed at least one protected award condition, the majority cut overtime, penalty rates, annual leave loading, public holidays payments and shift loadings and that the pay gap was worst for women on AWAs: One Year On: The Impact of the New IR Laws on Australian Working Families, ACTU publication, March 2007

*has broader connotations than pay. The concept of pay equity also comprehends that all skills, responsibilities and other elements of work value are transparently and objectively assessed to ascertain the true value of the work.*³⁴

- 5.2 Currently the WRA refers to equal remuneration for work of equal value. This is out of step with the majority of Australian states and international obligations. The concept of pay equity is not limited to the notion of equal remuneration for equal work but to equal remuneration for work of equal and comparable value. The reference to remuneration clearly demonstrates that the law is not solely concerned with the wage or salary but includes other payments made under the contract of employment. This reflects the ILO Convention 100 of which Australia is a signatory. The reference to comparable value removes any doubt that the pay equity principle is not limited to where the 'same' work is done but clearly includes 'similar' work.

Recommendation 8:

Amend the federal industrial relations legislation to insert definition of 'remuneration' consistent with ILO Convention 100 Article 1(a). It should read:-

"Remuneration, for a provision relating to work of equal or comparable value, includes:

- (a) the wage or salary payable to an employee; and**
- (b) amounts payable or other benefits made available to an employee under a contract of service"**

Recommendation 9:

Amend the federal industrial relations legislation to define pay equity principle as "equal remuneration for work of equal or comparable value".

Recommendation 10:

Amend the federal industrial relations legislation to insert in the definition of 'industrial matter' any matter which impacts on the obligations of the tribunal to give effect to ILO Convention 100.

³⁴ Pay Equity, Time to Act QIRC Sept 2000 p. 1

Discrimination and male comparator

- 5.3 As noted above the AIRC has a positive obligation to ensure equal remuneration for work of equal value when setting and adjusting minimum wages. However it has proved an ineffective remedy largely because the early cases before the AIRC adopted concepts from the anti discrimination jurisprudence.³⁵
- 5.4 The requirement to prove discrimination measured against a comparator group of men is particularly problematic. Cases of pay inequity are most likely to occur as a result of systematic undervaluation of work across a female dominated industry or sector rather than a direct case of men and women being paid differently for the same job.
- 5.5 The state based inquiries explicitly rejected the “discrimination” based model. The inquiries recommended the industrial tribunals no longer be required to find evidence of gender discrimination, nor to make comparisons within and between occupations and industries in order to find undervaluation of the work.

Recommendation 11:

Amend the industrial relations legislation to remove the requirement that the FWA find gender based discrimination or identify a male comparator in order to find that work is undervalued.

Pay equity powers of FWA

- 5.6 All state industrial jurisdictions (with the exception of Victoria) empower the state industrial commission/tribunal to deal with pay equity applications as a discrete industrial process. The powers conferred on the NSW and Queensland industrial commission represent the most comprehensive approaches to pay equity.
- 5.7 In Queensland, the QIRC is empowered under Chapter 2, Part 5 of the *Industrial Relations Act 1999* (Qld Act) to make orders
“...to ensure employees covered by the order receive equal remuneration for work of equal or comparable value”.
- 5.8 These provisions were first introduced in Queensland legislation in 1994. The history of the provisions and a review of the powers under them are the subject of consideration at paragraph 3.2.1 of the 2000/01 Qld Inquiry. These provisions were recognised by that Inquiry as an important and

³⁵ *In the Case of AMWU v HPM Industries*, the Commission held that “to establish that equal remuneration for work of equal value is justified it is necessary to establish that the rates have been established ‘without discrimination based on sex’. In the case of direct discrimination it is necessary to establish that the same circumstances exist and the equivalence of work needs to be established.”: *Automotive, Food, Metal, Engineering, printing and Kindred Industries Union v HPM Industries* (1998) 43 AILR

fundamental tool in addressing pay inequity which arises within the context of decentralised wage fixation.

5.9 The key features of these provisions include the following:

- the power to address pay equity is not limited by the existence of an industrial instrument. An order may be made in respect to any employment relationship where a woman worker does not receive equal remuneration for work of equal or comparable value;
- the QIRC is empowered to make any order it considers appropriate;
- although not an industrial instrument, an order overrides an industrial instrument otherwise made or approved by the QIRC. This includes awards and certified agreements; and
- there is no requirement for discrimination to be established in order for the QIRC to exercise power.

5.10 FWA similarly needs the discretion and power to make remedial orders to address instances of pay inequity. This is particularly important in addressing the pay gap between award-reliant employees and those able to access workplace bargaining.

5.11 Without broad remedial powers akin to the QIRC, the FWA will be restricted in its capacity to address the matter of bargaining outcomes as a source of pay inequity.

Recommendation 12:

Amend the federal industrial relations legislation to give broad powers to FWA to make any orders it sees fit to address pay inequity including the capacity to grant, in addition to adjustment of award-based pay rates:

- **One-off increases to redress any gap between award and agreement remuneration rates; and**
- **Ongoing equal remuneration increases to redress predicted ongoing pay inequities resulting from prospective bargaining outcomes in the comparator sector.**

Such orders should override any existing order in relation to any award or registered agreement. The minimum wage should not be exempt from such orders. In addition, this order should also be able to be exercised in relation to employment not governed by any industrial instrument or by a common law agreement.

The enlivening of the pay equity jurisdiction should be by way of an application by:-

- **parties to an award or agreement; or**

- an individual employee whose terms and conditions of employment are covered by an award or agreement of any kind; or
- FWA through the Pay Equity Commissioner.

Recommendation 13:

Provide mechanisms to ensure a review of any equal remuneration orders to ensure they continue to effectively address the pay inequity.

Pay Equity Commissioner

5.12 The appointment of a dedicated Pay Equity Commissioner within FWA would ensure that FWA has specialist expertise to deal with the complexity of pay equity issues. The Pay Equity Commissioner would have a sophisticated grasp of the legislation, case law, and aims of the equal remuneration scheme as a whole. They would oversee and promote an effective programme of remedies to advance pay inequity.

Recommendation 14:

Creation of a specialist Pay Equity Commissioner within FWA with jurisdiction across both the public and private sectors, with specific power to:

- oversee compliance with requirements for mandatory annual pay equity reporting;
- request an employer to conduct a pay equity audit;
- in response to a complaint or on own initiative, institute an inquiry or review.
- hear, determine and issue orders with respect to matters of discrimination;
- hear, determine and issue equal remuneration orders; and
- ensure awards are consistent with pay equity principles through annual award reviews.

Equal Remuneration Principle

5.13 The adoption of an Equal Remuneration Principle (ERP) by the NSW and Queensland industrial relations commissions was a central plank in pay equity reform. An Equal Remuneration Principle provides an analytical framework and tools to assess remuneration and employment differences including gender-neutral job evaluation tools and mechanisms. The adoption of such a principle is a necessary part of any reformed federal system, not least to ensure women in NSW and Queensland are not disadvantaged under a new national industrial relations regime.

5.14 The NSW Industrial Relations Commission (NSW IRC) adopted a new Equal Remuneration Principle in 1998 (NSW ERP). The Full Bench decision followed the recommendation of the NSW Inquiry that undervaluation and not discrimination should be the key construct to be

reflected in new institutional measures. The principle utilises 'work value' as the basis for the proper valuation of the work. The Full Bench in its determination noted:-

*“An assessment of the value of any work to which an award applies is not conducted in a vacuum but in a particular context, dealt with in the work value principles itself in para 6 (c), namely in the context of other work to which the award applies and the work of any related classifications in other awards”*³⁶.

- 5.15 Importantly the NSW ERP does not require applicants to prove discrimination, ensures that the reassessment of the work is gender neutral and allows comparisons to be made across dissimilar work, industries and industry sectors, employers, and across enterprises. The application of the NSW ERP is limited to awards.³⁷ However account can be taken of actual rates paid (including over-award payments and payments under enterprise agreements and contracts) where they reflect the value of the work. It also provides a range of measures to remedy undervaluation of work.
- 5.16 Another significant aspect of the Full Bench decision is the definition given to “remuneration”. The NSW IRC Full Bench limited the definition of ‘remuneration’ to the award rate of pay rather than the broader definition inclusive of all aspects of remuneration. A Practice Direction was issued in July 2000 by Justice Wright as to how the Commission would satisfy its obligations concerning equal remuneration.
- 5.17 The Public Service Association of New South Wales made the first application under the NSW ERP. The application was made on behalf of librarians, library officers and archivists. It sought an examination of classification and grading structures as well as the gender related undervaluation of the work. A full work value assessment of the work was undertaken in accordance with the NSW ERP. As a result significant adjustments to pay, classifications and grading were agreed between the union and the relevant employer(s). These adjustments resulted in an average increase of 16% across all classifications. Some grades benefited from an increase of up to 25%.³⁸
- 5.18 The Queensland Equal Remuneration Principle (Qld ERP)³⁹ represents a further evolution of the NSW ERP. The Qld ERP was issued by the QIRC in April 2002 and took effect from May of the same year. The Qld ERP is not limited to award matters. It applies when the QIRC exercises powers granted under the Qld Act to:

³⁶ Re Equal remuneration Principle (2000) 97 IR 177

³⁷ In the NSW Librarians case where the NSW IRC determined that the NSW Equal Remuneration principle was confined to the Commission’s award-making and wage fixation functions and inclusive only of the award rate of pay. (Lyons, M & Smith, M, Gender Pay Equity, Wage Fixation and WorkChoices: Forward to the Past? University of western Sydney, p. 115

³⁸ Re Crown librarians, Library Officers and Archivists award proceedings-Application under the Equal Remuneration Principle (2002) 111 IR 48

³⁹ Appendix D

- make equal remuneration orders;
 - make, vary or review an award; or
 - arbitrate an industrial matter.
- 5.19 As with the NSW ERP, the Qld ERP does not require gender discrimination to be demonstrated, nor does it require the identification of a male comparator.
- 5.20 The Qld ERP is otherwise more expansive than that in New South Wales (and elsewhere). It provides a more proactive role for the Commission in satisfying itself that the principle of equal remuneration has been met. It also identifies factors of an occupation or industry that may have contributed to the undervaluation of the work including the degree of occupational segregation, and limited representation by unions of women in workplaces covered by formal or informal work agreements. The Queensland Dental Assistant's case⁴⁰ and Child Care case⁴¹ show how the Qld ERP has been applied.
- 5.21 The adoption of an Equal Remuneration Principle at a federal level would add clarity to the operation of the legislative equal remuneration provisions and provide guidance to parties seeking to bring a case of pay inequity.
- 5.22 This principle should mirror the Qld ERP. In doing this, the principle should essentially provide:
- that FWA is to ensure work is valued objectively and free of assumptions based on gender or assumptions that the award rates were correctly set historically;
 - that FWA is to note contextual matters influencing pay inequity 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 workplace agreements and the incidence of consent awards or agreements; and
 - that FWA in assessing the value of work, is to examine the nature of work, the skill and responsibility required and the conditions under which work is performed as well as other contextual matters relating to the value of work such as whether sufficient and adequate weight has been placed on the typical work, skill and responsibilities performed by women. Another element, "other relevant features" should be added to capture a range of matters such as regular unpaid overtime or unpaid training expenses.

⁴⁰ The QIRC held that there had been an undervaluation of dental assistant's work because of gender related factors, and granted wage increases of \$53.60 per week (about 11%) plus an 'Equal Remuneration Component' (QIRC 2005).

⁴¹ (2006) 181 QGIG 568 and (2006) 182 QGIG 318. The QIRC found that 'the work performed by childcare workers had been historically undervalued based on the gender of the workers' based on evidence put forward by the LHMU regarding undervaluation of skills, qualifications and conditions of work.

Recommendation 15:

Incorporate an Equal Remuneration Principle (that mirrors the Queensland Industrial Relations Commission principle) into the industrial relations legislative scheme. Incorporation may be achieved by way of attachment to the industrial relations legislation or regulations.⁴²

Recommendation 16:

Amend the industrial relations legislation to clearly state that the Equal Remuneration Principle is to apply to all instruments regulating wages and conditions.

Funding

- 5.23 The Queensland government established a fund to assist industrial organisations pursuing equal remuneration matters before the QIRC.
- 5.24 The funding was in recognition of the significant costs and resources required to participate in equal remuneration cases, in particular where the employees were not union members.
- 5.25 The merit of providing this funding was recognised and endorsed by the 2007 Qld Inquiry.⁴³

Recommendation 17:

Establish a programme of government funding for industrial organisations engaged in equal remuneration cases.

6 ASSISTING WOMEN TO COLLECTIVELY BARGAIN

- 6.1 Balance in the employment relationship cannot possibly be reached for most workers in the absence of the opportunity to be represented collectively.
- 6.2 In those industries, occupations, sectors and enterprises characterised by low pay, insecure employment and difficult working conditions, federal anti-discrimination legislation, human rights commissions and the equal employment data generated by reports to Equal Opportunity for Women in the Workplace Agency (EOWA), contribute little or nothing to women's enjoyment of their right to be valued and properly paid for their contribution at work.
- 6.3 A significant contributing factor to pay inequity is the fact that women working in female dominated sectors in the private sector lack access to bargaining. If improvements in wages and working conditions are to be achieved through collective bargaining, then the legal framework must

⁴² See also Recommendations 3 and 4

⁴³ See para 2.3.3 and Recommendation 3, 2007 Inquiry

facilitate participation by low paid female dominated industries in collective bargaining.

- 6.4 The pay gap between women and men employed on awards and collective agreements is lower than AWAs or informal over-award individual bargaining. Women on awards earn 103% of men's award wages, women on collective agreements earn 90% of men's collective agreement wages compared to women on AWAs who earn just 81% of men's AWA wages.⁴⁴
- 6.5 Addressing the pay gap which arises as a result of the difficulties faced by many women in being able to collectively bargain will require positive measures to encourage award reliant women (and their employers) in low paid sectors to bargain.
- 6.6 This submission calls for the new workplace laws to provide for multi-employer bargaining in low paid sectors as a means to lift women in these industries off the award minimum.
- 6.7 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
 - franchised stores and restaurants where the employer has no real capacity to bargain on a workplace by workplace level.

Recommendation 18:

Amend the industrial relations legislation to allow employees and their employers to engage in multi employer bargaining:

- **as a single business where a group of employers are effectively controlled by another entity, or**
- **facilitated by FWA where the employees are low paid or have been unable to access collective enterprise bargaining.**

⁴⁴ Refer to Appendix C.

Recommendation 19:

When considering whether to facilitate multi-employer bargaining claims for the low paid FWA should take into account:

- the needs of low paid workers and the desirability of promoting bargaining and lifting living standards;
- where employees lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or sector makes collective bargaining difficult and impractical at the single business level; and
- the need to address the gender pay gap.

Recommendation 20:

Where the parties to a bargaining dispute involving low paid employees are unable to resolve the dispute, and where all other measures to resolve the dispute have been exhausted, FWA should be empowered to settle the outstanding differences between the parties.

Protections in the application of individual flexibility clauses

6.8 There must be appropriate protections in the industrial relations legislation in relation to the use of individual flexibility clauses including the model clause in the Modern awards. These protections should ensure that pay equity for women is not adversely affected by the implementation of lower terms and conditions. The primary focus for flexibility in the workplace should be through collective bargaining.

Recommendation 21:

Insert protections into the new industrial relations legislation to ensure the individual flexibility clauses are not used to undermine collective terms and conditions or the safety net.

Recommendation 22:

Insert into the new industrial relations legislation strong anti-coercion and freedom of association protections which recognise the unequal bargaining position of employees to employers, particularly in relation to individual negotiations.

Pay equity should be considered before certifying an agreement

6.9 *Forward with Fairness* envisages that FWA will approve an agreement that provides that workers are better off overall when compared to the award.

Recommendation 23:

FWA should be able to refuse to approve an agreement where it is

inconsistent with an equal remuneration order or if it is not satisfied that the agreement ensures equal remuneration for all men and women employees of the employer for work of equal or comparable value.

- 6.10 Pay equity data should be provided to FWA at the agreement certification stage in order to assist FWA to ensure the proposed agreement complies with equal remuneration principles and meets the better off overall test.
- 6.11 Not only would this enable FWA to quickly ascertain if there was a potential pay inequity issue requiring attention prior to certification, it would assist in developing a culture amongst bargaining parties of routinely factoring gender pay equity issues into the bargaining process.

**Recommendation 24:
Amend the industrial relations legislation to require information to be provided to FWA about the reasons for and purpose of any provisions in the proposed agreement which provide for or result in differential treatment of different groups of employees.**

The legal framework should facilitate employee education and representation

- 6.12 The various state based pay equity inquiries acknowledged the link between lower levels of union representation in female dominated industries and the associated lower bargaining outcomes. Female dominated industries are characterised by workplaces with small numbers of employees, often working on a part-time or casual basis, with low levels of unionisation. Lack of industrial organisation of employees in female dominated industries is a key factor in the growing wage gap between men and women.
- 6.13 Access to advice, information and support at work is important to develop the collective bargaining capacity of workers. Union right of entry is a necessary corollary to workers rights to advice and information at work. The legislation should provide right of entry for two purposes:
- to provide information and represent employees and to engage in bargaining activities; and
 - to ensure compliance with awards, agreements and industrial laws.
- 6.14 Unions should have access to the workplace that is fit for the purpose of entry including proximity and privacy. For example, recently an employer directed the female employees to attend a union meeting in the women's toilets and despite objections from both union officials and the workers,

refused to allow the union organiser access to any other site at the plant to talk to workers.⁴⁵

- 6.15 Union access to employees in the workplace is essential to ensuring pay equity for women. Pay equity achievement is a result of proactive representation and intervention by unions on behalf of women workers.
- 6.16 In order to investigate pay equity, union representatives must have the ability to access records and observe work performed in order to properly assess comparative skills and job requirements. In addition access to workplaces as part of pay equity investigations must include the capacity to interview employees at work because women often work part time or casual shifts with no rest or meal breaks.

Recommendation 25:

Right of entry laws should explicitly provide for:

- **employees to have access to unions in the workplace subject to undue interference with work. Access should include areas in the workplace where employees congregate during meal and rest breaks;**
- **unions to have access to employees in work areas in order to inspect the work performed of both members and non members;**
- **unions to be able to inspect both member and non-member records;**
- **the capacity to bargain for complementary rights of access; and**
- **unions to have the right to access workplaces regardless of the industrial instrument which regulates the employment of employees.**

- 6.17 In low paid female dominated workplaces, fear of retribution for contacting a union can discourage collective bargaining. In a recent case, a union was forced to hold a meeting in an open-air car park adjacent to a loading dock under the unblinking eye of a surveillance camera.⁴⁶

Recommendation 26:

The industrial relations legislative framework should provide very strong anti-victimisation provisions, including obligations on employers to facilitate reasonable union right of entry, and should support delegates in representing employees, particularly during the bargaining process.

⁴⁵ Textile Clothing and Footwear Union (TCFUA) and Feltex Carpets 2008

⁴⁶ Automotive, Manufacturing Workers Union (AMWU) and Geon Australia 2008

7 EFFECTIVELY IDENTIFYING PAY INEQUITY

7.1 Historical and current data about comparative remuneration and employment outcomes for men and women is inadequate. This inadequacy impacts on the ability of women, unions, employers or government to understand, monitor and combat pay inequity.

Universal data collection

7.2 The Australian Bureau of Statistics (ABS) regularly publishes earnings data. This data is reported as weekly earnings. Internationally data of this nature is more commonly reported as average or median hourly earnings. Unfortunately the ABS publication that does cover hourly earnings (Employee Earnings and Hours, 6306) is published only every two years. It would be desirable for both weekly and hourly earnings data to be published regularly. In addition the data should allow for as much disaggregation of industries and occupations as possible to allow for finer and timelier analyses of trends. In the absence of this data, disaggregation and analysis must be performed by specialist researchers and academics or requested of the ABS and paid for, with a starting figure of \$300 for basic requests.

7.3 Concerns regarding the ability to track data on the movement of wages and the gender pay gap were raised in the 2007 Qld Pay Equity Inquiry⁴⁷ (Qld Inquiry). This gap was similarly identified in the 2005 Victorian Department of Industrial Relations Report into pay equity⁴⁸ (Vic Inquiry). Both inquiries made recommendations aimed at ensuring data was available to allow adequate monitoring of pay equity into the future.⁴⁹

Recommendation 27:

Investment in increased data collection, including longitudinal survey data, to enable researchers to assess movements in gender pay equity.

Equal remuneration reporting and audits

7.4 Remedial provisions for equal remuneration for work of equal or comparable value are rendered meaningless if there are no tools by which unequal remuneration can be identified. Without access to information regarding remuneration outcomes in their organisation employees and employers can not pinpoint pay inequity. Access to information is also necessary to facilitate identification by unions, relevant agencies or FWA of systemic pay inequity.

⁴⁷ Pay Equity Time to Act, QIRC, Sept 2007

⁴⁸ URCOT Pay Equity: How to address the Gender Gap Dept of Industrial Relations Victoria 2005

⁴⁹ Vic Inquiry, Recommendation 2 and 2007 Qld Inquiry, Recommendation

- 7.5 In discussing the merits of mandatory pay equity reporting under the UK Equality Act, the Equal Opportunities Commission commented that “*only an equal pay review can ensure that an organisation is providing equal pay.*” That is, in reality, it is all but impossible for an employer to proactively address pay inequity without having accurate pay data and without examining the reasons for differentials.⁵⁰
- 7.6 The national reporting regime currently in place in Australia though the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)* and administered through the Equal Opportunity for Women in the Workplace Agency (EOWA) is inadequate and too restrictive. Pay inequity is most likely to occur in small private sector workplaces with less than 100 employees where there is less likely to be a formal human resources system or collective bargaining.
- 7.7 Mandatory pay equity reporting for all employers in both the public and private sectors is essential if we are to seriously address pay inequity. An established process of annual pay equity reporting provides employees and employers with the tools to understand and address pay equity issues in their workplace.
- 7.8 This submission proposes a two tiered approach. The first tier is mandatory annual reporting by all employers on basic gender pay data which is not overly onerous on employers but which is sufficient for meaningful analysis.
- 7.9 The second tier proposes a mechanism where in depth investigating and auditing can be instigated and enforced if mandatory reporting identifies pay inequity. Such investigations should be capable of being instigated not just by specialist pay equity agencies but women and their unions.
- 7.10 Information that is collected through mandatory pay equity reporting must be broadly available. This allows for systemic instances of pay inequity to be identified and addressed by unions, industry and government. In Victoria, pay equity information collected by the government through employer surveys is not accessible to working women or their collective representatives. The public report is too general to assist in prosecuting equal remuneration cases or identifying industries or workplace for further investigation and action.

Recommendation 28:

Amend the *Equal Opportunity for Women in the Workplace Act (1999)* to require mandatory annual pay equity reporting for all employees. Reporting should include basic remuneration data including information on the quality and standard of policies and programmes undertaken by organisations to advance pay equity. Reporting should be overseen and

⁵⁰ M. Jaffe, B. McKenna & L. Venner, *Equal pay, Privatisation and procurement*, The Institute of Employment Rights, August 2008 p.37

coordinated by the Pay Equity Division.

Recommendation 29:

Empower FWA and the Pay Equity Division to compel an employer to conduct a pay equity audit where pay inequity is suspected or alleged to exist. Grant FWA, the Pay Equity Division, employees or unions capacity to request an audit.

Recommendation 30:

Provide employers with resources and assistance, through the Pay Equity Division, with respect to annual pay equity reporting and pay equity audits.

Recommendation 31:

Ensure the Pay Equity Division is sufficiently resourced to provide assistance and guidance to employers complying with reporting requirements (including request for audits).

Recommendation 32:

Ensure information from annual mandatory pay equity reporting is publicly available.

Bargaining

- 7.11 Access to accurate and detailed information relevant to pay equity must be available to unions and employees who seek to negotiate provisions aimed at reducing pay inequity during the bargaining process.
- 7.12 Pay equity audits should be a mandatory feature of workplace bargaining. The audit should include basic gender pay information such as actual wages including all over-award entitlements including, but not limited to, any allowances, incentives, performance based payments, overtime, bonuses and penalty rates. The audit should also provide basic data on availability of flexible work arrangements and access to training.

Recommendation 33:

Provision of pay equity information should be a requirement in meeting the good faith bargaining principle and the object of ensuring pay equity in agreements.

- 7.13 In addition, FWA should have access to information relevant to pay equity when assessing workplace agreements.
- 7.14 The requirement for parties to supply basic gender pay data and a statement of measures taken to ensure equal remuneration for work of equal or comparable value would facilitate the capacity of FWA to ensure the pay equity object in agreement making has been met.

Recommendation 34:
Mandatory equal pay audits should be a specific feature of the implementation of the better off overall test and certification stages of agreement making.

Other reporting mechanisms

7.15 Incorporation of pay equity data into an employer's mainstream reporting mechanisms encourages stakeholders to routinely consider the pay equity in their organisations.

Recommendation 35:
Employers should as a matter of course include gender based remuneration data in reports to Annual General Meetings.

Recommendation 36:
Accounting standards should be amended to require auditors to consider the risk of non-compliance with the Act in routine company audits.

8 ESTABLISHING A DEDICATED PAY EQUITY DIVISION

- 8.1 The actual exercise of rights together with their public recognition has a constant and powerful educative function. Accordingly it is essential that women, their industrial representatives and their employers should be involved in establishing and implementing more effective approaches to pay equity. Involving women workers in the planning and implementation process increases the credibility of the process and the comfort level with the results. The processes adopted must be open and transparent to the scrutiny of employees, unions and organisations representing women.
- 8.2 The employment parties should agree on the tools, methods and processes for achieving pay equity. This requires the involvement of a competent agency or body with specialist knowledge and skills to be help realise pay and employment equity.
- 8.3 This submission supports the establishment of a specialist pay equity unit or division. While the establishment of a specialist unit or division should not replace direct regulatory intervention to redress pay inequity, a pay equity division would support, coordinate and oversee the pay equity initiatives otherwise outlined in this submission. Specialist units of this nature have been introduced nationally in Victoria and Western Australia and internationally in New Zealand and Canada.
- 8.4 The Pay Equity Division should preferably be part of a pay equity jurisdiction within FWA, overseen by the Pay Equity Commissioner. This is consistent with *Forward with Fairness*' policy of a one-stop-shop for all work related matters. The role of the Division should include:

- monitoring of progress towards eliminating pay equity;
- reviews of recruitment, training and reward procedures in workplaces;
- education and publication of best practice models;
- development of resources and model pay equity audits;
- assistance to organisations undertaking pay equity audits;
- data collection and analysis of routine annual equal pay reports;
- analysis of equal pay audits;
- development of gender neutral job evaluation tools and methods of analysis;
- monitoring compliance with mandatory pay equity orders;
- instigating further investigation into a particular employer, sector or group of people where it is deemed appropriate;
- instigating investigations and pay equity reviews where appropriate;
- providing organisations with assistance in conducting pay equity cases; and
- assisting FWA in conducting pay equity reviews.

Recommendation 37:

The establishment of a specialist pay equity division in FWA which promotes the aims of pay equity and assists parties to address pay inequity in a way which meets compliance with established pay equity principles.

9 ENCOURAGING GREATER FEMALE PARTICIPATION AND OPPORTUNITY IN THE LABOUR MARKET

- 9.1 Traditionally the analysis of Australia's gender pay gap has focussed upon average comparable male and female earnings at a point in time, rather than across the life course. However, the more recent State based inquiries have acknowledged that the quality of women's jobs and access to career progression are an important component of women's remuneration, and a determinant of women's retirement incomes.
- 9.2 Evidence suggests that women's caring responsibilities are a key factor in pay inequity. Women with caring responsibilities are more likely to work in lower paid part time or casual jobs in order to balance work and family. Any commitment to addressing pay inequity must include strengthening the capacity of employees to combine their careers and caring responsibilities.
- 9.3 Government can play a role by ensuring that flexible work arrangement provisions supporting employees balancing work and family commitments are contained within the minimum safety net. It is crucial that the minimum safety net maintains a strong focus on work and family related entitlements to ensure that they are not bargained away.

Recommendation 38:

The relationship between the National Employment Standard (NES) and modern awards must clearly provide that award terms can build upon NES conditions to provide higher standards of minimum entitlements.

Recommendation 39:

Ensure access to award dispute settlement procedures for both NES and award matters.

Improving the work and family safety net

9.4 Whilst in recent times, much progress has been made in relation to care for very young children, caring requirements for children do not stop once children reach school age. The ageing population and trend towards informal care of elderly parents in the home is likely to place more pressure on women who continue to carry the responsibility of care for family members.

Recommendation 40:

The NES flexible work arrangements provision should be extended to the care of school aged children, disabled and elderly dependents.

Recommendation 41:

Provisions for carer's leave in both the NES and awards should be clarified to ensure that the entitlement applies to a wide range of caring responsibilities broader than illness or emergency and is able to accommodate circumstances such as attending to a dependent's needs.

Recommendation 42:

There must be an obligation under the NES on employers to reasonably consider an employee's request for flexible work arrangements and to provide a reason for refusing such a request.

Recommendation 43:

The grounds upon which an employer may rely on 'reasonable business grounds' under the NES for refusal of a request should be limited. Employees must be provided with the capacity to review an unreasonable refusal.

9.5 Paid parental leave (currently the subject of an Inquiry by the Productivity Commission) is important to address the gender pay gap both as replacement of income during period of enforced leave and to mitigate the effects of broken service on superannuation savings.

9.6 Affordable and accessible quality early childhood care and education including the provision of before and after school care also impacts positively on women's capacity to participate in the labour force.

9.7 Workplace arrangements that facilitate transition in and out of the workforce are central to increasing the workforce participation of women. Without such flexibility, women suffer loss of career path, loss of service related entitlements such as annual and sick leave and instead enter into precarious employment with minimal access to career development opportunities.

Quality part time work

9.8 The right to part-time work upon return to work from parental leave is a critical factor in addressing the gender pay gap. A recent study indicated that a significant proportion of mothers are routinely (illegally) denied the right to return to their pre-leave job let alone access to part time work upon returning to work from maternity leave.⁵¹

Recommendation 44:

The right to part-time employment upon return to work from parental leave should be available to all employees and an education programme for employees and employers about this right should be conducted.

9.9 Flexible work arrangements must not be at the expense of quality of work. Hours of work, rosters, shift work and training arrangements influence the capacity of women with caring responsibilities to access equal opportunities at work.

9.10 Research by the Public Service Commission also revealed that two thirds of females who took maternity leave in 2001 had not received any promotion by 2007.⁵² Over 90% of the respondents were satisfied with their flexible work arrangements, indicating the issue was not simply a matter of accessing flexible work. Possible reasons cited by the Commission included:

- a majority of women take maternity leave when they are at a level that is an important feeder group for higher management positions (significant numbers of whom take subsequent periods of parental leave);
- many of these women are denied access to more senior roles as they are concerned they cannot manage the extra demands and hours of work and their caring responsibilities; and
- there is a lack of career opportunities for women employed in part-time work.

9.11 Similarly, a recent report into the effects of flexible work arrangements on women working in corporate law firms found that “far from being a

⁵¹ Sara Charlesworth and Fiona MacDonald, The Unpaid Parental leave Standard: What Standard? Paper delivered at the ACTU International Women’s Day Forum, 2008

⁵² This compared to just 42% of childless women who missed out on promotion in the same six year period: Public Service Commission, Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave, 2008.

panacea, flexible work is being invoked to confine women to subordinate roles and to restrict access to partnerships.”⁵³

- 9.12 In Australia, part-time work is the main means by which women workers are able to balance work and family commitments. Forty-five percent of women worked part time in 2005 compared to 26% across the OECD.⁵⁴ Strategies need to be developed to ensure that part-time work as a solution to work life balance is detrimental to gender equality at the workplace.
- 9.13 Employers should provide equitable workplace based training and career development opportunities. Part time women employees made up just 15% of all employees who accessed work-related training in 2005.⁵⁵
- 9.14 Employer’s pay equity reporting requirements should include access to training and professional development opportunities as well as access to formal or informal mentoring programmes.
- 9.15 Strategies to encourage and support women to attain senior or leadership positions should be promoted as a mechanism to address pay inequity. For example, the gender wage gap is less pronounced in businesses where there are significant numbers of women on boards of directors.⁵⁶

Recommendation 45:

Strategies aimed at providing quality part time work and addressing work organisation such as hours of work, rosters, shift work and training arrangements which discriminate against women with caring responsibilities should be identified and promoted.

Recommendation 46:

Access to part time work, hours of work, rosters, shift work and training arrangements should be considered by FWA as part of the object of ensuring equal pay for equal or comparable remuneration in agreement making.

Access to vocational training

- 9.16 Access to vocational training is vital for equality of opportunity for women re-entering the labour force and also as part of their ongoing career development.
- 9.17 Sub optimal access to vocational training for women also affects the international competitiveness of the Australian economy. Over the past

⁵³ “The Gender Trap: Flexible Work in Corporate Legal Practice” Thornton, M & Bagust, J., Published in Law Institute Journal September 2008

⁵⁴ Dr. Barbara Pocock, Labour Market Participation, Working Time and Work-Care Conflict: Lessons from Europe for Australia, June 2005.

⁵⁵ ABS Cat no. 6278.0, education and training Experience, 2005.

⁵⁶ National Foundation for Australian Women media release 27 August 2008

decade Australia has slipped below the OECD average on investment in vocational training and graduation levels.⁵⁷ In particular, the number of women participating in vocational education has dropped as has the number of women graduating from higher level certificates and diplomas.⁵⁸

9.18 The Australian National Training Authority in its report argued that investment should also include:

- flexibility of training;
- family friendly Vocational Education and Training (VET) provision;
- accessible pathways from informal to formal learning;
- responsiveness to different learning styles;
- access to role models and mentors;
- learning supports that recognise whole of life needs and remove barriers to participation; and
- professional development programmes that respect and include casual and part-time workers.⁵⁹

9.19 There has been no general improvement in women's access to vocational training and employment pathways to suggest that further investment in these areas is not warranted.

9.20 Greater provision of VET infrastructure to support women's participation such as childcare services should be considered.

Equitable Retirement Income

9.21 Pay inequity in employment is perpetuated in retirement due to women's significantly lower levels of retirement earnings as a result of lower earnings and broken service patterns. Women have just half the amount of savings men have accumulated in their superannuation accounts and 75% of women aged 60-64 have less than \$40,000 superannuation savings.⁶⁰

9.22 Australian unions have endorsed the following retirement income policies as a minimum:

- increasing minimum contributions to a goal of 15%, which can be achieved through one or more of bargaining or legislation;
- reducing the contribution tax including removal of the tax on incomes of less than \$70,000 per annum;
- restructuring superannuation taxes to provide greater equity;

⁵⁷ The Economic and Social Impact of Increased Investment in Vocational Education and training – An ACTU Discussion Paper, May 2007, p.4

⁵⁸ Recommendations to NSOC on Future Advisory Arrangements and a Proposed Structure to Manage Equity Reform Within the VET System

⁵⁹ ANTA National Women's Vocational education and Training Strategy 1996-2000; 2004-2010.

⁶⁰ Clare, Ross.200, Retirement Savings Update, p.1, 9, Association of Superannuation Funds of Australia (ASFA) research and Resource Centre February 2008. Available at www.superannuation.asn.au

- extending the entitlement of SG to all workers, irrespective of age or minimum earnings;
- fully disclosing all fees and charges, together with a ban on entry and exit fees and commissions charged on SG contributions; and
- equal treatment of same sex couples in the allocation of superannuation benefits.

10 ALTERNATIVE REMEDIAL POWERS TO ADDRESS PAY INEQUITY

- 10.1 This submission strongly supports the findings of both the NSW and Queensland inquiries that the most effective means of reform to pay inequity is by way of labour law rather than through individual claims lodged under anti-discrimination regimes.
- 10.2 The Australian anti-discrimination regime is characterised in part by ‘complaint based’ individualised legal processes to deal with instances of discrimination. This is administered by the Human Rights and Equal Opportunity Commission (HREOC). EOWA comprises a part of the overall anti-discrimination regime, by overseeing a ‘reporting’ regime on aspects of EEO. It is the view of this submission that the overall anti-discrimination regime at federal level has not brought about substantive improvement in pay equity because in part, it has developed within a framework of individualised and voluntarist approaches to workplace issues.
- 10.3 The inability of such a regime to deliver substantial improvement in women’s participation and pay levels has been noted elsewhere. The OECD Employment Outlook 2008 ⁶¹ found that despite the widespread introduction of anti-discrimination laws across the OECD, women’s labour market participation and remuneration equality continues to lag significantly behind men. Pervasive discrimination was found to potentially impair the effectiveness of policies such as labour market programmes, family friendly policies or tax incentives as means to increase women’s labour force participation rates.
- 10.4 It is clear from studies of the Australian labour market, as well as studies of comparable labour market experiences in the OECD, that individualised and voluntarist approaches are inadequate as remedies for persistent and endemic gender discrimination at work. They have not yielded substantial gains for either women as a whole or for the productive capacity of the economy generally. It is submitted that this anti-discrimination approach does not go far enough in meeting Australia’s international obligations. It does not address the subtler but more intractable issue of the persistent undervaluation of women’s work.

⁶¹ OECD Employment Outlook Chapter 3, ‘The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity’ OECD Employment Outlook 2008

Remedies available under the Sex Discrimination Act (SDA)

10.5 However this submission reflects the view that a strong anti-discrimination legislative regime can and should play a role in eliminating gender based inequity including pay inequity. The 2007 Queensland Inquiry examined the anti-discrimination regime and recommended that the QIRC be accorded shared jurisdiction under the Queensland Act to hear and determine discrimination complaints in the area of work.⁶² This recommendation recognised the high incidence of work related complaints in both state and federal anti-discrimination jurisdictions.⁶³ The recommendation further recognised that the QIRC possessed the necessary work related expertise and provided a timely, less legalist forum for the resolution of complaints. That argument has similar resonance at a federal level.⁶⁴

Recommendation 47:

Amend the *Sex Discrimination Act 1984 (Cth)* to grant FWA jurisdiction to hear and determine complaints of discrimination made with respect to work related matters.

10.6 We refer this Committee to submissions of the ACTU, QCU and UnionsNSW to the *Standing Committee on Legal and Constitutional Affairs Inquiry into the Commonwealth Sex Discrimination Act (1984)*⁶⁵. In these submissions we contend that whilst the role of the *Sex Discrimination Act* (SDA) in resolving individual complaints is critical and needs strengthening, substantive equality between men and women workers will not be achieved if the primary mechanism continues to be remedial orders arising from individual complaints. We propose a new framework to address systemic discrimination, which contains three elements:

- a positive approach including the restatement of the objective of the Act as achieving substantive equality between men and women and the introduction of a positive duty on employers to take all reasonable steps to eliminate sex discrimination;
- new regulatory models that actively uncover discrimination and assist organisations to eliminate discrimination and prevent its recurrence and enforce non-compliance; and
- improvements in the way in which complaints are handled.

⁶² Recommendation 7, 2007 Qld Inquiry

⁶³ The ADCQ Annual Report 2006/07 reported that 60% of complaints to ADCQ in that year related to the area of work.

⁶⁴ HREOC Annual Report 2006/07 reports that in 2006/07 81% of complaints lodged with HREOC related to the area of work.

⁶⁵ ACTU, QCU and Unions NSW submissions can be found at http://www.apf.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm

11 ENFORCEMENT AND COMPLIANCE

- 11.1 The importance of mandatory pay equity reporting and data collection has been discussed. For data collection to be meaningful, it must be integrated with a regulatory system which monitors and enforces mechanisms designed to address pay inequity.
- 11.2 In turn, for regulation to be most effective there must be a full range of powers including the 'pyramid' of self-regulation, enforceable regulation, and remedies.⁶⁶ The current system provides a low guidance and self-regulation level and some remedies for pay inequity, but lacks the middle tier of 'enforced self-regulation'.
- 11.3 Enforced regulation is necessary to encourage, educate and assist organisations to address pay inequity and to ensure pay inequity is addressed where it is most likely to occur.
- 11.4 If FWA is to be an effective one-stop shop, its inspectorate and compliance arm should be empowered to audit and investigate incidences of unequal pay for work of equal or comparable value.

Recommendation 48:

In conjunction with other agencies, FWA should monitor pay equity data, and investigate particular employers, sectors or groups of people where it is deemed appropriate.

Recommendation 49:

The compliance arm of FWA should have the capacity to follow up such employers or sectors to enforce pay equity audits or instigate a pay equity case where appropriate.

Recommendation 50:

The compliance arm of FWA should also be able to enforce orders made by FWA including mandatory pay equity plans.

Codes of conduct

- 11.5 Codes of practice can lower costs of compliance and enforcement. An example of this approach is the publication by the NSW government of a Code of Practice covering the practical steps required to achieve the standards of health, safety and welfare required by the Occupational Health and Safety Act and the Regulations.⁶⁷ Significantly, in proceedings under the OH&S Act or regulation, failure to observe a relevant approved industry code of practice can be used as evidence that a person or

⁶⁶ Ayres and Braithwaite model of effective regulation requires three tiers of regulation low, medium and high. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, p.14

⁶⁷ OH&S Consultation-Code of Practice 2001 WorkCover NSW

company has contravened or failed to properly comply with the provisions of the Act or the Regulation.

- 11.6 An example of this approach at federal government level is the provisions of s.51 AE *Trade Practices Act 1974 (Cth)*. This requires the Australian Competition and Consumer Commission (ACCC) to administer industry codes of conduct that have been prescribed by the Australian government. The aim of the codes is to foster competition and 'fair conduct' between the parties to a variety of commercial contracts, and was developed in recognition of the differences in power and capacity between small businesses and larger businesses with whom they must deal commercially. The ACCC is also responsible for promoting compliance with prescribed codes via education and information and where necessary, taking enforcement action.
- 11.7 In the UK codes of practice have also been used to good effect. The UK Equal Opportunities Commission has developed a *Code of Practice on Equal Pay* for employers. That Code sets out the practical obligations of employers in respect of the laws of the European Union and the United Kingdom.⁶⁸

Role of governments

- 11.8 Society has legitimate expectations that anti-discrimination measures will be advanced by government and its agencies. Without a proactive role in instigating measures to improve equal pay for work of equal or comparable value, the problem of pay inequity will be continued to be perceived as a private matter to be dealt with by an individual.
- 11.9 The federal government directly employs thousands of employees and has a much wider scope of influence through purchasing, tender processes and government assistance. We strongly urge the Government to investigate measures to directly address pay equity imbalance within its own sphere of influence.
- 11.10 The proposed pay equity division should be adequately resourced to research world best practice on pay equity measures, and to make recommendations to the federal government as an employer.

Recommendation 51:

Governments should set an example through the conduct of equal pay audits and the implementation of pay equity best practice in its direct employment. This should also extend to other areas of employment under Federal Government influence, including purchasing, grants and government assistance.

⁶⁸ Equal Pay in the UK is mandated by European Council directive 75/117/EEC and The Equal Pay Act 1970 (UK), as amended, which entitles women doing equal work with a man in the same employment to equality in pay and terms and conditions.

Recommendation 52:

Evaluation of all government regulation should be prior to its introduction to assess its impact on achieving pay equity. This assessment can be properly done by the pay equity division proposed elsewhere in this report.

Monitoring the effectiveness of the pay equity provisions of the Act

11.11 A system is required to effectively analyse the effectiveness of the pay equity provisions of the Act and the equal remuneration scheme as a whole. Analysis should include measurement of the prevalence of pay inequity, the effect of measures to address the key sources of pay inequity and the relative effectiveness of the pay equity scheme in delivering remedies to pay inequity.

11.12 Programmes designed to measure the extent of pay inequity exist, for example, in the United Nations Economic Commission for Europe on Work and the Economy and the Gender and Work database at York University in Canada. In Australia the WA Office of Women's policy keeps a modest score card against indicators such as representation of women in public life, labour force participation, health and well being of women and the number of women in senior positions and so on.

11.13 The state inquiries provided valuable insights into the causes of and possible remedies to pay inequity. The outcomes of these inquiries are a useful starting point upon which further follow-up analysis should be based.

Recommendation 53:

Follow up analysis of the effectiveness of the remedies provided through the state tribunals (such as the Queensland Dental Assistants' Case) should be conducted.

Recommendation 54:

Continue the comprehensive analysis of targeted areas with gender pay gaps as conducted by the key state based inquiries and cases to better inform policy makers of the causes and symptoms of pay inequity.

Recommendation 55:

Indicators or benchmarks against which the extent of pay inequity and the progress towards equal remuneration can be measured should be conducted by agencies on a regular basis and generate a review of the effectiveness of the pay equity system.⁶⁹

12 CONCLUSION

- 12.1 The persistent and seemingly intractable pay differential between Australian working women and men will be a challenge for the Rudd Labor Government. The promotion of individual contracts, the erosion of penalty rates and the abolition of a decent safety net which was the purpose of the WorkChoices regime (and its state based precursors) has hit hardest the areas where women are most concentrated in work – among the low paid.
- 12.2 Initiatives by the federal Labor Government to overturn these unfair laws are welcome and must be thorough in establishing a secure and relevant safety net and an environment where collective bargaining can become a reality for working women.
- 12.3 We propose that fair work laws be accompanied by a regulative environment that keeps equal pay in the spotlight, including ongoing monitoring of international models so that best practice can be implemented.

APPENDIX A: PAY RATES FOR MEN AND WOMEN MAY 2006

Table 1- Mean weekly earnings in main job

Full time employees only		All (full time and part time) employees
Industry	Women's earnings as a percentage of men's earnings	Women's earnings as a percentage of men's earnings
Agriculture, forestry and fishing	103	74
Mining	76	75
Manufacturing	80	69
Electricity, gas and water	82	74
Construction	85	73
Wholesale trade	92	80
Retail trade	80	62
Accommodation, cafes and restaurants	86	74
Transport postal and warehousing	74	66
Information, media & telecommunications	75	68
Financial and insurance services	60	54
Rental, hiring and real estate	65	54
Professional, scientific and technical	78	67
Administrative and support	88	80
Public administration and safety	86	79
Education and training	85	74
Health care and social assistance	62	56
Arts and recreational services	93	71
Other services	75	64

Table 2- Average weekly total cash earnings

Full time employees only		All (full time and part time) employees
Industry	Women's earnings as a percentage of men's earnings	Women's earnings as a percentage of men's earnings
Mining	70	65
Manufacturing	83	73
Electricity, gas and water	74	68
Construction	79	65
Wholesale trade	80	72
Retail trade	83	65
Accommodation, cafes and restaurants	97	80
Transport and storage	78	72
Communication services	87	75
Finance and insurance	65	58
Property and business services	73	64
Government administration and defence	91	81
Education	89	77
Health and community services	71	62
Cultural and recreational services	82	70
Personal and other services	80	68
All industries	81	66

SOURCE: ABS CAT. NO'S 6306.0 MAY 2006; 6310AUGUST 2007

APPENDIX B: COMPARATIVE WAGE RATES BY INDUSTRIAL INSTRUMENT

Table 1 - Average hourly cash earnings for non managerial employees - May 2006⁷⁰

	Permanent Full-Time \$		Permanent Part-Time \$		Casual \$		Total \$	
	Male	Female	Male	Female	Male	Female	Male	Female
Award only	17.60	18.10	17.70	19.30	19.00	18.70	18.00	18.60
Registered collective agreement	29.30	27.00	25.00	24.20	24.10	22.00	28.70	25.70
Unregistered collective agreement	24.00	20.50	20.30	20.40	21.80	22.00	23.60	20.70
Registered individual agreement	29.30	24.70	19.50	20.50	20.70	17.30	28.10	22.80
Unregistered individual arrangements	27.70	23.40	22.40	23.30	23.90	20.10	27.20	23.10
All methods of setting pay	27.20	24.20	22.50	22.80	22.00	19.90	26.30	23.20

Table 2 - Comparison of hourly cash earnings gap between men and women (non managerial employees) by industrial instrument⁷¹

Type of industrial instrument	Total Hourly cash earnings Men \$	Total Hourly cash earnings Women \$	Male/Female hourly earnings gap \$	Male/Female earnings gap %
Award only	18.0	18.6	+0.60	103
Registered collective agreements	28.7	25.7	-3.00	90
Unregistered collective agreements	23.6	20.7	-2.90	88
Registered individual agreements	28.1	22.8	-5.30	81
Unregistered individual arrangements	27.2	23.1	-4.10	85
All methods of setting pay	26.3	23.2	-3.10	88

⁷⁰ Professor Alison Preston 'Submission to Australian Fair Pay Commission' March 2007-Reproduced with permission

⁷¹ Table of earnings ABS 6306.0; Table 20

APPENDIX C: QUEENSLAND EQUAL REMUNERATION PRINCIPLE

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION
Industrial Relations Act 1999 – s. 288 – *application for statement of policy*

The Queensland Council of Unions and Others AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B450 of 2002)

EQUAL REMUNERATION PRINCIPLE

VICE PRESIDENT LINNANE
COMMISSIONER SWAN
COMMISSIONER BROWN 29 April 2002

STATEMENT OF POLICY

This matter coming on for hearing before the Full Bench of the Commission on 22 March, 16 April and 24 April 2002, the Commission declares by consent as follows:–

EQUAL REMUNERATION PRINCIPLE

This principle applies when the Commission:

- makes, amends or reviews awards;
- makes orders under Chapter 2 Part 5 of the *Industrial Relations Act 1999*;
- arbitrates industrial disputes about equal remuneration; or
- values or assesses the work of employees in “female” industries, occupations or callings.

In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The expression “conditions under which work is performed” has the same meaning as in Principle 7 “Work Value Changes” in the Statement of Policy regarding Making and Amending Awards.

The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.

The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.

Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

In assessing the value of the work, the Commission is 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. Relevant matters to consider may include:

- 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 or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that 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 is performed and other relevant work features.

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.

Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.

The Commission will guard against contrived classifications and over classification of jobs.

The Commission may determine in each case whether any increases in wages will be absorbed into over award payments.

Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.

The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.

Claims brought under this principle will be considered on a case by case basis.

This Statement of Policy will operate from 1 May 2002.

Dated 29 April 2002.

D.M. LINNANE, Vice President.

D.A. SWAN, Commissioner.

D.K. BROWN, Commissioner

APPENDIX D: SUMMARY OF KEY RECOMMENDATIONS

Recommendation	Description	Ref.
Recommendation 1	<p>Amend the industrial relations legislation to include equal remuneration for work of equal or comparable value as a stand alone object.</p> <p>Equal remuneration for work of equal or comparable value should also be a specific object in relation to the setting of minimum wages and workplace bargaining.</p>	2.2
Recommendation 2	<p>In setting and adjusting minimum wages FWA should ensure that minimum award wages comply with object of equal pay for work of equal or comparable value.</p> <p>A party to an award should be able to make an application to FWA seeking an adjustment to the minimum rates to ensure equal pay for work of equal or comparable value.</p>	3.3
Recommendation 3	Amend the industrial relations legislation to oblige FWA to consider historical undervaluation as part of ensuring equal pay for work of equal or comparable value.	3.5
Recommendation 4	<p>Amend the industrial relations legislation to require FWA to have regard to all relevant matters when engaged in setting the minimum wage including:</p> <ul style="list-style-type: none"> • 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 or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that 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 is performed and other relevant work features. 	3.5
Recommendation 5	The FWA should have the capacity to review any awards that are modernised and unions should have standing to seek a review of remuneration rates on a case by case basis to ensure that inequities have not been perpetuated through the award modernisation process.	3.6
Recommendation 6	As part of its annual review of awards, and in undertaking the reviews, or upon the application of a party to an award, FWA should be both required and empowered to ensure equal pay for work of equal or comparable value having regard to all elements of remuneration, including rates of pay in collective agreements and over-award pay arrangements.	3.13
Recommendation 7	Amend the industrial relations legislation to provide that the competency standards process contained in the relevant award is a significant component of the assessment of work value.	3.14
Recommendation 8	Amend the federal industrial relations legislation to insert definition of ‘remuneration’ consistent with ILO Convention 100 Article 1(a). It	5.2

	<p>should read:- “Remuneration, for a provision relating to work of equal or comparable value, includes: (a) the wage or salary payable to an employee; and (b) amounts payable or other benefits made available to an employee under a contract of service” .</p>	
Recommendation 9	Amend the federal industrial relations legislation to define pay equity principle as “equal remuneration for work of equal or comparable value”.	5.2
Recommendation 10	Amend the federal industrial relations legislation to insert in the definition of ‘industrial matter’ any matter which impacts on the obligations of the tribunal to give effect to ILO Convention 100.	5.2
Recommendation 11	Amend the industrial relations legislation to remove the requirement that the FWA find gender based discrimination or identify a male comparator in order to find that work is undervalued.	5.5
Recommendation 12	<p>Amend the federal industrial relations legislation to give broad powers to FWA to make any orders it sees fit to address pay inequity including the capacity to grant, in addition to adjustment of award-based pay rates:</p> <ul style="list-style-type: none"> • One-off increases to redress any gap between award and agreement remuneration rates; and • Ongoing equal remuneration increases to redress predicted ongoing pay inequities resulting from prospective bargaining outcomes in the comparator sector. <p>Such orders should override any existing order in relation to any award or registered agreement. The minimum wage should not be exempt from such orders. In addition, this order should also be able to be exercised in relation to employment not governed by any industrial instrument or by a common law agreement.</p> <p>The enlivening of the pay equity jurisdiction should be by way of an application by:-</p> <ul style="list-style-type: none"> • parties to an award or agreement; or • an individual employee whose terms and conditions of employment are covered by an award or agreement of any kind; or • any worker who is a dependent contractor; or • FWA through the Pay Equity Commissioner. 	5.11
Recommendation 13	Provide mechanisms to ensure a review of any equal remuneration orders to ensure they continue to effectively address the pay inequity.	5.11
Recommendation 14	<p>Creation of a specialist Pay Equity Commissioner within FWA with jurisdiction across both the public and private sectors, with specific power to:</p> <ul style="list-style-type: none"> • oversee compliance with requirements for mandatory annual pay equity reporting; • request an employer to conduct a pay equity audit; • in response to a complaint or on own initiative, institute an inquiry or review. • hear, determine and issue orders with respect to matters of discrimination; • hear, determine and issue equal remuneration orders; and • ensure awards consistent with pay equity principles through annual award reviews. 	5.12
Recommendation 15	Incorporate an Equal Remuneration Principle (that mirrors the Queensland Industrial Relations Commission principle) into the industrial relations legislative scheme. Incorporation may be achieved	5.22

	by way of attachment to the industrial relations legislation or regulations.	
Recommendation 16	Amend the industrial relations legislation to clearly state that the Equal Remuneration Principle is to apply to all instruments regulating wages and conditions.	5.22
Recommendation 17	Establish a programme of government funding for industrial organisations engaged in equal remuneration cases.	5.23
Recommendation 18	Amend the industrial relations legislation to allow employees and their employers to engage in multi employer bargaining: <ul style="list-style-type: none"> • as a single business where a group of employers are effectively controlled by another entity, or • facilitated by FWA where the employees are low paid or have been unable to access collective enterprise bargaining. 	6.7
Recommendation 19	When considering whether to facilitate multi-employer bargaining claims for the low paid FWA should take into account: <ul style="list-style-type: none"> • the needs of low paid workers and the desirability of promoting bargaining and lifting living standards; • where employees lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or sector makes collective bargaining difficult and impractical at the single business level; and • the need to address the gender pay gap. 	6.7
Recommendation 20	Where the parties to a bargaining dispute involving low paid employees are unable to resolve the dispute, and where all other measures to resolve the dispute have been exhausted, FWA should be empowered to settle the outstanding differences between the parties.	6.7
Recommendation 21	Insert protections into the new industrial relations legislation to ensure the individual flexibility clauses are not used to undermine collective terms and conditions or the safety net.	6.8
Recommendation 22	Insert into the new industrial relations legislation strong anti-coercion and freedom of association protections which recognise the unequal bargaining position of employees to employers, particularly in relation to individual negotiations.	6.8
Recommendation 23	FWA should be able to refuse to certify an agreement if it is inconsistent with an equal remuneration order or if it is not satisfied that the agreement ensures equal remuneration for all men and women employees of the employer for work of equal or comparable value.	6.9
Recommendation 24	Amend the industrial relations legislation to require information to be provided to FWA about the reasons for and purpose of any provisions in the proposed agreement which provide for or result in differential treatment of different groups of employees.	6.11
Recommendation 25	Right of entry laws should explicitly provide for: <ul style="list-style-type: none"> • unions to have access to employees in the workplace subject to undue interference with work. Access should include areas in the workplace where employees congregate during meal and rest breaks; • unions to have access to employees in work areas in order to inspect the work performed of both members and non members; • unions to be able to inspect both member and non-member records; • the capacity to bargain for complementary rights of access; and • unions to have the right to access workplaces regardless of the industrial instrument which regulates the employment of employees. 	6.16

Recommendation 26	The industrial relations legislative framework should provide very strong anti-victimisation provisions, including obligations on employers to facilitate reasonable union right of entry, and should support delegates in representing employees, particularly during the bargaining process	6.17
Recommendation 27	Investment in increased data collection, including longitudinal survey data, to enable researchers to assess movements in gender pay equity.	7.3
Recommendation 28	Amend the <i>Equal Opportunity for Women in the Workplace Act (1999)</i> to require mandatory annual pay equity reporting for all employees. Reporting should include basic remuneration data including information on the quality and standard of policies and programmes undertaken by organisations to advance pay equity. Reporting should be overseen and coordinated by the Pay Equity Division.	7.10
Recommendation 29	Empower FWA and the Pay Equity Division to compel an employer to conduct a pay equity audit where pay inequity is suspected or alleged to exist. Grant FWA, the Pay Equity Division, employees or unions capacity to request an audit.	7.10
Recommendation 30	Provide employers with resources and assistance, through the Pay Equity Division, with respect to annual pay equity reporting and pay equity audits.	7.10
Recommendation 31	Ensure the Pay Equity Division is sufficiently resourced to provide assistance and guidance to employers complying with reporting requirements (including request for audits).	7.10
Recommendation 32	Ensure information from annual mandatory pay equity reporting is publicly available.	7.10
Recommendation 33	Provision of pay equity information should be a requirement in meeting the good faith bargaining principle and the object of ensuring pay equity in agreements.	7.12
Recommendation 34	Mandatory equal pay audits should be a specific feature of the implementation of the better off overall test and certification stages of agreement making.	7.14
Recommendation 35	Employers should as a matter of course include gender based remuneration data in reports to Annual General Meetings.	7.15
Recommendation 36	Accounting standards should be amended to require auditors to consider the risk of non-compliance with the Act in routine company audits.	7.15
Recommendation 37	The establishment of a specialist pay equity division in FWA. The division to promote the aims of pay equity and assist parties to address pay inequity and in a way which meets compliance with established pay equity principles.	8.4
Recommendation 38	The relationship between the National Employment Standard (NES) and modern awards must clearly provide that award terms can build upon NES conditions to provide higher standards of minimum entitlements.	9.3
Recommendation 39	Ensure access to award dispute settlement procedures for both NES and award matters to protect women in weak bargaining positions.	9.3
Recommendation 40	The NES flexible work arrangements provision should be extended to the care of school aged children, disabled and elderly dependents.	9.4
Recommendation 41	Provisions for carer's leave in both the NES and awards should be clarified to ensure that the entitlement applies to a wide range of caring responsibilities broader than illness or emergency and is able to accommodate circumstances such as attending to a dependent's needs	9.4
Recommendation 42	There must be an obligation under the NES on employers to reasonably consider an employee's request for flexible work arrangements and to provide a reason for refusing such a request.	9.4

Recommendation 43	The grounds upon which an employer may rely on 'reasonable business grounds' under the NES for refusal of a request should be limited. Employees must be provided with the capacity to review an unreasonable refusal.	9.4
Recommendation 44	The right to part-time employment upon return to work from parental leave should be available to all employees and an education programme for employees and employers about this right should be conducted.	9.8
Recommendation 45	Strategies aimed at providing quality part time work and addressing work organisation such as hours of work, rosters, shift work and training arrangements which discriminate against women with caring responsibilities should be identified and promoted.	9.15
Recommendation 46	Access to part time work, hours of work, rosters, shift work and training arrangements should be considered by FWA as part of the object of ensuring equal pay for equal or comparable remuneration in agreement making.	9.15
Recommendation 47	Amend the <i>Sex Discrimination Act 1984 (Cth)</i> to grant FWA jurisdiction to hear and determine complaints of discrimination made with respect to work related matters.	10.5
Recommendation 48	In conjunction with other agencies, FWA should monitor pay equity data and investigate particular employers, sectors or groups of people here it is deemed appropriate.	11.4
Recommendation 49	The compliance arm of FWA should have the capacity to follow up such employers or sectors to enforce pay equity audits or instigate a pay equity case where appropriate.	11.4
Recommendation 50	The compliance arm of FWA should also be able to enforce orders made by FWA including mandatory pay equity plans.	11.4
Recommendation 51	Governments should set an example through the conduct of equal pay audits and the implementation of pay equity best practice in its direct employment. This should also extend to other areas of employment under Federal Government influence, including purchasing, grants and government assistance.	11.10
Recommendation 52	Evaluation of all government regulation should be prior to its introduction to assess its impact on achieving pay equity. This assessment can be properly done by the pay equity division proposed elsewhere in this report.	11.10
Recommendation 53	Follow up analysis of the effectiveness of the remedies provided through the state tribunals (such as the Queensland Dental Assistants' Case) should be conducted.	11.13
Recommendation 54	Continue the comprehensive analysis of targeted areas with gender pay gaps as conducted by the key state based inquiries and cases to better inform policy makers of the causes and symptoms of pay inequity.	11.13
Recommendation 55	Indicators or benchmarks against which the extent of pay inequity and the progress towards equal remuneration can be measured should be conducted by agencies on a regular basis and generate a review of the effectiveness of the pay equity system.	11.13